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TO BE CITED L.R.A. 1918C

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1918C

BURDETT A. RICH, HENRY P. FARNHAM, AND
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THE PUBLISHERS' EDITORIAL STAFF.

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LAWYERS REPORTS

ANNOTATED

NEW SERIES.

OKLAHOMA SUPREME COURT.

UNION MUTUAL INSURANCE COMPANY, Plff. in Err.,
v.
HATTIE PAGE et al.

(— Okla. —, 164 Pac. 116.)

Principal and surety — diligence of obligee.

1. The general liability of a surety upon a note, account, or bond is not conditioned upon the exercise of diligence by the holder of the obligation to collect of the principal, and the negligence or passive inactivity of the holder is not a defense available to the surety.

For other cases, see Principal and Surety, I. b, in Dig. 1-52 N. S.

Same — requiring proceeding against principal.

2. The term "require" as used in § 1058, Rev. Laws 1910, which provides that "a surety may require his creditor to proceed against the principal, . . . and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced," means, to demand; to insist upon; to claim as by right and authority; to exact; to claim as indispensable, a synonym, as understood by its use in this section, for exact; direct; order; and a simple suggestion to, or request of, the creditor will not suffice.

For other cases, see Principal and Surety, I. b, in Dig. 1-52 N. S.

Bills and note — failure to sue maker — release of surety.

3. The failure of the payee of a promissory note to sue the principal, upon the oral request of the surety sued, made to the col-

lector or attorney of the creditor, who had the note for collection, without any showing that the collector or attorney was authorized by the creditor to take legal proceedings for the collection of the note, or that such request or notice was not communicated to the creditor by the collector or attorney, will not operate as a release of the surety sued, even though the principal at the time the request was made was solvent and amply able to pay the note and in the meantime he had become insolvent, for the reason that it is the duty of the surety, upon the failure of the principal to pay the note when due, to pay the same and pursue his remedy against the principal to reimburse himself for the amount paid as such surety for his principal.

For other cases, see Principal and Surety, I. b, in Dig. 1-52 N. S.

(January 2, 1917.)

ERROR to the District Court for Washita County to review a judgment in favor of defendant Hays in an action brought to recover the amount alleged to be due on a promissory note. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. Willson & Scott and S. C. Burnette, for plaintiff in error:

The surety is not released by reason of making demand upon the creditor to sue the principal, he being solvent at the time of the making of the demand and insolvent at the time of the suit, but the surety should protect himself by means of the provisions of the law made for his benefit.

Kennedy v. Falde, 4 Dak. 319, 29 N. W. 667; Bingham v. Mears, 4 N. D. 437, 27 L.R.A. 257, 61 N. W. 808; Yerxa v. Ruthruff, 19 N. D. 13, 25 L.R.A.(N.S.) 139, 120 N. W. 753, Ann. Cas. 1912D, 809; Walton v. Williams, 5 Okla. 642, 49 Pac. 1022.

Notice to an agent or attorney will not suffice if the authority of such agent or

Headnotes by ROBBERTS, C.

Note. — For failure to comply with surety's demand or request to proceed in the enforcement of the obligation, see annotation following Sims v. Everett, post, 10, L.R.A.1918C.

attorney to receive it does not appear, even though the notice is in fact communicated to the creditor.

Cummins v. Garretson, 15 Ark. 132; Driskill v. Washington County, 53 Ind. 532; Sapington v. Jeffries, 15 Mo. 628; Adams v. Roane, 7 Ark. 360; Bartlett v. Cunningham, 85 Ill. 22; Shimer v. Jones, 47 Pa. 268; Hellen v. Bryson, 40 Pa. 472.

Notice cannot be given before cause of action accrues to the creditor.

Scales v. Cox, 106 Ind. 261, 6 N. E. 622; Conrad v. Foy, 68 Pa. 381; Hellen v. Crawford, 44 Pa. 105, 84 Am. Dec. 421; Donough v. Boger, 10 Phila. 616.

The collector had no authority whatever in the premises, and the plaintiff received none and was not bound with any notice; and such as was claimed to be given the collector was not such a demand as the law requires.

Smith v. Freyler, 4 Mont. 489, 47 Am. Rep. 358, 1 Pac. 214; Hier v. Harpster, 76 Kan. 1, 13 L.R.A.(N.S.) 204, 90 Pac. 817, 13 Ann. Cas. 919; Ray v. Brenner, 12 Kan. 105; Halderman v. Woodward, 22 Kan. 734; Goodacre v. Skinner, 47 Kan. 575, 28 Pac. 705; Ewing v. Williams, 19 Ky. L. Rep. 319, 89 S. W. 843; Gray v. Farmers' Nat. Bank, 81 Md. 631, 32 Atl. 518; Myers v. Farmers State Bank, 53 Neb. 824, 74 N. W. 252; Bank of Montreal v. Davy, 21 U. C. C. P. 179; Black River Bank v. Page, 44 N. Y. 453; Mutual L. Ins. Co. v. Davies, 56 How. Pr. 440; Kennedy v. Falde, 4 Dak. 319, 29 N. W. 667; Moore v. Peterson, 64 Iowa, 423, 20 N. W. 744; Bowling v. Chambers, 20 Colo. App. 113, 77 Pac. 16.

The notice must amount to a command; it is not sufficient to express a hope, a wish, or a desire; nor will it be a sufficient compliance for the surety to give a hint; to make a request; to urge; to suggest; to advise; or to state that the surety refuses to remain liable, or that he will not pay except under compulsion. The notice must be in effect a demand to sue, and be more than instructions to dun the principal.

32 Cyc. 104, 105; Denick v. Hubbard, 27 Hun, 347; Warner v. Beardsley, 8 Wend. 194; Greenawalt v. Kreider, 3 Pa. St. 264, 45 Am. Dec. 639; King v. Haynes, 35 Ark. 463; Simpson v. State, 6 Baxt. 440; McMillin v. Deardorff, 18 Ind. App. 428, 48 N. E. 233; Hill v. Sherman, 15 Iowa, 365; Erie Bank v. Gibson, 1 Watts, 143; Cope v. Smith, 8 Serg. & R. 110, 11 Am. Dec. 582; Kemmerer v. Yoder, 1 Woodw. Dec. 41; Jackson v. Huey, 10 Lea, 184, 42 Am. Rep. 301; Shehan v. Hampton, 8 Ala. 942; Harriman v. Egbert, 36 Iowa, 270; Porter v. First Nat. Bank, 54 Ohio St. 155, 43 N. E. 165; Bates v. State Bank, 7 Ark. 394, 46 Am. Dec. 293; Baker v. Kellogg, 29 Ohio L.R.A.1918C.

St. 663; Parrish v. Gray, 1 Humph. 88; Savage v. Carleton, 33 Ala. 443; Darby v. Berney Nat. Bank, 97 Ala. 643, 11 So. 881; Coykendall v. Constable, 48 Hun, 360, 1 N. Y. Supp. 9, affirmed in 117 N. Y. 627, 22 N. E. 1128; Keirn v. Andrews, 59 Miss. 39; Lockridge v. Upton, 24 Mo. 184; Wilson v. Glover, 3 Pa. St. 404; Williams v. J. Ogg & K. Lumber Co. 42 Tex. Civ. App. 558, 94 S. W. 420; Maier v. Canavan, 57 How. Pr. 504; Lawson v. Bulkley, 49 Hun, 329, 2 N. Y. Supp. 178.

Mr. Richard A. Billups for defendant in error Hays.

Robberts, C., filed the following opinion:

This action was brought by the Union Mutual Insurance Company, plaintiff in error, against Hattie Page and J. H. Hays, defendants in error, to recover on a promissory note given by defendants to plaintiff as premium for hail insurance policy on 60 acres of cotton for the season of 1911. The note is as follows:

Hail Insurance.

\$76. Enid, Okla., March 18, 1911.

On or before the 1st day of October of this year, for value received, I, we, or either of us, promise to pay to the Union Mutual Insurance Company, of Enid, Oklahoma, or order, the sum of seventy-six and ⁵⁰/₁₀₀ dollars, payable at the office of said company in Enid, Oklahoma.

This note is given for premium for insurance on my crop of grain, now growing on the W. $\frac{1}{4}$ of section 11, township 11, range 20, and on the ——— acres in all, situated in Washita county, state of Oklahoma, and this indenture, made on the day above written, and between the undersigned and the said company, witnesseth: That the undersigned mortgages to said company the said crop of grain, as security for the payment to said company the above-named sum of money on or before the 1st day of October of this year, and this mortgage shall also cover said grain wherever located after it is harvested. This note to bear interest at 10 per cent per annum from date, if not paid at maturity. Without interest if paid when due. I agree to pay an attorney fee of \$10, if it becomes necessary to collect the above sum of money or any part thereof by law, or if it be placed in the hands of an attorney for collection.

Hattie Page.
J. H. Hays.

Witness: Aug. Gumuster.
Policy No. 05475.

P. O., Canute.

No service was had upon defendant Page. Defendant Hays answered as follows:

"Comes now the defendant J. H. Hays,

and for answer to plaintiff's bill of particulars denies each, every, and all allegations therein, except such as are hereinafter specifically admitted.

"First. Defendant J. H. Hays admits that he signed the note named in plaintiff's bill of particulars as a surety and accommodation signer, and received no benefits in consideration therefor, believing that said company was lawfully authorized by the state of Oklahoma to write the kind of insurance that the principal of said note, Hattie Page, desired; to wit, hail insurance on a cotton crop. That on or about the date of the policy here involved, to wit, March 21, 1911, the State Insurance Commissioner, Honorable Perry A. Ballard, revoked the license of said Union Mutual Insurance Company, stating that said company has no legal right to write hail insurance on crops at that date. That by reason of the foregoing state of facts, consideration for which this defendant, J. H. Hays, signed said note never lawfully existed, or if the same ever existed it wholly failed when the said Insurance Commissioner revoked the license of the said company.

"Second. For a further answer and defense, defendant alleges that the plaintiff herein, in the fall of 1911, and after said note was due and collectable, neglected, failed, and refused to make an effort to collect said note from the principal, Hattie Page; that this defendant J. H. Hays asked and requested plaintiff to proceed to collect said note while the principal was in possession of a cotton crop from which this note could have been made, if the same was legal; that this defendant informed plaintiff at the time referred to herein that said cotton crop was all the protection that he as a surety had; and that he, defendant J. H. Hays, wanted this matter settled at once for his protection; that by reason of plaintiff's failure to so proceed against said principal, Hattie Page, as requested, said cotton has been disposed of by Hattie Page, and said Hattie Page is insolvent and has no means out of which any part of said debt can be made, to the damage of said defendant to the amount of his liability and said note."

Upon these issues, trial was had to a jury, verdict returned for defendant, and judgment rendered against plaintiff for costs. Plaintiff brings error.

It is apparent from the verdict that the jury found for this defendant on the allegation that he was only surety on the note; and, while there might be some question as to that fact, we will adopt the finding of the jury and consider the case upon that theory.

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This brings us to the proposition as to whether the defendant Hays was released and relieved from payment of the note because of the laches of the plaintiff in failing to proceed against the principal, or taking some steps to obtain payment out of the cotton belonging to the principal and pointed out to the agent of the plaintiff about the time of the maturity of the note. In support of his defense upon that theory, the defendant relies on § 1058, Rev. Laws 1910, which is as follows:

"1058. A surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety cannot himself pursue, and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced."

We gather from the record that the defendant relies principally upon that part of the section above quoted, which provides that a surety may require his creditor to proceed against the principal, and, if the creditor fails to do so, the surety is exonerated to the extent to which he is thereby prejudiced.

The particular steps taken by defendant Hays to require the plaintiff to proceed against the principal are detailed in his testimony given at the trial, as follows:

A. She got the crop insurance provided I signed her note. I signed her note. She wanted it signed for hail insurance, and I signed it.

Q. Had she signed the note at the time you did?

A. Yes, sir.

Q. And came to you afterwards?

A. Yes, sir.

Q. Did you have any conversation with the company or any of its agents with reference to this note in the year 1911?

A. I did.

Q. Tell the jury what it was.

A. I had no further conversation until fall. The first conversation I had with the agent was in the spring. That fall there came another man, a collector.

Q. State whether or not he had this note for collection.

A. He did. Mrs. Page refused to pay it, and so did I. I says, "There's two bales picked there, three picked, two on the ground and one on the wagon." I says, "You go and attach that cotton."

Q. What further statement did you make to him, if any, about attaching the cotton?

A. I told him to go ahead and attach the cotton and get his money out of it.

Q. Did you tell him in what capacity you had signed the note?

A. Yes, sir; he said he didn't want to attach the cotton. He would rather not, but he finally said he would, but he never did attach it. I told him if he would attach the cotton the parties would undoubtedly make a replevin bond and sell the cotton and he would have a bond the court would take, which would be much better than a note on me, and he would get his money. That was the only chance he had on it,—for him to take the cotton. I couldn't get it.

Q. What became of the cotton?

A. Mrs. Page sold the cotton.

Q. About how much cotton was picked and in the field at the time?

A. I believe at that time there had been about five bales sold, and I think the crop made about twenty-three bales. There was three bales picked at that time, or a little better.

Q. There was about eighteen in the field and on the ground and the wagon?

A. Something like that. There was five bales already sold and three bales picked, and the rest was in the field. Twenty-three bales out of the whole crop.

Q. Where is Mrs. Page at this time, if you know?

A. I don't know.

Q. Do you know whether she has any property at all in this country, or anywhere else?

A. If she has any, I don't know of it.

Q. Did she have anything at that time except this cotton?

A. She had a few stock.

Q. Do you think there was ample cotton at that time to settle this debt?

A. There was enough cotton picked there to settle it then.

Q. Do you remember who the gentleman was who came and talked to you in October?

A. Said his name was Webb.

Q. You say you told Mr. Webb to go and attach the cotton?

A. Yes, sir.

Q. Was that in writing?

A. No, sir.

Q. You never did give the company any written notice?

A. No, sir.

Q. You never did offer to pay the expenses or indemnify them against any expense in the matter?

A. No, I never did.

Q. The only reason you didn't protect yourself was from the fact that you thought you had a way to beat the note?

A. Well, I just looked at it like this: I would have to pay the note out of my own pocket, and I couldn't get anything out of her, and if they couldn't I didn't think I could.

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Q. Why didn't you when you saw that Mrs. Page was disposing of this security that was behind that note that you proposed,—why didn't you say something to Mrs. Page about paying the note?

A. We did talk about it.

Q. Did you ever suggest to her to pay the note?

A. I told her I would like to get it off of my hands.

Q. When she was telling you what she thought she could do from her advice, did you take any steps or make any remonstrations against her not making security against the note?

A. No.

Q. You never requested her to make you safe in any way so in case of litigation you would be protected?

A. Yes, sir; she told me she was going to leave, and she says, "If you ever have any trouble about that, I'll pay it." But she says, "You'll have never any trouble about it."

A. And on that assurance from her you let the matter drift and paid no more attention to it?

A. That's all I could do.

Q. John, when did you last see her?

A. I haven't seen her since she left the farm.

Q. When did she leave?

A. I don't know when she left, whether the first of 1912 or the last of 1911, but some time either the first of that year or the last, sometime along there.

Q. Where is she now?

A. I don't know.

Q. At that time she had some stock, you say?

A. Yes, sir.

Q. And she was leaving the state, you say?

A. Well, I don't know whether she was moving then to—somewhere in the northern part of this state. I forget the name of the place now.

Q. The note was then past due?

A. Oh, yes.

Q. You made no effort to secure yourself at all?

A. No.

Q. You rested on the assurance or the advice you had received that this company couldn't collect it because of the invalidity of the company as a corporation?

A. Well, yes; that's about all there was to it.

Q. You didn't think the company had any right to sue you?

A. Yes, sir.

Q. That was your advice?

A. Yes, sir.

Q. You went and sought counsel about it?

A. Yes, sir.

Q. And because of the defense you had on its organization and right to do business in this state—that was the reason you didn't pay it?

A. Yes, sir.

Q. This crop matured, and Mrs. Page held the policy all during the season of 1911?

A. Yes, sir.

Q. You retained the policy and received the benefits?

A. Which benefits?

Q. You had the insurance on the crop?

A. She had the insurance.

Q. I understand. Your note was outstanding at that time?

A. Yes, sir; the note was outstanding at that time.

There is testimony tending to show that at the time the collector demanded payment of the notes, being the time the conversation above related was had, the agent promised defendant that he would attach the cotton pointed out to him as belonging to Mrs. Page, but for some reason, which is not explained, he did not do so. There is no evidence on behalf of defendant Hays that he relied on that promise. There is no evidence tending to show that the agent had authority to bring the action, nor that he ever communicated the defendant's request to the company. There is no evidence tending to show that legal grounds existed for attachment against the principal. There is no evidence tending to show that Hays made any other or further effort to require the plaintiff to proceed against the principal. There was no evidence tending to show that the defendant notified the company of its agent that, in case the plaintiff failed to proceed against the principal, he, as surety, would hold himself discharged. The full purport of the evidence is that Hays, for his defense, relied upon the fact that the plaintiff could not recover because the plaintiff's license to transact business in Oklahoma had been revoked. At the conclusion of the testimony, the court gave the following instruction, among others: "If you find and believe from a preponderance of the evidence of this case that the defendant Hays signed said note as surety, that when the plaintiff presented said note for collection after its maturity the defendant Hays notified the plaintiff that he was surety on said note only, and requested and demanded of the plaintiff that they proceed and take legal steps to enforce collection of the note against the principal, Mrs. Page, by attachment of her cotton, and that the company failed to do so, and that by reason of such failure the defendant Hays has been

damaged to the full amount of the note sued upon, if you so find, your verdict should be for the defendant J. H. Hays; otherwise, you should find against him, and in favor of the plaintiff for the full amount of the note sued on."

It is apparent from the language of this instruction that the trial court was of the opinion that all that was necessary to a complete exoneration on the part of the surety was to notify or request the creditor to proceed against the principal. Nor do we overlook the fact that the word "demand" is used in the instruction, but the evidence does not justify in any sense the use of that word. There is no evidence even tending to show that the defendant demanded that the creditor proceed against the principal. The proof is simply to the effect that the defendant suggested or possibly requested the creditor to attach certain property belonging to the principal. As we view the authorities, this is not sufficient. Many of the authorities go to the extent of holding that "an unheeded request by a surety that the creditor proceed against the principal, after the maturity of a note, and while the principal is solvent, will not operate to discharge the surety, although the principal afterwards becomes insolvent, unless, accompanying the request to proceed against the principal, there is an explicit notice that, in case the creditor shall fail to sue, the surety will hold himself discharged." *Kennedy v. Falde*, 4 Dak. 319, 29 N. W. 667.

We do not base this opinion solely upon the fact that defendant failed to notify the creditor that he would "hold himself discharged if it failed to proceed against the principal," but cite the rule simply for the purpose of showing the extent to which some authorities go, the strictness to which the surety is held to bring himself within the rule to obtain exoneration from liability. It is well settled that a simple request to proceed against the principal is not sufficient. In the case of *Kennedy v. Falde*, supra, the language of the surety to the creditor was, "You had better collect the sum from Mr. Falde." Perhaps not quite as strong as the language used in this case, but in speaking to that point the court says: "Can it be claimed that such language was a requirement made upon the principal to proceed and collect the sum from Falde, and, if he neglected so to do, the surety would consider himself released? Clearly not. To require is 'to demand; to insist upon having; to claim as by right and authority; to exact; to claim as indispensable,'—a synonym, as we understand its use in this section, for 'exact;' 'direct;' 'order.'"

"If all the other modes provided by law

for the protection of a surety are by him to be disregarded, no action upon his part, under the provisions of § 1681 [Dakota, same as § 1058, Okla. Rev. Laws 1910], will be deemed a compliance with its provision, which falls short of a clear notice to the creditor that he expects and requires him to proceed in collection of the debt against the principal. Such a demand must be made that the creditor should understand that the wish and direction of the surety to him is to proceed against the principal in the collection of the debt. No requirement susceptible of any other construction will be sufficient. Applying this rule to the language used in the case at bar, it will be seen it falls far short of such a 'requirement' as is contemplated by statute."

It is definitely settled by the common law, as well as numerous decisions in this state, based upon statutory enactments, that "the general liability of a surety upon a note, account, or bond is not conditioned upon the exercise of diligence by the holder of the obligation to collect of the principal, and the negligence or passive inactivity of such holder is not a defense available to the surety."

It is also held by numerous authorities that notice of the surety to an agent or attorney of the creditor would not suffice unless the authority of such agent or attorney is made to appear by the evidence. *Cummins v. Garretson*, 15 Ark. 132; *Dris-kill v. Washington County*, 53 Ind. 532; *Sapington v. Jeffries*, 15 Mo. 628; *Adams v. Roane*, 7 Ark. 360; *Bartlett v. Cunningham*, 85 Ill. 22; *Shimer v. Jones*, 47 Pa. 268; *Hellen v. Bryson*, 40 Pa. 472.

Measuring the instruction of the trial court now under consideration by the foregoing rules, it must be apparent to all that it cannot be approved, and that prejudicial error was committed by the court in so instructing the jury.

The recent decisions of this court clearly settled the doctrine in this state upon the questions under consideration here, in favor of the contentions of plaintiff in error. In the case of *Palmer v. Noe*, 48 Okla. 450, 150 Pac. 464, the court says:

"Section 1058, Rev. Laws 1910, provides when sureties may be exonerated, and this section is as follows: 'A surety is exonerated: First, in like manner with a guarantor; second, to the extent to which he is prejudiced by an act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights, or which lessens his security; or, third, to the extent to which he is prejudiced by an omission of the creditor to do anything, when required by the surety, which it is his duty to do.'

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"Section 1058, Rev. Laws 1910, provides that a surety may require the creditor to proceed against the principal, under certain conditions. This section is as follows: 'A surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety cannot himself pursue, and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced.'

"The defendant insists that, under § 1058 and subdivisions 2 and 3 of § 1056, he is released from liability upon the note sued on, for the reason that the plaintiff failed to comply with the oral request made to his attorney to proceed against the principal and sureties upon said note at a time when the principal was solvent and amply able to pay the debtor, and that in the meantime the principal and the other sureties became insolvent, and that his failure to so proceed prejudiced his rights and remedies against the principal and his cosureties. With this contention we cannot agree. It was not the duty of the plaintiff to sue the principal, and, not being his duty, his failure to do so was not prejudicial to the rights and remedies of the defendant. The defendant obligated himself to pay the debt, and, upon the failure of the principal to pay it, at maturity, it was his duty to pay it and proceed against the principal and his cosureties under § 1061, Rev. Laws 1910.

"Plaintiff had the option to sue any or all of the makers of this note, and, having this option, his failure to comply with the oral request of the defendant would not operate as a release of liability. If, as a matter of fact, the principal and the other sureties thereon were solvent, it was the plain duty of the defendant to pay the obligation and proceed to protect himself under the statute."

Later in a similar case, *Miller v. State*, — Okla. —, 152 Pac. 410, this court adopted and approved the doctrine in *Palmer v. Noe*, supra, in the following language:

"On the merits, the question presented in this case cannot be distinguished from *Palmer v. Noe*, supra: 'Under § 4694, Rev. Laws 1910, the payee of a promissory note may, at his option, sue one of the sureties, without joining the maker and the other sureties as parties defendant; and his failure to sue the maker and other sureties does not operate as a release of the surety sued. The failure of the payee of a promissory note to sue the principal, upon the oral request of the surety sued, made long after the maturity of the note to the attorney of the payee, who had the note for collection, does not operate as a release of the surety

sued, even though the principal, at the time the request was made, was solvent and amply able to pay the note, and in the meantime he and the other sureties thereon became insolvent; it being the duty of the surety, upon the failure of the principal to pay the note when due, to pay the same, and pursue his remedy against the principal and his cosureties.'

"Counsel for the plaintiff in error has earnestly requested us, in a well-considered brief, to reconsider the question decided in that case and overrule it. But, after a careful consideration of the authorities, we are satisfied that that case was rightly decided, and in addition the importance of adhering to the decisions of this court once made, and thus preserving a conformity in the law, cannot be overestimated."

Other questions are presented in this case, but we deem it unnecessary to discuss them. The section under which the defense

is made came from Dakota, and was adopted here in early territorial days. The case of *Kennedy v. Falde*, supra, was decided by that court long before the section was adopted here, and became a part of the law of this state. That construction has been approved and consistently followed by numerous decisions in this court, and cited with approval by a number of the courts of last resort in sister states.

The case should be reversed and remanded to the District Court of Washita County, with instructions to render judgment for the plaintiff for the full amount of the note sued on, in accordance with the terms and provisions of said note.

Per Curiam:

Adopted in whole.

Petition for rehearing denied April 10, 1917.

ARKANSAS SUPREME COURT.

ALBERT SIMS et al., Appts.,
v.

J. M. EVERETT et al.

(113 Ark. 198, 168 S. W. 559.)

Appeal — from directed verdict — question open.

1. The only question open upon appeal from a directed verdict, when each party requested such verdict in his favor, is the legal sufficiency of the evidence to support it.

For other cases, see Appeal and Error, VII. c, in Dig. 1-52 N. S.

Bills and notes — consideration for assignment — right to question.

2. The sureties on a note cannot, in an action by the assignee, question the consideration for an assignment of the note if it is in writing.

For other cases, see Bills and Notes, V. a, 1, in Dig. 1-52 N. S.

Same — noncompliance with a parol request to sue — effect.

3. Failure of the holder to comply with a parol request of a surety on a note for suit against the maker does not release the surety, where the statute provides for such release on failure to comply with a request in writing.

For other cases, see Principal and Surety, I. b, in Dig. 1-52 N. S.

(June 1, 1914.)

Note. — For failure to comply with surety's demand or request to proceed in the enforcement of the obligation, see annotation following this case, post, 10. L.R.A.1918C.

APPEAL by plaintiffs from a judgment of the Circuit Court for Independence County in defendant's favor in an action to recover the amount alleged to be due on two promissory notes. Reversed.

The facts are stated in the opinion.

Mr. Samuel M. Casey, for appellants:

A notice to sue by one of the two sureties does not discharge the other one, who did not give notice.

Wilson v. Tebbetts, 29 Ark. 579, 21 Am. Rep. 165.

Even if the defendants gave the holder of the notes, Edmondson, notice to sue on them, still this falls far short of entitling them to a verdict, for the reason that they must go further and show that at the time they gave this notice the principal was solvent, and that he has since become insolvent.

Hempstead v. Watkins, 6 Ark. 353, 42 Am. Dec. 696; *Thompson v. Robinson*, 34 Ark. 44; *King v. Haynes*, 35 Ark. 463.

The maker of a note cannot question the authority or capacity of the payee to make a transfer thereof.

Winer v. Bank of Blytheville, 89 Ark. 444, 131 Am. St. Rep. 102, 117 S. W. 232.

Mr. Dene H. Coleman for appellees.

McCulloch, Ch. J., delivered the opinion of the court:

This is an action to recover from appellees, J. M. Everett and W. A. Halliburton, the amount of two negotiable promissory notes executed by them as sureties for J. T. Halliburton to O. B. Edmondson, now deceased. Edmondson, by written indorsement on the back of each of the notes, assigned the same to the Union Bank & Trust

Company, and the latter in turn assigned same to appellant Albert Sims, who instituted this action; but subsequent to its institution said Union Bank & Trust Company, as the executor of Edmondson's estate (he having died), was joined as plaintiff. The case originated before a justice of the peace, and there are no written pleadings; but the two appellees, as sureties, defended on the ground that they requested the payee of the note to sue and that he failed to do so, and by reason thereof the principal had become insolvent so that his liability could not be enforced. The only evidence tending to support that defense, if it be held to be a good defense, is that of witness Christopher, who stated that he heard a conversation between Edmondson and one of the sureties, in which the latter told Edmondson "to collect his money, that it was due, and that he didn't want to have to pay it." The only testimony which it is claimed tended to establish the solvency of the principal debtor at or about the time the request was made was that of a witness who stated that he heard a conversation between Edmondson and the principal debtor, in which the latter said that if required he would sell his wagon and team to pay the notes, and that Edmondson told him that he did not want him to do so, as the sureties on the notes were good. The court was requested by the parties on both sides of the controversy to give a peremptory instruction, and the court refused to grant appellant's request, but instructed the jury to return a verdict in favor of appellees, the defendants.

The case therefore stands here as if the jury had, upon correct instructions, returned a verdict in appellees' favor, and the sole question is that of the legal sufficiency of the evidence. *St. Louis Southwestern R. Co. v. Mulkey*, 100 Ark. 71, 139 S. W. 643, Ann. Cas. 1913C, 1339.

There was testimony tending to qualify the interest of appellant Sims in the notes, and to show that the original payee had an interest therein; but, inasmuch as there was a valid assignment in writing, he was authorized to sue, and appellees cannot question the consideration upon which the assignment is based. Moreover, the executor of the original holder is made party, and that eliminates any question of the relative interests of the parties in the recovery.

The statutes of this state provide that "any person bound as surety for another in any bond, bill, or note, . . . may, at any time after action hath accrued thereon, by notice in writing, require the person having such right of action forthwith to commence suit against the principal debtor." And that "if such suit be not commenced

within thirty days after the service of such notice, and proceeded in with due diligence, in the ordinary course of law, to judgment and execution, such surety shall be exonerated from liability to the person notified." Kirby's Dig. §§ 7921, 7922.

It is not shown that the terms of the statute were complied with, but it is contended that noncompliance with the verbal request was sufficient to exonerate the sureties, if the principal was solvent at the time the request was made and afterward became insolvent. The trial court evidently based the decision upon that view of the law.

It is said that the law has been so declared in three of the decisions of this court. *Hempstead v. Watkins*, 6 Ark. 317, 42 Am. Dec. 696; *Thompson v. Robinson*, 34 Ark. 44; *King v. Haynes*, 35 Ark. 463. There are statements to that effect in the opinions in the two cases last cited, but in each case it was mere dictum, for the reason that the point was not involved and the court did not decide it. The case of *Hempstead v. Watkins*, supra, was cited in each of those cases as supporting the statement; but the point was not decided in that case. In the case last referred to notice had been given in the manner provided by statute, but had not been complied with; the suit brought within the time specified in the statute having been instituted by the plaintiff in the wrong capacity. After the expiration of the statutory time for complying with the notice, another suit was instituted, and judgment was rendered against the principal and sureties; and subsequently the sureties filed a bill in the chancery court to restrain the enforcement of said judgment against them. The point of the case was whether or not the sureties had any remedy in a court of equity which was not barred by the judgment at law, and the court decided that the judgment at law did not bar the sureties of their equitable remedies, and that the chancery court had jurisdiction to grant relief to the sureties against the enforcement of said judgment, and, following the decision of the New York court in the case of *Pain v. Packard*, 13 Johns. 174, 7 Am. Dec. 369, said that "the statute is but declaratory, and an extension of an existing and originally equitable remedy, and which has been adopted and converted by courts of law into a subject of legal cognizance."

In *Thompson v. Robinson*, the surety requested the payee in the note to sue the principal debtor and attach the property of the principal, and, after judgment, instituted action in chancery to restrain the enforcement. The court held that no ground for relief was shown, for the reason that

there appeared no ground for attachment of the property of the principal debtor. The court said that mere delay or neglect to sue, without notice, would not discharge the surety, but that "if, after the debt was due, the surety, verbally or in writing, request the creditor to sue the principal, who is then solvent, and the creditor fail to do so, and the principal afterwards becomes insolvent, the surety is thereby discharged."

King v. Haynes was a suit in equity to enjoin the enforcement of a judgment against a surety on the ground that the creditor had extended the time of payment without his consent; but this court held that there had been no extension for a definite period upon a valid consideration, and the surety was not discharged. Mr. Justice Eakin in the opinion of the court stated the rule announced in *Hempstead v. Watkins*, supra, but held that the proof was not sufficient to bring the case within that rule.

So it will be seen that in each of those cases the announcement of that rule was dictum. It is clearly against the great weight of authority, and we think it also inconsistent with other decisions of this court.

We have held that the statute on the subject is in derogation of the common law and of the contractual rights of the parties to such instrument, and should be strictly construed. *Cummins v. Garretson*, 15 Ark. 132; *Thompson v. Treller*, 82 Ark. 247, 101 S. W. 174.

An examination of the authorities discloses the fact that there was no such rule at the common law, and that in the absence of a statute the surety cannot compel the creditor to bring suit against the principal, and is not discharged by the failure of the principal to do so. Mr. Brandt calls attention to the few cases holding to the rule above announced, but says that it is contrary to the great weight of authority, and cites numerous cases in support of that statement. "The great majority of cases on the subject hold," he says, "in the absence of any statutory provision, that if, after the debt is due, the surety request the creditor to sue the principal, who is then solvent, and the creditor fails to do so, and the principal afterwards becomes insolvent, the surety is not thereby discharged. The ground upon which these decisions rest is that the principal and surety are both equally bound to the creditor, who may have taken a surety in order that he might not have to sue the principal. If the surety desires a suit brought against the principal, he may himself pay the debt and immediately sue the principal. The contrary doctrine is an innovation, and was unknown L.R.A.1918C.

to the common law." 1 Brandt, *Suretyship & Guaranty*, § 265.

The doctrine seems to have originated with the case of *Pain v. Packard*, supra, decided by the New York court of errors in 1816.

Chancellor Kent, in the case of *King v. Baldwin*, 2 Johns. Ch. 554, refused to follow the rule announced in *Pain v. Packard*, and on appeal the court of errors reversed his decision by a divided court; the deciding vote being cast by the lieutenant governor, who was a layman. The New York courts, in later decisions, have recognized the rule announced in *Pain v. Packard*, but almost invariably have done so with protest against its correctness. The case has been condemned by nearly all the courts which have had occasion to discuss the law on the subject.

Chief Justice Parker, speaking for the Massachusetts court in *Frye v. Barker*, 4 Pick. 382, said: "We never have adopted the law stated to be settled in the New York case of *Pain v. Packard*, that a surety may discharge himself, if upon request the creditor does not sue the principal. . . . The cases cited of a discharge to the surety, where the principal may still be holden, are chiefly cases of obligation to perform some duty other than the payment of money, where the terms of the contract are changed by the obligee without the consent of the surety. . . . There seems to be no reason in the case of money contracts, for discharging the surety because the promisee neglects to sue the principal, for the surety may pay the debt and then bring an action himself."

In the case of *Inkster v. First Nat. Bank*, 30 Mich. 143, Mr. Justice Christianity, speaking for the court, said: "The case of *Pain v. Packard*, 13 Johns. 174, 7 Am. Dec. 369 (which has been followed in New York not without some vigorous protest, and to some extent in some other states), was, we think, a clear departure from the common law; and we find nothing in the English decisions to warrant the qualifications of a surety's liabilities there recognized."

Many other decisions discuss the doctrine laid down in *Pain v. Packard*, and expressly decline to follow it, declaring it to be an innovation. *Davis v. Huggins*, 3 N. H. 231; *Dame v. Corduan*, 24 Cal. 157, 85 Am. Dec. 58; *Langdon v. Markle*, 48 Mo. 357; *Hickok v. Farmers' & M. Bank*, 35 Vt. 476; *Jenkins v. Clarkson*, 7 Ohio, pt. 1, p. 72; *Stout v. Ashton*, 5 T. B. Mon. 251; *Nichols v. McDowell*, 14 B. Mon. 6; *Gage v. Mechanics' Nat. Bank*, 79 Ill. 62; *Huff v. Sliffe*, 25 Neb. 448, 13 Am. St. Rep. 497, 41 N. W. 289. Those cases hold, in effect, that in the absence of statute, the surety has no right to

require the creditor to proceed against the principal, and that a failure to sue upon request does not discharge the surety. In *Stout v. Ashton*, 5 T. B. Mon. 251, where it was proved that the surety, who had requested the payee to sue the principal, insisted upon suit being brought, the court said: "We cannot concur with the court below by supposing the surety to be released by the mere laches or neglect of the obligee to bring suit. No case which has come under our notice goes that far. On the contrary, it is well settled that mere delay in bringing suit by the obligee, though urged to do so by the surety, does not discharge the surety, and for a good reason. The surety has undertaken positively to pay the debt. If his obligee will not sue, and he is in danger, he can relieve himself by fulfilling his obligation; that is, by paying his debt and taking the whip into his own hands and pursuing his principal."

In the other case cited above from the Kentucky court of appeals, it was said: "If he [referring to the surety] has an equitable right to require the creditor to sue and coerce the debt out of the principal, the extent of that right, and the manner in which he can avail himself of it, have been defined and prescribed by statute, and he cannot avail himself of it in any other mode." [14 B. Mon. 7.]

In Ohio there is a statute on the subject

similar to ours, and the supreme court of that state, in the case above cited, said: "Since this statute was passed, the common-law rule has not been in force in this state; and it is unnecessary to inquire what its provisions are, for it has given place to the statute, and is repealed by it, if any such rule existed as that which would discharge a surety who gave the creditor notice to sue the principal by *parol*, if the creditor did not proceed accordingly. The statute of Ohio requires the notice to be *in writing*." [7 Ohio, pt. 1, p. 74.]

We are convinced therefore that the dicta contained in the three decisions referred to in the beginning are erroneous, and should not be allowed to control in the decision of this case on the question presented. They are therefore disapproved, and the rule is announced that the statute on this subject controls, and unless complied with the surety is not discharged by mere inactivity on the part of the creditor or failure or refusal to sue the principal.

The question whether or not the creditor may waive the form of the notice and accept verbal notice is not raised in the present case, and it is left for decision in some case in which it is directly raised.

The judgment of the Circuit Court is therefore reversed, and judgment will be entered here in favor of appellants for the amount of the notes sued on, with interest.

Annotation—Principal and surety: failure to comply with surety's demand or request to proceed in the enforcement of the obligation.

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II. Rule in the absence of statute:

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I. *Introductory.*

Apart from the effect of a request by the surety, it is undisputed that the holder of an obligation on which there is a surety owes the surety no duty of active diligence in enforcing the obligation after its maturity.¹ On the other hand, it seems to be quite well settled, at least it has been stated by a leading text-writer,² that sureties are entitled to come into equity after the debt has become due to compel the debtor to exonerate them from their liability by paying the debt. This principle has been recognized in cases coming within the scope of this note.³ In fact, it has been held to be the right of a surety by application to a court of equity to compel the creditor to proceed in the collection of the claim.⁴ A decree was rendered in one case to the effect that the creditor make demand upon the principal debtor, and upon his refusal to pay that he commence suit on the obligation or be barred from claiming any rights against the surety, upon the surety tendering a sufficient amount to pay reasonable costs and expenses.⁵ It seems clear, therefore, that the surety may, by appli-

III. b—continued.

- 9. *Rights of surety after suit is begun on obligation*, 47.
- 10. *Rights of a surety not appearing as such on the instrument*, 47.
- 11. *What contracts are within the operation of this rule*, 48.
- 12. *Effect of discharge of one surety upon cosureties*, 50.
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- 14. *Availability of the release as a defense at law*, 51.
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cation to a court of equity at or after the maturity of the obligation, obtain relief. Whether the surety can, by a request or demand, impose upon the creditor the duty of enforcing the obligation, is the subject of investigation in this note. The fact that the surety may have relief in equity is by some courts considered a reason for not giving him the additional remedy to compel the creditor to sue by request;⁶ while the court in *King v. Baldwin*⁷ argues directly contrary.

II. *Rule in the absence of statute.*

a. *Rule that surety is not relieved by failure of holder to sue after request.*

In the absence of a statute regulating the subject, the rule sustained in a majority of jurisdictions is that a creditor is under no obligation to take active steps to enforce the instrument even though he has been requested to do so by the surety; and therefore his failure to proceed to collect the instrument after notice by the surety does not release the surety.⁸ That a failure to pro-

¹ 32 Cyc. 92, 93; 27 Am. & Eng. Enc. Law, 508.

² 1 Story, Eq. Jur. 13th ed. § 327.

³ *Villars v. Palmer* (1873) 67 Ill. 204; *Cope v. Smith* (1822) 8 Serg. & R. (Pa.) 110, 11 Am. Dec. 582. See *King v. Baldwin*, infra, note 21; *Pickett v. Land* (1831) 2 Bail. L. (S. C.) 608; *Lang v. Brevard* (1849) 3 Strobh. Eq. (S. C.) 59.

⁴ *Sasseer v. Young* (1834) 6 Gill & J. (Md.) 243; *Frenner v. Yingling* (1872) 37 Md. 491; *Butler v. Hamilton* (1804) 2 Desauss. Eq. (S. C.) 226, 2 Am. Dec. 692.

⁵ *Dane v. Corduan* (1864) 24 Cal. 157, 85 Am. Dec. 53. The surety, not having complied with the duty imposed upon him by L.R.A.1918C.

the decree, was held not entitled to be released by reason of the failure of the creditor to proceed in accordance with the decree.

⁶ *Infra*, notes 11 et seq.

⁷ See *infra*, note 21.

⁸ *Sims v. Everett*, ante, 7, disproving the theory of the earlier Arkansas cases.

Dane v. Corduan (Cal.) supra. A provision in the Practice Act in this state gave the surety himself the right to bring a suit against the creditor and principal debtor, and compel the latter to pay the debt; and this is stated to be a substitute for a proceeding in chancery to compel the

ceed in the collection of the obligation after notice by the surety does not release the surety is true even though the

principal debtor was solvent at the time of such notice and afterwards became insolvent.⁹ And this is true although

creditor to sue. See *Huey v. Pinney*, *infra*, note 25.

Halstead v. Brown (1861) 17 Ind. 202; *Daily v. Robinson* (1882) 86 Ind. 382; *Leavitt v. Savage* (1839) 16 Me. 72 (dictum); *Frye v. Barker* (1826) 4 Pick. (Mass.) 382; *Routon v. Lacy*, 17 Mo. 399 (dictum); *Bank of Maywood v. McAllister* (1898) 56 Neb. 188, 78 N. W. 552; *Kemp Lumber Co. v. Stanley* (1916) — N. M. —, 160 Pac. 351; *Rockwell v. Portland Sav. Bank* (1901) 39 Or. 241, 64 Pac. 388, following *Findley v. Hill*, *infra*, note 9; *Caston v. Dunlap* (1831) Rich. Eq. Cas. (S. C.) 77, 23 Am. Dec. 194, but see *South Carolina case* in note 18; *Bank of Montpelier v. Dixon* (1832) 4 Vt. 587, 24 Am. Dec. 640; *Harris v. Newell* (1877) 42 Wis. 687.

This is the theory of *Bull v. Allen* (1848) 19 Conn. 101, in which the surety had signed as a joint obligor with the debtor, and was treated as a joint debtor, so far at least as the payee of the note was concerned; and it is stated that nothing would operate as a defense to the note for one of the joint obligors which would not also be a defense for the other.

In *Stout v. Ashton* (1827) 5 T. B. Mon. (Ky.) 251, the surety claimed to be released because he had insisted on the holder of the note pursuing the principal by suit, and the holder had failed to do so, but had permitted him to leave the state openly and with his knowledge. It was further claimed that the principal debtor was then solvent and at the time of trial wholly insolvent. The court does not discuss the effect of the request, but states simply that the creditor was under no duty of active diligence, and therefore the surety was not released.

The failure of a bank to cause the arrest of a defaulting clerk upon the request of a surety on his bond was held not to release the surety, in *Louisiana State Bank v. Ledoux* (1848) 3 La. Ann. 674.

It was admitted in *Hickok v. Farmers' & M. Bank* (1862) 35 Vt. 476, that ordinarily a request of the surety does not obligate the creditor to sue the principal debtor, but it was claimed that in that case there were circumstances which should entitle the surety to relief. These were that the surety resided out of the state; that the bankruptcy of the principal debtor was imminent, and his personal property was known and easily attachable, and there would have been no expense to the creditor; that the surety's counsel was ready to see that it was faithfully done, and that the surety himself was then embarrassed so that he could not pay the note. The right of the surety to relief under such circumstances was denied however, it being stated that these circumstances do not furnish any sufficient ground for making an exception to the general rule.

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In *National Bank v. Gilvin* (1913) — Tex. Civ. App. —, 152 S. W. 652, an action upon a promissory note, where a surety claimed to be relieved because of the failure of the creditor to sue at the first term of court after maturity, the court, in denying this defense, states that no obligation rested on the creditor to sue at the first term of court, "no statutory notice having been pleaded." And further in the opinion the court states that the rule which seems to prevail in the great majority of states is "that the surety cannot accelerate the action of a dilatory creditor by notice to proceed against the principal, unless there is express statutory authority to that end."

The sureties on the bond of a deputy sheriff are not relieved from liability thereon by failure of the sheriff to whom the bond was given to comply with the request of the sureties to remove the deputy from office or otherwise discharge them from future liability on the bond, since he had become incompetent, negligent, and unfit for the office, and they were unwilling longer to be accountable for his conduct as a deputy sheriff, even though the sheriff promised them that he would remove the deputy in a reasonable time. *Crane v. Newell* (1824) 2 Pick. (Mass.) 612, 13 Am. Dec. 461. The court refers to the doctrine of *Pain v. Packard* (1816) 13 Johns. (N. Y.) 174, 7 Am. Dec. 369, and *King v. Baldwin* (1819) 17 Johns. (N. Y.) 384, 8 Am. Dec. 415, and disapproves the same.

The court in *Bizzell v. Smith* (1831) 17 N. C. (2 Dev. Eq.) 27, expresses an opinion in accord with these views, but leaves the point undecided, and holds that the surety did not show that he had been prejudiced, since it appeared that the principal debtor was insolvent at the time the obligation was given, and much more so when the notice to bring suit was given, and therefore the surety could not complain of the failure of the creditor to bring suit as requested.

This is the rule approved in *Hartman v. Burlingame* (1858) 9 Cal. 557, where there was no sufficient showing of insolvency occurring after notice.

⁹ *Taylor v. Beck* (1851) 13 Ill. 376; *Nichols v. McDowell* (1853) 14 B. Mon. (Ky.) 6 (but the court here concludes by stating that, if the surety has an equitable right to require creditor to sue, the extent of that right, and the manner in which the surety can avail himself of it, are defined by statute, and he cannot avail himself of it in any other mode); *Inkster v. First Nat. Bank* (1874) 30 Mich. 143 (this is true even though the surety adds the word "surety" to his signature), approved in *Michigan State Ins. Co. v. Soule* (1883) 51 Mich. 312, 16 N. W. 662; *Smith v. Freyler* (1882) 4 Mont. 489, 47 Am. Rep. 358, 1

the creditor brought a suit upon notice which he afterwards discontinued.¹⁰ The creditor is not bound to active diligence against the debtor, and the surety cannot compel this by requesting that the creditor proceed to collect his debt; the surety can pay the debt at maturity and immediately resort to the debtor for reimbursement.

The fact alluded to in the introduction, that the surety may resort to equity to obtain relief, is viewed by the courts following the rule now under consideration as a reason against allowing the surety to impose upon the creditor the duty of active diligence by a request.¹¹ In Minnesota, where a statute gave to the surety the right to bring an action against the creditor and principal debtor to compel payment, the equitable rule relieving the surety upon failure of the creditor to sue upon notice was held not applicable.¹²

That the surety is not relieved by the creditor's failure to sue upon request has been held true although the creditor, upon being notified to sue, tells the surety that part of the note has been paid, that arrangements have been made with the debtor for the balance, and

that the creditor will not call on the surety for the note.¹³

It has been held, however, in case a creditor, upon notice from the surety to collect the debt of the principal debtor, promises the surety to look solely to the principal debtor, and the surety by reason of such assurance fails to protect himself, that an estoppel arises to the extent of any loss suffered by the surety.¹⁴ The estoppel arises in such a case from the failure to comply with the promise, and it has been held that no estoppel arises from the failure of a bank to apply the general deposit account of a depositor upon a note of his held by it upon a mere verbal request or demand of the surety that this should be done, where the surety knew that the bank did not intend to comply with his demand.¹⁵ The effect of a promise, however, whether made with or without a request to sue, has been excluded from this note.

In some cases it is held that a refusal of the creditor to sue upon the request of the surety unaccompanied by an offer of indemnity against the costs and charges of the suit does not furnish a defense at law against the suit of the

Pac. 214; *Davis v. Huggins* (1825) 3 N. H. 231; *Pintard v. Davis* (1843) 20 N. J. L. 205, affirmed in (1846) 21 N. J. L. 632, 47 Am. Dec. 172; *Findley v. Hill* (1880) 8 Or. 247, 34 Am. Rep. 578. See *Rockwell v. Portland Sav. Bank* (1901) 39 Or. 241, 64 Pac. 388, supra, note 8. Both Oregon cases are approved in *White v. Savage* (1906) 48 Or. 604, 87 Pac. 1040; *Pickett v. Land* (1831) 2 Bail. L. (S. C.) 608, but see South Carolina cases in note 18; *Roger v. Davis* (1826) 1 Aik. (Vt.) 296; *Hogaboom v. Herrick* (1832) 4 Vt. 131; *Crough-ton v. Duval* (1801) 3 Call (Va.) 69; *Dennis v. Rider* (1841) 2 McLean, 451, Fed. Cas. No. 3,797.

This is stated, in *Wilds v. Attix* (1866) 4 Del. Ch. 253, to be the settled law. In that case there was a further equity arising out of the fact that the creditor failed to comply with his promise to proceed, made to the surety when the surety made the request. The surety was held not to have altered his condition by waiving some protection or remedy which he would otherwise have secured, and therefore could not urge this as a release.

In the contention of the surety in *Dane v. Corduan* (1864) 24 Cal. 157, 85 Am. Dec. 53, it is stated that the debtor was solvent at the time of notice and afterwards became insolvent, but the court says nothing about insolvency.

See *Carr v. Howard* (1846) 8 Blackf. (Ind.) 190, infra, note 133.

See *Miller v. Arnold* (1879) 65 Ind. 488, infra, note 45.
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¹⁰ *Manning v. Shotwell* (1819) 5 N. J. L. 584, 8 Am. Dec. 622 (sealed bill).

¹¹ *Taylor v. Beck* (1851) 13 Ill. 376, approved in *Villars v. Palmer* (1873) 67 Ill. 204; *Pickett v. Land* (1831) 2 Bail. L. (S. C.) 608; *Harris v. Newell* (1877) 42 Wis. 687.

¹² *Huey v. Pinney* (1861) 5 Minn. 310, Gil. 246. See infra, II. b, 1, for fuller discussion of this theory. See *Dane v. Corduan* (1864) 24 Cal. 157, 85 Am. Dec. 53, supra, note 8.

¹³ *Mahurin v. Pearson* (1837) 8 N. H. 539. See *Conklin v. Conklin* (1876) 54 Ind. 289, infra, note 214; see *Wilds v. Attix*, supra, note 9.

¹⁴ *Bullard v. Ledbetter* (1877) 59 Ga. 109 (sureties on a rent note notified the creditor that the tenant was removing his property and calling on him to distrain. The creditor promised to do so, and said that he would not look to the sureties for the money); *Johnson v. Longley* (1914) 142 Ga. 814, 83 S. E. 952.

In *Triplet v. Randolph* (1891) 46 Mo. App. 569, it is held that if a creditor, knowing that one of his debtors is a surety for the other and that such surety is about to give him legal notice to bring suit, by his conduct, prevents the notice from being given, which, if given and acted upon, would have caused the bringing of the suit and the collection of the note, the surety is discharged, where the principal has become insolvent so that the note cannot be collected from him.

¹⁵ *Davenport v. State Bkg. Co.* (1906)

creditor, notwithstanding the principal may have become insolvent.¹⁶ An offer of indemnity will not under this theory obligate the creditor to sue in all cases.¹⁷

b. Rule that surety is relieved by failure of holder to sue after request.

1. In general.

A rule supported in some jurisdictions even in the absence of statute, is that

it is the duty of the creditor, upon receiving notice at or after maturity to proceed in the collection of the obligation, and his failure to do so discharges the surety if, at the time of the notice, the principal debtor is solvent and afterward becomes insolvent so that the debt cannot be collected of him; in other words, the surety must suffer some injury from the delay.¹⁸ This doctrine

126 Ga. 136, 8 L.R.A.(N.S.) 944, 115 Am. St. Rep. 68, 54 S. E. 977, 7 Ann. Cas. 1000. Generally, as to the effect upon surety or indorser of bank's failure to apply principal's deposit account upon note, see notes in 8 L.R.A.(N.S.) 944, and L.R.A.1917F, 266.

¹⁶ Bellows v. Lovell (1827) 5 Pick. (Mass.) 307. See Huey v. Pinney, *infra*, note 25. A mere verbal promise of the surety to furnish such a bond is held in Eaton v. Waite (1877) 66 Me. 221, not sufficient to require the creditor to proceed.

¹⁷ In Adams Bank v. Anthony (1836) 18 Pick. (Mass.) 238, a creditor who held two notes of the same person brought a suit against the debtor and attached property more than sufficient to cover both notes. He did not intend to sue on the note on which there was a surety. Subsequently, other creditors attached the property in question, and the creditor did not take judgment on the note on which there was a surety. The surety contended that upon his request the creditor was bound to include the amount of this note in the judgment, and that because he refused to do so the surety was exonerated from his liability. The court, however, held otherwise, stating that the introduction of this note into the judgment of this creditor would have been a fraud upon the after-attaching creditors which would have avoided the creditor's own attachment; that the offer of indemnity by the surety did not in the slightest degree vary the legal or moral obligations and duties of the creditor.

¹⁸ Bruce v. Edwards (1827) 1 Stew. (Ala.) 11. 18 Am. Dec. 33; Goodman v. Griffin (1830) 3 Stew. (Ala.) 160 (for this purpose the common law of a sister state will be presumed to be the same as that of the law of the forum. Dampskibsskattieselskabet Habil v. United States Fidelity & G. Co. (1904) 142 Ala. 363, 39 So. 54 (dictum); Martin v. Skehan (1874) 2 Colo. 614 (goods at law); Pain v. Packard (1816) 13 Johns. (N. Y.) 174, 7 Am. Dec. 369; King v. Baldwin (1819) 17 Johns. (N. Y.) 384, 8 Am. Dec. 415; Manchester Iron Mfg. Co. v. Sweeting (1833) 10 Wend. (N. Y.) 162; Remsen v. Beekman (1862) 25 N. Y. 552; Colgrove v. Tallman (1876) 67 N. Y. 95, 23 Am. Rep. 90; Toles v. Adeo (1881) 84 N. Y. 222; Denick v. Hubbard (1882) 27 Hun (N. Y.) 347; Mutual L. Ins. Co. v. Davies (1878) 56 How. Pr. (N. Y.) 440; Cope v. Smith (1822) 8 Serg. & R. (Pa.) L.R.A.1918C.

110, 11 Am. Dec. 582; Geddis v. Hawk (1823) 10 Serg. & R. (Pa.) 33; Gardner v. Ferree (1826) 15 Serg. & R. (Pa.) 28, 16 Am. Dec. 513; Erie Bank v. Gibson (1832) 1 Watts (Pa.) 143; Kemmerer v. Yoder (1862) 1 Woodw. Dec. (Pa.) 41; Wetzel v. Sponsler (1852) 18 Pa. 460; Strickler v. Burkholder (1864) 47 Pa. 476; Hancock v. Bryant (1829) 2 Yerg. (Tenn.) 476; Thompson v. Watson (1837) 10 Yerg. (Tenn.) 362; Jackson v. Huey (1882) 10 Lea (Tenn.) 184, 43 Am. Rep. 301.

The principle of Hancock v. Bryant (1829) 2 Yerg. (Tenn.) 476, and Thompson v. Watson (1837) 10 Yerg. (Tenn.) 362, *supra*, is stated, in Burrow v. Bank of Tennessee (1846) 6 Humph. (Tenn.) 440, to go "to the verge of the law."

The court in Pennsylvania at first declined to express an opinion as to whether the surety would be released, if it should appear that the insolvency of the debtor would have prevented the collection of the debt from him, if suit had been brought against him when notice was given. Cope v. Smith (1822) 8 Serg. & R. (Pa.) 110, 11 Am. Dec. 582. The notice to sue being held insufficient, the surety was held not released. Subsequently, however, this court expressed an opinion that the surety would not be released unless he could show that he had been injured through the debtor becoming insolvent after notice so that the opportunity to collect the debt from him had been lost. Gardner v. Ferree (1826) 15 Serg. & R. (Pa.) 28, 16 Am. Dec. 513.

In Manchester Iron Mfg. Co. v. Sweeting (1833) 10 Wend. (N. Y.) 162, it is stated that the failure of the creditor to prosecute the principal on the request of the surety was virtually an agreement to discharge the surety and look to the responsibility of the principal alone.

It is stated in De Caumont v. Rasines (1890) 38 App. Div. 153, 56 N. Y. Supp. 652, that "to sustain the defense that a creditor, as between a surety and the principal debtor, must resort first to the property of the principal debtor, two things are necessary,—a request by the surety to the creditor so to proceed, and a failure to comply therewith with resultant damages."

See State use of Snell v. Reynolds (1832) 3 Mo. 95, *infra*, note 98.

See other cases which in theory support the rule, but hold that the surety is not discharged because of insufficiency of the notice, *infra*, II b, 2.

Whatever may have been held in Dehuff

was announced in *Pain v. Packard*,¹⁹ and at first met with considerable opposition from the courts of New York,²⁰ and it has been expressly disapproved in a number of the jurisdictions holding to the opposite rule, as discussed *supra*. It was finally firmly established in New York by the decision in *King v. Baldwin*.²¹ In the latter case Spencer, Ch. J., calls attention to the right of a surety to go into equity and compel the creditor to obtain payment of the principal debtor.²² From this he reasons that there is a duty owing from the creditor to obtain payment of the debt from the

principal debtor in the first instance if that is possible, and continues thus: "If this duty exists, and does bind the conscience of the creditor, I cannot conceive why it may not be brought into exercise by an act in pais, and without the interposition of a court of equity." In Pennsylvania, where there is no court of chancery, the court, in adhering to this theory, argues that unless a request in pais is sufficient the equity of the surety to have the obligation enforced against the principal debtor is sacrificed.²³

A request simply to bring suit against

v. Turbett (1801) 3 Yeates (Pa.) 157, the rule relieving the surety upon failure of the creditor to sue upon notice is now established in Pennsylvania.

This is the theory upon which *Hempstead v. Watkins* (1845) 6 Ark. 317, 42 Am. Dec. 696; *Thompson v. Robinson* (1879) 34 Ark. 44; and *Kendall v. Milligan* (1896) 62 Ark. 629, 34 S. W. 78, were decided, but this can no longer be regarded as the law in this jurisdiction since the decision in *SRMS v. EVERETT*, ante, 7.

The South Carolina cases are on both sides of the question. The doctrine of *Pain v. Packard* was expressly disapproved in *Caston v. Dunlap* (1831) Rich. Eq. Cas. (S. C.) 77, 23 Am. Dec. 194, and *Pickett v. Land* (1831) 2 Bail. L. (S. C.) 608, *supra*. It was the theory of the early South Carolina case of *Butler v. Hamilton* (1804) 2 Desauss. Eq. (S. C.) 226, 2 Am. Dec. 692, as interpreted in the subsequent case of *Rutledge v. Greenwood* (1806) 2 Desauss. Eq. (S. C.) 389, "that equity will give relief to a surety where the obligee has not used due diligence to recover his debt from the principal in the first instance, and has refused or neglected to comply with the surety's request to use that diligence." Relief was denied the surety in *Butler v. Hamilton* for the reason that the creditor had proceeded against the principal debtor on one of the obligations involved, and process was found unavailing, this fact, proving, in the opinion of the court, that he was in no situation to pay, and therefore it was not necessary to proceed on the other obligations involved. In *Rutledge v. Greenwood* relief was denied the surety on the theory that, the suretyship not appearing on the face of the instrument and the surety failing to prove to the satisfaction of the court that he was such, he was not entitled to relief. Upon the rehearing of *Rutledge v. Greenwood* the court assumed the suretyship, but it being shown that the surety waited for five years and four months after the creditor had a right to demand the payment of the debt before he required the obligee to sue, was held guilty of laches, and therefore not entitled to the relief sought. As a further reason for denying relief to the surety in *Rutledge v. Greenwood*, it L.R.A.1918C.

was shown that, when notice was given to the creditor, he proposed to put the obligation in suit against all the obligors; that the surety declined this proposition, and requested that the suit be brought against the principal debtor alone. These decisions were previous to the decision in *Pain v. Packard*. In the subsequent case of *Lang v. Brevard* (1849) 3 Strobb. Eq. (S. C.) 59, the South Carolina court refers to the doctrine of *Pain v. Packard* and *King v. Baldwin*, and states that it has never been judicially recognized by the courts of the state, nor is it necessary to decide the question in the case at bar; but the court continues: "I am authorized to say that a majority of this court are prepared to adopt the principle of this decision, and to extend similar relief to a surety under the like circumstances."

¹⁹ (1816) 13 Johns. (N. Y.) 174, 7 Am. Dec. 369.

²⁰ See *Warner v. Beardsley* (1831) 8 Wend. (N. Y.) 194.

"The courts have been disinclined to extend" the rule, says the court in *Wells v. Mann* (1871) 45 N. Y. 327, 6 Am. Rep. 93.

²¹ (1819) 17 Johns. (N. Y.) 384, 8 Am. Dec. 415, reversing (1817) 2 Johns. Ch. 554. Attention has been called by the opponents of the doctrine of *Pain v. Packard* and *King v. Baldwin*, to the fact that *King v. Baldwin* was decided by the casting vote of the presiding officer of the court of errors, who was a layman.

²² This rule is also regarded as a settled rule in *Hayes v. Ward* (1819) 4 Johns. Ch. (N. Y.) 123, 8 Am. Dec. 554. And see *supra*, notes 2 et seq.

²³ *Cope v. Smith* (1822) 8 Serg. & R. (Pa.) 110, 11 Am. Dec. 582. It is stated that in Pennsylvania the court holds itself bound to administer equity in all cases where the forms of law do not restrain it. The notice given in this case, however, was decided to be insufficient, and therefore the surety was not released.

In *Erie Bank v. Gibson* (1832) 1 Watts (Pa.) 143, the court states: "I am reconciled to the rule by the fact that we have no court of chancery; for if we had one I would compel the surety to seek his remedy there."

the principal debtor has been held sufficient without a tender of expenses, or a stipulation to pay them, or an offer by the surety to take the obligation and bring suit himself, unless the creditor at the time of notice expressly puts his refusal to sue on the ground of the trouble and expense, and offers to proceed if that objection is removed.²⁴ On the other hand, the supreme court of Minnesota, while approving the equitable doctrine, has stated that the surety is not relieved by the failure of the creditor to sue upon notice, unless the surety has tendered the creditor indemnity against expenses.²⁵ The Minnesota court, while approving the equitable rule releasing the surety for failure of the creditor to sue upon notice, holds that it will not be applied because of a statute in that state providing that an action may be brought by one person against two or more persons for the purpose of compelling one to satisfy a debt due the other for which the plaintiff is bound as surety, the theory being that, if the surety had the power in his own hands to sue

the maker and holder of the notes to compel the maker to pay the holder, he should have exercised this right, and not demanded that the holder do so for him.²⁶

If the creditor, at the time of notice, offers to permit the surety to use the bond in any way he may think beneficial to him, and the surety refuses to accept, he cannot complain of the failure of the creditor to sue.²⁷

It has been held not necessary for the suretyship to appear on the face of the instrument to bring the equitable rule into operation.²⁸

As stated supra, it is a condition of this rule that the debtor be solvent at the time of notice, and that he afterwards become insolvent. If he is not solvent at such time, the surety is not relieved by failure of the creditor to sue.²⁹ In other words, a release under this rule is based upon the fact that the surety has been injured by the failure of the creditor to sue after notice. Hence, if there is no injury to the surety, he is not relieved.³⁰

²⁴ *Wetzel v. Sponsler* (1852) 18 Pa. 460.
²⁵ *Huey v. Pinney* (1861) 5 Minn. 310, Gil. 246.

See *Bellows v. Lovell*, supra, note 16.

²⁶ *Huey v. Pinney* (Minn.) supra, followed in *Benedict v. Olson* (1887) 37 Minn. 431, 35 N. W. 10.

As the New York court recognizes that the surety has a remedy, at least an equitable remedy, to compel payment by the principal debtor, the reasoning of the Minnesota court would seem to require that the surety be not granted the right to compel the creditor to sue by a request.

²⁷ *Gardner v. Ferree* (1826) 15 Serg. & R. (Pa.) 28, 16 Am. Dec. 513. It is stated that nothing more can be required than to invest the surety with the means in the power of the obligee to enforce the obligation.

²⁸ *Bruce v. Edwards* (1827) 1 Stew. (Ala.) 11, 18 Am. Dec. 33. But see *Rutledge v. Greenwood*, supra, note 18.

It is held in *Benedict v. Olson* (1887) 37 Minn. 431, 35 N. W. 10, that the payee of a note upon the face of which the signers appear to be joint makers is not bound to take notice of the equitable rights of one of them, who is in fact a surety, until he is informed of the relation of the makers to each other.

²⁹ *Warner v. Beardsley* (1831) 8 Wend. (N. Y.) 194; *Huffman v. Hulbert* (1835) 13 Wend. (N. Y.) 377; *Herrick v. Borst* (1843) 4 Hill (N. Y.) 650; *Valentine v. Farrington* (1833) 2 Edw. Ch. (N. Y.) 53; *Black River Bank v. Page* (1871) 44 N. Y. 453; *Hunt v. Purdy* (1880) 82 N. Y. 486, 37 Am. Rep. 587; *Merritt v. Lincoln* (1855) 21 Barb. (N. Y.) 249; *Thompson v. Hall*. (1866) 45 Barb. (N. Y.) 214; *Field v. Cutler* (1870) L.R.A.1918C.

4 Lans. (N. Y.) 195; *Marsh v. Dunckel* (1881) 25 Hun (N. Y.) 167. See *Bizzell v. Smith* (1831) 17 N. C. 27 (2 Dev. Eq.) supra, note 8.

The creditor cannot be compelled to pursue an insolvent principal. *Merritt v. Lincoln* (1855) 21 Barb. (N. Y.) 249.

It does not appear in any of these cases that the principal debtor became solvent after notice, so that the rule in such a situation is not declared. In fact, it affirmatively appears in most of them that the debtor remained insolvent. The rule is stated in these cases as in the text, that if the debtor was not solvent at the time of notice, the surety cannot claim to be released, no attention being given to his condition as to solvency thereafter. In *Field v. Cutler* (1871) 4 Lans. (N. Y.) 195, the rule is stated to apply where the principal debtor was insolvent at time of notice and remained insolvent.

Five days after the notice took effect, in *Weiler v. Hoch* (1853) 25 Pa. 525, the debtor made an assignment for the benefit of creditors. It is stated that the delay in this case was not long enough to give the surety a defense, but even if it were he had no reason to complain of it, for before the judgment could have been revived the assignment took effect, and a scire facias would only have increased the burden which the surety doubtless deemed heavy enough already.

³⁰ In *Herbert v. Hobbs* (1830) 3 Stew. (Ala.) 9, the debtor died and the creditor was requested by the sureties to proceed against his administrator. It was thought at the time of notice that the estate was solvent, but a large claim was subsequently presented, which if successful would make

While the present note does not deal exhaustively with the burden of proof, it may be stated that it has been held that the burden of showing the solvency at the time of notice and the subsequent insolvency is on the surety.³¹ Again, it has been stated that, to bring a case within the operation of the rule, it is necessary for the surety to show that the principal was solvent at the time he requested the creditor to proceed and collect his debt, and was within the jurisdiction of the state, and that the cred-

itor, without any reasonable excuse, neglected or refused to proceed until the principal debtor became insolvent and unable to pay.³²

By solvency, within the rule, is meant that the debtor is in such a condition that the demand may be collected out of his property by due course of law, and not merely that the debtor might have paid if hard pressed.³³ A charge sustained in one decision was that "the term 'solvent,' in law, meant that a man was able to pay all his debts from his

the estate insolvent. The administrator testified that, if the note had been sued on against him as early as was possible, it might possibly have been paid, but that this was doubtful; that the property of the estate had diminished in value by the fall of prices. These facts are not discussed, but the court concludes that the surety suffered no injury by the delay.

In *Gayle v. Randle* (1836) 4 Port. (Ala.) 232, it is stated that a plea which does not state that the debt has been lost by the negligence of the plaintiff through the insolvency of the debtor after notice, nor that the notice was in writing is bad.

Cummins v. Garretson (1854) 15 Ark. 132.

This is apparently what is meant by the court in *Bates v. State Bank* (1847) 7 Ark. 394, 46 Am. Dec. 293, where it is stated merely that, upon a defense set up by a surety that the creditor had failed to bring suit when requested, where the surety offered no evidence as to the solvency of the principal either before or after the institution of the suit, it is clear that the surety could not succeed upon the plea. Since the decision in *SIMS v. EVERETT*, ante, 7, it can no longer be rendered as the rule in this jurisdiction that the surety would be released at common law upon a showing of injury.

See *Hartman v. Burlingame* (1856) 9 Cal. 557, supra, note 8.

A guarantor of the payment of a bond secured by a mortgage, who had given notice to the mortgagee to enforce his mortgage, was held not released in *Hunt v. Purdy* (1880) 82 N. Y. 486, 37 Am. Rep. 587, where it was not shown that the mortgaged premises had depreciated in value after the notice was given.

In *Hopkins v. Spurlock* (1870) 2 Heisk. (Tenn.) 152, a surety on several notes due from the principal debtor notified the creditor to collect his debt from the principal, especially mentioning one of the notes. A sum of money was collected from the principal debtor and applied to some of the notes, including the one specifically mentioned in the letter. In a suit to enjoin the collection of one of the notes, an allegation of the creditor's failure to sue upon notice was made; the creditor answered by setting up the facts that a sum had been collected from the principal debtor and ap-

plied on some of the obligations, and that he was unable to collect any more after exhausting all remedies by law or otherwise, thus leaving the note in suit unpaid. This was held to be a sufficient answer to the plea of release by failure to sue.

³¹ *Wheeler v. Benedict* (1885) 36 Hun (N. Y.) 478; *Maier v. Canavan* (1872) 57 How. Pr. (N. Y.) 504, 8 Daly, 272.

To constitute a defense to the surety it is necessary for him to aver and prove "that the principal has become insolvent after notice given to sue him, and that the means of recovering the debt of him have been lost by the negligence of the plaintiff." *Bruce v. Edwards* (1827) 1 Stew. (Ala.) 11, 18 Am. Dec. 33.

³² *Warner v. Beardsley* (1831) 8 Wend. (N. Y.) 194; *Strickler v. Burkholder* (1864) 47 Pa. 476.

³³ *Huffman v. Hulbert* (1835) 13 Wend. (N. Y.) 377.

In *Marsh v. Dunckel* (1881) 25 Hun (N. Y.) 167, the term "insolvent" is stated to usually mean one whose estate is not sufficient to pay his debts, or one who is unable to pay all his debts from his own means. Again, it is stated that one is solvent who has property sufficient to pay all his debts and all his debts can be collected by legal process.

In *Darby v. Berney Nat. Bank* (1893) 97 Ala. 643, 11 So. 881, a plea setting up a failure to sue was held bad at common law in that it did not appear therefrom that the principal "was then solvent in the sense that payment of the note could have been coerced by action, judgment, and execution against him." The court continues: "The principal may then have had 'ample means wherewith to pay said indebtedness' as averred in the plea, and yet an effort to enforce payment, for aught that is alleged, have been entirely abortive, so that the plea fails to show affirmatively that the defendant was prejudiced by plaintiff's omission to proceed against" the principal debtor.

In *Hancock v. Bryant* (1829) 2 Yerg. (Tenn.) 476, it is stated that the fact that the money might have been made out of the principal, had the creditor been prompt on receiving notice to sue, is made by the evidence even more probable, thus not requiring an absolute proof on this question.

own means, or that his property was in such a situation that all his debts might be collected out of it by legal process."³⁴

The equitable right to require the creditor to proceed with the collection of the debt has been held not to extend to the right to require the creditor to proceed after judgment.³⁵

If the principal debtor has effects in the state, the fact that he is out of the state does not excuse the creditor from bringing suit.³⁶

This equitable rule is practically codified in some statutes which have been enacted on the subject.³⁷

Availability of defense at law.

There is a disagreement among the authorities as to whether the defense of a release by failure of the creditor to sue after notice, and consequent injury, is available to the surety at law. According to the majority view, it is a defense at law.³⁸ But in some cases it has been held available only in equity, and not to be available as a defense to an action at law upon the note.³⁹ In a state in which there was a statute which was held cumulative to the equitable remedy, it was held that a surety can be discharged in a law court only by notice under the statute.⁴⁰

Effect of failure to make defense at law upon jurisdiction of equity.

As just shown, the release of a surety by failure of the creditor to sue upon notice is, according to the majority view, a defense at law. But the failure of the surety to make this defense in an action

at law on the instrument has been held not to prevent him from afterwards coming into equity to restrain the enforcement of a judgment against him.⁴¹ Spencer, Ch. J., in delivering the opinion in *King v. Baldwin*,⁴² states that the defense that a surety is released upon the failure of the creditor to bring suit against the principal debtor upon request from the surety, if the principal debtor was solvent at the time of the request and has since become insolvent, was not firmly established at the time of the decision in the court of law in that case, and this being true the acquiescence by the surety in the decision at the court of law did not preclude him from subsequently coming into equity with his defense. It is stated: "But if it be doubtful whether a court of law can take cognizance of the defense, and there exists no doubt of the jurisdiction of a court of equity, and if, in such a case, a defendant at law, under the influence of such doubt, omits to make his defense, or if he bring it forward and it be overruled, under the idea that it is not a defense at law, it is not granting a new trial for a court of equity to afford relief notwithstanding the trial at law."

On the contrary, it has been held that a failure to make the defense at law precludes the surety from obtaining relief in equity.⁴³

Of course, where the view that the defense is not available at law prevails, the surety is entitled to relief in equity, although he has made no defense at law.⁴⁴

³⁴ *Herrick v. Borst* (1843) 4 Hill (N. Y.) 650, approved in *Marsh v. Duncel* (N. Y.) supra.

See *Butler v. Hamilton* (1804) 2 Desauss. Eq. (S. C.) 226, 2 Am. Dec. 692, supra, note 18.

³⁵ *McNeilly v. Cooksey* (1878) 2 Lea (Tenn.) 39.

See infra, III. b, 9.

³⁶ *Hancock v. Bryant* (1830) 2 Yerg. (Tenn.) 476.

³⁷ See infra, III. a.

³⁸ *Herbert v. Hobbs* (1830) 3 Stew. (Ala.) 9; *Hempstead v. Watkins* (1846) 6 Ark. 317, 42 Am. Dec. 696 (suretyship appeared on face of instrument); *Martin v. Skehan* (1875) 2 Colo. 614; *Pain v. Packard* (1816) 13 Johns. (N. Y.) 174, 7 Am. Dec. 369 (release was, without discussion, held a defense to an action at law on the note); *King v. Baldwin* (1819) 17 Johns. (N. Y.) 384, 8 Am. Dec. 415.

³⁹ *Rice v. Simpson* (1872) 9 Heisk. (Tenn.) 809.

⁴⁰ *Simpson v. State* (1873) 6 Baxt. (Tenn.) 440.

⁴¹ *Hempstead v. Watkins* (1846) 6 Ark. L.R.A.1918C.

⁴² 17 Johns. (N. Y.) 384, 8 Am. Dec. 415. Neither the pleadings nor the evidence showed that the surety had made any defense whatever to the action at law. He had waived certain objections to the judge of the lower court trying the cause, but such waiver was held not to prejudice him in his right to afterwards maintain his equitable action. Suretyship appeared upon the face of the instrument.

⁴³ (1819) 17 Johns. (N. Y.) 384, 8 Am. Dec. 415. This case is criticized on this point in *Schroeppehl v. Shaw* (1850) 3 N. Y. 446.

⁴⁴ *Herbert v. Hobbs* (1830) 3 Stew. (Ala.) 9, an action to enjoin the collection of a judgment on the principal obligation. The court states that "a neglect to sue on a verbal request, and consequent injury thereon, is by the securities available as a defense both in law and equity; and that as the securities did not insist on its benefit in their defense to the action at law, they are now precluded from relying on it as a ground of equitable jurisdiction."

⁴⁵ Without any discussion, an accommodation indorser who had failed to make the

2. Sufficiency of the notice.

(a) In general.

The sufficiency of the demand or notice under the statutes is discussed in III. b, 2, *infra*. While the sufficiency of the demand or notice under statute has been affected to a certain extent by the form of the statute, the general theory underlying the sufficiency of the notice is the same under the equitable rule as under the statutes, and reference is made to a subdivision dealing with the sufficiency under the statutes for further discussion of this question. No general

rule can be formulated that will automatically determine the sufficiency of a notice. Some general statements, however, are found in the cases which serve as guides to that end. It has been stated that the notice must be certain as to time and terms, to release the surety where the debtor has subsequently become insolvent.⁴⁵ Again, it is stated that the notice to the creditor must be a clear and explicit request to take legal proceedings to collect the debt, or enforce the liability of the principal.⁴⁶ It should clearly inform the creditor that he is required to take proceedings in the courts to enforce his debt;⁴⁷ a

defense of a release by the creditor's failure to sue after notice, in an action at law on the note, was held in *Thompson v. Watson* (1837) 10 Yerg. (Tenn.) 362, entitled to enjoin the enforcement of the judgment. At the time of the decision in *Thompson v. Watson*, it had not been established in this state that the surety could not make the defense at law. That doctrine was established by the decision in *Rice v. Simpson* (1872) 9 Heisk. (Tenn.) 809.

⁴⁵ *King v. Haynes* (1879) 35 Ark. 463.

In *Miller v. Arnold* (1879) 65 Ind. 488, the court, after expressing an opinion in accordance with the rule discussed *supra*, II. a, in general, that a verbal notice is insufficient, states that whether the notice is verbal or written it must be so clear and distinct that the meaning of the surety can be at once apprehended without explanation or argument, and it must be accompanied by an explicit declaration that unless suit is brought the surety will no longer remain liable. It is then stated that no such notice was given in that case, and it is not necessary that any opinion should be expressed as to its materiality.

A notice by the agent of a surety to the creditor, stating that his principal was the surety of the debtor upon the note, and demanding that suit be brought upon it against the parties thereto, is a sufficient common-law notice. It is stated that it would have been a sufficient statutory notice, had it been in writing. *Pickens v. Yarrowborough* (1855) 26 Ala. 417, 62 Am. Dec. 728.

⁴⁶ *Howe Mach. Co. v. Farrington* (1880) 82 N. Y. 126.

Valentine v. Farrington (1833) 2 Edw. Ch. (N. Y.) 53.

It is stated *obiter*, in *Fulton v. Matthews* (1818) 15 Johns. (N. Y.) 433, 8 Am. Dec. 261, that the holder of a note ought to be fairly and fully apprised by the surety that he is required to prosecute the principal. And in an *obiter* statement in *Goodwin v. Simonson* (1878) 74 N. Y. 133, it is stated that it must be shown that the creditor was requested to enforce the collection of the debt "by due process of law."

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A statement made to a member of the law department of a corporation, who had nothing to do with the finance committee, which had charge of mortgages, that the surety on a note secured by mortgage desired the mortgage foreclosed if there were any taxes or assessments unpaid and in arrears upon the premises, has been held not to amount to a full and explicit request to the corporation to foreclose the mortgage. *Mutual L. Ins. Co. v. Davies* (1878) 56 How. Pr. (N. Y.) 440.

In *Burrow v. Bank of Tennessee* (1846) 6 Humph. (Tenn.) 440, the court, in holding the notice insufficient, states that it was not distinctly or satisfactorily established by the testimony.

⁴⁷ *Hunt v. Purdy* (1880) 82 N. Y. 486, 37 Am. Rep. 587. Within this rule a notice given by the guarantor of the payment of a mortgage and the accompanying bond before the maturity thereof (but apparently after a default in the payment of interest, upon which the principal became due at the option of the holder), to the creditor to "collect that mortgage in the spring; do not let it run over the time it is due," is not such a notice as calls upon the creditor to enforce his debt at the risk of releasing the guarantor.

A statement by the surety to the creditor that she "must push Jacob (the principal debtor), and keep pushing him," is not a sufficient notice to prosecute within this rule, unless the creditor understood the words as a request in fact to prosecute the principal debtor or to collect the note, and the defendant meant and intended this construction of the words. *Singer v. Troutman* (1867) 49 Barb. (N. Y.) 182.

Denick v. Hubbard (1882) 27 Hun (N. Y.) 347.

A statement made in a conversation between one surety and the attorney for the holder of the note, who had the note for collection, that "by request of [the other sureties] I came here, and would urge the collection of the note," is not such a notice as to require the holder of the note to proceed with reasonable diligence to enforce by suit his remedy against the maker. *Coykendall v. Constable* (1888) 48 Hun,

mere expression of a wish or desire is not sufficient.⁴⁸

It was stated in an early case in Pennsylvania that the notice must be proved clearly and beyond all doubt; it must be positive and accompanied with a declaration that, unless it be complied with, the surety will be considered as discharged.⁴⁹ The rule so stated has since been fol-

lowed in that state.⁵⁰ Consequently, if it is not a positive request to sue, it is insufficient.⁵¹ Likewise, a notice which does not state that unless suit is brought the surety will consider himself discharged is insufficient.⁵²

(b) *Verbal notice.*

A verbal notice is sufficient under the

360, 1 N. Y. Supp. 9, affirmed in (1889) 117 N. Y. 627, 22 N. E. 1128.

A notice by the surety to the holder of the note, that "you must make Daniel come to time this fall; you know it is the best time for making money with farmers," is not a sufficient notice to release the surety because of the failure of the holder to take the requisite proceedings to enforce the note. *Lawson v. Buckley* (1888) 49 Hun, 329, 2 N. Y. Supp. 178. It is further stated here that the holder of the note, to satisfy the surety, replied that he would see the principal debtor about the note and see what he had been trying to do. This reply is stated not to indicate that the request of the surety implied that legal proceedings were to be taken.

A statement by the surety to the holder of a note, to "go and get your money, there is enough to pay you," is not a sufficient notice to the holder to sue. *Maier v. Canavan* (1879) 57 How. Pr. (N. Y.) 504, 8 Daly, 272.

See *Kennedy v. Falde* (1886) 4 Dak. 319, 29 N. W. 667, *infra*, note 115.

⁴⁸ A wish expressed by the surety to the holder of a note, viz., "I want it settled, and told Mr. Bowling [the holder] plainly that I wanted it settled," is not a sufficient notice to the holder to proceed and collect the note, under the common-law rule that the failure of the holder of a note to collect the same after notice given after maturity of the obligation discharges the surety, where the debtor has in the meantime become insolvent. *Bowling v. Chambers* (1904) 20 Colo. App. 113, 77 Pac. 16.

⁴⁹ *Cope v. Smith* (1822) 8 Serg. & R. (Pa.) 110, 11 Am. Dec. 582. Within this rule a statement made to the creditor that he should call on the principal debtor and demand or ask the money is insufficient.

⁵⁰ A notice by the surety to the creditor "to push Andrew [the principal debtor] or give him clear," stating that the surety would pay nothing, is stated in *Wilson v. Glover* (1846) 3 Pa. St. 404, not to comply with the rule of law on this subject; but this case turned on another point.

A notice which is definite as to the note to which it applies, and which is not clearly proved, is insufficient. *Wolleshlare v. Searles* (1863) 45 Pa. 45.

So it was stated in *Shimer v. Jones* (1864) 47 Pa. 268, approving *Wolleshlare v. Searles*, that the notice must be clear and distinct, so that its meaning will strike the mind of the hearer at once and without argument.

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Notice by a surety to the creditor to collect the note, as he would not stand bail any longer, is a sufficient notice. It is stated that notice to collect is notice to sue, if suit be necessary for collection. It is further stated here that an effort to collect is not necessarily a suit, and it may be doubted whether a mere notice to make an effort amounts to anything. *Strickler v. Burkholder* (1864) 47 Pa. 476.

A notice by the surety for a tenant to "push for the rent as soon as it was due, that he wanted out of it," is stated in *Fidler v. Hershey* (1879) 90 Pa. 363, not to be a sufficient notice.

It is stated *Donough v. Boger* (1874) 10 Phila. (Pa.) 616, that nothing less than clear and positive proof of a notice given by persons duly authorized to give it, and a notice clear and explicit in its terms, given at a time when the creditor had it in his power to proceed to collect the debt, should discharge the surety from an undoubted legal obligation to pay the debt.

The letter set forth in *Erie Bank v. Gibson*, *infra*, note 52, is stated by the court to contain a sufficient notice to bring suit.

⁵¹ *Greenawalt v. Kreider* (1846) 3 Pa. St. 264, 45 Am. Dec. 639. The notice here was as follows: "Please take notice that you hold a bond against Benjamin Stees for \$1,000, in which Charles Greenawalt and myself are bail. I therefore notify you that I will be no longer considered bail. Please to take another bond from him, or payment." It is stated that there is no request to sue in this notice, that the request to take payment might perhaps be taken for a hint to push for the money, but, according to the plain rule laid down for all cases, a hint is not enough; it requires an explicit direction to sue.

⁵² *Erie Bank v. Gibson* (1832) 1 Watts (Pa.) 143. The notice relied upon was contained in a letter written by the surety to the creditor, in which he stated some of his difficulties in attempting to secure payment from the principal debtor. The part of the letter relied upon as notice was as follows: "We see no way of securing ourselves from Gibson unless suit be brought against all of us, and when judgment is obtained we will direct the sheriff to make as much of the money from him as we can. The balance we will, of course, have to pay. If any other course is pursued we would lose the whole of it." The creditor answered this letter by suggesting a partial payment and objecting to suit, and no reply was made thereafter.

equitable rule.⁵³ By the Pennsylvania Act of May 14, 1874, notice is required to be in writing.⁵⁴ Under this act a verbal notice has been held insufficient.⁵⁵

(c) When notice must be served.

The notice must be given after the maturity of the debt.⁵⁶

(d) By whom may notice be given.

The demand to collect the obligation must come from the surety, or someone

authorized by him to make it, and not from a third person;⁵⁷ an authorized agent may serve the notice.⁵⁸ After the death of the surety the notice should come from his legal representative; at least, a direction of the surety to his wife before his death, to notify the creditor to proceed against the principal debtor, has been held not sufficient, where communicated to the creditor about five months after the surety's death, by the widow, who was not at the

First Nat. Bank v. Delone (1916) 254 Pa. 409, 98 Atl. 1042.

Jackson v. Huey (1882) 10 Lea (Tenn.) 184, 42 Am. Rep. 301.

⁵³ Bruce v. Edwards (1827) 1 Stew. (Ala.) 11, 18 Am. Dec. 33; Herbert v. Hobbs (1830) 3 Stew. (Ala.) 9 (dictum); Goodman v. Griffin (1830) 3 Stew. (Ala.) 160; Strader v. Houghton (1839) 9 Port (Ala.) 334; Pickens v. Yarborough (1855) 28 Ala. 417, 62 Am. Dec. 728; Howle v. Edwards (1892) 97 Ala. 649, 11 So. 748; Huey v. Pinney (1861) 5 Minn. 310, Gil. 246 (dictum); Strickler v. Burkholder (1864) 47 Pa. 476; Jackson v. Huey (Tenn.) supra; Thompson v. Watson (1837) 10 Yerg. (Tenn.) 362.

In Herbert v. Hobbs (1830) 3 Stew. (Ala.) 9, where the sureties, not having interposed the defense of a failure of the creditors to sue upon a verbal notice in an action at law in which the creditors obtained a judgment against them, sought in an equitable action to prevent the collection of the judgment, it was held that, as they did not insist on the benefit of the verbal notice in their defense to the action at law, they were precluded from relying on it as a ground of equitable jurisdiction.

That a verbal notice is sufficient is the theory of the Arkansas cases cited in note 18, supra, but this theory is overruled in SIMS v. EVERETT, ante, 7.

That a mere request by the surety to bring suit is not sufficient to release him upon the failure of the creditor to sue in compliance therewith is the opinion of Scott, J., in Routon v. Lacy (1853) 17 Mo. 399. This case is cited in an obiter statement in Langdon v. Markle (1871) 48 Mo. 357, to the proposition that a verbal notice is insufficient at common law. It seems evident, however, that the court in the earlier case was not considering the sufficiency of a verbal notice.

In Cope v. Smith (1822) 8 Serg. & R. (Pa.) 110, 11 Am. Dec. 582, it is stated that the court has no right to say "that a request of this sort should be void unless in writing, but certainly it would be best to make it in writing, because of the difficulty of establishing the truth with sufficient accuracy by parol evidence; and when the penalty is so great on the creditor as the loss of his debt, the surety who

sets up this defense should be held to strict proof."

⁵⁴ Hickernell's Appeal (1879) 90 Pa. 328.

⁵⁵ First Nat. Bank v. Delone (1916) 254 Pa. 409, 98 Atl. 1042.

⁵⁶ Hellen v. Crawford (1862) 44 Pa. 105, 84 Am. Dec. 421, holding insufficient a verbal notice given about six months before the note was due, to the effect that the surety would not stand after the note became due; that creditor must collect the note or get other security; Fidler v. Hershey (1879) 90 Pa. 363.

Donough v. Boger (1874) 10 Phila. (Pa.) 616. An allegation in the affidavit of defense that the notice was served "at or about the time" of the maturity of the note is not sufficient.

Notice to the creditors of an estate before their claims have been adjudicated, by a surety on the administration bond, does not relieve such surety from liability to such creditors. Kauffman v. Com. 5 Sadler (Pa.) 385, 8 Atl. 600.

A notice stated to have been given immediately before the note fell due was treated as valid in one case; but no question was raised as to its validity. Kemmerer v. Yoder (1862) 1 Woodw. Dec. (Pa.) 41.

See Conrad v. Foy (1871) 68 Pa. 381, infra, note 60.

⁵⁷ Geddis v. Hawk (1823) 10 Yerg. & R. (Pa.) 33. The note in this case was held by the administrators of the estate of a decedent, and the notice was given by a guardian of one of the minor heirs of the decedent, and was held insufficient.

⁵⁸ Wetzel v. Sponsler (1852) 18 Pa. 460. In this case a son of the surety who transacted his business served the notice. It is stated by the court that the notice need not be given by the surety in person; that he may employ an agent, and if he has a general agent who transacts all his business, it is the duty of such general agent, without special instruction, to give the notice in a proper case, and the validity of a notice so given is not to be questioned for want of authority.

It was by the trial court left for the jury to say, in Klingensmith v. Klingensmith (1868) 31 Pa. 460, whether a son of the surety was authorized to give the notice, and this was held proper by the supreme court.

time administratrix.⁵⁹ A notice given by the husbands of the heirs (who were also legatees) of a deceased surety at a time when there was a personal representative has been held not a sufficient notice, especially where it was given in advance of the maturity of the note.⁶⁰

(e) *To whom must notice be given.*

The sufficiency of notice to an attorney, generally, has been doubted.⁶¹ But a notice to the attorney for a divorced woman who had caused the arrest of her former husband, by the sureties on his bail bond, to take him into custody, was held to be a notice to the proper person, and equivalent to a notice to the woman.⁶² It is stated that the attorneys had charge of the litigation, that their authority as attorneys continued after the decision of the case for the purpose of entering judgment and issuing execution, and it would be very inconvenient, and contrary to the common understanding, to hold that in a case like this they did not represent the plaintiff.

Where the creditor has gone out of the state, leaving the obligation in the hands of his son as his agent for collection, the notice to sue may be addressed to the agent;⁶³ it is not necessary to follow the creditor, or wait until he returns.

A notice to the husband to "collect

the money loaned," as the surety "would not stand accountable any longer," is not a notice to the wife so as to relieve the surety for failure of the wife to collect, especially where the husband held a note himself similarly secured.⁶⁴ A notice given to the husband of the holder of a note, treating him as the owner of the note and requesting him to bring suit, is insufficient, although communicated to the wife.⁶⁵

In regard to corporate agents it has been stated that, "when a request of this nature is to be made of a corporation, to be effective, it should be formally made and communicated to one charged with the subject. . . . Persons seeking to charge a corporation with notice to, or with acts or omissions of, its agents, must see to it that the notice is communicated to, or that the act or omission proceeds from, a person charged with a duty in the premises." Accordingly, notice given to a member of the law department of a large corporation, who was neither president nor a member of the finance committee of the corporation, having control of matters such as that involved, was held not sufficient notice.⁶⁶

(f) *Waiver of effect of notice.*

The surety may, after he has given a proper notice to the creditor, waive his right to have the suit begun.⁶⁷

⁵⁹ Gardner v. Ferree (1826) 15 Serg. & R. (Pa.) 28, 16 Am. Dec. 513. Whether or not this request, if communicated immediately, would have been sufficient, is not decided; it is stated that after the lapse of the time which expired the request came too late.

⁶⁰ Conrad v. Foy (1871) 68 Pa. 381.

⁶¹ The court in Coykendall v. Constable (1888) 48 Hun, 380, 1 N. Y. Supp. 9, affirmed in (1889) 117 N. Y. 627, 22 N. E. 1128, after referring to the role that notice to an attorney is not sufficient, states that such a rule seems to be in consonance with sound principles. The attorney here had the note for collection. The notice was held insufficient on other grounds, however.

⁶² Toles v. Adey (1881) 84 N. Y. 222.

⁶³ Wetzel v. Sponsler (Pa.) supra. That notice may be given to the counsel of an absent creditor is held in Thomas v. Mann (1857) 28 Pa. 520, following Wetzel v. Sponsler.

⁶⁴ Hellen v. Bryson (1861) 40 Pa. 472. There is dictum in this case to the effect that a summons or notice designed for a wife, delivered to her husband at or about his home, might be good, but to affect her the notice must be for her.

⁶⁵ Shimer v. Jones (1864) 47 Pa. 268. On the point that the notice was clearly intended for the husband, it is stated that the wife's name was not mentioned at all, and no message was attempted to be sent

to her through the husband. He was treated as the owner of the note, which he was clearly not, without the precaution of inquiry as to whom the note really belonged to. On the point that the notice had been communicated to the wife, it is stated that the evidence amounted to no more than that the husband informed her of the conversation the surety had had with him, not about what he wanted her to do, but what he wanted the husband to do.

⁶⁶ Mutual L. Ins. Co. v. Davies (1878) 56 How. Pr. (N. Y.) 440.

⁶⁷ The notice was treated as waived in Weiler v. Hoch (1855) 25 Pa. 525, by an agreement to postpone the suit against the debtor.

The common law defense available to the surety because of the failure of the creditor to sue the principal debtor upon request by the surety is not waived by a letter in regard to the obligation expressing a hope of settlement, where it does not appear that by reason of the letter the creditor did any act or omitted to do any that has in any way operated to his prejudice. Crandall v. Moston (1897) 24 App. Div. 547, 50 N. Y. Supp. 145. It is stated that there was no promise contained in the letter to pay the debt; certainly there was no express promise in it, and a mere acknowledgment is not sufficient. It is further stated that the surety did not have full knowledge

3. When suit must be brought.

There is very little authority under the equitable rule as to when suit must be brought. The rule has been stated that the creditor is bound not only to commence his suit against the principal immediately or without any unnecessary delay, but must prosecute it with all reasonable diligence, must arbitrate the cause if that be required by the circumstances or demanded by the surety, and must use all those means of saving the surety which the existing state of the law puts in his power, and which a prudent man would adopt to save himself.⁶⁸ Again, it has been stated as a general rule that the creditor, after receiving proper and explicit notice from the surety to sue the principal, should do so at the next court, if there is a reasonable time intervening and nothing to prevent, and that he should act promptly in obtaining judgment.⁶⁹

A request upon the creditor to enforce securities held by him, which in some jurisdictions is held to come within the operation of the rule, does "not impose the absolute duty upon the plaintiff [the creditor] to proceed at once. It [the creditor] held these securities for two notes, upon one of which the defendants were not indorsers. It was to judge,

of all the facts which operated to discharge him at the time of writing the letter, and therefore there could be no waiver, because a waiver can be made out only upon full knowledge of all the facts.

⁶⁸ *Wetzel v. Sponsler* (Pa.) supra. In this case the notice was given on the 19th of January, when, according to the creditor's evidence, it was too late to sue out a writ to the January term, he claiming that it would have required until the 27th of the following August, the second term after the suit was brought, to obtain judgment by the ordinary course of law; that suit was brought on the 2d of May and judgment obtained by arbitration on the 1st of June following, two months and twenty-six days sooner than if suit had been brought on the 19th of January, 1850, and not arbitrated. This defense was held not sufficient as a matter of law to excuse the failure to bring the suit sooner. Accordingly, the question was left to the jury. A verdict was rendered for the surety on instructions as to the law, similar to that announced by the supreme court in the text above.

⁶⁹ *Donough v. Boger* (1874) 10 Phila. (Pa.) 616. In this case the note fell due April 2, and notice was given at or about maturity. The last day for issuing writs to the next term of court was on the 23d of May. The writ was not issued until the 31st of May. It was held that to discharge the surety it was necessary for him to show that a service could have been had

acting in good faith, when it was best to convert them. If it delayed unreasonably, or was guilty of bad faith or gross negligence in the care and management of the property mortgaged to it, and the securities were thus damaged, they would, undoubtedly, to the extent of such damage, have a defense to the note."⁷⁰

4. What contracts are within operation of rule.

The equitable rule has been applied to relieve sureties on a great variety of contracts. Sureties on the bond of a church treasurer, conditioned upon the faithful performance of his duties and the accounting for all moneys received by him, have been held to be within the operation of the rule.⁷¹ The doctrine was held applicable to a suretyship arising from the dissolution of a partnership and the agreement by the continuing partner to pay the debts of the firm, the retiring partner being treated as surety, and the failure of the creditor to proceed against the continuing partner upon notice was held to release the surety.⁷² It was held applicable also to a suretyship resulting from a sale of mortgaged premises in which the purchaser assumed payment of the mortgage.⁷³ The rule

upon the principal debtor between the 23d and 31st of May, and that he was injured by this delay.

⁷⁰ *Black River Bank v. Page* (1871) 44 N. Y. 453. In this case the court found that the creditor acted in good faith and was not guilty of culpable neglect. The delay in enforcing the securities was less than a year. There was no proof that the securities could have been or ought to have been foreclosed sooner; that the property would have sold for more at an earlier date, or that anyone was damaged by the delay; accordingly, the surety was held not released.

⁷¹ *Albany Dutch Church v. Vedder* (1835) 14 Wend. (N. Y.) 165.

⁷² *Colgrove v. Tallman* (1876) 67 N. Y. 95, 23 Am. Rep. 90.

⁷³ *Russell v. Weinberg* (1877) 2 Abb. N. C. (N. Y.) 422. It was held in this case that, upon a foreclosure of the mortgage after the premises had depreciated so as to make it altogether probable that there would be a deficiency after applying the proceeds of the sale, no judgment could be rendered against the mortgagor, who had by a previous sale become a surety. It is stated that, if the purchaser, who at the time of the foreclosure occupied the position of principal debtor, was solvent, it was the duty of the holder of the mortgage to collect the deficiency from him; and if he was insolvent, the surety had suffered through the failure of the holder of the

has been applied to a surety on a bail bond, so that he was released by a failure of the complainant against the principal to take the principal in execution, upon notice by the surety, when this could have been done.⁷⁴ A surety on an adjournment bond has been held released by the failure of a judgment creditor to issue execution on his judgment as soon as it could legally have been done, so that the judgment debtor might have been surrendered by the surety.⁷⁵

But the New York court refused to apply the doctrine of *Paine v. Packard* and *King v. Baldwin* to a case in which a party took a note in payment of a debt and then transferred it in part payment for a farm purchased by him, and at the time of the transfer signed it under the maker's signature. It is stated that such

person was not a surety within the rule of these cases, and the omission of the holder of the note to prosecute the maker upon his request did not discharge him from liability, although the maker subsequently became insolvent.⁷⁶

An indorser is held not to be a surety within the operation of this rule.⁷⁷

5. Effect of discharge of one surety upon cosureties.

Where one surety has been released by the failure of the creditor to sue, the discharge has been held to inure to the benefit of all sureties, since the right of contribution which theretofore existed has been destroyed; the notice to sue inures to the benefit of the cosureties.⁷⁸ On the contrary, it has been held that the release of one surety on a joint and several obligation, by the failure of the

debt to enforce it as required by the notice, and therefore was relieved of liability.

In *Remsen v. Beekman* (1862) 25 N. Y. 552, a mortgagee, upon a sale of the mortgaged premises, released all but a small part of the premises from the mortgage upon the purchaser giving a bond guaranteed by another for the payment of the remaining amount due on the mortgage. Subsequently, the premises were conveyed to the person who had guaranteed the payment of the bond, and by him conveyed subject to the mortgage in satisfaction of certain debts owed by him and his grantor. He then called upon the original mortgagee to enforce his mortgage against the land which was then sufficient to satisfy it. The mortgagee failed to do so, but allowed his debt to run until the land had become insufficient to satisfy the mortgage. The person who had thus guaranteed the payment of the bond, and had subsequently become the owner of the premises, was held to stand in the relation of surety and to be released by the failure of the mortgagee to enforce his mortgage.

⁷⁴ *Toles v. Adees* (1881) 84 N. Y. 222. The bond involved was not a valid bail bond, but was treated as an ordinary surety contract. It was held that the surety was not entitled to protect himself as a surety on a valid bail bond might, by the surrender of his principal, but that he had the right of an ordinary surety to require due diligence on the part of the plaintiff in pursuing his remedies against the principal, and inasmuch as laches in that respect had been charged, the question of laches should be submitted to the jury. On a second appeal of this case, reported in (1883) 91 N. Y. 562, there was held to be such laches as released the surety as a matter of law.

The general rule applicable to a case in which a creditor refuses to proceed when required by a surety was applied in the case of sureties on a bond to indemnify L.R.A.1918C.

bail. *Carr v. Sutton* (1912) 70 W. Va. 417, 74 S. E. 239, Ann. Cas. 1913E, 453. The exact notice that was given in this case does not appear. The court, without detailing the evidence, stated that it showed conclusively that, at the time the sureties signed the bond, the bail was notified to keep a close surveillance over the prisoner, and if he observed any disposition to escape, to at once arrest him and deliver him to jail, and that if an indictment should be returned against him, he should immediately deliver him into the custody of the officer.

⁷⁵ *Row v. Pulver* (1823) 1 Cow. (N. Y.) 246.

⁷⁶ *Wells v. Mann* (1871) 45 N. Y. 327, 6 Am. Rep. 93.

⁷⁷ *Trimble v. Thorne* (1819) 16 Johns. (N. Y.) 152, 8 Am. Dec. 302.

Beardsley v. Warner (1831) 6 Wend. (N. Y.) 610. Upon appeal to the court of errors that court held, in (1831) 8 Wend. 194, that the surety was not released for the reason stated in the text to note 32, supra, and accordingly the judgment was affirmed. One of the senators who voted for an affirmance of the judgment expressly stated that it was not necessary to decide whether an indorser was a surety within the meaning of this rule.

On the contrary, an accommodation indorser was, without discussion, held entitled to the rights of a surety in *Thompson v. Watson* (1837) 10 Yerg. (Tenn.) 362.

That an indorser is not a surety within the meaning of the statutory rule, see *infra*, III. b, 11.

The general question of the release of an indorser of a note by failure to enforce the liability of the maker is discussed in the note to *Rogers v. Detroit Sav. Bank*, 18 L.R.A.(N.S.) 530.

⁷⁸ *Towns v. Riddle* (1841) 2 Ala. 694. The securities here are spoken of as "joint securities."

creditor to sue as required by notice given by him, does not release a cosurety.⁷⁹

6. Notice to enforce security.

Where collateral security has been taken by the creditor in addition to the direct obligation of the principal debtor and surety to pay the money, it has been held that the surety cannot require the creditor to proceed to the enforcement of the collateral security.⁸⁰ A notice given by the surety to proceed upon the collateral security is ineffectual as a defense to the surety to an action on the note,⁸¹ even though it is shown that the collateral security has depreciated in value so that it is no longer sufficient to pay the debt.⁸² A surety on a note which stated that it was given for the rent of a farm has been held not to be released from liability on the note by the failure of the landlord to enforce a lien against his tenant upon notice from the surety, since the landlord was entitled to the payment of money, and was not required to enforce any lien he might have.⁸³

The surety has, however, in some jurisdictions, been relieved of his liability by failure of the creditor to enforce securities.⁸⁴ In one such case it is stated

not to have been contended "that it makes any difference in the rule, or in the application of the principles on which it is founded, that the principal to which the creditor refuses or neglects to resort, when he should, is a fund or property primarily liable for the debt in exoneration of the surety, instead of being a person so primarily liable."⁸⁴ Thus, the surety of a tenant has been held to be relieved by the failure of the landlord to claim a preference to which he was entitled in the proceeds of a sale under execution of the tenant's goods, as requested to do by the surety.⁸⁵

The general question of the duty of a creditor to a surety with respect to management and collection of collateral is discussed in another note in this series of reports.⁸⁶

7. Effect of statute upon equitable rule.

In jurisdictions in which the rule now under consideration has been adopted, the question arises upon the adoption of a statute as to whether the equitable rule is abrogated by the statute, or whether the statute is merely cumulative. It is a theory of some cases holding to the equitable rule, that a statute on the subject is merely cumulative.⁸⁷ Hence

⁷⁹ *Klingensmith v. Klingensmith* (1858) 31 Pa. 460.

⁸⁰ *Branch Bank v. Perdue* (1843) 3 Ala. 409 (mortgage given by principal debtor); *Haden v. Brown* (1851) 18 Ala. 641; *American Mechanics Bldg. & L. Asso. v. Dunlap* (1900) 20 Lane. L. Rev. (Pa.) 59. But see *Lichtenthaler v. Thompson* (1825) 13 Serg. & R. (Pa.) 157, 15 Am. Dec. 587; *Bank of Montreal v. Davy* (1870) 21 U. C. C. P. 179.

It is held in *Myers v. Farmers State Bank* (1898) 53 Neb. 824, 74 N. W. 252, that, where the maker of a note secured its payment by chattel mortgage and the payee of the note indorses and delivers it to a third party, the failure of the indorsee to seize the mortgaged property for the purpose of satisfying the note, even though requested so to do by the sureties of the maker, will not discharge them.

See *Bingham v. Mears*, *infra*, note 91.

⁸¹ *Branch Bank v. Perdue and Haden v. Brown* (Ala.) *supra*.

⁸² *Miller v. White* (1886) 25 S. C. 235.

A surety on a tenant's rent note was held not relieved by the failure of the landlord, upon request of the surety, to attach crops of a subtenant which were being removed from the rented premises. *Ewing v. Williams* (1896) 19 Ky. L. Rep. 319, 39 S. W. 843.

⁸³ *Remsen v. Beekman* (1862) 25 N. Y. 552.

See *Russell v. Weinberg* (1877) 2 Abb. L.R.A.1918C.

N. C. (N. Y.) 422, and *De Caumont v. Rasines* (1899) 38 App. Div. 153, 56 N. Y. Supp. 652.

See also *Hunt v. Purdy* (1880) 82 N. Y. 486, 37 Am. Rep. 587, *supra*.

See *Black River Bank v. Page*, *supra*, note 70.

It is stated obiter in *Moorehead v. Daniels* (1915) — Okla. —, 153 Pac. 623, that sureties on a note secured by a chattel mortgage had a right to require, at any time after maturity of the note sued upon, the property described in the mortgage to be at once sold and the net proceeds of such sale, so far as necessary, applied to the payment of the note.

⁸⁴ *Remsen v. Beekman* (N. Y.) *supra*.

⁸⁵ *Lichtenthaler v. Thompson* (1825) 13 Serg. & R. (Pa.) 157, 15 Am. Dec. 587. See *American Mechanics Bldg. & L. Asso. v. Dunlap*, *supra*, note 80.

⁸⁶ *Note to First Nat. Bank v. Kittle*, 37 L.R.A.(N.S.) 699.

⁸⁷ *Bruce v. Edwards* (1827) 1 Stew. (Ala.) 11, 18 Am. Dec. 33; *Herbert v. Hobbs* (1830) 3 Stew. (Ala.) 9; *Pickens v. Yarrowborough* (1855) 26 Ala. 417, 62 Am. Dec. 728; *Howe v. Edwards* (1892) 97 Ala. 649, 11 So. 748; *Hancock v. Bryant* (1830) 2 Yerg. (Tenn.) 476; *Thompson v. Watson* (1837) 10 Yerg. (Tenn.) 362; *Jackson v. Huey* (1882) 10 Lea (Tenn.) 84, 42 Am. Rep. 301. The statute is treated as cumulative in the early Arkansas decisions. *Hempstead v. Watkins* (1845) 6 Ark. 317,

the surety may resort to this right as given him under the equitable rule, although a statute has been enacted.⁸⁸ Other courts take the view that any rights the surety may have to require the creditor to sue are defined by a statute on this question.⁸⁹

III. Rule under statute.

a. Statutes codifying equitable rule.

Statutes have been quite generally enacted governing the rights of a surety as to requiring the creditor to bring suit upon the obligation. Some statutes are a practical codification of the equitable rule above discussed.⁹⁰ Under this form of statute prejudice or injury to the surety from the failure to sue must be shown in order to release the surety.⁹¹ These statutes, at least, as construed by the courts of Oklahoma, go further than the equitable rule and make it a condition of the right of the surety to require the creditor to sue that the surety cannot himself pursue the remedy.

In Oklahoma there is, in addition to the statute conferring upon the surety the right to require the creditor to sue, another statute which is interpreted to give to the holder of an obligation or instrument, including bills and notes, the option as to which one of the parties he will sue.⁹² This statute is treated as negating the right of the surety to

require the creditor to proceed against the principal under the statute first referred to.⁹³ But the surety under the statute first referred to can require the creditor to pursue any other remedy in his power which the surety cannot himself pursue, and which would lighten his burden, and if the creditor neglects to do so on notice, the surety is exonerated to the extent to which he is thereby prejudiced.⁹⁴

But if the remedy is within the power of the surety, he must pursue it; he cannot call on the creditor to do so.⁹⁵ The failure of the payee of a promissory note to sue the principal upon the oral request of the surety sued, made to an attorney of the payee, who had the note for collection, long after the maturity of the note, does not operate as a release of the surety sued, even though the principal at the time the request was made was solvent and amply able to pay the note, and in the meantime he and the other surety thereon became insolvent, the court stating that it is the duty of the surety, upon the failure of the principal to pay the note when due, to pay the same and pursue his remedy against the principal and the cosurety.⁹⁶

A surety is not released by the failure of the creditor, upon demand, to proceed against a third person who had taken property held by the creditor under a chattel mortgage executed by the prin-

42 Am. Dec. 696; *Bates v. State Bank* (1847) 7 Ark. 394, 46 Am. Dec. 293; *Cummins v. Garretson* (1854) 15 Ark. 132. But see *Sims v. EVERETT*, ante, 7.

⁸⁸ *Bruce v. Edwards* (Ala.) supra, sustaining an oral notice where the statute required a written one; *Herbert v. Hobbs* (1830) 3 Stew (Ala.) 9 (in order, however, that the failure of the creditor to sue constitute a defense, injury must be shown to have resulted from the delay); *Pickens v. Yarborough* (1855) 26 Ala. 417, 62 Am. Dec. 728 (oral notice which may fail as a statutory notice may be good at common law); *Howle v. Edwards* (1892) 97 Ala. 649, 11 So. 748 (verbal notice sufficient, although statute required written).

⁸⁹ *Colerick v. McCleas* (1857) 9 Ind. 245 (at least to the extent of making only a written notice valid).

Nichols v. McDowell (1853) 14 B. Mon. (Ky.) 6, see supra, note 9.

That the common law is repealed by a statute on the question is the opinion of the court in *Jenkins v. Clarkson* (1835) 7 Ohio, pt. 1, p. 72.

⁹⁰ The Dakota statute involved in *Kennedy v. Falde* (1886) 4 Dak. 319, 29 N. W. 667, and *Bailey Loan Co. v. Seward* (1896) 9 S. D. 326, 69 N. W. 58, was of this kind, as is also the Oklahoma statute set out in *UNION MUT. INS. CO. v. PAGE*, ante, 1. L.R.A.1918C.

In the absence of a demand the surety cannot claim any rights under this statute. *Baker v. Gaines Bros. Co.* (1917) — Okla. —, 166 Pac. 159; *Bailey Loan Co. v. Seward* (1896) 9 S. D. 326, 69 N. W. 58.

⁹¹ *Bingham v. Mears* (1894) 4 N. D. 437, 27 L.R.A. 257, 61 N. W. 808, holding it no defense to an action against sureties on an appeal undertaking that the plaintiff held security sufficient to pay the claim, and refused on demand to resort to such security for payment, where there was no proof that the sureties were prejudiced by such refusal.

It is apparently the theory of the court in *Bailey Loan Co. v. Seward* (S. D.) supra, where a creditor was called upon to enforce collateral, that it must be shown that the collateral was of some value in order to bring the rule into operation.

⁹² *Palmer v. Noe* (1915) 48 Okla. 450, 150 Pac. 402; *Miller v. State* (1915) — Okla. —, 152 Pac. 409.

⁹³ *Ibid.*; *National Bank v. Lowery* (1916) — Okla. —, 157 Pac. 103.

⁹⁴ *National Bank v. Lowery* (Okla.) supra.

⁹⁵ *Ibid.* See *UNION MUT. INS. CO. v. PAGE*, ante, 1.

⁹⁶ *Palmer v. Noe* (Okla.) supra.

principal as further security for his debt, where the creditor at the time refused to take such action and advised the surety that, if he would pay the balance due on the note, the creditor would deliver the mortgage to him for the purpose of allowing him to take any proceedings thereon he might desire, a proposition that he refused; in such a case the remedy was within the power of the surety.⁹⁷

As to the effect of the Negotiable Instruments Act upon the Oklahoma statute, see *infra*, III. b, 2.

b. Ordinary form of statute.

1. In general.

The ordinary form of statute on this subject is not a mere codification of the equitable rule. The statutes vary, but in general provide for notice by a surety to the creditor to bring suit on the obligation, and, in case of a failure to bring the suit within a stated time or "forthwith" or within a reasonable time, provide that the surety shall be released. Under such a statute the failure of a creditor to bring suit as required, upon notice from the surety, relieves the surety of liability on the obligation.⁹⁸

Under the ordinary form of statute, which contains no provision as to injury to the surety, the surety is held to be relieved independently of any question of injury growing out of the delay.⁹⁹ The surety is released by failure to sue within the statutory period, even though

it appear that the surety in fact sustained no injury.¹⁰⁰

As shown below, according to the majority view the suit must be brought whether the debtor is solvent or insolvent.¹⁰¹

Under a statute empowering the surety to require the creditor to sue, or permit the surety to commence suit in his name,¹⁰² the mere failure of the creditor to sue does not release the surety, if he has given the surety permission to sue.¹⁰³

After the notice has been given under such a statute, the surety need take no further steps. The creditor must then act in response to the demand either by suing or authorizing the surety to bring suit, and if he fails to do so for the statutory period the surety is released.¹⁰⁴ And this is not changed by the fact that the surety was a director in the bank which was the holder of the instrument, especially when it does not appear that it was his official duty to institute the suit, or that he had custody of the note, or that, as an officer of the bank, he was guilty of any negligence or fraud in respect to the transaction.¹⁰⁵

Under a statute empowering a surety who "apprehends that his principal is about to become insolvent," to give notice to the creditor to sue, the surety's apprehension cannot be put in issue.¹⁰⁶

As to waiver of the defense provided by these statutes, see *infra*, III. b, 15.

Effect of Negotiable Instruments Act.

The statutory provisions which are

⁹⁷ *National Bank v. Lowery* (Okla.) *supra*.

⁹⁸ *State Bank v. Watkins* (1845) 6 Ark. 123; *Monticello v. Cohn* (1886) 48 Ark. 254, 3 S. W. 30; *McAllister v. Ely* (1856) 18 Ill. 249.

It is stated in *State use of Snell v. Reynolds* (1832) 3 Mo. 95, that any indulgence by the creditor to the principal debtor after the surety has notified the creditor to sue, to the injury of the surety, discharges the surety from his liability. No statute is referred to, but apparently a statute was in force.

⁹⁹ *Shehan v. Hampton* (1846) 8 Ala. 942. The statute provided that a creditor failing to comply with the requisition of the surety to put the instrument in suit "shall thereby forfeit the right which he otherwise would have had, to demand and receive of such security the amount of such bond, bill, or note."

Bruce v. Edwards (1827) 1 Stew. (Ala.) 11, 18 Am. Dec. 33 (dictum.)

It is not necessary for a surety to show that he has suffered some injury from the neglect of the creditor to sue, where the statute imposes no such burden. *Shenan-L.R.A.1918C.*

doah Nat. Bank v. Ayres (1893) 87 Iowa, 526, 54 N. W. 367.

¹⁰⁰ *Sullivan v. Dwyer* (1897) — Tex. Civ. App. —, 42 S. W. 355.

¹⁰¹ III. b, 6.

¹⁰² *Hill v. Sherman* (1863) 15 Iowa, 365.

¹⁰³ *Citizens' Bank v. Hickman* (1917) — Iowa, —, 162 N. W. 606.

¹⁰⁴ *First Nat. Bank v. Smith* (1868) 25 Iowa, 210.

¹⁰⁵ *Ibid.*

In *Graham v. Rush* (1887) 73 Iowa, 451, 35 N. W. 518, it was urged, as a ground for not releasing the surety on account of the failure of the creditor to sue, that at the time of the notice the principal debtor had already become insolvent and had removed from the state, and therefore the surety could not have apprehended that his principal was about to become insolvent or remove permanently from the state. In answer to this argument the court simply states that it is sufficient to say that the evidence did not show that the principal debtor was insolvent at the time of service of the written notice and request, but that he was insolvent some time prior thereto. Nothing is said as to his removal.

the subject of discussion in this note prescribe a method of release of a surety. When the instrument from which the release is sought is negotiable, it has been urged in jurisdictions in which the Negotiable Instruments Act is in force that the methods of release of the parties to negotiable instruments therein provided are exclusive; hence a surety can no longer be released by failure of the creditor to sue upon notice, that not being one of the methods of release provided in the Negotiable Instruments Act. The supreme court of Tennessee has agreed with this contention and treated the provisions of that act in this regard as exclusive, repealing the statutory provision for a release of a surety by failure to sue after notice so far as it conflicts with the provisions of the Negotiable Instruments Act.¹⁰⁸ But in Oklahoma the discharge provided by such a statute has been held

to be an enlargement of the grounds of discharge provided by the Negotiable Instruments Act.¹⁰⁷

2. Sufficiency of demand or notice.

(a) In general.

As is true in the case of the notice under the equitable rule discussed in II. b, 2, *supra*, no general statement can be framed that will determine the sufficiency of the notice in all contingencies. It has been stated generally that the notice must be a clear expression to the creditor that the surety expects and requires him to proceed in the collection of the debt against the principal.¹⁰⁸ A mere inquiry seeking to ascertain whether the creditor has filed a claim with the receiver of the principal debtor is not sufficient.¹⁰⁹ It must be a demand or requirement to proceed to collect the debt,

¹⁰⁶ *Graham v. Shephard* (1916) 136 Tenn. 418, 189 S. W. 867. This opinion was expressed in a case in which the surety, who signed as maker, his suretyship not appearing, was seeking relief on the ground of an extension of time. It does not appear, at least not expressly, that the surety was seeking relief also because of failure to sue after notice.

¹⁰⁷ *National Bank v. Lowrey* (1916) — Okla. —, 157 Pac. 103.

¹⁰⁸ See *UNION MUT. INS. CO. v. PAGE*, ante, 1.

A notice directed to the creditor as follows: "You are hereby required at once to proceed and collect the note you hold dated the 17th of April, 1872, for \$178.50, upon which I am surety and James Satterfield is principal; that I will stand no longer,"—is a sufficient notice. *Iliff v. Weymouth* (1883) 40 Ohio St. 101.

A notice directed to the creditor as follows: "You are hereby requested to commence an action forthwith against Alexander McKee, on a promissory note which you now hold against said Alexander McKee, and signed by said McKee and also signed by one William Clark, now deceased; said McKee is principal debtor in said note and said Clark was at the time of his death bound as surety," and signed by executors of the surety, was held sufficient in *Clark v. Osborn* (1884) 41 Ohio St. 28. The use of the word "request" instead of the word "required" was held not to vitiate the notice.

A notice in writing in the language following: "I hereby wish to inform you that I am not a principal on the note of \$300, signed by S. Dwyer, Ed. Dwyer, and Mrs. A. Dwyer and myself, but that I signed same only as surety. Under no consideration will I consent to a prolongation of said note, and hereby request you respectfully to use every effort to collect L.R.A.1918C.

said note from the Dwyer family," is a sufficient notice under statute. *Sullivan v. Dwyer* (1897) — Tex. Civ. App. —, 42 S. W. 355. It is stated not to be essential to such notices that they be worded in the very language of the statute; a notification to use every effort to collect is stated to be a notice to sue; that it can mean nothing else than a demand for suit forthwith; whereas in this case the notice is coupled with a virtual demand that it be no longer held. Neither is the notice insufficient because it was merely a request to collect from the principal and the other sureties.

Edmonson v. Potts (1910) 111 Va. 79, 68 N. E. 254, 21 Ann. Cas. 1365. The notice here was given by the administrator of the surety, and was to the effect that the creditors should "take such action as was necessary to get Mr. Pott's name off the note." It is stated that, to discharge a surety, the surety, in giving the notice, must comply substantially with the statute, and must show a clear, unequivocal, and distinct demand upon or command to the creditor to institute suit upon the contract. The statute in question authorized the surety to require the creditor "forthwith to institute suit" upon the contract.

See *McNeilly v. Cooksey* (1878) 2 Lea (Tenn.) 39, *infra*, note 163, for a notice held insufficient.

A request by a surety after suit had been begun in an ordinary action upon the note, and the surety served with process therein, to attach property of the debtor, is stated in *Thompson v. Robinson* (1879) 34 Ark. 44, not to be "a notice in writing to sue under the statute." Whether this is because the request was not in writing, or because it was not a request to sue, is not made plain.

¹⁰⁹ *Bumpus v. Lovejoy* (1917) — Tex. Civ. App. —, 196 S. W. 631.

and so understood by the parties at the time.¹¹⁰ The rule has been announced that a notice which is positive in its demand to sue, and does not mislead the creditor as to the instrument to be sued upon, is sufficient.¹¹¹ It must require the

creditor to institute an action forthwith upon the contract, under statutes empowering the surety to require the creditor "forthwith to institute an action," or "to commence an action on such instrument forthwith."¹¹² A mere ex-

¹¹⁰ *Bethune v. Dozier* (1851) 10 Ga. 235. Whether it was such was left to the jury in the case.

And see cases cited *infra*, note 112.

¹¹¹ *Alabama Nat. Bank v. Hunt* (1899) 125 Ala. 512, 28 So. 488. In this case a letter written by the surety to the creditor upon receipt of a notice from the creditor concerning the note, stating that "your notice concerning the note of [the debtor] to hand. Under the circumstances of the case I shall resist my liability on the note. This is to notify you that you must take all needful legal steps to fasten on me any liability. You must sue [the debtor] as the law requires, and sue at once," and signed by the surety, was held to comply with the statute as to notice. The case of *Sheehan v. Hampton*, *infra*, note 122, is referred to and held not to conflict with this ruling.

¹¹² *Kaufman v. Wilson* (1868) 29 Ind. 504. A notice to the holder of a note to "express N. & Co.'s note to Esquire Bennett for collection to-day. Dont fail," is insufficient. It is stated that this notice does not require the holder to institute an action forthwith upon the contract or note, but to express it to Esquire Bennett for collection. For aught that appears it was the intention of the surety that he or the debtors would pay it. It is further stated that it was not the province of the surety to direct in whose hands the note should be placed for collection, but by notice in writing to require the holder forthwith to institute an action on the note against the principals. The notice involved was sent by telegraph, but no point is made of this fact.

McMillin v. Deardorff (1897) 18 Ind. App. 428, 48 N. E. 233. The notice in this case, given by the surety to the holder of the note, was as follows: "Sue the note which I signed as surety for Rue, or I will not continue to be responsible as surety," and was signed by the surety. It is stated that the language of the notice may as well be said to be a direction to sue in a reasonable time as it may be said to be a direction to sue forthwith or immediately or at once; and therefore does not comply with the statute which requires the use of language equivalent to the requirement therein "forthwith to institute an action."

A note in the language following: "The writer, having disposed of his holdings in the Valley Paper Company, begs to advise you that you do not extend any further credit on the strength of his indorsement and on notes given by Valley Paper Company. These notes fall due on demand, and I want you to enforce collection or consider my indorsement canceled,"—is not L.R.A.1918C.

a sufficient notice. *Frye v. Eisenbeiss* (1914) 56 Ind. App. 123, 104 N. E. 995. It is stated that the first sentence of the notice is not peremptory, but advisory only; the second sentence expresses a desire only that the bank enforce collection or consider the surety's indorsement as canceled, and on the whole the language used indicates no demand or notice to bring suit forthwith or at any time.

In *Baker v. Kellogg* (1876) 29 Ohio. St. 663, a notice as follows: "I wish you would proceed against I. C. Nickols, and collect that note on which I am bail, belonging to Mr. Brim's estate, or have it arranged in some way to release me, as I do not wish to remain his bail any longer,"—is held an insufficient notice under a statute empowering the surety to require the creditor forthwith to commence an action against the principal debtor. It is stated that under this statute the requirement must be unconditional; it must be a requirement to proceed by action and to proceed forthwith.

A notice directed to the creditor containing the following language: "Unless you hear from us to the contrary by 10 A. M. to-morrow, December 17, 1891, we require you to take judgment on the D. J. McConnell note,"—does not contain a peremptory requirement of the surety on the creditor to commence suit forthwith, or any equivalent language, and is therefore insufficient. *Porter v. First Nat. Bank* (1896) 54 Ohio St. 155, 43 N. E. 165.

A letter written to an attorney who has a note for collection, in answer to a letter from him requesting payment, to "please collect of Mr. Beers all you can of this amount and notify me, and I will arrange for the balance,"—is not a sufficient notice under the statute. It is stated that this is rather more of a wish than a positive demand, but even if it is sufficiently peremptory it does not require action forthwith within the meaning of the statute. *Haakell v. Beers* (1906) 16 Ohio Dec. 368.

A letter by a surety to the creditor inquiring as to a note, in which there is the statement: "I wish you would come up and do something with it. He [the maker] has plenty of property now to make your money,"—is not a sufficient notice within a statute authorizing the surety to require the creditor by notice in writing forthwith to put the note in suit. *Rice v. Simpson* (1872) 9 Heisk. (Tenn.) 809.

A letter written by the surety on a note, who had taken property from the principal debtor under a chattel mortgage given to secure him, stating to the creditor, who had sold the property to the debtor and had received in payment the note in

pression of desire or request that suit be brought is not sufficient;¹¹³ nor is advice to the creditor that he should attempt to collect sufficient.¹¹⁴ There must be an explicit notice that unless the creditor

institutes suit the surety will hold himself discharged.¹¹⁵ A mere statement that the surety will no longer stand as security is not sufficient;¹¹⁶ nor that he does not intend to pay until forced to do

suit: "If you wish to take the property back in order to make yourself whole, we are willing to let you have it. If this is not done, it will be necessary for you to exhaust every means possible to get it out of [the principal debtor], as we do not intend to pay any more of the notes until we are forced to do so"—is not a sufficient notice under the statute. *Williams v. J. Ogg & K. Lumber Co.* (1906) 42 Tex. Civ. App. 558, 94 S. W. 420.

A letter written by a surety in reply to a demand from the holder of a note for payment, stating that he was only surety on the note and that the other signer was the principal and had property subject to execution sufficient to pay off said note, and that he wanted the holder to collect the money from the principal to pay off the note, is not a sufficient notice. *Naylor v. Anderson* (1915) — Tex. Civ. App. —, 178 S. W. 620.

A letter written by the surety in reply to one received from the creditor requesting payment stating: "Yours of the 12th came to hand. If you hold any note signed by C. M. Rider and ourselves, C. M. Rider is the principal and we are only his sureties, and we notify you to commence an action on the note forthwith and proceed to collect it. Rider is able to pay his own notes," is a sufficient notice under the statute. *Meriden Silver Plate Co. v. Flory* (1886) 44 Ohio St. 430, 7 N. E. 753. It is stated that "here was no condition, and there was a substantial compliance with the statute. This is sufficient."

See *Illiff v. Weymouth* (1883) 40 Ohio St. 101, *supra*, note 108.

See *Sullivan v. Dwyer* (1897) — Tex. Civ. App. —, 42 S. W. 355, *supra*, note 108.

A notice directed to the holders of a note, stating that "the note of J. T. McKinstry, on which I am surety, dated in December, 1906, for something over \$500. You will please file your claim with the probate court for payment. The estate of said J. T. McKinstry is now being represented in said court by Mrs. Ella E. McKinstry, as administratrix, and there is plenty of property or funds there to pay you. Please kindly see to this matter at once and oblige,"—is insufficient. *National Bank v. Gilvin* (1913) — Tex. Civ. App. —, 152 S. W. 652. The court states that the notice "must be a full, explicit, and peremptory demand that suit be brought forthwith, with the further statement that the surety will not be bound any further if such is not done."

¹¹³ A letter written by a surety to the creditor, stating that "I am desirous that you should bring suit on . . . note on which I am security to . . . due about

January, 1854, for somewhere about \$860 when given, before any payments were made. I should prefer that you would enter suit early in August in Clarke county, so that the principal could not have the same time to dodge. You might then obtain judgment in Clarke county, so that yours would be older than judgments obtained in Marengo,"—is not a notice to the creditor "to bring suit" on the note. *Savage v. Carleton* (1859) 33 Ala. 443. It is stated that this notice contains no language which can be fairly construed into a demand or requisition on the part of the surety that suit should be brought on the note. It was accordingly held that the failure of the creditor to comply with this notice by bringing suit did not discharge the surety.

A notice by the surety on a note to the holder of the note, requesting the holder to put it "in a train of collection, as he had reason to believe they [the debtors] would avoid payment if possible," is not a sufficient notice under a statute authorizing a notice in writing requiring the person having the right of action forthwith to commence suit against the principal debtor and other party liable. *Bates v. State Bank* (1847) 7 Ark. 394, 46 Am. Dec. 293.

The notice in *Rice v. Simpson* (1872) 9 Heisk. (Tenn.) 809, was held a mere expression of a wish that the creditor would collect the debt, and was therefore insufficient.

See *Parrish v. Gray*, *infra*, note 120.

See *Branch Bank v. Perdue*, *supra*, note 81, as to notice to foreclose mortgage.

That the use of the word "request" instead of "require" does not necessarily invalidate the notice, see *Clark v. Osborn* (1884) 41 Ohio St. 28, *supra*.

¹¹⁴ *Benge v. Eversole* (1913) 156 Ky. 131, 160 S. W. 911. The surety had here written a number of letters to the creditor advising the creditor of the condition of the debtor and stating that some attempt should be made to collect.

¹¹⁵ A letter written by the surety to the creditor, using the language: "You had better collect the same from . . . the principal,"—is not a requirement within the meaning of a statute providing that the surety may require his creditor to proceed against the principal. *Kennedy v. Falde* (1886) 4 Dak. 319, 29 N. W. 667. It was also stated that this would not be a sufficient notice within the equitable rule.

¹¹⁶ *Lockridge v. Upton* (1857) 24 Mo. 184. The notice here was as follows: "You are hereby notified that I will not stand good as security any longer on the note you hold against William Upton and myself as security." It is stated that there

so.¹¹⁷ A suit begun by the surety is not notice under the statute.¹¹⁸

A demand by a surety that the creditor "collect" the debt from the debtor is not a sufficient demand under a statute authorizing him to require the creditor "to bring suit thereon against the principal debtor;"¹¹⁹ nor is it sufficient under a statute empowering the surety to require by notice in writing, the creditor forthwith to put the bond, etc., in suit, and unless "the creditor so required to put such bond," etc., "in suit, shall within thirty days thereafter commence an action on such bond," etc., "he shall forfeit the right to demand of the security

the amount due by such bond," etc.¹²⁰ On the contrary, it has been held that a notice by the surety on a note to the holder thereof, "to proceed at once to collect the note," couple with a statement that the principal debtor is solvent and able to pay it, is a sufficient compliance with a statute requiring a notice "forthwith to institute an action upon the contract."¹²¹

The notice must point out with sufficient particularity the note upon which a suit is desired.¹²² But a notice which did not point out the note has been held sufficient where no uncertainty resulted from the omission.¹²³

ought to be an explicit direction to sue that there may be no misapprehension of the meaning.

A notice to the creditor to take such action as may be necessary to get the surety's name off the note is not a sufficient compliance with the statute authorizing the surety to require the creditor "forthwith to institute suit." *Edmonson v. Potts* (1910) 111 Va. 79, 68 N. E. 254, 21 Ann. Cas. 1365.

See *McNeilly v. Cooksey* (1878) 2 Lea (Tenn.) 39, *infra*, note 162.

¹¹⁷ *Williams v. J. Ogg & K. Lumber Co.* (1906) 42 Tex. Civ. App. 558, 94 S. W. 420.

¹¹⁸ *Barnes v. Mowry* (1891) 129 Ind. 568, 28 N. E. 535. Apparently the suit in question in this case was one begun by the surety to compel the payment of the debt by the debtor, but the nature of the suit is not made clear.

¹¹⁹ *Darby v. Berney Nat. Bank* (1892) 97 Ala. 643, 11 So. 881.

¹²⁰ *Parrish v. Gray* (1839) 1 Humph. (Tenn.) 87. The notice was as follows: "I wish you to collect the debt out of Polson, wherein I am security." This is stated not to require the creditor to put the bond in suit, but simply to express a wish that he would "collect" the debt; and, continuing, the court states: "That the request to collect is not a requisition to sue is evident."

¹²¹ *Franklin v. Franklin* (1880) 71 Ind. 573. The surety, however, was held not to have been released for other reasons.

And in *Weir v. Dicker* (1889) 11 Ky. L. Rep. 523, a notice to the creditor that he must "collect the note" is held a sufficient compliance with a statute empowering the surety to require the creditor "to sue."

But see *Sullivan v. Dwyer* (1897) — Tex. Civ. App. —, 42 S. W. 355, *supra*, note 108.

¹²² *Shehan v. Hampton* (1846) 8 Ala. 242. The notice involved in this case was directed to the personal representatives of the deceased holder of the note, and notified them "to collect all monies due to the estate of Joel Chandler, dec'd for which I stand as surety, as well for the L.R.A.1918C.

land as for the personal property of the said deceased, as soon as the law will permit, or I shall no longer stand as surety," and was signed by the surety. In discussing the sufficiency of this notice, the court states that it is bad "alike under the statute and at common law, in not setting out that the party giving the notice is in point of fact a surety for Joel Chandler. Conceding that the notice in other respects may be general, or at least with regard to the sum, date, and description of the instrument by which the surety is bound, yet in this instance the notice or writing gives no intimation to the creditor that he is required to proceed by suit upon any note in which Joel Chandler is the principal debtor. The notice is too general and indeterminate in this particular to warrant any presumption that the defendant demanded this particular note should be put in suit."

A written notice handed to the payee in the words: "I hereby notify C. M. Hunter [the payee] to sue; that I will not stay on note for G. S. Musetter any longer," was held sufficient in *W. P. Brown & Sons Lumber Co. v. Steele* (1915) 195 Ala. 211, 70 So. 161, there being but one note and the payee knowing who was the principal debtor and who the surety.

See *Pickens v. Yarborough*, *supra*, note 45.

¹²³ *Routon v. Lacy* (1853) 17 Mo. 399. It is here stated that to require of the surety an accurate description of the note, its date, amount, or even the names of all the cosureties would render it impossible to comply with the statute in many cases, as the note is not accessible to the surety, and it is not to be expected that he could remember such circumstances. It is further stated that, if any confusion or uncertainty should be created by reason of the surety's name being on two obligations, it is in the power of the creditor to show it by producing them. The notice in this case was as follows: "You are hereby notified that the estate of William Hall, deceased, will no longer stand security for Tillman A. Todd, unless suit is commenced and prosecuted according to law."

Failure to comply with the express provision of a statute, that the notice to sue must state the county of the principal's residence, renders the notice ineffectual.¹²⁴

Under a statute authorizing the giving of notice by a surety whenever he "shall apprehend that his principal is likely to become insolvent or to migrate from this state," it is not necessary that the notice specify the apprehension of the surety.¹²⁵

In a number of cases no general test as to the sufficiency of the notice is giv-

en; the facts in the case at bar are examined, and sufficiency of the notice determined from these without reference to any general test.¹²⁶

A notice which requests the creditor to sue the principal before suing the surety has been held not to be a sufficient notice, and therefore a surety is not released by failure of the creditor to sue.¹²⁷

Under a statute providing that the surety may "by notice require the creditor to sue . . . or permit the surety to commence suit in such creditor's

And see *Meriden Silver Plate Co. v. Flory* (1886) 44 Ohio St. 430, 7 N. E. 753, supra, note 112, where it is stated that there could have been no doubt about the note as there was but one note in question.

And see *Alabama Nat. Bank v. Hunt* (1899) 125 Ala. 512, 28 So. 488, supra, note 111.

¹²⁴ *Smith v. Morris Fertilizer Co.* (1916) 18 Ga. App. 217, 89 S. E. 174. The notice involved in this case was given in two letters. In addition to the failure to comply with the requirement that the county of the principal's residence be stated, the letters were further defective in that one of them was mailed to the creditor before the maturity of the debt, and contained merely the expression of a desire on the part of the indorser that the plaintiff would collect the obligation when it became due; and the other letter suggested the advisability of bringing suit, and expressed a doubt whether the plaintiff could make the money later if suit should be delayed, but gave notice to the creditor "to proceed to collect the same out of the principal."

¹²⁵ *Shehan v. Hampton* (1846) 8 Ala. 942.

See *Clark v. Osborn* (1884) 41 Ohio St. 28, *infra*, note 138.

As to whether there may be an issue as to the surety's apprehension of insolvency, see *supra*, note 104.

¹²⁶ A notice by the surety on a contractor's indemnity bond, setting forth in full the bond, and concluding, "Now, therefore, the said Prescott National Bank is hereby notified to forthwith institute suit upon such contract," is such a notice as fulfils the condition of a statute providing that any person bound as a surety upon any contract for the payment of money or the performance of any act, when the right of action has accrued, may require by notice in writing the creditor or obligee forthwith to institute suit upon such contract. *Prescott Nat. Bank v. Head* (1907) 11 Ariz. 213, 90 Pac. 328, 21 Ann. Cas. 990.

A notice contained in a letter to the holder of the note, viz., "You are hereby notified that I don't want to stand longer as surety on the note given by . . . on which I am surety. You will therefore make your money," is held a sufficient notice. The court stated that "it shows the relation of principal and surety; that the

surety did not want to be longer held, and directed the payee to make the money." *Miller v. Gray* (1889) 31 Ill. App. 453.

A notice requiring suit to be brought against the principal debtors by name is a sufficient compliance with the statute empowering the surety to require suit to be brought against the principal debtor and other parties liable. *Christy v. Horne* (1857) 24 Mo. 242.

A notice by the administrator of a deceased surety, requiring the creditor to commence suit, is not made ineffective by the expression, "if [the decedent] signed said notes, he did so as surety." *Hammond v. McHargue* (1913) 170 Mo. App. 497, 156 S. W. 725.

See *Pickens v. Yarborough* (1855) 26 Ala. 417, 62 Am. Dec. 728, supra, note 45.

That the notice must state that the person giving the notice is a surety, see *Shehan v. Hampton* (1846) 8 Ala. 942, supra, note 122.

¹²⁷ *Herriman v. Egbert* (1873) 36 Iowa, 270. The statute provided that the sureties might require the creditor to institute proceedings on the contract, or to permit them to do so at their own costs in the creditor's name. It is stated to be very plain from the language of this statute that the action contemplated, which the sureties may require the creditor to institute, or to permit them to institute in his name, is upon the contract, and against the sureties as well as the principal. The principal debtor had died and his estate was being administered, and the sureties stated in their notice that they feared the estate would be insolvent, and asked the creditor to bring suit on the note and try to make it out of the estate before suing the sureties.

A request by a guarantor of a contract to pay for goods, in the language following: "I again notify and request you to begin suit against W. H. Peterson for the collection of the amount due for which I am his surety, or permit me to begin suit against him in your name at my costs," is not a sufficient notice under the Iowa statute. *Moore v. Peterson* (1884) 64 Iowa, 423, 20 N. W. 744.

But see *Sullivan v. Dwyer* (1897) — Tex. Civ. App. —, 42 S. W. 355, supra, note 108, where a notice to sue the principal and the other sureties was held sufficient.

name," the surety must notify the creditor to sue or permit him to do so, a notice to the creditor to collect the note not being sufficient; it being held to be within the discretion of the creditor to sue or permit the surety to sue.¹²⁸ Under this statute a letter which does not amount to a request to sue, unless the creditor authorized a named attorney to bring suit, is not sufficient.¹²⁹

Inquiry as to the sufficiency of the notice has been denied upon the theory that the question was not properly raised by the pleadings.¹³⁰ The question of pleading has, however, not been considered generally in this note; it is assumed herein that the question is properly raised.

(b) *Verbal notice.*

Under statutes requiring the notice to be in writing, a verbal notice is insufficient.¹³¹ Under a statute not expressly requiring a written notice, a verbal notice has been held sufficient.¹³²

In jurisdictions in which the equitable rule is not recognized, a surety who has not given the written notice where that form of notice is required is not relieved, although the principal has become insolvent.¹³³ In jurisdictions in which the statutory rule is concurrent with the equitable rule, failure to give a written notice is not necessarily determinative against the release of the surety. He may rely on the equitable rule and be relieved on his oral notice,

¹²⁸ *Hill v. Sherman* (1863) 15 Iowa, 365. The notice is not set out here in *hæc verba*, but the facts found by the court were that the surety wrote to the creditor, who resided in another state, informing him that he wished him to see to collecting the note in suit, and that he, the surety, did not intend to stand bail any longer.

¹²⁹ *Davis Sewing Mach. Co. v. McGinnis* (1877) 45 Iowa, 538. The attorney for the sureties on a bond wrote the creditor, and, after stating the aggregate of the notes on which the sureties were bound, continued: "Please send the notes to your attorney for this district for collection. . . . Also send me copy of the bond with authority to sue the principal and sureties both." This was held to be no request to sue, unless the creditors authorized the attorney for the sureties to sue, a condition which it was held could not be attached to the notice.

¹³⁰ *Waterford v. Hensley* (1827) Mart. & Y. (Tenn.) 275.

See *Shehan v. Hampton* (1846) 8 Ala. 942, *supra*.

¹³¹ *Darby v. Berney Nat. Bank* (1892) 97 Ala. 643, 11 So. 881; *Hightower v. Ogletree* (1896) 114 Ala. 94, 21 So. 934; *Souter v. Bank of Southwestern Georgia* (1894) 94 Ga. 713, 20 S. E. 111; *Timmons v. Butler* (1912) 138 Ga. 69, 74 S. E. 784; *Johnson v. Longley* (1914) 142 Ga. 814, 83 S. E. 952; *Jordan v. Farmers & M. Bank* (1908) 5 Ga. App. 244, 62 S. E. 1024; *Ward v. Stout* (1863) 32 Ill. 399; *Imming v. Fiedler* (1881) 8 Ill. App. 256; *Carr v. Howard* (1846) 8 Blackf. (Ind.) 190; *Colerick v. McCleas* (1857) 9 Ind. 245; *Halstead v. Brown* (1861) 17 Ind. 202; *Miller v. Arnold* (1879) 65 Ind. 488, see *supra*, note 45; *Mendel v. Cairnes* (1882) 84 Ind. 141; *Stevens v. Campbell* (1858) 6 Iowa, 538 (the statutory provision is not set out in this case. In *Hill v. Sherman* (1863) 15 Iowa, 365, it does not appear that written notice was required, the provision being that the surety may "by notice" require the creditors to sue, etc. The statute involved in L.R.A.1918C.

First Nat. Bank v. Smith (1868) 25 Iowa, 210, expressly required a writing); *Nichols v. McDowell* (1853) 14 B. Mon. (Ky.) 6; *Bridges v. Winters* (1868) 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598; *Keirn v. Andrews* (1881) 59 Miss. 39; *Sapington v. Jeffries* (1852) 15 Mo. 629; *Freligh v. Ames* (1860) 31 Mo. 253; *Langdon v. Markle* (1871) 48 Mo. 357; *Coats v. Swindle* (1874) 65 Mo. 31; *Petty v. Douglass* (1882) 76 Mo. 70; *First Nat. Bank v. Homesley* (1888) 99 N. C. 531, 6 S. E. 797; *Jenkins v. Clarkson* (1835) 7 Ohio, pt. 1, p. 72; *Headington v. Neff* (1835) 7 Ohio, pt. 1, p. 229 (notice in writing must also be pleaded); *Miller v. Childress* (1841) 2 Humph. (Tenn.) 320; *Simpson v. State* (1873) 6 Baxt. (Tenn.) 440; *Leazar v. Menefee* (1901) — Tex. Civ. App. —, 61 S. W. 438; *Brooks v. Stevens* (1915) — Tex. Civ. App. —, 178 S. W. 30; *Bumpus v. Lovejoy* (1917) — Tex. Civ. App. —, 196 S. W. 631.

In *Lumsden v. Leonard* (1875) 55 Ga. 374, an action in which a surety was seeking relief from a judgment obtained against the principal and himself on account of the failure of the creditor to levy upon real estate of the principal until the lien of the judgment had been lost, it is stated that it was not alleged that the creditor was notified in writing to levy, or that he was tendered the expenses of proceeding against the land, and in the absence of such averments no error was committed in striking this ground in the motion.

As to notice by telegraph, see *Kaufman v. Wilson* (1868) 29 Ind. 504, *supra*, note 112.

¹³² *Bolton v. Lundy* (1839) 6 Mo. 46. The statute here provided that any person bound as security on any bond, bill, or note may, "at any time after an action has accrued thereon, require the person having such right of action forthwith to commence an action against the principal debtor and all other parties liable."

See *Stevens v. Campbell*, *supra*, note 131.
¹³³ *Carr v. Howard* (1846) 8 Blackf. (Ind.) 190.

provided he is able to bring his case within the requirements of the equitable rule. It has been held, however, where the equitable remedy is concurrent with the statutory one, that in a court of law only the statutory remedy will be administered, and in order that this operate to discharge the surety notice must be given in the manner provided by statute.¹³⁴

Parol evidence of the contents of the notice may be given upon a proper showing of the loss of the original.¹³⁵

Waiver of written notice.

It has been held that the written notice required by statute may be waived by the party to whom such notice is required to be given.¹³⁶ It is the theory of these cases that the written notice is for the benefit of the creditor and, this being true, he may waive it. The statement

by the creditor at the time of the giving of oral notice by the surety, and the offer by the surety to give a written notice, that he (the creditor) did not require a written notice, that a verbal notice was all that was necessary, and that he waived a written notice, he thereby expressly accepting the verbal notice, has been held to constitute a waiver, where the surety, relying thereon, did not give the written notice.¹³⁷ The acknowledgment of the notice, and the agreement to treat it as valid, and the promise to sue have been held to constitute a waiver.¹³⁸ But the mere promise of the creditor upon oral notice to sue, that he will do so, has been held not to constitute a waiver of the written notice.¹³⁹ Promise of the creditor as a waiver of the written notice must be distinguished from the promise as the basis of an estoppel against the creditor.¹⁴⁰ Failure

¹³⁴ *Simpson v. State* (1873) 6 Baxt. (Tenn.) 440.

¹³⁵ *Gillilan v. Ludington* (1873) 6 W. Va. 128.

¹³⁶ *Pickens v. Yarborough* (1855) 26 Ala. 417, 62 Am. Dec. 728 (attorney said he would admit notice when surety began drawing a written notice); *Hamblin v. McCallister* (1868) 4 Bush (Ky.) 418; *Taylor v. Davis* (1860) 38 Miss. 493; *Clark v. Osborn* (1884) 41 Ohio St. 28.

¹³⁷ *Hamblin v. McCallister* (Ky.) *supra*. The creditor in this case, at the time the oral notice was given and the offer made to give a written notice, stated: "I do not require a written notice. I waive a written notice. A verbal notice is all that is necessary." The court, after stating that this constituted a waiver of a written notice, stated further that the creditor is estopped to deny that the notice thus given and accepted was legal and sufficient or that the sureties were discharged by his failure to sue.

¹³⁸ *Taylor v. Davis* (1860) 38 Miss. 493; *Smith v. Clopton* (1873) 48 Miss. 66.

In *Clark v. Osborn* (Ohio) *supra*, the notice required suit to be brought on the note signed by the surety. In fact, the creditor held two notes against the same debtor signed by this surety to which the notice would apply indifferently. The creditor went to the surety's executors, who had given the notice, and, exhibiting the notes, said that he accepted the notice as applicable to both. He was urged to sue at once, and promised that he would without further notice commence an action forthwith against the principal debtor on both notes, and collect the same with due diligence. This was held to be a valid parol substitute for a formal notice. It is stated that the statute in a sense is a part of the contract, and the suretyship is accepted with knowledge of its terms; that it gives rights to both parties; that the right of the creditor L.R.A.1918C.

is to disregard with impunity any notice not in strict conformity to its terms; that this is his privilege and concerns him alone, and is unaffected by considerations of public policy; and that, like other personal privileges, it may be waived.

¹³⁹ *Kittridge v. Stegmier* (1895) 11 Wash. 3, 39 Pac. 242.

In *English v. Bourn* (1870) 7 Bush. (Ky.) 138, the surety claimed exoneration because of the failure of the creditor to sue after he had been told that he was wanted to sue, and that written notice would be given if he should require it, and had promised to sue. It is stated that there was no express and certain acceptance of the suggestion to sue as a substitute for an explicit and peremptory notice in writing, as was the case in *Hamblin v. McCallister* (Ky.) *supra*.

It was held that a mere promise did not constitute a waiver as a matter of law in *Chrisman v. Tuttle* (1877) 69 Ind. 155.

The fact that the agent of the holder upon whom the notice was served made no objection to its being verbal does not relieve the surety of his obligation to serve a written notice. *Sapington v. Jeffries* (1852) 15 Mo. 628. The allegation contained in the answer that the agent had accepted the notice as sufficient and had promised to sue, whereupon the surety took no further action, is not noticed in the opinion.

The effect of a promise by the creditor to sue, upon oral notice by the surety, was not considered in *Miller v. Arnold* (1879) 65 Ind. 488, holding the oral notice insufficient.

It is stated in *Mendel v. Cairnes* (1882) 84 Ind. 141, that the agreement of the creditor or obligee with the surety, that he will sue forthwith, must be shown to have been founded upon a new consideration, and not to have been a mere nudum pactum.

¹⁴⁰ See *supra*, notes 14 et seq.

to object to the introduction of oral evidence showing the request is no waiver of the requirement that the notice shall be in writing.¹⁴¹

Some statutes expressly provide that the written notice can be waived only in writing. Under such a statute the promise of the creditor to sue upon oral notice being given him by the surety, and the bringing of an action which is subsequently dismissed, do not constitute a waiver of the written notice.¹⁴²

(c) *When notice must be served.*

According to the usual form of statute, the notice must be given at or after the maturity of the instrument.¹⁴³

As to when notice must be given with reference to the beginning of a term of court, under statutes requiring suit to be begun at the next term of court after notice is given, see *infra*.¹⁴⁴

Under a statute authorizing the giving of notice when the surety "apprehends that his principal is about to become insolvent, or to remove permanently from the state without discharging the contract," it is not necessary for the surety to show, in order that he be released by the failure of the creditor to sue, that he did apprehend the insolvency or removal; the apprehension may not have been well grounded, or it may not have

been for such cause as would create it in the minds of others.¹⁴⁵

(d) *By whom may notice be given.*

A husband may in his own name give the written notice to the holder of a note on which his wife became surety before marriage, where he is liable for debts of the wife contracted before marriage.¹⁴⁶

In the absence of any provision in the statute relating to the manner of service, the court has resorted to a general statutory provision relating to the manner of serving notice. Under such a general statutory provision, that notice may be served by "the proper officer or any other person," the surety has been held a proper person to serve the notice.¹⁴⁷

Some statutes expressly provide that executors or administrators of a deceased surety may give the notice.¹⁴⁸

See also III. b, 2 (f) *infra*, as to how notice may be served.

(e) *To whom must notice be given.*

The notice may be served upon the legal owner of the debt or demand; it is not necessary to search for equitable owners.¹⁴⁹

Where the surety, upon a suit being brought by one to whom a note has been transferred by the payee, claims to have been released by failure of such person

¹⁴¹ Davis v. Payne (1876) 45 Iowa, 104.

¹⁴² Hibler v. Shipp (1879) 78 Ky. 64.

¹⁴³ Imming v. Fiedler (1881) 8 Ill. App. 256 (statute); Scales v. Cox (1886) 106 Ind. 261, 6 N. E. 622 (the notice was given seven months before the note was due, and required the creditor to institute action upon it when it became due—statute provided for notice "when the right of action has accrued").

A notice given by the surety on a contractor's indemnity bond impliedly binding the contractor to discharge all material lien claims, while one such claim is disputed by the owner, is premature, although other claims have been satisfied by the owner, since successive suits cannot be required upon the bond, but the entire amounts due from the contractor must be determined before an action accrues on such bond. Prescott Nat. Bank v. Head (1907) 11 Ariz. 213, 90 Pac. 323, 21 Ann. Cas. 990.

And this is true although the lien claimant whose claim is in dispute is the surety on the contractor's bond. Prescott Nat. Bank v. Head (Ariz.) *supra*. Consequently, a failure to sue upon receipt of such notice does not release the surety.

A surety upon a contract conditioned that it should not be performed until it should be ascertained by the administrators of an estate what amount they could pay L.R.A.1918C.

on a certain note cannot give notice before such fact is ascertained, although it may be well known that the estate in question would fall far short of paying the debt. Field v. Burton (1880) 71 Ind. 380.

¹⁴⁴ See *infra*, III. b, 4. See particularly Gutzwiller v. Wagner (1881) 3 Ky. L. Rep. 470, *infra*, note 203.

¹⁴⁵ First Nat. Bank v. Smith (1868) 25 Iowa, 210. And see Graham v. Rush (1887) 73 Iowa, 451, 35 N. W. 518, *supra*, note 105.

¹⁴⁶ Medley v. Tandy (1887) 85 Ky. 566, 4 S. W. 308.

¹⁴⁷ McCoy v. Lockwood (1880) 71 Ind. 319.

Apparently the statute involved in Prather v. Phelps (1883) 5 Ky. L. Rep. 184, in which a surety was held a proper person to serve the notice, provided for service "in person."

¹⁴⁸ Clark v. Osborn (1884) 41 Ohio St. 28.

¹⁴⁹ Gillilan v. Ludington (1873) 6 W. Va. 128. It was accordingly held in this case that a special replication by the obligee in the bond in suit, to the defense of the surety that notice had been given and the creditor failed to sue, that another was the equitable or beneficial owner of the bond in suit, and that the creditor never was the owner of that bond, and that these facts were known to the surety, was insufficient.

to sue upon notice, it must be proved that such person held the note at the time of notice.¹⁵⁰

A service upon the payee after he has transferred the note is insufficient; the notice must be served upon the person who, at the time of serving notice, is the holder of the instrument.¹⁵¹ However, a mere delivery of the note in escrow, by the payee, to be delivered to a third person upon performance of certain conditions, vests neither title nor right of possession in such third person before performance of the conditions; the right to sue is in the original payee, and notice must be given to him.¹⁵²

A notice is properly served by a surety on a note given to the administrator of a decedent's estate, upon the guardian of minor heirs of the decedent after the note has been turned over to such guardian upon distribution.¹⁵³

Note pledged as collateral.

One holding a note as collateral security is the proper person upon whom to serve the notice to sue.¹⁵⁴ This rule has been applied in various situations. One holding a note as collateral security with instructions to apply the proceeds of it

when collected to the payment of the demand against the owner is held to be the proper person to whom notice to sue should be given, under a statute authorizing the surety on a note to require "the holder thereof to proceed to collect the same."¹⁵⁵ Some cases have made the test, the right of the holder of collateral security to sue on the obligation; if he has the right to sue, he is held to be the proper person on whom to serve notice; if he has not such right, he is held not to be the proper person.¹⁵⁶ On the contrary, the fact that the holder of collateral security may not have authority to sue has been held not to change the rule; he is still held to be the proper person upon whom to serve notice.¹⁵⁷

Service upon an agent.

Under a statute requiring the notice to be served upon the person having the right of action, an attorney for the party is not a proper person upon whom to serve notice,¹⁵⁸ even though suit has been begun against the sureties on the obligation and the attorney advises his client of the notice.¹⁵⁹ A notice directed to the attorney for county commission-

¹⁵⁰ *Boyd v. Titzer* (1869) 6 Coldw. (Tenn.) 568.

¹⁵¹ *England v. McKamey* (1856) 4 Sneed (Tenn.) 75.

But see *German American Bank v. Denmire* (1882) 58 Iowa, 137, 12 N. W. 237, *infra*, note 155.

¹⁵² *W. P. Brown & Sons Lumber Co. v. Steele* (1915) 195 Ala. 211, 70 So. 161.

¹⁵³ *Overturf v. Martin* (1851) 2 Ind. 507.

¹⁵⁴ *Pickens v. Yarborough* (1855) 26 Ala. 417, 62 Am. Dec. 728.

¹⁵⁵ *McCrary v. King* (1859) 27 Ga. 26. It is here stated that the instructions by the owner of the note to his creditor, to whom it was given as collateral security, to apply the proceeds after it when collected to the payment of the demand against the owner, made such creditor the legal as well as the actual holder, and he was the only person who had the right to bring suit upon it.

But the payee of a note who had pledged the same as collateral security was held by the trial court to be the proper person upon whom to serve notice after the debt for which the note was collateral had been paid, so that it again belonged to the payee, although it seems he did not have possession. *German American Bank v. Denmire* (Iowa) *supra*. There is no discussion nor holding on this question in the supreme court.

¹⁵⁶ *McCrary v. King* (Ga.) *supra*.

And see *Carhart v. Wynn*, *infra*, note 162.

¹⁵⁷ *Pickens v. Yarborough* (Ala.) *supra*. The statute involved is not set out. An earlier Alabama statute set out in *Shehan L.R.A.1918C*.

v. Hampton (1846) 8 Ala. 942, authorized the surety to require in writing "his creditor . . . to put the bond, bill, or note . . . in suit, and unless the creditor so required" shall within a reasonable time begin suit, the surety shall be discharged. Whether this statute was in force at the time of the decision in *Pickens v. Yarborough* is not certain. In the subsequent case of *Savage v. Carleton* (1859) 33 Ala. 443, a statute is set out which provides that the surety may require "the creditor or anyone having the beneficial interest in the contract" to sue.

¹⁵⁸ *Sapington v. Jeffries* (1852) 15 Mo. 628. The attorney had possession of the instrument in question, but this fact was not noticed. See *UNION MUT. INS. CO. v. PAGE*, *ante*, 1.

¹⁵⁹ *Cummins v. Garretson* (1854) 15 Ark. 132. The statute involved in this case required the person having the right of action upon the obligation, upon notice from the surety, forthwith to commence suit against "the principal debtor and the other party liable." It was for the purpose of requiring suit against the principal debtor that the notice was served in this case after a suit had been begun against the sureties alone. Although the statute provided that certain notices during the progress of a suit may be served upon the party or his attorney of record, it is stated that, in the absence of any positive regulation of law, there is no authority for holding that notices of this description can be effectually given to the attorney before or during the progress of a suit, so as to be notice to the

ers, directing him to bring suit upon a bond, is not a notice sufficient under a statute which requires a notice to the creditor or obligee.¹⁶⁰

It has been held that an agent for the collection of the note is not a proper person upon whom to serve notice, even while he has the instrument in his possession, where he has no authority to sue.¹⁶¹ The owner of the note is not bound by such notice, even though the agent afterwards, upon returning the same, informs him of the notice.¹⁶² It has been held, where the evidence as to the agency of the person upon whom the notice was served was conflicting, that it cannot be said, even if it is admitted that such person told the holder of the note of the notice, that the requirement of the statute providing that a notice in writing shall be given has been met.¹⁶³

client, whereby his interests may be injuriously affected.

¹⁶⁰ *Driskill v. Washington County* (1876) 53 Ind. 532.

¹⁶¹ *Carhart v. Wynn* (1857) 22 Ga. 24, holding an indorser not released by failure to sue. The agent notified the indorser at the time of the notice that he had no authority to sue.

¹⁶² *Carhart v. Wynn* (Ga.) *supra*. The note was returned, however, after the expiration of the period fixed by statute for suit to be brought.

That notice served upon a guardian of minor heirs, who were the owners of the note, is sufficient, see *Overturf v. Martin* (Ind.) *supra*.

In *McNeilly v. Cooksey* (1878) 2 Lea (Tenn.) 39, the surety notified the constable at the time the summons was served in an action brought by the creditor, that he was surety on the note, and told the constable to proceed to collect it as soon as possible. It is stated by the court that if a constable who is the agent of the plaintiff for the collection of the debt can, by anything the debtor may say to him, be turned into an agent of the plaintiff for any other purposes touching the debt, so that notice of the defendant's wishes will be notice to the creditor, the evidence fails to show that the defendant required active diligence on the part of the creditor, or requested the officer to notify the creditor of his wishes.

¹⁶³ *Bartlett v. Cunningham* (1877) 85 Ill. 22. The theory of this case is not altogether clear. After referring to the conflicting evidence, the court states: "Whether any notice was ever served upon appellee [the holder of the note], or whether he was notified to institute suit upon the note, were questions purely of fact for the jury." The court then states that, the evidence being conflicting, the finding of the jury for the holder of the note against the surety would not be disturbed. Farther on in the L.R.A.1918C.

A notice addressed to and intended for the husband of the holder of the note is not sufficient, although communicated to the wife, under a statute authorizing a person bound as surety to "require his creditor, by notice in writing, to commence an action on such instrument forthwith against the principal debtor."¹⁶⁴ But a notice upon the wife of the holder of the note at his residence, while he was temporarily absent, with a request to her to deliver the notice to the holder, has been held sufficient, especially where a few days afterwards the surety informed the holder of his leaving such notice and of its contents and purport, and the holder did not object at the time either to the sufficiency of the notice or to the manner of its service.¹⁶⁵

Under a statute which authorizes no-

opinion the court states that the holder of the note may have been told by the alleged agent that the surety desired the note sued. "But," the court continues, "such fact will not release appellant [the surety]. If he in good faith desired suit upon the note,—which, however, would have availed nothing, as Deatherage [the principal debtor] was insolvent when the note was given, and continued in the same condition,—he should have prepared a notice in writing, in duplicate, and delivered it, in the presence of a witness, to appellee in person. Had this course been pursued, appellant would have been in a position to rely upon the defense given by the statute."

¹⁶⁴ *Moormann v. Voss* (1907) 77 Ohio St. 270, 83 N. E. 76. It is stated that it was neither averred nor proved that the husband was constituted the agent of the wife to accept and receive for her this notice, nor was it claimed that he was constituted the agent of the surety to deliver the notice to her. At the time of communicating the notice, the husband, who was an attorney, advised his wife that the same was not a notice to her, and that she need pay no attention to it whatever.

See *McCoy v. Lockwood* (Ind.) *infra*.

¹⁶⁵ *McCoy v. Lockwood*, (1880) 71 Ind. 319. A statute provided that the written admission of a party which states the time and place of service shall be proof of service. In this case the agreed statement of facts contained the admission of the creditor that the surety left at his residence at a stated time in the hands of his wife, during his temporary absence from home, a notice in writing forthwith to institute an action upon the note. It was stated that this was a legal and valid service upon the creditor of the notice in writing referred to. After reciting his failure to make objections to the service, it was further stated that he must be taken to have waived any objection to such notice either as to its sufficiency or to the manner of its service.

tice after action has accrued requiring the "person having such right of action" to bring suit within a stated time, a notice served upon the clerk of the trustees of a bank to whom the note is payable is not sufficient, although the clerk communicated it to one of the trustees.¹⁶⁶

A notice to the treasurer of a board of school trustees, by the surety on a note payable to the trustees, is not sufficient to discharge the surety, although the treasurer's duties are to loan moneys, collect and safely keep funds, and discharge other duties, if the board of trustees exercises a supervisory power over him.¹⁶⁷

Notice to a sheriff to proceed in the collection of a note given in payment of a fine does not discharge the surety where the sheriff has no authority to enforce obligations to the county.¹⁶⁸

Several creditors.

A service of the notice on one of two payees of a note is insufficient, and the surety is not released by the failure to

bring suit within the time designated by statute; the notice must be served upon all the obligees named in the instrument.¹⁶⁹ The fact, however, that notice has been served upon only one of several administrators of a deceased creditor's estate has been held not to render it invalid.¹⁷⁰

(f) How notice may be served.

Under some statutes there must be personal service of the notice.¹⁷¹ Under a statute requiring the notice in writing to be "served in person," there is no service of notice shown as required, where the surety claims to have mailed a letter to the creditor, which the creditor denies receiving, and there is no testimony showing that the letter was received other than the fact of mailing.¹⁷² It has been held that a letter, although received by the creditor, is not sufficient.¹⁷³

It is not necessary that an officer or third person give the notice; the surety may himself do so; ¹⁷⁴ nor is it necessary

¹⁶⁶ *Adams v. Roane* (1847) 7 Ark. 360. It is stated that the record did not contain any information as to how far the clerk was authorized to waive or control the rights of the trustees, and the court was not at liberty to take judicial notice of any such power. It is further stated that, since the note was made payable to the trustees, the clerk cannot be said to have the right of action; that a notice to him, although communicated to one of the trustees, cannot be said to be a service upon the trustee in accordance with the statute.

¹⁶⁷ *Trustees of Schools v. Southard* (1889) 31 Ill. App. 359. The transaction in which the note was given for borrowed money was had with the treasurer. After reviewing the duties of the treasurer and the supervisory power exercised by the board of trustees over such official, the court states that these are matters of public law of which all persons must take notice; that the surety should have given notice to each agent of the public who had the right or duty under the law to direct the collection of the note,—the treasurer and the board of trustees.

The treasurer cannot be regarded as the agent of the board of trustees. *Ibid.*

¹⁶⁸ *Wilson v. White* (1907) 82 Ark. 407, 102 S. W. 201, 12 Ann. Cas. 378.

¹⁶⁹ *Kelly v. Matthews* (1843) 5 Ark. 223. The statute is not set out in this opinion, but in the subsequent case of *State Bank v. Watkins* (1845) 6 Ark. 123, the statute in this state is set out, and from that opinion it appears that it provides that any person bound as security for another in any bond, bill, or note for the payment of money or delivery of property may, at any time after action has accrued thereon, by a notice in writing, require the person hav-

ing such right of action forthwith to commence suit.

¹⁷⁰ *Baker v. Kellogg* (1876) 29 Ohio St. 663 (notice held insufficient for other reasons, however).

¹⁷¹ *Conway v. Campbell* (1889) 38 Mo. App. 473. A statute providing that "the notice required above shall be served by delivering a copy thereof to the person having the right of action on the instrument, or leaving a copy at his usual place of abode with some person of the family over the age of fifteen years," was held to require a personal service, and a notice sent through the mails, although it may have been received by the creditor, would not be sufficient.

In a statement contained in the opinion in *Sapington v. Jeffries* (1852) 15 Mo. 628, it is said that the service of the notice is required by statute to be on the person having the right of action on the instrument personally, or by leaving a copy at his usual place of residence with some white person of the family over the age of fifteen years.

¹⁷² *Benge v. Eversole* (1915) 156 Ky. 131, 160 S. W. 911. But see *Weir v. Dicker*, *infra*, note 175.

The general question of presumption as to receipt of communication sent through the mail is discussed in the note to *Feder Silberberg Co. v. McNeil*, 49 L.R.A.(N.S.) 458.

¹⁷³ *Conway v. Campbell* (Mo.) *supra*. But see *Weir v. Dicker*, *infra*, note 175.

¹⁷⁴ *Prather v. Phelps* (1883) 5 Ky. L. Rep. 184 (Kentucky statute requires service "in person").

McCoy v. Lockwood (1880) 71 Ind. 319, *supra*, note 165.

that such a notice should be served by an officer or by a disinterested party and a return made.¹⁷⁵

The service of one of duplicate notices is sufficient under a statute providing that notice shall be served by delivering a "copy" thereof to the person having the right of action on the instrument.¹⁷⁶ In fact, it has been held not necessary for the surety to retain a copy of the notice.¹⁷⁷

Some statutes require the party pleading the notice to prove service of notice by two witnesses. Under a statute so requiring, it is necessary that the required number of witnesses prove the notice, although it is shown by the principal debtor that the creditor, in demanding of him payment of the note, stated that he had been requested to sue.¹⁷⁸ But it has been held that a surety may be relieved in a proper case by virtue of the equitable rule, although he is not able to prove his notice by two witnesses.¹⁷⁹

(g) *Waiver of effect of notice.*

The notice may be waived or revoked by the surety after it has been given, and if it has been waived by him the failure of the creditor to sue does not release the surety. Asking indulgence after

notice to sue has been given is a waiver or revocation of the notice, provided the time at which the surety asked the indulgence was before the expiration of the time within which suit must be brought, and provided the indulgence was asked not for himself, but for the principal debtor.¹⁸⁰ A request by the surety not to sue before he has been released by the failure of the creditor to sue within the required time after a notice was given by the surety relieves the creditor of the obligation to sue.¹⁸¹

But if the request not to sue is made after the surety is released, the surety's liability is not reinstated.¹⁸²

But it has been held where, at the time of serving notice, the surety requested the creditor to see the debtor before suing and induce him to pay a part of or all the money if possible, that a written notice to the creditor that he need not sue, given after the expiration of the statutory period, precludes the surety from taking advantage of the notice to sue, where the notice not to sue was treated as a waiver of the notice to sue by both parties.¹⁸³

The consent by the surety to the dismissal of the suit begun by the creditor operates as a waiver of the notice, and the surety continues bound by his contract.¹⁸⁴

¹⁷⁵ Weir v. Dicker (1889) 11 Ky. L. Rep. 523. In this case a letter written by the attorney for the surety, and purporting to have been written at the surety's request, was held sufficient notice, the receipt of the letter and the time it was received being admitted. See Benge v. Eversole (Ky.) supra.

¹⁷⁶ Sparks v. Munson (1898) 76 Mo. App. 83.

¹⁷⁷ Lewis v. Warden (1912) 163 Mo. App. 256, 148 S. W. 165. The statute provided that the notice shall be served by "delivering a copy thereof" to the person having the right of action on the instrument. It is stated that there is nothing in this section which makes it necessary that the surety shall retain a copy of the notice served on the payee; such a notice cannot be likened to a summons, for that is a court record and contains a sheriff's return. The statute goes no further than to require a written notice.

¹⁷⁸ Miller v. Childress (1841) 2 Humph. (Tenn.) 320, approved in Simpson v. State (1873) 6 Baxt. (Tenn.) 440.

In a note to Waterford v. Hensley (1827) Mart. & Y. (Tenn.) 275, it is stated to have held in this state that service of the notice proved by one witness and an acknowledgment by the creditor of such service proved by a second witness, constitute a substantial compliance with the statute.

¹⁷⁹ Hancock v. Bryant (1830) 2 Yerg. L.R.A.1918C.

(Tenn.) 476. As to when the equitable rule will be applied in Tennessee, see supra.

¹⁸⁰ Bailey v. New (1859) 29 Ga. 214.

¹⁸¹ Rotting v. Cleman (1898) 20 Wash. 116, 54 Pac. 935. This question is not squarely decided in this case. The reply of the creditor to the defense that he had failed to sue upon notice was that, after the notice was given, the surety instructed him not to sue upon the note, and that the surety also instructed the one who had held the note for collection not to sue upon the note. It was contended that this reply was insufficient to constitute a defense or waiver of the notice pleaded in the answer, but the court determined that the allegation was sufficient to warrant the proof as to when the notice not to sue was given. It was held that this notice not to sue was given before the surety had been relieved by a failure of the creditor to begin suit, and therefore his liability was continued.

In Gillilan v. Ludington (1873) 6 W. Va. 128, a replication setting up notice by the surety not to sue immediately after giving the original notice was sustained.

¹⁸² Medley v. Tandy (1887) 85 Ky. 566, 4 S. W. 308.

¹⁸³ Simpson v. Blunt (1868) 42 Mo. 542. After the expiration of two years the surety again gave notice to sue, and on this notice suit was instituted.

¹⁸⁴ Kittridge v. Stegmier (1895) 11 Wash. 3, 39 Pac. 242.

The insertion in the notice of information to the effect that the principal debtor had made an assignment to an assignee who was "authorized by law to hear and render judgment for claims of creditors" does not nullify the requirement that suit be commenced forthwith.¹⁸⁵

As to waiver of the benefits of the statute, see *infra*, III. b, 15.

3. Who must be sued.

Under a statute authorizing the surety to give notice in writing to the creditor, and requiring the creditor forthwith to put the obligation in suit without expressly specifying against whom the suit is to be brought, a suit against the surety alone has been held not to be sufficient.¹⁸⁶ So, under a statute empowering any person bound as surety for another for the payment of money or the performance of any other contract, after a right of action has accrued on the contract, to require the creditor "to sue upon the same, or to permit the surety to commence suit in such creditor's name and at the surety's cost," it has been held that, even assuming a claim filed against the surety's estate is a suit within the meaning of this statute, it is not a suit against the principal, and is therefore insufficient.¹⁸⁷

But under a similar statute requiring the creditor, upon written notice after the maturity of the claim, "forthwith to put the bond, bill, or note . . . in suit," without specifying against whom the suit shall be brought, it has been held not necessary for the creditor to sue the debtor; he may sue the surety alone, especially where another section of the statute provides for the surety obtaining judgment against the debtor at the same time that judgment is obtained against him; the surety cannot therefore insist upon the failure of the creditor to sue the debtor or as releasing him under the statute.¹⁸⁸

A statutory provision, independent of the one empowering the surety by notice to require the creditor to sue, providing that persons severally liable upon the same obligation "may all or any of them be included in the same action at the option of the plaintiff," has been held to authorize the payee of a note, at his option, to bring suit against a surety who had given him notice to sue the maker and sureties, without joining the maker and other sureties.¹⁸⁹

The action need not be brought against the surety giving the notice, nor a non-resident cosurety, if it is brought against the principal.¹⁹⁰

¹⁸⁵ *Hammond v. McHargue* (1913) 170 Mo. App. 497, 166 S. W. 725.

¹⁸⁶ *Starling v. Butties* (1826) 2 Ohio, 303. The statute is not set out in the opinion, but the substance is given in the language of the court as above stated. In coming to the conclusion at which the court arrived, it is stated that the object of the act is plainly to enable sureties to compel a creditor, when his debt is due, to pursue the principal debtor by a suit, or exonerate the surety; that if, upon receiving notice, it would be sufficient to sue the surety alone, the object of the law would be evaded. Consequently, a separate suit against the surety without any suit against the principal was held not a compliance with either the letter or spirit of the law.

It seems that the statute was subsequently changed so that the creditor might be required to commence his action against the principal debtor on such note. See *Iliff v. Weymouth* (1883) 40 Ohio St. 101; *Clark v. Osborn* (1884) 41 Ohio St. 28.

A statute involved in *Central Bank & T. Co. v. Hill* (1913) — Tex. Civ. App. —, 160 S. W. 1099, excused a suit against the principal obligor in certain cases. A case which came within the exception was held not to require suit against the principal obligor; otherwise the suit must be brought against all the parties to whom the person making the request stands in the attitude of surety, under a statute merely requiring suit to be instituted forthwith upon the contract.
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¹⁸⁷ *Citizens Bank v. Hickman* (1917) — Iowa, —, 162 N. W. 606.

¹⁸⁸ *Scott v. Bradford* (1837) 5 Port. (Ala.) 443. The debtor had moved from his former residence, but still resided in the state, and the place of his residence was known. Another statute involved in this case made all joint obligations joint and several, and provided for suit against one or more of the obligors. The Alabama statute was subsequently changed so that a suit against the debtor was required.

¹⁸⁹ *Palmer v. Noe* (1915) 48 Okla. 450, 150 Pac. 462. See *supra*, III. a, for complete discussion of Oklahoma cases.

¹⁹⁰ *Perry v. Barret* (1853) 18 Mo. 140. At the time the notice was given, a suit was instituted and pending against all the parties liable on the note. A cosurety of the surety giving the notice resided out of the limits of the state, and he was not served with process. The action resulted in a judgment against the principal debtor and a return upon the execution of nulla bona. It was discontinued as to the surety giving the notice and as to the cosurety who was not served. It is stated that it is not an important advantage to the surety giving the notice that he himself should be included in the action as defendant, and should have a judgment rendered against him, for, in the action brought against the other parties, the creditor, in order to hold the notifying surety bound, must proceed with diligence to collect the money.

And it has been stated that a suit against the principal debtor and the sureties other than the one giving the notice is a sufficient compliance with a demand to proceed against such parties.¹⁹¹

Where the creditor is excused from suing the principal for some reason discussed in III. b, 6, *infra*, it is the theory of some courts that no suit need be brought even against the surety; that the surety can pay the debt without suit, and he himself proceed against the principal debtor.¹⁹²

As to right to require suit against principal alone under equitable rule, see *supra*.¹⁹³

4. When suit must be brought.

Some statutory provisions fix a definite time in which suit must be brought or the surety released. Other statutes do not fix a definite time. In the statutes which do not fix a definite time, the requirements as to when suit must be brought vary widely. Some require the suit to be brought "forthwith" after the notice; others at the first term of court after the notice; others within a reasonable time. These various provisions will be discussed in detail.

Under statutes requiring a suit to be brought within a "reasonable time" or

"within a reasonable time and with due diligence," the question of what amounts to a reasonable time cannot be answered in any general way. The delay may be so great as to make it apparent from the mere time element that the suit was not commenced within a reasonable time. A delay of fourteen months discharges the surety.¹⁹⁴ A delay of three years discharges the surety.¹⁹⁵ An action brought after such a delay is not an action brought within a reasonable time. A suit begun after a delay of a less period than these has been held not to have been begun in a reasonable time.¹⁹⁶

A delay of one month after notice was given has been held not to be unreasonable, so that the direction by the surety at the end of that time, not to sue, relieved the creditor from the duty to sue, and held the surety without a new consideration.¹⁹⁷

The time element is frequently combined with other elements. From these cases no general rule can be deduced. Examples are given in the footnote.¹⁹⁸

A question has also arisen where it appears that suit was promptly begun by the creditor, as to whether it was begun in the right court. As to this question, see III. b, 5, *infra*.

As shown in III. b, 1, *supra*, it is not

¹⁹¹ *Sullivan v. Dwyer* (1897) — *Tex. Civ. App.* —, 42 S. W. 355. See *Central Bank & T. Co. v. Hill* (*Tex.*) *supra*.

¹⁹² *Rowe v. Buchtel* (1859) 13 *Ind.* 381.

That no suit need be brought seems to be the theory of *Thompson v. Treller* (1907) 82 *Ark.* 247, 101 S. W. 174.

In *Conklin v. Conklin* (1876) 54 *Ind.* 289, where there was a delay of three years in suing, the court states that the surety cannot complain that he was not sued sooner.

¹⁹³ *Rutledge v. Greenwood*, *supra*, note 18.

¹⁹⁴ *Root v. Dill* (1871) 38 *Ind.* 169. The Indiana statute empowers a surety to require by notice in writing the creditor or obligee "forthwith" to institute an action upon the contract," and provides that, if the action is not brought "within a reasonable time" thereafter, the surety shall be discharged.

¹⁹⁵ *McCoy v. Lockwood* (1880) 71 *Ind.* 319.

It is stated obiter in *Conklin v. Conklin* (*Ind.*) *supra*, that a delay of over three years discharges the surety, but as the principal debtor was out of the state the failure of the creditor to sue was held excused. It was held that the surety could not under these circumstances complain of a delay of three years.

¹⁹⁶ A finding of the trial court, as a conclusion of law, that the creditor, a Connecticut corporation, did not bring its suit, against the debtor, a resident of Ohio, with-
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in a reasonable time after notice, in bringing it three months and six days from the time of notice, was sustained in *Meriden Silver Plate Co. v. Flory* (1886) 44 *Ohio St.* 430, 7 N. E. 753. The statute involved in this case required the action to be commenced within a reasonable time after the notice.

¹⁹⁷ *Rotting v. Cleman* (1898) 20 *Wash.* 116, 54 *Pac.* 935. The statute is not set out in this case.

¹⁹⁸ A suit brought ten months after the notice was served does not show such diligence as the law requires in bringing a suit, where it appears that a term of court was held in the county of the debtor's residence about one month after the notice was given, and court was held in the county where the other parties reside about seven months after the giving of the notice. *Overturf v. Martin* (1851) 2 *Ind.* 507.

The jury here had found against the creditor on all issues of fact, and it is stated that the facts fully sustained the finding. Whether the question as to the suit having been brought in a reasonable time was left to the jury as an issue of fact does not appear. It is stated further that, even if it was not incumbent on the creditor to go to the county where the principal debtor resided, he should have at least brought suit at the next succeeding term of the court in the county where the remaining parties resided.

necessary, to the release of a surety under the ordinary form of statute, that he has been injured by the delay through the insolvency of the principal debtor or the placing of his property beyond the reach of process. The fact that the property of the principal debtor has been taken on execution on other judgments, or has been placed beyond the reach of process in some other way, is a fact, however, that has been taken into consideration in determining what is a reasonable time to sue.¹⁹⁹

The fact that a suit was brought erroneously and dismissed has been held to be no evidence of diligence;²⁰⁰ but it has been stated that, if the creditor brought any other action, which for any cause failed, this matter might be shown by way of replication.²⁰¹

Under a statute requiring suit to be brought to the first court to which suit can be brought after the receipt of the notice, a suit is brought if the summons is returnable at such term, although there may not be time for the defendant to put in his plea so that the case may stand for trial at that term.²⁰² Some statutes require the suit to be brought at the next term of court after the notice is given.²⁰³ The fact that the principal debtor is out of the state excuses the creditor from bringing suit to the first term of court to which suit could be brought after notice,

as required by statute; according to the case holding to this theory, the surety may at once pay the debt and follow the principal and enforce his remedy against him.²⁰⁴

Under statutes prescribing a definite time in which the suit must be brought, a creditor who has brought his suit within the required time is not guilty of such laches as will discharge a surety because, by bringing his suit at one city in which a circuit court was held, the summons was returnable one week later than it would have been had he commenced his suit at another city in the same county, where a term of circuit court was also held.²⁰⁵

A surety has been held not released on the theory that there was no prosecution with due diligence, where the suit was begun two days after the notice was served, although the summons was made returnable beyond the statutory period for the beginning of the suit; but it appeared that two of the defendants lived in different townships from that of the justice before whom the suit was brought, and nothing was given in evidence tending to show that the creditor had caused the return day of the summons to be set for a time later than was necessary for service on the defendant, and the return day was within the time allowed by law.²⁰⁶

¹⁹⁹ Under a statute providing the surety may, when he thinks his principal is likely to become insolvent and after a right of action has accrued on the contract on which he is surety, give notice in writing to the creditor to sue on the contract, and providing that, unless such creditor shall "within a reasonable time and with due diligence commence suit thereon and prosecute the same to final judgment, the surety shall be discharged," a surety is discharged where the creditor failed to bring suit for thirty-six days after the notice, it being shown that twenty-five days after the notice the debtor sold property belonging to him and paid judgments which were liens thereon, and money was made from him on execution. *Miller v. Gray* (1889) 31 Ill. App. 453.

²⁰⁰ A suit erroneously begun by a creditor and subsequently dismissed cannot be taken into consideration in determining the diligence used by the creditor. *Overturf v. Martin* (Ind.) *supra*.

²⁰¹ *Root v. Dill* (1871) 38 Ind. 169.

²⁰² *Guttry v. Pickett* (1899) 125 Ala. 434, 27 So. 840. The notice was given a sufficient length of time before the next term of court to begin the action, and service was had the requisite time before the term, although the cause could not stand for trial at that term. The creditor delayed about a month after notice. L.R.A.1918C.

²⁰³ In *Weir v. Dicker* (1889) 11 Ky. L. Rep. 523, a surety was held released by the failure of a creditor to sue at the next term after he was notified by the surety that he must sue, although the notice was given only three days before the term commenced. It is stated that, as all the parties lived in the county and within 3 miles of the courthouse, three days were ample time in which to sue.

It was apparently under such a statute that it was held in *Gutzwiller v. Wagner* (1881) 3 Ky. L. Rep. 470, that notice by a surety to the obligee to sue must be given in time to enable him to obtain judgment at the next term of court after the notice was given. Only an abstract of this case appears. In this abstract it is stated that "notice given more than ten days before the beginning of the term was not sufficient in this case." What is meant by this statement is problematical.

²⁰⁴ *Hightower v. Ogletree* (1896) 114 Ala. 94, 21 So. 934. The creditor subsequently sued the surety and upon the debtor coming into the state joined him as defendant in the action.

²⁰⁵ *Collum v. Fahrner* (1900) 83 Mo. App. 110.

²⁰⁶ *Patton v. Cooper* (1900) 84 Mo. App. 427.

But if the suit is not begun within the statutory period, the surety is discharged, even though the suit is not begun because of the neglect of the justice whom the creditor ordered to bring suit; the creditor must not only direct the institution of the suit, but must see that it is actually commenced within the time fixed by statute.²⁰⁷

Diligence in pursuing.

The creditor must under some statutes proceed "with due diligence" after suit is brought, "in the ordinary course of law, to judgment and execution." Under such a statute a creditor who commences suit upon notice, against the debtor and surety, but who, upon the writ against the debtor, which has been sent to another county where the debtor resided, not being returned, dismisses his suit as to the debtor and takes judgment against the surety alone, has not proceeded with due diligence.²⁰⁸ It has been held where a suit of which the justices' court has concurrent jurisdiction with the circuit court was brought in the justices' court, which could not issue a summons to another county, that dismissing the suit against the debtor was not proceeding with due diligence, and the surety was discharged.²⁰⁹

But under a statute requiring the creditor to use due diligence in prosecuting

suit "to judgment, and by execution," a creditor who has obtained judgment in a reasonable time is not guilty of laches relieving the surety, where upon demand the clerk refused to issue execution upon the belief that he was prohibited from so doing by a stay law, whereupon the creditor sought the interposition of a court to compel the issuance of the execution and was refused relief.²¹⁰

It is stated generally in one case that a statute requiring a creditor to sue and to prosecute his suit with due diligence to judgment and by execution, upon receiving notice from the surety to sue, "does not require the creditor to pursue the principal's estate in equity, to impeach alleged fraudulent conveyances, or to subject an equity of the principal to the payment of his debt, or, in a word, to exhaust his remedies against the principal before he can have satisfaction out of the estate of the surety."²¹⁰

5. Where suit must be brought.

A question has been raised in a suit which was begun promptly by the creditor after receiving notice, as to whether he had a choice of courts where more than one court was available. It has been held to be the duty of the creditor to bring the suit in the court the term of which is thereafter first to convene.²¹¹ On the

²⁰⁷ In *German American Bank v. Denmire* (1882) 58 Iowa, 137, 12 N. W. 237, the surety had attempted to bring suit himself without requesting the holder of the note to do so. But subsequently, on advice of counsel, he served the creditor with the statutory notice and at the same time wrote the justice before whom the suit was to be brought not to bring suit in his behalf. It was urged that the surety, by writing the justice not to bring suit in his behalf, prevented the justice from obeying the direction given by the creditor to begin suit; but this contention was denied.

²⁰⁸ *Peters v. Linenschmidt* (1874) 58 Mo. 464. It is stated to have been the duty of the creditor under the above circumstances, upon his failure to obtain service on the principal debtor at the first term, to take an alias summons returnable to the second term, and then, under the provisions of a statute, if service was not had on the debtor, the creditor would have been entitled to judgment against the surety unless the surety consented to a further delay.

See *Patton v. Cooper* (1900) 84 Mo. App. 427, supra, note 206.

²⁰⁹ *Sisk v. Rosenberger* (1884) 82 Mo. 46. It is stated that the plaintiff knew at the time suit was begun in the justices' court that the principal debtor resided out of the county; that by suing him in the L.R.A.1918C.

justices' court he chose not to sue the principal debtor at all. It is further stated that the creditor, having at his election two tribunals in his county equally convenient and remedial to himself, one of which would enable him to protect the surety as contemplated by the statute, and the other would not, should, upon the plainest principles of fair dealing and equity, have selected the forum which would enable him to respect the notice given him by the surety and execute the object of the statute.

A similar holding appears in *Hardy v. Worthen* (1893) 53 Mo. App. 580.

²¹⁰ *Harrison v. Price* (1874) 25 Gratt. (Va.) 553.

²¹¹ *Craft v. Dodd* (1860) 15 Ind. 380. The creditor began his suit immediately after notice, but not in the court the term of which commenced at the earliest day. An answer setting up this fact was held to make a prima facie defense for the surety, against which a demurrer was not good, although the surety did not allege that he suffered any injury from the suit having been thus begun.

See *Overturf v. Martin* supra, note 198.

See *Sisk v. Rosenberger* (1884) 82 Mo. 46, supra, note 209.

See *Collum v. Fahrner* (1899) 83 Mo. App. 110, supra, note 205.

contrary, the creditor has been held to have a discretion as to the court in which to bring suit under such circumstances.²¹²

Where the principal debtor resides in a county other than that of the residence of the creditor and surety, and a notice to sue is given by the surety, the failure of the creditor to begin a suit in the county of the residence of the principal debtor, where a term of court in which the cause could be prosecuted was then in session, has been held to be a failure to proceed within a reasonable time, although the creditor began his action in the county of his residence and that of the surety

within two days from the service of the notice, but the term of the court in such county was not held until a little over two months after the notice was served.²¹³

6. Excuses for failure to sue.

The creditor cannot be compelled to go out of the state to sue the debtor; consequently, his failure to sue upon notice by the surety is excused where the debtor is absent from the state.²¹⁴ This rule has been followed where the debtor is absent from the state and has left no available property in the state.²¹⁵ It has been held that the creditor is excused from joining

²¹² In *Robertson v. Angle* (1903) — Tex. Civ. App. —, 76 S. W. 317, where there were two courts with jurisdiction of the cause, it is stated that the creditor had the right to select the court in which to bring her suit. She brought it in the district court, the term of which did not begin for three months after suit was brought, while a term of the county court began about ten days after notice was given. A statute required ten days' service before the first day of the term in order to compel the defendant to plead at the return day. The court concluded that the creditor used due diligence in employing attorneys and beginning the suit. The decision in this case, however, denying relief to the surety, seems to rest largely upon the fact that the debtor was insolvent at the time of notice, and it was held that, this being true, suit was not necessary.

²¹³ *Hamrick v. Barnett* (1891) 1 Ind. App. 1, 27 N. E. 106.

²¹⁴ *Rowe v. Buchtel* (1859) 13 Ind. 381. The creditor here failed to sue at the first term of court after receiving notice, but at the second term thereafter he sued the surety. The surety defended on the ground that he himself had not been sued at the first term after the notice; but this was held not a valid defense, it being stated that the notice to sue did not operate as a requirement to sue the surety.

Conklin v. Conklin (1876) 54 Ind. 289. The Indiana statute required merely that action be brought on the instrument. It is stated in *Rowe v. Buchtel*, that the debtor left no property and never had any administrator in the state. Nothing is said about property in *Conklin v. Conklin*, where the rule was applied nevertheless. A further reason is advanced in the *Conklin* Case for the rule; that is, that, where the common law prevails unmodified by statute, a judgment against one of several joint debtors merges the cause of action, and the others cannot be afterwards sued, and therefore if the creditor were to follow his principal into another jurisdiction and there obtain a several judgment against him, the judgment might bar an action against the surety, though the principal were utterly insolvent and the judgment never paid.

Bostwick v. Norwalk Nat. Bank (1895) L.R.A.1918C.

13 Ohio C. C. 675, 6 Ohio C. D. 682. Suit was brought against the surety, but when does not appear.

The answer of a surety to an action against him on a joint and several note, that the principal debtor had died leaving an ample estate for the payment of all debts, and that he had given the holder of the note notice in writing to forthwith institute an action upon the note, and that the holder failed to institute the action, is bad, since, conceding, without deciding, that a creditor may be required to pursue the estate of a deceased principal in order to preserve the liability of the surety, he cannot be required to go out of the state to sue the principal. The answer, not having made it appear where the principal debtor had died, or where the estate was situated, is therefore bad, there being held to be no presumption that he died within the state, nor that his estate or any part of it was situated in the state. *Whittlesey v. Heberer* (1874) 48 Ind. 260.

It was proved in *Conklin v. Conklin* (Ind.) supra, that when the notice was served on the creditor he said to the person serving it, "Tell Newton that will be all right." This statement was urged as an estoppel, but the court, stating that it did not appear that the surety did anything or parted with anything or in any manner changed his situation in consequence of the message thus sent to him, said that there were none of the elements of estoppel; that by this message the creditor meant to give the surety to understand that he would comply with the notice by bringing suit, but, as he was not bound to bring an action out of the state, the message did not bind him to do it.

As to necessity of suing a nonresident surety, see *Perry v. Barret* (1853) 18 Mo. 140, supra, note 190.

²¹⁵ *Thompson v. Treller* (1907) 82 Ark. 247, 101 S. W. 174. The Arkansas statute set out in *SIMS v. EVERETT*, ante, 7, is apparently not the full statute relating to this matter. In *Hall v. Equitable Surety Co.* (1917) 126 Ark. 535, 191 S. W. 32, it appears that the creditor is required to commence suit against "the principal debtor and other party liable."

the debtor if he did not know, nor could have known in the exercise of due diligence, that the debtor resided within the state.²¹⁶

It was urged in one case in which the creditor as well as the principal debtor was a nonresident of the state in which the contract was entered into, and the law of which governed the same, that the rule excusing suit because of nonresidence did not apply; this contention was denied. The court stated: "We do not perceive that the residence of the plaintiff [creditor] has anything to do with the question. The contracts were Indiana contracts and governed by the Indiana law, wherever the parties to them might reside." Accordingly, the surety was held not discharged by failure of the creditor to sue where the principal debtor was a nonresident.²¹⁷

A plea of a surety setting up a discharge because of the failure of the creditor to sue after notice, which admitted the death of the debtor and failed to show that it did not occur so soon after the service of the notice as to prevent the bringing of an action, and also failed to show that the debtor left in the county or state any estate on which administration had been or could be granted, has been held bad as a defense to an action against the surety.²¹⁸

It has been held that the creditor is not compelled to go to a distant county

A surety is not relieved by the failure of the creditor to bring suit on the obligation within the stated time after notice is served, where the principal debtor is a nonresident of the state, and the notice requires merely that suit be commenced against the principal debtor. *Phillips v. Riley* (1858) 27 Mo. 386. The action here was begun, after the expiration of the statutory period, against the principal and surety, but was discontinued as to the nonresident principal debtor.

The sureties on an attachment bond cannot require the obligee therein to begin suit where the principals on the bond were nonresidents, and it is not made to appear that they had any property in the state liable to attachment. *Seattle Crocker Co. v. Haley* (1893) 6 Wash. 302, 36 Am. St. Rep. 156, 33 Pac. 650.

See *Rowe v. Buchtel and Conklin v. Conklin*, *supra*, note 214.

²¹⁶ *Cox v. Jeffries* (1898) 73 Mo. App. 412. The creditor sued in the justices' court on a note the amount of which gave the circuit court concurrent jurisdiction.

²¹⁷ *Conklin v. Conklin* (1876) 54 Ind. 289. The creditor was a resident of Iowa, the principal debtor of Illinois. It was urged that the debtor had property in Illinois out of which the claims could have L.R.A.1918C.

in the state to sue the debtor, even under a statute requiring suit against the principal debtor and the surety, but that he may sue the surety alone in the county where he and the surety reside.²¹⁹

But under a statute which gives the creditor the option to bring suit himself or permit the surety to do so, the fact of nonresidence at the time of notice is no excuse for the failure of the creditor either to bring suit or permit the surety to do so.²²⁰

The nonresidence of the creditor does not excuse him from complying with the requirements of the statute.²²¹ But if the debtor is a nonresident, the creditor is excused from suing him, although the creditor is a nonresident.²²²

The fact that the debtor is out of the state excuses the creditor from bringing suit at the first term of court after notice is served.²²³

The disturbed condition of Missouri during the year 1861 is no excuse for the creditor not bringing suit within the required time after service of notice upon him by the surety, where it appears that a court of common pleas in a county in which he could have sued was open to him.²²⁴

Insolvency of debtor.

Under the ordinary statute the suit must be brought whether the debtor is solvent or insolvent;²²⁵ it is the privilege of the surety to require suit to be

been made. In answer to this argument it is stated that, if the creditor was not bound to go into Illinois to sue the principal, it was not material whether the latter had property in that state or not.

²¹⁸ *Franklin v. Franklin* (1880) 71 Ind. 573.

²¹⁹ *Hughes v. Gordon* (1842) 7 Mo. 297. In this case the amount of the note in suit was such as to bring it exclusively within the jurisdiction of the justice of the peace. See *Sisk v. Rosenberger* (1884) 82 Mo. 46, where the amount was large enough to bring it within the jurisdiction of the circuit court.

As to nonresident cosurety, see *Perry v. Barret* (1853) 18 Mo. 140, *supra*, note 190.

²²⁰ *Hayward v. Fullerton* (1888) 73 Iowa, 371, 39 N. W. 651.

²²¹ *Meriden Silver Plate Co. v. Flory* (1886) 44 Ohio St. 430, 7 N. E. 753.

²²² See *Conklin v. Conklin* *supra*, note 217.

²²³ See *Hightower v. Ogletree* (1896) 114 Ala. 94, 21 So. 934, *supra*, note 204.

See *Phillips v. Riley* (1858) 27 Mo. 386, *supra*, note 215.

²²⁴ *Cockrill v. McCurdy* (1863) 33 Mo. 365.

²²⁵ *Reid v. Cox* (1840) 5 Blackf. (Ind.) 312, approved in *Overturf v. Martin* (1851)

brought and diligently prosecuted to final judgment, that the ability of the principal to pay may be tested.²²⁶

7. Applicability in case of death or incompetency of principal debtor.

A statute empowering the surety to give notice to the creditor to sue, and providing that upon the failure of the creditor to comply within a stated time the surety shall be discharged, has been held to have no application to a case in which the principal debtor died prior to the time of the service of notice;²²⁷ nor to a case in which the principal debtor died during the currency of the thirty days limited for the institution of the suit.²²⁸ These decisions are based upon a principle that makes it immaterial whether or not a personal representative has been appointed.²²⁹

But it has been held that, if a personal representative of the deceased debtor's estate has been appointed, the statute applies, and the surety is released by failure to bring suit after notice.²³⁰

A statute empowering the surety to require, by notice in writing, the creditor forthwith to institute a suit upon the contract, has been held not to apply in the case of an insane principal debtor under guardianship.²³¹ The court argues that it is clear such a statute contemplates a principal amenable to suit forthwith, "while, under the circumstances of this case, the law would not have permitted appellant [the creditor] to proceed directly against the principal, but it would have been incumbent upon the appellant to file a claim with the guardian, and in no event could a suit have been brought unless the claim had been disallowed by the guardian or disapproved by the court, and then suit would have to be against the guardian, and not against the principal."

8. Applicability in case of death of surety.

Such statutes as are under discussion in this note apply where the surety has died; the notice required by statute may

2 Ind. 507; *Hamrick v. Barnett* (1891) 1 Ind. App. 1, 27 N. E. 106; *Meriden Silver Plate Co. v. Flory* (1886) 44 Ohio St. 430, 7 N. E. 753; *Central Bank & T. Co. v. Hill* (1913) — *Tex. Civ. App.* —, 160 S. W. 1099.

On the contrary, it has been held that suit need not be brought where the debtor is insolvent at time of notice. *Robertson v. Angle* (1903) — *Tex. Civ. App.* —, 76 S. W. 317. The court relies on some New York cases decided under the equitable rule discussed supra. Also some Texas cases are cited which deal with another question. Apparently, the court in *Bumpus v. Lovejoy* (1917) — *Tex. Civ. App.* —, 196 S. W. 631, was of the opinion that insolvency of the principal excused suit.

It will be observed by reference to the discussion of the equitable rule above that a release under that rule is based upon the fact that the principal debtor became insolvent after notice, so that insolvency at the time of notice, under that rule, excused suit.

²²⁶ *Reid v. Cox* (1840) 5 Blackf. (Ind.) 312.

²²⁷ *Hickam v. Hollingsworth* (1853) 17 Mo. 475. In the course of the opinion it is stated that it may often turn out that more than thirty days (the time given by the statute in which to sue) may elapse after the death of the obligor before administration is granted on his estate; in such case notice to sue given a few days before the death must be entirely nugatory.

The general question of the effect of failure to present claim against the estate of a deceased or bankrupt principal, to release surety, is discussed in the note to *Yerxa v. Ruthruff*, 25 L.R.A.(N.S.) 139. L.R.A.1918C.

²²⁸ *Davis v. Gillilan* (1897) 71 Mo. App. 498.

²²⁹ In *Hickam v. Hollingsworth* (Mo.) supra, it is stated that notice to present the note or demand against the estate of the decedent "will not expedite the collection if given within ten days after administration granted, more than if given ten months after. The law allows one year after administration granted, before there can be any compulsory order or process against the administrator to pay demands. . . . Now it is clear that the legislature never contemplated forcing the holder of such claim to commence his suit against the administrators in the county court or probate court, and also against the other parties liable, too, in these courts, or to sue the administrator in one court and the security in the bond or note in another court."

It is apparently the theory of *National Bank v. Gilvin* (1913) — *Tex. Civ. App.* —, 152 S. W. 652, that a creditor is not bound to file his claim with an administrator although notified to do so by the surety, and it is held in this case that, even though he has filed his claim, "still this step did not in law impose upon him any duty of active diligence in obtaining payment of said claim, for the law imposes the duty of activity in such cases upon the surety rather than the creditor." There were other reasons, however, for denying relief to the surety in this case. See infra, note 231.

²³⁰ *Daily v. Robinson* (1882) 86 Ind. 382. See *Whittlesey v. Heberer* (1874) 48 Ind. 260, supra, note 214.

²³¹ *National Bank v. Gilvin* (Tex.) supra. The court concludes, however, that, even if the surety had statutory authority to require by notice the creditor to proceed

be given by the executor²³² or the administrator.²³³ And it may be given although the creditor has filed the notes for allowance in the probate court.²³³

9. Rights of surety after suit is begun on obligation.

A statute authorizing the giving of notice to the creditor, and requiring him thereupon to sue the principal debtor, is not available to a surety against whom, though alone, suit has already been begun by the creditor.²³⁴

The surety on the bond of an assignee for the benefit of creditors cannot, after suit has been brought against him to secure the amount of a judgment obtained against the assignee, on which an execution has been issued and returned nulla bona, give the notice required by a statute providing that a surety, co-obligor, or co-contractor, or one of several defendants to a judgment, may, by notice in writing to the creditor, require him to sue or issue execution within a stated time on penalty of releasing the person so giving the notice, as such statute does not apply to a case in which suit has been brought or in which execution has been issued against the principal.²³⁵

Nor is a surety against whom a judgment by default has already been obtained in an action on the note against both principal and surety, but in which process was returned not found as to the principal debtor, entitled to avail himself of such a statute.²³⁶

It has been held, however, under a statute

against the estate of an insane principal under guardianship, a pleading alleging such notice is deficient unless it goes further and avers that the notice was not complied with. The decision is based in part, also, upon the insufficiency of the notice. See *supra*, note 229.

²³² *O'Howell v. Kirk* (1890) 41 Mo. App. 523. "Any person" as used in such statute, it is stated, must be liberally construed to include the executor of a person bound as surety.

See *supra*, note 148.

²³³ *Hammond v. McHargue* (1913) 170 Mo. App. 497, 156 S. W. 725.

²³⁴ *Taylor v. Taylor* (1917) — Ala. —, 75 So. 912.

The notice in *Cummins v. Garretson* (1854) 15 Ark. 132, and *Thompson v. Robinson* (1879) 34 Ark. 44, was served after suit had been begun against the sureties, but no point was raised as to this; the notice was held insufficient to require suit.

²³⁵ *National Surety Co. v. Arterburn* (1901) 110 Ky. 832, 62 S. W. 862.

²³⁶ *Irwin v. Helgenberg* (1863) 21 Ind. 106. The statute involved in this case provided that, upon notice after maturity, the credi-

tor giving the creditor upon whom notice to sue has been served the right to bring the action himself or permit the surety to do so, that, where a note is signed by two debtors and a surety, and suit is begun, but service obtained on only one of the debtors and the surety, and thereafter the surety serves notice upon the holder of the note to bring suit against all the makers or permit him to do so in his own name and at his own expense, the failure of the holder to take any action in this regard until after the expiration of the time allowed by statute releases the surety, although the other debtor afterwards excepts service and judgment is taken against him at the trial.²³⁷

And it has been held that the filing of notes in the probate court does not prevent an administrator of the deceased surety from giving the notice under the statute.²³⁸

The equitable remedy is not available to a surety after judgment has been taken on the obligation.²³⁹

10. Rights of a surety not appearing as such on the instrument.

It is quite generally held that statutes such as those under consideration herein are available to a surety whose suretyship does not appear on the instrument, as against the payee.²⁴⁰ It may be shown by parol against the payee of a note that a person who has signed an instrument is in fact a surety, as the payee is presumed to know the relation the parties sustain

tor shall "bring his action upon such contract and prosecute the same to judgment." It is not stated against whom the action is to be brought.

²³⁷ *Shenandoah Nat. Bank v. Ayres* (1893) 87 Iowa, 526, 54 N. W. 367.

²³⁸ *Hammond v. McHargue* (1913) 170 Mo. App. 497, 156 S. W. 725. Apparently the notes were filed in the proceedings for settlement of the estate of the deceased surety, although this is not clear. The argument of the creditor was that she had a right to proceed against the signers of the note singly or jointly as she thought proper, and as she had already begun suit by filing the note for allowance in the probate court, she could not be required to proceed otherwise. In answer to this defense the court states: "We think the point not well taken. That right was not intended to permit her to destroy the right of a surety to give the statutory notice to sue."

²³⁹ See *McNeilly v. Cooksey* (1878) 2 Lea (Tenn.) 39, *supra*, note 55.

²⁴⁰ *Hamrick v. Barnett* (1890) 1 Ind. App. 1, 27 N. E. 106; *Meriden Silver Plate Co. v. Flory* (1886) 44 Ohio St. 430, 7 N. E. 753.

to each other;²⁴¹ this is held to be no violation of the rule that a written instrument cannot be varied by parol evidence, since it does not affect the terms of the contract, but establishes a collateral fact merely.²⁴² And such a showing may be made at law upon a sealed instrument where the statute has put sealed instruments upon the footing of commercial paper.²⁴³

There is, however, some authority to the effect that these statutes are not available to a surety not appearing on the instrument as such. The judgment of a lower Federal court, to the effect that sureties who jointly and severally, with the principal, promise to pay, and thereby admit themselves as principals in a joint and several sealed note, cannot set up their suretyship so as to be relieved upon failure of the creditor to sue upon notice, was affirmed upon appeal to the United States Supreme Court by an equally divided court.²⁴⁴ And it has been stated generally that, in order to sustain a plea by a surety that he was released by failure of the creditor to sue upon notice, "it must appear on the face of the note that he signed it as security."²⁴⁵

Where the suretyship does not appear on the face of the instrument,—the surety having signed the note apparently as maker though he might be only an accommodation maker, and in consequence only a surety,—and the note passes into the hands of a bona fide holder without notice of the suretyship, the surety cannot require such bona fide holder to sue.²⁴⁶

On the contrary, it has been held that notice may be given against a bona fide assignee of the note without notice of the suretyship.²⁴⁷

Where the suretyship does appear on the face of the instrument, the surety can require an assignee of the note to sue upon penalty of releasing the surety for failure.²⁴⁸

11. What contracts are within the operation of this rule.

A bond securing the payment of a stated sum of money by one who has been awarded the privilege of public weigher is a bond single for the payment of money, and not conditioned "to secure the performance of his trusts or the duty of his office," nor "for the performance of a covenant or agreement for the payment of money or delivery of property," within the meaning of a statute excluding such obligations from the operation of a statute relieving the surety in case the creditor fails to sue upon notice. Hence, the failure to sue after notice, by a surety on such bond relieves the surety.²⁴⁹

An indemnity bond given by a building contractor has been held to be within the meaning of a statute providing that any person bound as a surety upon any contract for the payment of money or the performance of any act, when the right of action has accrued, may require by notice in writing the creditor or obligee forthwith to institute suit upon such contract.²⁵⁰

But an indemnity bond given to a sure-

²⁴¹ Ward v. Stout (1873) 32 Ill. 399; Piper v. Newcomer (1868) 25 Iowa, 221; Coats v. Swindle (1874) 55 Mo. 31; Baker v. Kellogg (1876) 29 Ohio St. 663; Fowler v. Alexander (1870) 1 Heisk (Tenn.) 425.

It is stated in Trustees of Schools v. Southard (1889) 31 Ill. App. 359, that whether notice of the fact of suretyship existed or not cannot affect the question.

²⁴² Ward v. Stout (Ill.) supra.

²⁴³ Smith v. Clofton (1873) 48 Miss. 66.

²⁴⁴ Ellis v. Jones (1843) 1 How. (U. S.) 197, 11 L. ed. 100.

²⁴⁵ Payne v. Webster (1857) 19 Ill. 103. The action was apparently by an assignee of the note. Moreover, the statement in the text is apparently obiter, as it seems the suretyship did appear on the face of the instrument; at least, a decision of the trial court sustaining a demurrer to the plea and rendering judgment against the surety was reversed by the supreme court.

²⁴⁶ Rich v. Warren (1910) 185 Ga. 394, 69 S. E. 573. See Payne v. Webster (Ill.) supra.

²⁴⁷ The case of McCoy v. Lockwood (1880) 71 Ind. 319, is very obscure on this point. The note involved here was a joint L.R.A.1918C.

and several note of the debtor and his surety, apparently without any indication of suretyship on the face of the note. At any rate it is stated that the holder, to whom the notice was given, took the note in good faith without any knowledge of the suretyship, but that after he purchased the note and before its maturity he was informed by the surety that he was only surety on said note. The case was decided without any reference to the fact that the holder of the note, to whom the notice had been given, was an assignee, but on rehearing it was objected that the surety could not, after maturity of the note, avail himself of the remedy as to notice against a holder who was an assignee. Without directly discussing the relationship thus sustained by the holder, the court concludes that the surety was released by the holder's failure to sue as required in the notice.

²⁴⁸ Payne v. Webster, see comment supra, note 245.

²⁴⁹ Monticello v. Cohn (1886) 48 Ark. 254, 3 S. W. 30.

²⁵⁰ Prescott Nat. Bank v. Head (1907) 11 Ariz. 213, 90 Pac. 328, 21 Ann. Cas. 990.

ty company which signed an employee's fidelity bond, to protect it against loss on such fidelity bond, the indemnity bond not being signed by the employee nor by the indemnitors as sureties, is not within the operation of the statute giving any person bound as surety for another on any bond, bill, or note for the payment of money or the delivery of property the right to notify the creditor to commence suit against the principal debtor, and discharging such surety if the suit is not begun, since the statute is applicable only in cases where there is a principal debtor or obligor and a surety. A contract of indemnity is held distinguishable from a contract of guaranty or suretyship in that a contract of indemnity is an original and independent contract.²⁵¹

A bond given by an agent for the faithful performance of his duties and the payments by him of all moneys received does not come within the statute.²⁵²

It has been said that such a statute does not refer to obligations given for public use.²⁵³ Hence bonds given for school moneys to a county for the use of one of its school townships are held not to come within the provisions of a statute relating to sureties giving notice and being released by failure of the creditor to sue within the stated time. It is stated that no person has any special interest in the collection of such a bond, and one who becomes a surety must hold himself ready to pay it if the principal fails; that he will not be discharged on account of the neglect of public officers.²⁵⁴ So a bond executed to a county for the use and benefit of a fund derived from the sale of swamp land in that

county is not within the meaning of the statute.²⁵⁵

A bond given to a commissioner upon a judicial sale is not within the meaning of such a statute.²⁵⁶ The statute is held to have no reference to statutory bonds, such as forthcoming bonds taken in the progress of judicial proceedings.²⁵⁷

A statute providing for notice by and release of a surety on bonds, bills, and notes for the direct payment of money or property does not apply to a contract for the sale and delivery of personal property; hence the surety on such a contract is not entitled thereunder to give the stipulated notice and to be released upon failure of creditor to sue.²⁵⁸

A statute providing for the release of sureties upon "contracts for the payment of money, or the performance of any other contract in writing," by the failure of the creditor to sue upon notice after a right of action has accrued on the contract, has been held not to refer to a contract of suretyship arising from a conveyance of mortgaged premises and the assumption of the mortgage debt by the grantee, so that the grantors thereby become sureties as between themselves for the debt, since the statute refers to contracts in writing binding sureties, and not to contracts of suretyship arising by implication.²⁵⁹

Where, upon the dissolution of a partnership, one partner is to collect the assets of the firm and pay its debts, and the other is to pay his share of any deficits, the latter cannot, by paying a creditor of the firm one half of the amount of a firm note, make himself a surety as to such creditor, so that a failure of

²⁵¹ Hall v. Equitable Surety Co. (1917) 126 Ark. 535, 191 S. W. 32.

²⁵² Etina Ins. Co. v. Monaghan (1866) 38 Mo. 432.

But a bond guaranteeing the faithful performance of the contract of a machine agent by him was treated, in Davis Sewing Mach. Co. v. McGinnis (1868) 45 Iowa, 538, as being within the contracts covered by a statute authorizing the sureties for another for the payment of money or the performance of any other contract in writing to give notice to the creditor to sue thereon; but there is no discussion.

²⁵³ Cedar County v. Johnson (1872) 50 Mo. 225; Jasper County v. Shanks (1875) 61 Mo. 332; Johnson County v. Gilkeson (1879) 70 Mo. 645.

Official bonds or securities held as collateral are stated, in First Nat. Bank v. Homesley (1888) 99 N. C. 531, 6 S. E. 797, to be excepted from the operation of the North Carolina act.

²⁵⁴ Cedar County v. Johnson (1872) 50 L.R.A.1918C.

Mo. 225; Johnson County v. Gilkeson (1879) 70 Mo. 645.

²⁵⁵ Jasper County v. Shanks (1875) 61 Mo. 332.

²⁵⁶ Davis v. Sneed (1880) 33 Gratt. (Va.) 705. The theory of the court is that the commissioner is not a creditor within the meaning of this statute; another ground, not within the scope of the present note, is given for the decision in this case, so that it does not rest entirely upon the fact that the bond given to a commissioner is not within the terms of the statute.

²⁵⁷ Hobbs v. Taylor (1912) 11 Ga. App. 579, 75 S. E. 906.

See Carr v. Sutton (1912) 70 W. Va. 417, 74 S. E. 239, Ann. Cas. 1913E, 453, supra, note 74.

²⁵⁸ Taylor v. Beck (1861) 13 Ill. 376.

²⁵⁹ Fish v. Glover (1894) 154 Ill. 86, 39 N. E. 1081. But see Russell v. Weinberg (1877) 2 Abb. N. C. (N. Y.) 422, supra, note 73.

the creditor thereafter to sue for the balance of the note releases such partner.²⁶⁰ It is stated that, to entitle a party to proceed under the statutes relating to notice, he must have been a surety at the inception of the contract.

The indorser of a note is not a security within the meaning of such a statute, and is not relieved by failure of the creditor to sue after notice.²⁶¹ By the express terms of some statutes, the rights of a surety under such a statute have been extended to indorsers.²⁶²

It has been held that a statute empowering a person bound as surety "in a written instrument for the payment of money," to give notice to the creditor to sue, requiring him to commence an action on such instrument forthwith against the principal debtor, is not available to a surety unless he appears upon the same instrument upon which the principal debtor is liable. Accordingly, one who has given a separate writing guaranteeing generally the payment of any note or notes which the obligee therein may discount for and on behalf of a certain named company was held not entitled to the benefits of the statute, where there was no express provision in either the note or the guaranty incorporating or enacting into it the other.²⁶³

12. Effect of discharge of one surety upon cosureties.

The courts are not agreed as to whether the discharge of one surety upon failure of the creditor to sue after notice by such surety, as required by statute, discharges another surety or sureties. One line of authorities holds that

other sureties are not released. This is held under a statute providing that any person bound as security for another may, after action has accrued on the obligation, require the person having such right of action to begin suit, and if he fails to do so "such surety shall be exonerated from liability to the person notified;"²⁶⁴ and under a statute providing that, in case the creditor fails to commence suit, "the surety shall be discharged;"²⁶⁵ likewise under a statute empowering "any surety" to give the notice, and providing that in case of the failure of the creditor to bring suit as required "the surety who shall have given such notice shall be discharged from liability, and the creditor shall be barred from all recovery against him."²⁶⁶ It has been contended that the discharge of one surety must work a discharge of the other because the claim for contribution which the latter, in case of payment of the debt by him, had against the former by virtue of the original obligation, is thereby destroyed; but this contention is denied in the face of the statute which was involved in this case.²⁶⁶

A surety having been released by the failure of the creditor to sue after notice is not liable for contribution to his cosurety who has paid the debt.²⁶⁷

Under a statute providing that, "when any person or persons shall hereafter become bound as security or securities, . . . it shall . . . be lawful . . . [under certain stated circumstances] to require . . . creditor or creditors to put the bond, bill, or note . . . in suit," and providing further that, upon failure of creditor to comply with the

²⁶⁰ Fensler v. Prather (1873) 43 Ind. 119.

But see Colgrove v. Tallman (1876) 67 N. Y. 95, 23 Am. Rep. 90, supra, note 72.

²⁶¹ Clark v. Barrett (1853) 19 Mo. 39. The Missouri statute authorizes "any person bound as security for another" to give the notice. Freligh v. Ames (1860) 31 Mo. 253; Faulkner v. Faulkner (1880) 73 Mo. 327; Boatmen's Sav. Bank v. Johnson (1887) 24 Mo. App. 316.

That an indorser is not a surety within the meaning of the equitable rule, see supra, note 77.

The general question of the release of an indorser of a note by failure to enforce the liability of the maker is discussed in the note to Rogers v. Detroit Sav. Bank, 18 L.R.A. (N.S.) 530.

²⁶² Williams v. J. Ogg & K. Lumber Co. (1906) 42 Tex. Civ. App. 558, 94 S. W. 420; Central Bank & T. Co. v. Hill (1913) — Tex. Civ. App. —, 160 S. W. 1099.

²⁶³ Morrison v. Equitable Nat. Bank (1899) 9 Ohio S. & C. P. Dec. 31, 6 Ohio N. P. 7.

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See Fensler v. Prather (1873) 43 Ind. 119, supra, note 260.

²⁶⁴ Wilson v. Tebbetts (1874) 29 Ark. 579, 21 Am. Rep. 165. A statute in this jurisdiction made all contracts joint and several.

²⁶⁵ Trustees of Schools v. Southard (1839) 31 Ill. App. 359; Cochran v. Orr (1884) 94 Ind. 433.

In Martin v. Orr (1884) 96 Ind. 491, it is held that one surety is not released by the delay of the creditor in taking out execution, by a notice given by another surety to forthwith institute an action upon the note, since this notice cannot operate in favor of a surety other than the one giving the notice.

In Casson v. Rasback (1890) 36 Ill. App. 40, it is held that the release of one of the sureties who had attempted to give notice, from his obligation as surety, would not release other sureties.

²⁶⁶ Ramey v. Purvis (1860) 38 Miss. 499.

²⁶⁷ Letcher v. Yantis (1835) 3 Dana (Ky.) 160.

request "of such security or securities," the creditor shall forfeit his rights against such "security or securities," a failure of the creditor in a joint obligation to sue upon request from three of four sureties has been held to release the fourth.²⁶⁸

Another theory is that, in the case of joint suretyship, each surety is bound only for a ratable portion of the debt; that this liability cannot be increased, and that the release of one surety by the failure of the creditor to sue after notice from him does not release the remaining sureties, but leaves them still bound, but for the ratable portion of the debt only.²⁶⁹

13. Duty to attach debtor's property.

It has been held that the surety cannot impose upon the creditor the duty of attaching property of the debtor, even by offering to procure a bond for the attachment.²⁷⁰ A surety who has requested the creditor to attach property of the debtor is not released by the failure of the creditor to do so, where the surety has not shown that there were legal grounds for suing out the attachment.²⁷¹

14. Availability of the release as a defense at law.

As shown in II. b, 1, *supra*, the ma-

jority of courts hold the defense arising from failure to sue under the equitable rule a defense at law. It has been argued that the failure of a creditor to sue upon notice as required by statute is available to the surety as a defense only in equity; that it is not a defense in an action at law upon the instrument; this contention has been denied, as it clearly should have been.²⁷² Nor is this holding changed by a statutory provision that all persons signing an obligation are considered as principals, and no one of them can aver or show at law that he is security only, where the instrument sued on shows him to be a surety.²⁷³ That the release is a defense at law has been held in case of sealed instruments when such instruments are by statute put upon the footing of commercial paper.²⁷⁴

15. Waiver.

Stipulations given at the time of executing the instrument, and contained in the obligation or elsewhere, have been urged as depriving the surety of his right to give notice under such a statute. It has been held that a surety who has given consent for a valuable consideration that the holder of the instrument on which he is surety may grant any extension thereon which he deems proper

²⁶⁸ *Wright v. Stockton* (1834) 5 Leigh (Va.) 153. It is here stated by the court that, if the statute were taken literally, it would seem to require that, where there are more sureties than one, all should join in the requisition, but that this construction would in a great measure defeat the remedy intended to be provided for by the statute, and would put it in the power of one, where there were many sureties, to prevent the notice by refusing to join. It is further stated that the common-law principle attaching to all joint obligations is that the discharge of one obligor is the discharge of all, and that the act of the creditor, in refusing to sue upon a request of three of the sureties, discharges those giving the notice, and their discharge, under the operation of the common-law principle, discharges all sureties. Again it is stated that the release of three of the sureties changes the situation of the fourth one in that he has no further right to call on his cosurety for contribution.

²⁶⁹ *Routon v. Lacy* (1859) 17 Mo. 399. In this case there were two sureties; one of them having been released by the failure of the creditor to sue, the other was held liable to pay one half the demand.

²⁷⁰ *Robertson v. Angle* (1903) — Tex. Civ. App. —, 76 S. W. 317.

See also II. b, 6, *supra*, as to failure to enforce securities.
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²⁷¹ *Thompson v. Robinson* (1879) 34 Ark. 44.

There was held to be no security available to the creditor in *Bumpus v. Lovejoy* (1917) — Tex. Civ. App. —, 196 S. W. 631; hence the objection of the surety that he was released by failure to levy on the security was held unavailing.

²⁷² *State Bank v. Watkins* (1845) 6 Ark. 123; *Hempstead v. Watkins* (1845) 6 Ark. 317, 42 Am. Dec. 696.

²⁷³ *State Bank v. Watkins* (1845) 6 Ark. 123. This case does not contain any extended discussion of this point. The defense that the surety was relieved was demurred to on the ground that under the statute all persons signing an obligation are considered principals, and no one of them can aver or show at law that he is security only. The court states that the instrument itself purports to have been executed by defendant as security; that he is jointly and severally bound with his principal and cosecurity to the full extent for the payment of the note sued upon, unless discharged by some act or omission on the part of the payee to the prejudice of the security; that the bank, by failing to bring suit within thirty days after service of notice, discharged the surety from liability to it.

²⁷⁴ *Smith v. Clopton* (1873) 48 Miss. 66.

is not released by the failure of the holder to sue upon notice.²⁷⁵

But a stipulation contained in a joint and several note, that "the makers and indorsers severally waive presentment for payment, protest, and notice of protest, and the bringing of suit at the first term of court upon nonpayment of this note after maturity, and also consent that time of payment may be extended without notice thereof," is a waiver of the defense provided by such a statute.²⁷⁶

The mere waiver in a note of grace,

²⁷⁵ *Armour Fertilizer Works v. Bond* (1913) 139 Ga. 246, 77 S. E. 22. The extension in this case was granted in a writing apparently executed on the same date as the note, which immediately followed the signature of the principal maker and contained the following stipulation: "For value received the undersigned, jointly and severally, hereby guarantee the payment of the within note at maturity, and waive demand, protest, and notice of nonpayment thereof, and consent that the holder may grant any extension on within note that he deems proper." It is stated that the surety is bound by the written stipulation in which he consents to any extension of time, and he cannot afterwards at will revoke the

protest, notice, and presentation for payment, however, has been held not to be a waiver of the right of the surety to give notice under the statute.²⁷⁷

And a provision in a note that "no extension of the time of payment with or without our knowledge, by the receipt of interest or otherwise, shall release us, or either of us, from the obligation of payment," has been stated not to be a perpetual waiver of a right given by the statute to the surety to demand an effort at collection by the payee for the protection of the surety.²⁷⁸

written consent which he has given, directly, or by implication, as by giving the notice to sue immediately. At the time of extending credit to the principal debtor the holder of the instrument had the right to protect himself against such a defense, and he, by securing for a valuable consideration the consent of the surety to an extension, has secured to himself complete protection against the plea of the surety based upon the failure to sue after notice.

²⁷⁶ *Naylor v. Anderson* (1915) — Tex. Civ. App. —, 178 S. W. 620.

²⁷⁷ *Central Bank & T. Co. v. Hill* (1913) — Tex. Civ. App. —, 160 S. W. 1099.

²⁷⁸ *Trustees of Schools v. Southard* (1889) 31 Ill. App. 359. W. A. E.

ILLINOIS SUPREME COURT.

FRANK PASKEWIE, by Guardian,
v.
EAST ST. LOUIS & SUBURBAN RAIL-
WAY COMPANY, Appt.

(281 Ill. 385, 117 N. E. 1035.)

Infant — judgment — right of next friend to satisfy.

1. The next friend of an infant is not authorized to receive satisfaction of a judgment in favor of the infant where, by statute, none but a legally qualified guardian is authorized to receive and take charge of the property or estate of a minor.

For other cases, see Infants, III. in Dig. 1-52 N. S.

Same — satisfaction by attorney.

2. An attorney employed by a next friend of an infant has no authority to receive payment and enter satisfaction of a judgment recovered for the infant.

For other cases, see Attorneys, II. d, in Dig. 1-52 N. S.

Same — satisfaction by father.

3. A father cannot, solely by reason of

Note. — As to right of next friend to receive payment of, and satisfy, judgment in behalf of infant, see annotation following this case, post, 55.
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his parental relation to his child, receive payment and enter satisfaction of a judgment recovered in favor of the child.

For other cases, see Parent and Child, I. in Dig. 1-52 N. S.

Pleading — payment to infant — sufficiency.

4. A plea of payment to plaintiff of a judgment in favor of an infant is good, since its effect is that the payment was made to the guardian.

For other cases, see Pleading, III. d, in Dig. 1-52 N. S.

Interest — infant's judgment — want of guardian.

5. That no guardian had been appointed for an infant in whose favor a judgment had been entered will not prevent the accrual of interest on the judgment.

For other cases, see Interest, I. d, in Dig. 1-52 N. S.

(December 19, 1917.)

A PPEAL by defendant from a judgment of the Appellate Court, Fourth District, affirming a judgment of the Circuit Court for Madison County in plaintiff's favor in an action upon a judgment recovered by plaintiff against defendant. Reversed.

The facts are stated in the opinion.

Messrs. Williamson, Burroughs, & Ryder for appellant.

Messrs. Hiles & Simpson, for appellee:

An attorney of record representing the next friend of an infant plaintiff, or representing the infant himself, has no authority to receive the money in settlement of a judgment in favor of such infant and satisfy it of record.

Greenburg v. New York C. & H. R. R. Co. 210 N. Y. 505, 104 N. E. 931; *Heiter v. Joline*, 135 App. Div. 13, 119 N. Y. Supp. 819.

The next friend of an infant plaintiff has no authority to receive the money in settlement of a judgment in favor of said infant and satisfy it of record.

Greenburg v. New York C. & H. R. R. Co. supra; *Horowitz v. Independent Western Star Order*, 183 Ill. App. 162; 22 Cyc. 704.

The father of an infant has no authority to receive the money in settlement of a judgment in favor of said infant and satisfy it of record.

Perry v. Carmichael, 95 Ill. 519.

A lawfully appointed and duly qualified guardian of an infant is the only person who can receive the money in settlement of a judgment in favor of said infant and satisfy it of record.

Greenburg v. New York C. & H. R. R. Co.; *Perry v. Carmichael*; and *Horowitz v. Independent Western Star Order*,—supra.

If an attempt is made to satisfy a judgment, but the attempt shows on its face that it is not regular, and is not done under lawful authority, the attempted satisfaction need not be set aside before suit can be brought on said judgment.

Seymour v. Haines, 104 Ill. 557.

The fact that an infant has no guardian at the time judgment is rendered in his favor is no excuse for the payment by the party liable on said judgment to a party not entitled under the law to receive it.

Perry v. Carmichael, 95 Ill. 519; *Horowitz v. Independent Western Star Order*, 183 Ill. App. 162.

A plea of payment in an action upon a record, which does not allege satisfaction of the record, is bad on demurrer.

1 Chitty, Pl. 10th Am. ed. p. 485; *Pyle v. Crebs*, 112 Ill. App. 480; *Harding v. Hawkins*, 141 Ill. 572, 33 Am. St. Rep. 347, 31 N. E. 307.

Cooke, J., delivered the opinion of the court:

This is an appeal by the East St. Louis & Suburban Railway Company from a judgment of the appellate court for the fourth district, affirming a judgment of the circuit court of Madison county in an action of L.R.A.1918C.

debt brought by Frank Paskewie, a minor, by H. C. Gerke, his guardian, and comes to this court upon a certificate of importance.

The declaration consists of one count, and alleges that Frank Paskewie, by John Paskewie, his next friend, on August 10, 1914, recovered a judgment against appellant for \$444 and costs in the St. Clair county circuit court; that the same remains in full force; and that appellant has not paid to appellee the amount of said judgment or any part thereof, but refuses to do so. Appellant filed three pleas, to which demurrers were sustained, and then, upon leave granted, filed an additional plea, to which a demurrer was also sustained. The appellant elected to stand by its pleas, and judgment was rendered for \$478.96, \$34.96 of which was the amount of accrued interest from August 10, 1914, the date of rendition of judgment in the circuit court of St. Clair county.

By its first plea the appellant stated that it "did, on the 10th day of August, 1914, pay to the plaintiff the said sum of \$444 damages recovered by said plaintiff against the defendant in the St. Clair county circuit court, as in said declaration alleged." By its second plea it alleged that after the recovery of the judgment declared upon, it paid the attorney of record of the plaintiff in the suit in which the judgment was recovered the said sum of \$444, together with costs. By the third plea it was alleged that payment had been made to the attorney for plaintiff in the suit in the circuit court of St. Clair county, who was then an attorney at law and the attorney of record for the plaintiff, and that said attorney thereupon discharged and satisfied the said judgment of record. The additional plea alleged that appellant, after the recovery of the judgment sued on, caused the sum of \$444 to be paid to the father of plaintiff as full payment and discharge of that judgment; that the plaintiff was then, and yet is, a minor, and that the father was next friend of plaintiff in the suit in which the judgment declared on was recovered, and accepted said sum in payment and discharge of that judgment; that plaintiff then was, and since is, a minor, living with his father as a member of his family; that the sum so paid to the father was expended for physicians' bills, care, maintenance, education, and other necessities for the sole use and benefit of plaintiff, prior to the bringing of this suit; and that at the time of such payment to the father the plaintiff had no guardian.

The principal question raised by these pleadings is whether a judgment secured by a minor may be satisfied by payment of the

amount recovered to the next friend or his attorney. In this state there is no statute which expressly or by implication authorizes such a payment. Under our statutes the only person authorized to receive and take charge of the property or estate of a minor is the legally qualified guardian, and it is the general rule that no one but the legal guardian of an infant has authority to receive payment and enter satisfaction of a judgment recovered in favor of such infant. The duty of the next friend begins and ends with the prosecution of the infant's suit, unless by statute he is authorized to take further action after the termination of the suit. The precise question here raised has never before arisen in this state, and there is not a great volume of authority in other jurisdictions. The weight of authority in jurisdictions where no statutory provision on the subject exists is to the effect that the next friend does not have the right to receive payment of and to satisfy a judgment recovered in behalf of the infant. See *Smith v. Redus*, 9 Ala. 99, 44 Am. Dec. 429; *Glass v. Glass*, 76 Ala. 368; *Barbee v. Williams*, 4 Heisk. 522; *Miles v. Kaigler*, 10 Yerg. 10, 30 Am. Dec. 425; *Benton v. Pope*, 5 Humph. 392; *Cody v. Roane Iron Co.* 105 Tenn. 515, 58 S. W. 850; *Fletcher v. Parker*, 53 W. Va. 422, 97 Am. St. Rep. 991, 44 S. E. 422; *Gulf, C. & S. F. R. Co. v. Styron*, 66 Tex. 421, 1 S. W. 161; *Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 60 Am. Rep. 32, 3 S. W. 705; *Greenburg v. New York C. & H. R. R. Co.* 210 N. Y. 505, 104 N. E. 931; *Allen v. Roundtree*, 1 Speers, L. 80; 22 Cyc. 407. These cases are grounded upon sounder reasoning than the few holding to the contrary. While the next friend acts by the appointment of court, express or implied, and is subject to the orders and direction of the court, and may be removed, he acts only for the purposes of the suit. In the absence of any statutory provision he is not required to give a bond to the infant, and is not authorized to receive any of the infant's property. To hold that a demand due an infant could be discharged by payment to one who was not legally authorized to receive it, and who could be forced to pay the money over only in case he was solvent, would not only result in depriving an infant of that protection which the law has ever thrown around him, but would be in direct conflict with our Guardian and Ward Act.

As the next friend has no authority to receive payment and enter satisfaction of the judgment, it necessarily follows that the attorney, who derives his authority solely from the next friend, is not clothed with such authority. *Collins v. Gillespy*, 148 Ala. 558, 121 Am. St. Rep. 81, 41 So. 930. L.R.A.1918C.

So far as the allegation in the third plea, that appellant paid the amount of the judgment to the father of plaintiff, is concerned, that allegation does not present a defense, because the father has no right, by reason of the parental relation, to the custody of the estate of his minor child. *Perry v. Carmichael*, 95 Ill. 519.

The court properly sustained the demurrers to the second and third pleas, and to the additional plea.

It is insisted that, in any event, the first plea is a good plea of payment. That plea in general terms alleges the payment of the amount of the judgment to the plaintiff. It will be noted that the action in the case under consideration was brought by Frank Paskewie, a minor, by H. C. Gerke, his guardian. Our statute on guardian and ward provides that the guardian shall demand and sue for, and receive in his own name as guardian, all the personal property of and demands due his ward. Regarding the guardian as the only proper person plaintiff in this action, the plea squarely alleges payment of the amount of the judgment secured in the circuit court of St. Clair county to the guardian. Treating the minor as the plaintiff here, as is done by counsel, the plea is still a good plea of payment, because under the statute the only legal payment that could be made to the minor would be one made to his legally qualified guardian, and the effect of the allegation of this plea is that the payment was so made. Under this plea appellant would have a right to prove, if it could do so, that it had paid the amount of this judgment to the legal guardian of the minor. The plea was sufficient, and the court erred in sustaining the demurrer thereto.

Appellant contends that the damages assessed were excessive, as it appears from the record that the judgment was secured on August 10, 1914, and no guardian was appointed for the minor until September 14, 1914, and as there was no one authorized to receive the amount of the judgment during that period, it should not bear interest until after the appointment of the guardian. A judgment in this state bears interest from the date it is rendered, and there is no reason for any exception in this case. Appellant had the right, if it desired to pay the judgment and prevent the accruing of interest, to apply to the probate court for the appointment of a guardian for the minor.

The judgments of the Appellate and Circuit Courts are reversed, and the cause is remanded to the Circuit Court, with directions to overrule the demurrer to the first plea.

Annotation—Right of next friend to receive payment of, and satisfy, judgment recovered in behalf of infant.

The present annotation supplements that to *Wood v. Claiborne*, 11 L.R.A. (N.S.) 913.

As to right of parent, guardian, or next friend to compromise infant's cause of action for personal injuries, see note to *Missouri P. R. Co. v. Lasca*, 21 L.R.A. (N.S.) 338, which is supplemented by the annotation to *Leslie v. Procter & G. Mfg. Co.* post, 58. As to right of attorney employed by guardian ad litem or next friend of an infant to receive payment and satisfy a judgment recovered in behalf of the infant, see note to *State ex rel. Lane v. Ballinger*, 3 L.R.A. (N.S.) 72.

As is stated in the earlier note, the weight of authority in jurisdictions not controlled by statutory provision on the subject is against the right of a next friend to receive payment of, and satisfy, a judgment recovered in behalf of an infant. For late cases supporting this doctrine, see *Aley v. Missouri P. R. Co.* (1908) 211 Mo. 460, 111 S. W. 102; *Greenburg v. New York C. & H. R. R. Co.* (1914) 210 N. Y. 505, 104 N. E. 931; and *Fidelity Trust Co. v. Buchner* (1912) 26 Ont. L. Rep. 367, 22 Ont. Week. Rep. 72, 5 D. L. R. 282. This is upon the theory that the duty of a next friend begins and ends with the prosecu-

tion of the infant's suit. *Greenburg v. New York C. & H. R. R. Co.* (N. Y.) supra. And see *Fidelity Trust Co. v. Buchner* (Ont.) supra, holding that the next friend is brought into court simply to protect the infant's rights and guarantee costs.

And for a better reason a next friend is not entitled to receive payment of and satisfy a judgment recovered in behalf of an infant where by statute none but a legally qualified guardian is authorized to receive and take charge of the property and estate of a minor. *PASKIEWIE v. EAST ST. LOUIS & SUBURBAN R. Co.* ante, 52. And again, in *Horowitz v. Independent Western Star Order* (1913) 183 Ill. App. 162, it was held, without reference to any statute, that while the prosecution of a suit for an infant may be undertaken and conducted by a next friend, he is not authorized to collect the judgment, the court saying that payment should be into the court, or to a lawfully appointed guardian.

And in Texas a judgment should not authorize the payment thereof to the next friend of an infant plaintiff without requiring him to give bond, as required by the Texas statutes. *Parriss v. Jewell* (1909) 57 Tex. Civ. App. 199, 122 S. W. 399. G. J. C.

KANSAS SUPREME COURT.

ALFRED LESLIE

v.

PROCTER & GAMBLE MANUFACTURING COMPANY, Appt.

(102 Kan. 159, 169 Pac. 193.)

Infant — settlement of claim by father — effect.

1. Where a minor has sustained personal injuries which his father and the wrongdoer settled for an inadequate sum, such minor, on attaining his majority, may bring an action against the wrongdoer for his injuries notwithstanding the settlement negotiated by his father.

For other cases, see Infants, III. in Dig. 1-52 N. S.

Headnotes by **DAWSON, J.**

Note. — The right of a parent, guardian, or next friend to compromise an infant's cause of action for personal injuries is discussed in the annotation following this case, post, 58. L.R.A.1918C.

Compromise — by father — child's claim.

2. An inadequate settlement by a father for his minor son's injuries does not bar an action by the son on attaining his majority, although the father and the wrongdoer had by agreement filed an action in a city court (like that of a justice of the peace) for the agreed sum, and judgment had been taken thereon against the wrongdoer without evidence, without judicial consideration, and with only a perfunctory entry of the judgment by the city court for the agreed sum. *For other cases, see Infants, III. in Dig. 1-52 N. S.*

Equity — setting aside compromise.

3. In the circumstances narrated in paragraphs 1 and 2 of the syllabus, it was unnecessary for the son to give any countenance to the judgment in the city court, or to appeal from that judgment; he could properly proceed by an independent action in a court having general jurisdiction both at law and in equity, and have the judgment of the city court set aside as a pertinent incident to the securing of adequate redress for his injuries.

For other cases, see Judgment, VII. in Dig. 1-52 N. S.

Judgment — suit to set aside.

4. On attaining his majority, the plaintiff brought an action in the district court, in which his petition, in substance, alleged that when he was seventeen years old he sustained an injury to his hand while in defendant's employment and through the latter's negligence; that his father, without authority, settled plaintiff's claim for damages for \$300, a grossly inadequate sum; that an attorney employed by defendant filed an action against the defendant in a city court for the agreed amount; that another attorney employed by defendant confessed judgment for the agreed amount; that there was no trial, no evidence, no judicial consideration of the facts nor of the propriety or adequacy of the settlement. All the pertinent facts were pleaded. Held, that a demurrer to such a petition was properly overruled.

For other cases, see Pleading, VII. c, in Dig. 1-52 N. S.

Appeal — continuation pending.

5. When a litigant has determined to bring an intermediate appealable order of the district court to the supreme court for review, he commits no impropriety and loses no rights by suggesting to the district court the advisability of continuing the cause in the trial court until the supreme court determines the question presented by the appeal.

For other cases, see Appeal and Error, VII. k, 2, in Dig. 1-52 N. S.

(December 8, 1917.)

APPEAL by defendant from an order of the District Court for Wyandotte County overruling a demurrer to the petition in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. C. Angevine for appellant.

Messrs. J. O. Emerson and David J. Smith, for appellee:

No party whose appearance has been entered in court without authority is bound to ratify the act and appear in the case, nor is an infant against whom a judgment has been confessed without authority bound to adopt the action even by appealing from it.

Missouri P. R. Co. v. Lasca, 79 Kan. 318, 21 L.R.A.(N.S.) 338, 99 Pac. 616, 17 Ann. Cas. 605; Shaw v. Rowland, 32 Kan. 157, 4 Pac. 146; List v. Jockheck, 45 Kan. 748, 27 Pac. 184; Blair v. Blair, 98 Kan. 757, 153 Pac. 544.

Equity will relieve against a judgment obtained by extrinsic fraud.

Simpson v. Kimberlin, 12 Kan. 579; Electric Plaster Co. v. Blue Rapids City Twp. 81 Kan. 730, 25 L.R.A.(N.S.) 1237, 106 Pac. 1079; Garrett Biblical Institute v. Minard, 82 Kan. 338, 108 Pac. 80; Blair v. Blair, L.R.A.1918C.

96 Kan. 757, 153 Pac. 544; United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93; Pittsburgh, C. C. & St. L. R. Co. v. Haley, 170 Ill. 610, 48 N. E. 920.

A record in a justice's court does not import verity, but evidence may always be given of the actual proceedings.

Re Baum, 61 Kan. 117, 58 Pac. 958; State v. Cole, 93 Kan. 819, 145 Pac. 842; Pearce v. Olney, 20 Conn. 544.

Neither the father of the plaintiff nor any attorney for the plaintiff or his parent, much less an attorney furnished by the defendant, had any authority to appear for the infant and take judgment without evidence and judicial hearing.

Missouri P. R. Co. v. Lasca, 79 Kan. 311, 21 L.R.A.(N.S.) 338, 99 Pac. 616, 17 Ann. Cas. 605; Reynolds v. Fleming, 30 Kan. 106, 46 Am. Rep. 86, 1 Pac. 61; State ex rel. Knittle v. Will, 86 Kan. 197, 119 Pac. 379; Steele v. Duncan, 47 Kan. 511, 28 Pac. 206; Lillibridge v. Ross, 59 Mo. 217; 1 Black, Judgm. § 374; 23 Cyc. 993.

Since infants have no right to commence or control a suit brought against them, anyone who commences, or assists in commencing, a suit on behalf of an infant, is bound to see that the infant receives his legal and just rights.

Newland v. Gentry, 18 B. Mon. 666; Rals-ton v. Lahee, 8 Iowa, 17, 74 Am. Dec. 291.

Dawson, J., delivered the opinion of the court:

The plaintiff brought this action for damages sustained while in defendant's employment by an injury to his hand. The petition alleged that in 1912, when plaintiff was a minor about seventeen years old, he was employed in defendant's packing house; that while so employed he slipped and fell on a wet and oily floor, and his hand was caught and crushed in a box nailing machine; that the machine was defective, and had no fender or guard about it; and that it was practical to have such a guard. It was also alleged that in 1913 the defendant made an agreement with plaintiff's father whereby defendant was to pay plaintiff and his father the sum of \$300 in settlement of plaintiff's claim for the injuries sustained by him, and that a judgment for that agreed sum should be rendered for plaintiff and against the defendant in a city court (like that of a justice of the peace) in Kansas City, Kansas; that, pursuant thereto, the defendant's attorney caused a petition to be drawn, entitled "Alfred Leslie, a minor under the age of twenty-one, by and through his father as guardian and next friend, Willey Leslie, plaintiff, versus The Procter & Gamble Manufacturing Company, a corporation, defendant," wherein it was

alleged that the plaintiff was entitled to recover from the defendant the sum of \$300 for the injuries to the plaintiff. The defendant employed another attorney to sign the said petition as attorney for the plaintiff, but the said attorney was not in fact attorney for the plaintiff, but was one of the attorneys for the defendant. The petition continues:

"That the defendant, by its attorneys, . . . caused the petition to be filed in the city court, . . . and caused a judgment to be entered . . . in favor of the plaintiff Alfred Leslie and against [itself] . . . for three hundred dollars (\$300). . . .

"The aforesaid judgment was entered solely by agreement and consent of the defendant and Willey Leslie. No trial was had before the court, and no evidence was offered or presented to the court. No hearing or inquiry was made by the court into the merits of the case or of the rights of the plaintiff, and no judicial examination of the facts was made by the court to determine whether the settlement was reasonable and proper. . . . At the time of said proceeding, Willey Leslie was not the legal guardian of Alfred Leslie, nor was he appointed by the said city court as next friend of Alfred Leslie, nor did he qualify as next friend of Alfred Leslie in the said action in the city court.

"The plaintiff has been and is greatly aggrieved and hindered by the said settlement and judgment in the city court. Said settlement was not fair to the plaintiff, and plaintiff was thereby deprived of his substantial rights, and has been and will be defrauded out of a large sum of money, to wit, three thousand dollars (\$3,000), which he should recover from the defendant, unless said settlement and judgment is set aside. The said proceeding and judgment were illegal, null, and void, and should be vacated and held for naught. As against said judgment the plaintiff has no adequate remedy at law. . . .

"The plaintiff, Alfred Leslie, became twenty-one years of age August 21, 1916, and he disaffirmed the aforesaid settlement for three hundred dollars (\$300) within a reasonable time after he became of age, by bringing this suit on the 12th day of September, 1916.

"The plaintiff has not had any power or control of any part of the three hundred dollars (\$300) paid on said pretended settlement, since the plaintiff arrived at the age of majority."

Defendant's demurrer to plaintiff's petition was overruled, and the correctness of this ruling is the subject of this review.

The appellee raises a preliminary question. L.R.A.1918C.

tion, that defendant cannot have this ruling determined at this time because its counsel filed a motion in the district court, alleging that it had appealed to the supreme court on the ruling on the demurrer, and that "this defendant therefore respectfully requests this court to make an order staying further proceedings in this court until said appeal shall have been disposed of by the supreme court."

The rule announced in *Union P. R. Co. v. Estes*, 37 Kan. 229, 15 Pac. 157, does not cover the incident at bar. The defendant, having appealed, could ask for nothing from the district court as a matter of right, but there was no impropriety in suggesting a stay, a continuance, until the supreme court had determined the question appealed. The practice of asking a continuance or suggesting to the trial court its propriety when an intermediate appeal is taken is common, although it is not ordinarily made with the formality of a written motion.

Passing, then, to the main question, it is defendant's contention that the district court had no jurisdiction to entertain this cause as an independent action, and that it could only exercise an appellate jurisdiction to affirm, reverse, modify, or vacate the judgment of the city court. Defendant also insists on the application of the ordinary rule that a judgment can only be vacated in the court in which it is rendered.

In this case, however, it should be noted that the petition contains allegations of extrinsic fraud not involved in the issues in the city court case, and the judgment is therefore properly subjected to a direct attack. Moreover, the judgment in the city court was not upon the merits, but upon an unauthorized agreement between plaintiff's father and the defendant. There was no judicial consideration of the matter at all in the city court, not even on the question whether the infant's interests were being protected by the agreement to which the city court was asked to give its judicial sanction. There was in fact no judgment in any proper sense, but merely a mummery of form in a vain endeavor to give some colorable judicial approval of the settlement.

In *McAdow v. Boten*, 67 Kan. 136, 72 Pac. 529, it was held that an independent suit could be maintained to set aside a sale of property and to set aside an administrator's deed thereto which had been procured through extrinsic fraud.

In *Fincke v. Bundrick*, 72 Kan. 182, 4 L.R.A.(N.S.) 820, 83 Pac. 403, where a sale of real estate had been made by an executor pursuant to an order of the probate court, fraudulently procured, a minor, whose interests had been sacrificed in such sale,

was permitted, on attaining her majority, to maintain an action to set aside the sale and to set aside the executor's deed. The court said: "Since it was not possible for the plaintiff to obtain relief in the probate court, administration having been closed and the executor finally discharged, the district court had jurisdiction to entertain her suit. *Gafford v. Dickinson*, 37 Kan. 287, 15 Pac. 175; *McAdow v. Boten*, 67 Kan. 136, 72 Pac. 529." 72 Kan. 189, 83 Pac. 406.

It is not discernible how the wrongs of plaintiff, alleged in his petition, could have been redressed in the city court nor by an appeal from that judgment. The city court judgment, treating it as a bona fide judgment, was for the full amount prayed for in the petition prepared by an attorney furnished by defendant, and filed by him under the unauthorized agreement made with plaintiff's father.

In *Union P. R. Co. v. Luck*, 79 Kan. 320, 100 Pac. 278, an independent action in an infant's behalf was entertained to set aside a judgment theretofore rendered in favor of the infant for an inadequate sum for personal injuries. That action was brought in the same court—a court of record—in which the prior judgment had been rendered. This court said that "as a general rule a judgment can only be vacated in the court in which it was rendered." (p. 320.) But as we have seen in *McAdow v. Boten* and *Fincke v. Bundrick*, supra, the jurisdiction of the district court may be invoked to set aside judgments of an inferior court for fraud extrinsic to the issues without the formality of seeking their correction in the inferior court which rendered such judgment. And if this may be done with reference to such judgments in the probate court, it may certainly be done with reference to such judgments of a city court whose status is but that of a justice of the peace. In 1 *Black on Judgments*, § 297, it is said: "The power to vacate judgments is said to be incident to all courts of record, and to be usually exercised under restraints imposed by their own rules. It is not commonly possessed by the inferior tribunals,—courts not of record,—such as the courts of magistrates or justices of the peace, though in some of the states it may be."

Where the fraud complained of is extrinsic to the issues, an independent action is permitted, and ordinarily equitable relief is a necessary and pertinent feature of such an action, and it is not necessary to bring it in the inferior court where the first judgment was rendered, especially if such court has no equitable jurisdiction. Moreover, a mere vacation of the collusive judgment in the city court was not all the relief the plaintiff was entitled to. Tested by defendant's demurrer, he is entitled to relief for a sum ten times greater than the city court could give.

It is urged that the plaintiff's petition is but a collateral attack on the judgment entered in the city court. We think not. It is a direct attack. "Proceedings instituted for the purpose of destroying, impairing, or modifying the force or effect of a judgment for all cases, such as proceedings to reverse, vacate, set aside, declare void, suspend, modify, or perpetually enjoin a judgment, are direct proceedings." *Mastin v. Gray*, 19 Kan. 458, 466, 27 Am. Rep. 149.

As against a demurrer the petition sufficiently alleged the plaintiff's grievances, the misconduct of defendant and of plaintiff's father; it shows that there was in fact no trial, no judicial consideration, no bona fide judgment, but merely a complainant and perfunctory acquiescence by the city court in the unauthorized settlement; it shows the predicament of plaintiff on account of the collusive proceedings, and that only the strong arm of a court of equity can sweep the rubbish of the settlement out of his way so that his wrongs may be adequately redressed.

In all the discussion of the facts of this case, it should not be overlooked that the court only assumes the facts pleaded in the petition to be true for the purpose of testing the propriety of the demurrer. The proof may wholly fail. When defendant answers and the evidence is adduced, a radically different state of affairs may be disclosed.

But the facts as pleaded do disclose that plaintiff has no other adequate remedy, and the demurrer to his petition was properly overruled.

Annotation—Right of parent, guardian, or next friend to compromise infant's cause of action for personal injuries.

The present annotation supplements that to *Missouri P. R. Co. v. Lasca*, 21 L.R.A.(N.S.) 338.

And as to right of next friend to receive payment of and satisfy judgment recovered in behalf of infant, see note L.R.A.1918C.

to *Wood v. Claiborne*, 11 L.R.A.(N.S.) 913, and the supplemental annotation following *Paskewie v. East St. Louis & S. R. Co.* ante, 55.

The doctrine of the earlier cases, that a parent, guardian, or next friend cannot

compromise or settle an infant's cause of action for personal injuries, is supported by *Butler v. Winchester Home* (1914) 216 *Mass.* 567, 104 N. E. 451, citing *Tripp v. Gifford* (1891) 155 *Mass.* 109, 31 *Am. St. Rep.* 530, 29 N. E. 208, which is set out and quoted at some length in the earlier note. So, in *Joyce v. Washington Storage Warehouse & Van Co.* (1917) 176 *App. Div.* 538, 163 N. Y. *Supp.* 519, it was held that neither a compromise of an infant's cause of action for personal injuries, signed by a guardian ad litem and the infant, nor a payment of the agreed sum to such guardian, affected the infant's rights against the wrongdoer where no order had been obtained allowing a compromise and no bond had been given by the guardian ad litem, as required by a statute providing that an infant's guardian ad litem shall not receive money of or for the infant until he has given sufficient security, approved by the court.

And where a parent and the wrongdoer have settled an infant's cause of action for an inadequate sum, it has been held that the minor, on attaining his majority, may maintain an action against the wrongdoer notwithstanding the settlement negotiated by the parent. *LESLIE v. PROCTER & G. MFG. CO.* ante, 55. And this notwithstanding the taking of a judgment in an inferior court against the wrongdoer pursuant to an agreement with the father, where the same was taken without evidence, without judicial consideration, and with only a perfunctory entry of a judgment for the agreed sum, it being in such a case unnecessary to either recognize the judgment or appeal therefrom, and the proper procedure being to bring an independent action and have the judgment set aside as a pertinent incident of the securing of redress for the wrong. *Ibid.*

But, applying the rule that judgments and orders cannot be collaterally attacked for fraud not affecting the jurisdiction, it has been held that a judgment of dismissal in an action by the next friend of an infant to recover damages for personal injuries, entered after the action had been compromised and the claim released by the next friend, cannot be collaterally attacked. Thus, in *Clark v. Southern Can Co.* (1911) 116 *Md.* 85, 36 *L.R.A.* (N.S.) 980, 81 *Atl.* 271, where an infant brought an action by her next friend for personal injuries, which claim was compromised and the case marked "agreed and settled," and which compromise and settlement were made under the eye and sanction of the

court and pursuant to a statute expressly authorizing the next friend who has brought a suit at law for the benefit of an infant to compromise and settle the same, it was held that such next friend could not institute another suit in the same court to recover against the same person for the same injuries while the record of the prior suit remained, although it was claimed that the compromise, release, and consequent entry were procured by fraud, the court saying: "We think from both principle and authorities that the release in the prior case and the orders based thereon upon which the entry of 'agreed and settled' was made under the eye and with the sanction of the court in that case cannot, from the facts and circumstances here disclosed, be annulled and set aside by the collateral proceeding thereafter instituted by the appellant against the appellee, and from the judgment in which case this appeal is taken. The appellant is asking in a collateral proceeding instituted in a court of law that a judgment previously entered in a prior case by the same court, in a suit brought to recover for the same injuries for the recovery of which this suit is instituted, be set aside and annulled. The plaintiff's remedy in this case was either by motion to strike out the judgment, filed in due season in the court in which the judgment was entered, or by a direct proceeding instituted in a court of equity within a reasonable time after the discovery of the facts which are supposed to establish the fraud for the setting aside and annulment of the judgment."

G. J. C.

MASSACHUSETTS SUPREME JUDICIAL COURT.

FRANCESCO AGUGLIA

v.

LUIGIA CAVICCHIA.

(— *Mass.* —, 118 N. E. 283.)

Landlord and tenant — eviction — collecting rent from subtenants.

1. The collecting by a property owner of rent from subtenants, and forbidding them to pay rent to the tenant, do not evict the tenant.

For other cases, see Landlord and Tenant, II. d, in Dig. 1-52 N. S.

Note. — As to eviction by interference with sublessee, see annotation following this case, post, 61.

Same — breach of covenant of quiet enjoyment.

2. Collecting rents from the subtenants and forbidding them to make further payment to the tenant do not constitute a breach by the landlord of his covenant of quiet enjoyment.

For other cases, see Landlord and Tenant, II. d, in Dig. 1-52 N. S.

(January 14, 1918.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County, made during the trial of an action brought to recover damages for breach of a covenant of quiet enjoyment, which resulted in a verdict for defendant. Overruled.

The facts are stated in the opinion.

Mr. J. W. Pickering, for plaintiff:

The facts offered to be proved were sufficient to warrant a verdict for the plaintiff upon either count of his declaration.

Royce v. Guggenheim, 106 Mass. 201, 8 Am. Rep. 322; Sherman v. Williams, 113 Mass. 481, 18 Am. Rep. 522; Colburn v. Morrill, 117 Mass. 262, 19 Am. Rep. 415; Fillebrown v. Hoar, 124 Mass. 580; Skally v. Shute, 132 Mass. 367; Brown v. Holyoke Water Power Co. 152 Mass. 463, 23 Am. St. Rep. 844, 25 N. E. 966; Case v. Minot, 158 Mass. 577, 22 L.R.A. 536, 33 N. E. 700; Amidon v. Harris, 113 Mass. 59; Dexter v. Manley, 4 Cush. 14; Whitehouse v. Aiken, 190 Mass. 468, 77 N. E. 499; Boston Veterinary Hospital v. Kiley, 219 Mass. 533, 107 N. E. 426; Callahan v. Goldman, 216 Mass. 238, 103 N. E. 689; Leishman v. White, 1 Allen, 489; Holbrook v. Young, 108 Mass. 83; Moore v. Mansfield, 182 Mass. 302, 94 Am. St. Rep. 657, 65 N. E. 398; Hall v. Middleby, 197 Mass. 485, 83 N. E. 1114; McCall v. New York L. Ins. Co. 201 Mass. 223, 21 L.R.A.(N.S.) 38, 87 N. E. 582; Casassa v. Smith, 206 Mass. 69, 91 N. E. 891; Nesson v. Adams, 212 Mass. 429, 99 N. E. 93; Smith v. Tennyson, 219 Mass. 508, 107 N. E. 423, Ann. Cas. 1916B, 121; Epstein v. Dunbar, 221 Mass. 579, 109 N. E. 730.

Messrs. Frank P. Fralli and Charles Grillo, for defendant:

Eviction consists in some act of the landlord upon the premises which involves the physical exclusion of the tenant from the same or from a material part thereof.

Royce v. Guggenheim, 106 Mass. 201, 8 Am. Rep. 322; DeWitt v. Pierson, 112 Mass. 8, 17 Am. Rep. 58; Sherman v. Williams, 113 Mass. 481, 18 Am. Rep. 522; Mirick v. Hoppin, 118 Mass. 582; Skally v. Shute, 132 Mass. 367; International Trust Co. v. Schumann, 158 Mass. 287, 33 N. E. 509; Taylor v. Finnigan, 189 Mass. 568, 2 L.R.A.(N.S.) 973, 76 N. E. 203.
L.R.A.1918C.

The offer of proof did not show that the lessor or her representative had so interfered with the lessee's estate as to exclude him from or permanently deprive him of, its full use and enjoyment as it existed at the date of the demise.

Smith v. McEnany, 170 Mass. 26, 64 Am. St. Rep. 272, 48 N. E. 781.

To constitute an eviction there must be some act done on the premises with the intent of depriving the tenant of the enjoyment and occupation of the whole or part of the demised premises.

Bartlett v. Farrington, 120 Mass. 284.

The act of the defendant had no tendency to interrupt, and did not interrupt, the lessee's quiet enjoyment.

International Trust Co. v. Schumann, 158 Mass. 287, 33 N. E. 509; Groustra v. Bourges, 141 Mass. 7, 4 N. E. 623; Stevens v. Pierce, 151 Mass. 207, 23 N. E. 1006.

Carroll, J., delivered the opinion of the court:

This action is brought by the lessee against his lessor. The declaration is in two counts. By the lease dated September 28, 1912, the premises were demised to the plaintiff for two years from October 1, 1912. The plaintiff offered to show that the premises consisted of a store and four-family suites, that the plaintiff paid the rent to February 1, 1913, and on the same day the agent of defendant received from one of the plaintiff's tenants the rent for one month, due on that day, and receipted for the same in the defendant's name, and that the defendant had written this tenant forbidding him to pay rent to the plaintiff, and gave like notice to the other tenants, all of whom refused to pay rent to the plaintiff, "who has never received any rent from any of said tenants, since that which accrued on February 1, 1913, though plaintiff paid to defendant on March 1, 1913, the rent which became due under the lease on that day;" that the defendant represented to all the tenants that the plaintiff had no right to the premises and had "procured them to attorn to her as their landlord," and the plaintiff, learning of this, wrote the defendant and "at the end of March, 1913, removed from the suite which he occupied and surrendered the lease to defendant."

The first count of the declaration alleges that the plaintiff was evicted from the leasehold. The plaintiff's offer did not show the disturbance of his possession or that he was deprived of the beneficial enjoyment of the leasehold. The collection of the rent from the plaintiff's tenants and the notice forbidding them to pay any further rent to him were acts which did not constructively evict him from his estate. "To

constitute an eviction . . . there must either be an actual expulsion of the tenant, or some act of a permanent character, done by the landlord with the intention and effect of depriving the tenant of the enjoyment of the demised premises or some part of it, to which he yields, abandoning the possession within a reasonable time." *Bartlett v. Farrington*, 120 Mass. 284; *Taylor v. Finnigan*, 189 Mass. 568, 2 L.R.A.(N.S.) 973, 76 N. E. 203; *Skally v. Shute*, 132 Mass. 367; *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322.

The acts complained of did not amount to an eviction, as the offer of proof did not show that by his wrongful act the landlord had deprived the tenant of the beneficial use and enjoyment of the whole or a part of the leasehold. *Taylor v. Finnigan*, 189 Mass. 568, 2 L.R.A.(N.S.) 973, 76 N. E. 203. The plaintiff cannot recover under the first count.

The acts stated in the offer of proof, even if they constituted an interference with the rights of the plaintiff, were not equivalent to a breach of the covenant of quiet enjoyment. The defendant did not enter upon the land and repossess himself of his former estate, determining the estate of his lessee. And the tenants were estopped to deny their landlord's title. They remained his tenants, for the reason that they were not ousted by one having a superior title, or compelled to yield to the lawful owner of a claim which could not be resisted, without entry on the premises by such owner. See, in this connection, *Hinckley v. Guyon*, 172 Mass. 412, 52 N. E. 523; *George v. Putney*, 4 Cush. 351, 50 Am. Dec. 788; *Eddy v. Coffin*, 149 Mass. 463, 14 Am. St. Rep. 441, 21 N. E. 870; *Morse v. Goddard*, 13 Met. 177, 46 Am. Dec. 728; *King v. Bird*, 148 Mass. 572, 20 N. E. 196; *Casassa v. Smith*, 206 Mass. 69, 91 N. E. 891; *Groustra v. Bourges*, 141 Mass. 7, 4 N. E. 623. The offer of proof does not bring the case within *Holbrook v. Young*, 108 Mass. 83, where the defendants' lessors were themselves tenants at will of two stores, one of which they

leased in writing to the defendants. After the execution of the lease the tenants at will became bankrupt. The reversioner thereupon entered and required the tenants to attorn to her, which they did, and it was there decided that these proceedings terminated the tenancy of the tenants at will and constituted an eviction of the lessees, so that when they were sued for rent by the assignee of the bankrupts, the defendants could recoup for the breach of the covenant for quiet enjoyment.

Rejecting the immaterial matter alleged in the second count, the plaintiff, after stating in effect that the defendant wrongfully interfered with his tenants and prevented them from paying rent to the plaintiff, asserts that by such means the defendant thereby ousted the plaintiff, whereby he was evicted. For the reasons stated, there was no eviction or ouster, and on the offer of proof there can be no recovery on the second count. Some of the allegations of this count would indicate that the plaintiff was seeking to recover on the ground of an intentional and unjust interference with an existing contract. See *McGurk v. Cronenwett*, 199 Mass. 457, 19 L.R.A.(N.S.) 561, 85 N. E. 576; *Wheeler-Stenzel Co. v. American Window Glass Co.* 202 Mass. 471, L.R.A.1915F, 1076, 89 N. E. 28; *Beekman v. Marsters*, 195 Mass. 205, 11 L.R.A.(N.S.) 201, 122 Am. St. Rep. 232, 80 N. E. 817, 11 Ann. Cas. 332.

We do not decide that the averments of this count, standing alone, were sufficient, together with the offer of proof, to entitle the plaintiff to recover under the principle of the above cases. These averments of unlawful interference were matters of inducement, introductory to the statement of the eviction or ouster of the plaintiff, which was the principal subject of the count and the one upon which he relied, and which is merely explained by the introductory matter describing the unlawful interference with the plaintiff's contract rights.

Exceptions overruled.

Annotation—Eviction by interference with sublessee.

The holding in *AGUGLIA v. CAVICCHIA*, ante, 59, that there is no evidence of the lessee where the lessor notifies the undertenants to pay no rent to the lessee, actually collects rent from some of the undertenants, and the lessee vacates because of such acts, is against the great weight of authority, both English and American. In fact, all other authority supports the proposition that, under such circumstances, there is an eviction. L.R.A.1918C.

In *Burn v. Phelps* (1815) 1 Starkie (Eng.) 94, 18 Revised Rep. 749, the landlord gave notice to the undertenants of tenant to quit, and one of them vacated accordingly, the premises occupied by him remaining unoccupied for a year; the tenant paid all the rent except for the time this particular property remained unoccupied, and the landlord brought action for rent. Lord Ellenborough was of the opinion that the land-

lord was guilty of an eviction, at least as to the particular premises, and suggested that an eviction might have been pleaded to the whole demand.

Edge v. Boileau (1885) L. R. 16 Q. B. Div. (Eng.) 117, is on all fours as to its facts with *AGUGLIA v. CAVICCHIA*, ante, 59, but the court reached the opposite conclusion. The court said: "In my judgment there is sufficient evidence to show that there has been a breach of the covenant for quiet enjoyment. The covenant is in the usual terms. The facts are these: During the plaintiff's term, there being some rent in arrear, the agent for the defendants, the plaintiff's lessors, by their authority, sends to the tenants of the plaintiff a notice desiring them not to pay their rents to the plaintiff, but to pay them to the defendants, and threatening them with legal proceedings in default of compliance with the notice. It is obvious what the probable results of such a notice would be. It is impossible, as it seems to me, to hold that, under the circumstances of this case, and having regard to what actually followed, this notice can be treated as no more than a mere false and idle claim or threat of which no notice might be taken. To my mind there is evidence of a substantial disturbance of the plaintiff's quiet enjoyment of the property demised. The case of *Witchcot v. Nine* (1611) 1 Brownl. & G. 81, 123 Eng. Reprint, 679, is the only authority to which we were referred on this subject. When the report of that case is looked at, it is very short, and simply comes to this; that the mere telling a tenant not to pay his rent is not necessarily a breach of the covenant for quiet enjoyment. There is nothing said as to the circumstances under which the man was told not to pay his rent, and it appears that he did pay his rent notwithstanding the notice. I can understand that there might be circumstances under which such a notice might be treated as a mere idle threat and as not amounting to a breach of the covenant for quiet enjoyment because there was no substantial interference with the enjoyment. Here I think that there is a substantial interference with the rights of the plaintiff, and one which might very well seriously affect the value of his property."

In *Levitzky v. Canning* (1867) 33 Cal. 299, it was held that there was a breach of covenant for quiet enjoyment where lessor had constructively evicted lessee's subtenants, and the court said: "From the third count in the complaint it appears that the defendant had slandered

the plaintiff's possession, giving out and pretending publicly that he had no right to the possession of the demised premises, and that he had brought two actions at law to recover the possession of the premises from the plaintiff and his tenants, under the pretense that his lease had expired. That in consequence of these actions brought against himself and his tenants he had been put to great expense in defending the same, and his tenants had quit the premises, leaving the same vacant, and that he had been unable to rent the same to other parties, by reason of their doubts as to the lawfulness of his possession, caused by the acts of the defendant in bringing said suits and publicly declaring that the possession of the plaintiff was unlawful and that he had no legal right to let the premises. Was this a breach of his covenant within the rule already stated and the cases which we have cited? That it was does not admit of doubt. Those acts, if performed by him, were as much a molestation, disturbance, and invasion of the plaintiff's possession as a taking by the shoulders and a forcible eviction of the plaintiff's tenants would have been. The character of the act must be determined by the results which follow it, and in view of the results which are alleged to have followed the acts of the defendant, there can be no question that he disturbed and interrupted the possession of the plaintiff to his injury, which is precisely what he had covenanted not to do."

And the court in *Agar v. Winslow* (1899) 123 Cal. 587, 69 Am. St. Rep. 84, 56 Pac. 422, recognized the same principle with approval, distinguishing the instant case from the *Levitzky Case* by the fact that the landlord had not disturbed the subtenants, but had actually advised them to pay their rent to lessee.

In *Leadbeater v. Roth* (1861) 25 Ill. 587, it was held that the landlord is guilty of an eviction of his tenant so as to bar his right to further payment of rent where he forbids the undertenant to pay rent to the tenant, and demands payment thereof to himself. This view was also adopted in *Burhans v. Monier* (1889) 38 App. Div. 466, 56 N. Y. Supp. 632.

It was held in *Rowbotham v. Pearce* (1876) 5 Houst. (Del.) 135, that a lessor's wilfully preventing the lessee from subletting the premises, so that they remained unoccupied, was an eviction which would sustain an action for breach of covenant of quiet enjoyment. And the same principle underlies the deci-

sion in *Doran v. Chase* (1876) 2 W. N. C. (Pa.) 609, cited with approval in *Hoever v. Fleming* (1879) 91 Pa. 322. And the same rule is recognized in *Tennes v. American Bldg. Co.* (1913) 72 Wash. 644, 131 Pac. 201, but not applied, for the reason that the lessee retained possession and did not treat the act as an eviction.

Where the landlord refused to permit tenant's undertenant to take possession of the premises, there was an eviction that will bar an action for rent against

the tenant. *Randall v. Alburdis* (1857) 1 Hilt. (N. Y.) 285.

In *Ogilvie v. Hull* (1843) 5 Hilt (N. Y.) 52, the court distinguished the case before it from *Burn v. Phelps* (1815) 1 Starkie (Eng.) 94, 18 Revised Rep. 749, by the fact that the tenant remained in possession and failed to show that the acts of the landlord were the real cause of his failure to sublet.

J. W. M.

NEBRASKA SUPREME COURT.

ABRAHAM L. REED

v.

AMERICAN BONDING COMPANY OF
BALTIMORE, Appt.

(— Neb. —, 166 N. W. 196.)

Insurance — larceny — proof.

1. Under the contract sued upon, "the mere disappearance of an article" is not sufficient evidence of larceny; but, when other circumstances are in evidence indicating larceny, it may become a question for the jury.

For other cases, see *Trial, II. c, 9, in Dig. 1-52 N. S.*

Costs — attorney's fee.

2. Our former decisions, that an attorney's fee may be allowed as costs in a judgment upon an insurance policy, although the contract was made before the Act of 1913, are adhered to.

For other cases, see *Costs and Fees, II. in Dig. 1-52 N. S.*

(January 21, 1918.)

APPEAL by defendant from a judgment of the District Court for Douglas County in favor of plaintiff in an action on a policy insuring against loss of property by burglary, theft, or larceny. Affirmed.

The facts are stated in the opinion.

Messrs. Stout, Rose, & Wells, for appellant:

The evidence shows nothing more than the disappearance of the ring. It is insufficient, either under the express stipulation of the contract or the general rules of evidence, to sustain the finding that the ring was lost by burglary, theft, or larceny.

Waxham v. Fink, 86 Neb. 180, 28 L.R.A. (N.S.) 367, 125 N. W. 145, 21 Ann. Cas.

Headnotes by SEDGWICK, J.

Note. — The general subject of burglary and theft insurance is covered in the notes to *Rosenthal v. American Bonding Co.* 46 L.R.A. (N.S.) 561, and *Blank v. National Surety Co.* L.R.A. 1918B, 565. L.R.A. 1918C.

301; *Roddy v. Missouri P. R. Co.* 91 Neb. 75, 135 N. W. 217; *Grayson v. Maryland Gas Co.* 100 Neb. 354, 160 N. W. 85; *Shindler v. United States Fidelity & G. Co.* 58 Misc. 532, 109 N. Y. Supp. 723; *Gordon v. Aetna Indemnity Co.* 116 N. Y. Supp. 558; *Hart v. American Fidelity Co.* 121 N. Y. Supp. 605, 126 N. Y. Supp. 626; *Duschenes v. National Surety Co.* 79 Misc. 232, 139 N. Y. Supp. 881.

The contract was made and the loss occurred before § 3212 of the Revised Statutes of 1913 was enacted. If construed to authorize the taxation of an attorney's fee, it will impair the obligation of the contract and violate § 10, article 1, of the Constitution of the United States, and § 16 of the Bill of Rights in the Constitution of Nebraska.

Walker v. Whitehead, 16 Wall. 314, 21 L. ed. 357; *Collins v. Collins*, 79 Ky. 88; *State Tax on Foreign-held Bonds*, 15 Wall. 300, 320, 21 L. ed. 179, 187; *Green v. Biddle*, 8 Wheat. 84, 5 L. ed. 568; *Farrington v. Tennessee*, 95 U. S. 683, 24 L. ed. 59; *Edwards v. Kearzey*, 96 U. S. 601, 24 L. ed. 796; *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042; *McCracken v. Hayward*, 2 How. 608, 11 L. ed. 397; *State ex rel. Brown v. McPeak*, 31 Neb. 139, 47 N. W. 691; 15 Am. & Eng. Enc. Law, 2d ed. 1040, 1047.

The statute in effect authorizes the recovery of a penalty by plaintiff, and violates the due-process-of-law provision of the state Constitution.

Atchison & N. R. Co. v. Baty, 6 Neb. 37, 29 Am. Rep. 356; *Roose v. Perkins*, 9 Neb. 315, 31 Am. Rep. 409, 2 N. W. 715; *Riewe v. McCormick*, 11 Neb. 264, 9 N. W. 88; *Boldt v. Budwig*, 19 Neb. 745, 28 N. W. 280; *Grand Island & W. C. R. Co. v. Swinbank*, 51 Neb. 525, 71 N. W. 48.

Messrs. Morsman & Maxwell, for appellee:

The evidence required the submission of the case to the jury, and sustained the verdict and judgment.

Great Eastern Casualty Co. v. Boli, —

Tex. Civ. App. —, 187 S. W. 686; Miller v. Massachusetts Bonding & Ins. Co. 247 Pa. 182, L.R.A.1915D, 615, 93 Atl. 320.

The court properly allows attorneys' fees to plaintiff in this case as a part of the costs.

Nye-Schneider-Fowler Co. v. Bridges, H. & Co. 98 Neb. 863, 155 N. W. 235; Ward v. Bankers' Life Co. 99 Neb. 812, 157 N. W. 1017; Meeker v. Lehigh Valley R. Co. 236 U. S. 433, 59 L. ed. 658, P.U.R.1915D, 1072, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916B, 691; Missouri, K. & T. R. Co. v. Cade, 233 U. S. 651, 58 L. ed. 1139, 34 Sup. Ct. Rep. 678; Missouri, K. & T. R. Co. v. Harris, 234 U. S. 420, 58 L. ed. 1383, L.R.A.1915E, 942, 34 Sup. Ct. Rep. 790; Carter v. Bartel, 110 Iowa, 211, 81 N. W. 462; Ellis v. Whittier, 37 Me. 548; Grace v. Altemus, 15 Serg. & R. 133; Kossuth County v. Wallace, 60 Iowa, 508, 15 N. W. 305; Dowell v. Talbot Pav. Co. 138 Ind. 675, 38 N. E. 389; Onondaga County v. Briggs, 3 Denio, 173; 11 Cyc. 26.

Sedgwick, J., delivered the opinion of the court:

The policy upon which this action was brought insured against the direct loss of the property described "by burglary, theft, or larceny." The plaintiff alleged that the diamond ring insured was stolen, and recovered a verdict and judgment in the district court for Douglas county for the value thereof.

1. The defendant contends that the evidence that the ring was stolen was not sufficient to justify the court in submitting that question to the jury. The evidence is not conflicting, and established that the plaintiff's wife wore the ring the evening of May 28, 1912, and at night placed it in a jewel box with other jewelry in her room on the second floor of the residence. The box was provided with a lock, and she left the key in the lock. She had no occasion to wear the ring again for something over a month, and then discovered that it had been taken from the box. In the meantime a servant girl who had been in her employ for about two weeks had suddenly left her upon one day's notice, and although she had mailed a postal card from Salt Lake City, Utah, to another girl in the plaintiff's employ, it gave no information as to her intentions for the future, and she has not been located since. This girl had had the care of the room in which the ring was left, and was in that room in the absence of the plaintiff or his wife. She had no money when she left, and borrowed a dollar to pay for taking her trunk to the station, and was paid the balance of her wages, \$13.60, by the plaintiff's check, which was cashed at a drug store. She had informed the plaintiff's wife that

she intended to go to Los Angeles. The defendant company and the police were immediately notified when the loss of the ring was discovered, and although search was made in the pawnshops of the city the ring was not discovered. The policy contained the provision: "The mere disappearance of an article or money shall not be deemed sufficient evidence of its loss by burglary, theft, or larceny."

The defendant relies upon *Duschenes v. National Surety Co.* 79 Misc. 232, 139 N. Y. Supp. 881, and other similar cases. In that case the provision of the policy relied upon was: "The assured shall also produce direct and affirmative evidence that the loss of the article or articles for which claim is made was due to the commission of a burglary, theft, or larceny; the disappearance of such article or articles not to be deemed such evidence."

The evidence was not entirely identical with that in the case at bar, but it was quite similar, and the court said: "No direct or affirmative evidence has been presented of any theft or larceny. . . . In order to protect itself from claims under the policy for loss of the articles covered by the policy by reason of some other cause than burglary, theft, or larceny, the company has provided that the insured must produce, not circumstantial, but direct and affirmative, evidence of the wrong;" and decided that the evidence was not sufficient to support a verdict. Under a policy containing the same language, the supreme court of Pennsylvania held that quite similar evidence would support the finding that the article was stolen. The court said: "This contention gives to the words 'direct and affirmative evidence' a meaning so severely technical that if this meaning alone can be given them, a policy containing the provision we have here would avail the assured only in the rarest and most exceptional cases,—so exceptional that the average person would hardly think the contingency in which the policy could operate worth guarding against. . . . To limit the assured's right to recovery to cases where the corpus delicti can be proved by direct testimony—that is, by the testimony of witnesses who saw the actual taking—would make the policy next to valueless."

The court refused to construe the words "direct and affirmative evidence" literally, as it could not be supposed that the parties to the contract so understood them. *Miller v. Massachusetts Bonding & Ins. Co.* 247 Pa. 182, L.R.A.1915D, 615, 93 Atl. 320. These words are not in the contract under consideration. Indeed, the language we have to construe is much more liberal. It is true that if larceny, which is the gist of the action, is sufficiently established by this evidence,

the company's risk is a hazardous one. Such a contract would make it easy to manufacture a case against the company. The husband might remove the ring and secrete it until the litigation was over, and the wife could then in good faith make the same proof that she has made in this case. The question is therefore a difficult one. The company may, if it desires, assume such risks as are here indicated, and to hold that under this contract it has done so presents to our minds the less difficulty than to hold otherwise. The husband was a witness in the case and submitted to cross-examination, and his evidence seems frank and fair, as does also the evidence of the wife. When, as in this case, the company selects for such insurance a family of high standing in the community, the insured being a man of well-known and unquestionable character, by so doing the risk is minimized. It seems more probable that both parties to this contract understood the difficulties in making proof of larceny in many cases, and that proof of the facts and circumstances from which larceny might justly be inferred, in the absence of any evidence to the contrary, would require the matter to be submitted to the jury.

2. The defendant also complains of the allowance of an attorney's fee and taxing the same as costs against the defendant. The contract of insurance was made before the enactment of the Statute of 1913 (Laws 1913, chap. 234; Rev. Stat. 1913, § 3212), providing for such attorney's fee, and it is

earnestly insisted that to apply that statute to litigation upon contracts made before its enactment impairs the obligation of the contract. The reasons advanced for this contention on the part of the defendant, and the manner in which they are presented in this brief, might well cause us to hesitate if the question was an open one. *Nye-Schneider-Fowler Co. v. Bridges, H. & Co.* 98 Neb. 863, 155 N. W. 235; *Ward v. Bankers' Life Co.* 99 Neb. 812, 157 N. W. 1017. The decisions in these cases are based upon the proposition that the statute affects the remedy only, and to change the taxation of costs, even if it results in increasing the amount of costs, does not change the liability provided for in the contract, but only affects the method of enforcing that liability. If the contract is complied with, no costs are taxed against the company. If litigation becomes necessary to determine the liability, the costs result from the litigation, and not from any construction of the contract. To suggest that the statute relates only to litigation upon contracts of a particular nature, and not litigation generally, presents a distinction of more or less difficulty; but that has already been determined in the cases above cited,—a conclusion that we do not now feel at liberty to depart from.

The judgment of the District Court is in harmony with these conclusions, and is affirmed.

Letton and Rose, JJ., not sitting.

WASHINGTON SUPREME COURT.
(Department No. 1.)

A. BERTSCHINGER, Appt.,

v.

R. H. CAMPBELL, Respnt.

(— Wash. —, 168 Pac. 977.)

Duress — threatened prosecution — recovery of money.

1. Sufficient duress to warrant recovery of money is shown where it is paid by a physician to protect his good name when threatened by an alleged officer with prosecution for abortion upon one who is stated to be dying, and to have made before becoming unconscious a written statement against the physician, which is in possession of the officer, where all the alleged facts are false, although no proceeding has

been commenced or immediate arrest or imprisonment threatened.

For other cases, see Duress, in Dig. 1-52 N. S.

Case — action to recover money extorted.

2. Violation of a criminal statute against extortion creates a right of action in favor of the victim to recover the property secured.

For other cases, see Assumpsit, II. c, 1, in Dig. 1-52 N. S.

Duress — compounding felony — recovering money.

3. Money paid under duress may be recovered although it was paid to compound a felony.

For other cases, see Assumpsit, II. c, 1, in Dig. 1-52 N. S.

(November 23, 1917.)

Note. — As to right to recover back money paid to suppress a threatened prosecution for a crime, see annotation following this case, post, 73; and references therein to annotation on related questions.
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APPPEAL by plaintiff from a judgment of the Superior Court for Lewis County dismissing an action brought to recover an amount alleged to have been unlawfully

extorted from plaintiff by defendant. Reversed.

The facts are stated in the opinion.

Messrs. J. N. Hart, George W. Wilson, and Wedmark & Grimm for appellant.

Messrs. Herman Allen and Hayden, Langhorne, & Metzger, for respondent:

A mere threat to imprison, without an actual arrest, does not constitute duress.

Bodine v. Morgan, 37 N. J. Eq. 426; Thorn v. Pinkham, 84 Me. 101, 30 Am. St. Rep. 335, 24 Atl. 718; Cornwall v. Anderson, 85 Wash. 374, 148 Pac. 1; Thorne v. Farrar, 57 Wash. 441, 27 L.R.A.(N.S.) 385, 135 Am. St. Rep. 995, 107 Pac. 347.

Threats of imprisonment, not accompanied with the statement that the prosecution has been commenced, do not constitute duress.

Cornwall v. Anderson, 85 Wash. 374, 148 Pac. 1; Thorne v. Farrar, 57 Wash. 441, 27 L.R.A.(N.S.) 385, 135 Am. St. Rep. 995, 107 Pac. 347; Buchanan v. Sahlein, 9 Mo. App. 552; Sulzner v. Cappeau-Lemley & M. Co. 234 Pa. 162, 39 L.R.A.(N.S.) 421, 83 Atl. 103; Elston v. Chicago, 40 Ill. 514, 89 Am. Dec. 361.

Threats of criminal prosecution, unaccompanied by threats of immediate imprisonment, do not constitute duress.

Beath v. Chapoton, 115 Mich. 506, 69 Am. St. Rep. 589, 73 N. W. 806; Ingebrigt v. Seattle Taxicab & Transfer Co. 78 Wash. 435, 139 Pac. 188.

The true test for determining whether or not a penal statute confers a cause of action for private injuries resulting from the breach seems to be intention. That is, whether the intention of the law is to confer a right upon individuals in addition to creating a new public offense.

Grant v. Slater Mill & Power Co. 14 R. I. 380; Taylor v. Lake Shore & M. S. R. Co. 45 Mich. 74, 40 Am. Rep. 457, 7 N. W. 728; Barden v. Crocker, 10 Pick. 383; Hayes v. Porter, 22 Me. 371; Little v. Ince, 3 U. C. C. P. 528; Flynn v. Canton Co. 40 Md. 312, 17 Am. Rep. 603; Heeney v. Sprague, 11 R. I. 456, 23 Am. Rep. 502; Gorris v. Scott, L. R. 9 Exch. 125, 43 L. J. Exch. N. S. 92, 30 L. T. N. S. 431, 22 Week. Rep. 575; Atkinson v. Newcastle & G. Water Co. L. R. 2 Ex. Div. 441, 46 L. J. Ch. N. S. 775, 36 L. T. N. S. 761, 25 Week. Rep. 794.

A mere threat to arrest is not equivalent to charging a person with the commission of a criminal offense.

Sively v. State, 44 Tex. 274; Schultz v. State, 135 Wis. 644, 114 N. W. 505, 116 N. W. 259, 571.

Parker, J., delivered the opinion of the court:

The plaintiff, Bertschinger, seeks recovery L.R.A.1918C.

of the sum of \$1,025 alleged to have been unlawfully extorted from him by the defendant, Campbell, and also the sum of \$125 as special damages incidental thereto. The cause proceeded to trial in the superior court for Lewis county, sitting with a jury, resulting in a judgment of dismissal rendered by the court upon the motion of the defendant's counsel at the close of the plaintiff's evidence. The motion and judgment were rested upon the ground that the evidence introduced in the plaintiff's behalf was not sufficient to support any recovery against the defendant, in that it conclusively showed that appellant voluntarily paid the money to the defendant. From this disposition of the cause the plaintiff has appealed to this court.

Appellant is a physician practising his profession in Portland, Oregon. Respondent is a physician practising his profession at Little Falls, in this state, some 70 miles distant from Portland. On December 26, 1912, a young man and a young woman called at appellant's office in Portland and requested him to examine her with a view of determining certainly whether or not she was pregnant; they believing that she was then probably in that condition. Appellant was then given to understand that, should he find the young woman pregnant, they desired that he perform an abortion upon her. Appellant consented to examine the young woman, but positively refused to perform any abortion upon her. His examination convinced him that she was pregnant, and he so advised them. He then charged her \$5 for making the examination. No abortion was performed upon her by appellant, and nothing further was ever done by him for her. Appellant was not acquainted with either the young man or the young woman, but from conversation then had with her learned that she lived at Castle Rock, and was soon going to Little Falls to work. Appellant was well known in Portland, having lived there thirty-three years, and had built up a good practice there in his profession. On January 6, 1913, eleven days after the visit of the young woman to his office, appellant received from respondent through the mail the following letter:

Dear Dr.:—

A young lady lays dying from septic condition and incomplete abortion. She has made a full confession, you are charged with the crime. The confession is in my possession. In event of her death it will be turned over to the police. Confession is witnessed. I do not think she can last more

than a day or so, judging by her present condition.

I am very truly,
[Signed] Dr. R. H. Campbell,
Little Falls,
Va.

January 4/12.

While the letter, upon its face, does not state to whom it was addressed, it came to appellant through the mail, addressed upon the envelop to him, in apparently the same handwriting as the letter, the postmark showing that it had been mailed at Little Falls. The figures "12" upon the letter, indicating the year, manifestly mean 13, since it was written after the visit of the young woman to appellant's office in Portland, which occurred, as we have seen, on December 26, 1912. Appellant was then wholly unacquainted with respondent. Remembering the visit of the young woman to his office a short time previous, and remembering that he had then learned that she was going to Little Falls to work, appellant concluded that the letter had reference to her.

What appellant did and what occurred thereafter may be stated in appellant's own language from his testimony given upon the trial as follows:

Q. When you received that letter you may state what you did.

A. Well, I immediately called up my wife at that time and told her about the letter.

Q. Now, what effect did this letter have upon your mind?

A. Why, the effect was somebody was putting up blackmail, or a job, as I would call it.

Q. Now, after talking with your wife on the telephone, what did you do next?

A. I waited for my wife to come to the office, and we talked the matter over, and she advised me to call up this Dr. Campbell on the telephone, if possible.

A. I had to go to the long-distance office. The lines were somewhat out of order on account of the storms at that time.

Q. Just state what conversation you had with Dr. Campbell on the telephone.

A. Why, I told Dr. Campbell this was Dr. Bertschinger. I told him I received the letter from him that morning, and told (asked) him what the meaning of the letter was. He told me the letter speaks for itself, and advised me to come over there. We could not carry a conversation on very distinctly as it was very hard to hear.

... Advised me to come over, and told me what train to take. I wasn't posted on the trains, and he told me to take the train leaving about 2 o'clock. I took that train

over there, and when I got there I met him just as he was going into his house, by the gate. I arrived in Little Falls about 3 o'clock, and we got to talking about the matter and I asked him what the meaning of the letter was. . . . I wanted to find out what kind of a proposition I was up against; that was all, it looked like a piece of blackmail of some kind or shape to me. I had no reason to believe anything but that. I didn't know if any girl was in league with Dr. Campbell in the proposition, or whether something else had been done or what. . . . I asked about the girl, and I wanted to see her. He said, "There is not much for you to see here." She was lying unconscious and liable to draw her last breath, and no chance to see her. Finally he told me he had her in his house, and laughed at me and said he had me just where he wanted me. . . . He threatened to have me arrested, turn me over to the authorities.

Q. What did he say in reference to the official capacity of himself?

A. Well, that came later on. I then challenged him to take it up with the authorities or I would take it up myself, and then he told me it was no use to make any fuss over it, as he was the health officer there, and the best thing I could do was to settle with him, and in the event of death he could sign the death certificate; he was health officer there and the only physician in the town.

Q. What else did he say?

A. . . . When I spoke of taking it up with the authorities myself, he then told me I had better not do that, I better settle the proposition with him, and first he asked me to pay the price of the nurse, which was \$25. That I paid him in cash at the time. Then after that, I guess he thought I was a good subject, and he again said for a thousand dollars he would protect me no matter what the outcome would be. . . . Under the circumstances I reasoned, if he had such a confession, although it was a frame-up, that if the girl did it, which I didn't know whether she did or not, I would be liable if she did; he might use it against me. Rather than have a case of that kind I would sacrifice a thousand dollars and then investigate and find out and fight him afterwards. . . . I told him I could not pay any thousand dollars; I had just come back from the East on a trip, and I told him I could not raise a thousand dollars. "You will have it here in two hours," he said. I told him I could not raise that in twenty-four hours; I could raise \$500 and give him my note for the balance. He said, "No, no notes and no drafts, a thousand dollars in cash, in gold." That was the only option I

had. We walked down to the depot. I waited four or five hours. The train wasn't on schedule, and got home along about 2 o'clock in the morning. I told my wife of the conversation I had with Dr. Campbell, and she advised me to raise the money by mortgage or some way and go over there and protect my name rather than face this thing; it was a blackmail proposition, but rather than take a chance of having that on me, I had better pay a thousand dollars. So I thought of Mr. McKensie, a friend of mine, and through him we raised a thousand dollars and took it over to him.

Q. When you left Dr. Campbell did he give you any length of time in which to raise the thousand dollars?

A. Twenty-four hours specifically. . . . He said to have it there in twenty-four hours.

Q. When did you get back to Little Falls?

A. We took the train at home that day at 2 o'clock and arrived there about 5.

Q. Who went with you?

A. My wife.

Q. Your wife at that time?

A. Yes. . . .

Q. Now, when you got back to Little Falls you say that it was about 5 o'clock. Just tell the jury what happened then.

A. My wife and I approached his house, and he came out as we got to the gate, in his shirt sleeves; he didn't have a coat on, and he evidently was expecting us, and before we got to the porch of the house he came and opened the door to receive us, and as we entered the house he told my wife to go into the room to the left, and took me straight over to where he had his office in the residence, and we had a short talk there, and he said the girl was about the same, and she was still unconscious, and that he didn't know whether she would draw her last breath any minute, and he wanted to know if I had the money. I said yes, I had it there. By the way, I forgot to mention this: The day before he said he would surrender this confession from the girl if I paid over this thousand dollars. This he refused to do the second day. He didn't give us the confession, but he kept the money. That is, after a little talk I said my wife had the money. He wanted me to get the money. I told him my wife had it, that we had to mortgage our home, and that my wife had the money. . . .

A. When I told him my wife had the money,—really the money was coming out of her money as well as mine,—he sort of hesitated and said, "Well, we will have her come in," and she came into the room and asked him what the money was paid for, and he said, "To keep that man out of the pen,"

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and there was some more conversation which wasn't material, but she counted out the money to him. My wife gave him that money in \$20 gold pieces. . . . After he had the money he patted us on the back and said the danger was all over; the girl wasn't in a very serious condition at all; he thought everything would come out right, and in the event of her death he would protect us. We then left Dr. Campbell's place and went home. . . .

Q. State whether or not you paid the money by reason of the fact that you were afraid of being prosecuted.

A. Yes; the only reason I did pay it.

The jury would have been fully warranted in believing all of the facts above stated had the cause been submitted to it.

The principal contention of counsel for respondent, and apparently the conclusion reached by the trial court, is rested upon the theory that it must be determined, as a matter of law, from these facts, that appellant cannot recover because the money was not paid under such legal duress as the law requires to be proven to avoid a contract, in that appellant was not charged with the commission of a crime in any proceeding instituted in court, nor was he threatened with immediate arrest or imprisonment. In other words, counsel invoke the rules applicable to cases where claims of right are asserted in good faith, accompanied by threats of civil or criminal proceedings made in good faith, looking to the enforcement of such asserted rights, and where the contract, settlement, or compromise involved would not be invalid for want of consideration, apart from the question of coercion. Counsel rely principally upon the law as announced in our decision in *Ingebrigt v. Seattle Taxicab & Transfer Co.* 78 Wash. 433, 139 Pac. 188. In that case the plaintiff sought to set aside a settlement claimed to have been made by him with the defendant under duress, for money alleged to have been unlawfully appropriated by him, and to recover damages measured by the value of the consideration he gave to effect the settlement. Judgment of nonsuit was rendered at the close of the plaintiff's evidence, upon motion of the defendant, the case being taken from the jury, which judgment was affirmed by this court. No criminal prosecution was commenced; it was only threatened. Judge Gose, speaking for the court, at page 436 of 78 Wash. of the reported decision, said: "Under the appellant's testimony, he had unlawfully appropriated money which belonged to respondent. The respondent had a right to say to him that, if he did not settle, it would commence a civil action. It also

had a right to point out to him that he was subject to a criminal prosecution. Under his own testimony, the good faith of the charge that he was subject to criminal prosecution cannot be questioned. It is not duress for one who in good faith believes that he has been wronged to threaten the wrongdoer with a civil suit; and if the wrong includes a violation of the criminal law, it is not duress to threaten him with a criminal prosecution."

The learned writer of the opinion cites as lending support to the conclusion reached therein the following decisions: *Hilborn v. Bucknam*, 78 Me. 482, 57 Am. Rep. 816, 7 Atl. 272; *Bodine v. Morgan*, 37 N. J. Eq. 426; *Thorn v. Pinkham*, 84 Me. 101, 30 Am. St. Rep. 335, 24 Atl. 718; *Buchanan v. Sahlein*, 9 Mo. App. 552; *Sulzner v. Cappeau-Lemley & M. Co.* 234 Pa. 162, 39 L.R.A. (N.S.) 421, 83 Atl. 103; *Loan & Protection Assn. v. Holland*, 63 Ill. App. 58; *Elston v. Chicago*, 40 Ill. 514, 89 Am. Dec. 361; *Beath v. Chapoton*, 115 Mich. 506, 69 Am. St. Rep. 589, 73 N. W. 806; *Williams v. Stewart*, 115 Ga. 864, 42 S. E. 256; *McCormick Harvesting Mach. Co. v. Miller*, 54 Neb. 644, 74 N. W. 1061; *Alexander v. Pierce*, 10 N. H. 494; *Englert v. Dale*, 25 N. D. 587, 142 N. W. 169; *Harrison Twp. v. Addison*, 176 Ind. 389, 96 N. E. 146. It may be said, speaking generally, that all these cited decisions deal with contracts, settlements, or compromises which, within themselves, apart from the question of duress, were not invalid for want of lawful consideration, and also that in making the demands and threats which brought about the contract, settlement, or compromise the party charged with duress believed, in good faith, that he was making a lawful demand and threat, looking to the enforcement of a right possessed either by himself or those for whom he was acting. We notice here, however, those of these decisions which may seem to deal with situations not wholly of this nature.

In *Sulzner v. Cappeau-Lemley & M. Co.* 234 Pa. 162, 39 L.R.A. (N.S.) 421, 83 Atl. 103, the demand involved was made for property which the one making the demand believed in good faith that his company was entitled to, but the alleged threat was that the son of the one upon whom the demand was made would be imprisoned if the demand was not complied with. Settlement was thereupon effected, a valuable consideration passing from each party to the other. No proceedings having been commenced nor warrant of arrest issued and no actual arrest of the son attempted, the evidence was held, as a matter of law, not sufficient to support a verdict of recovery of the fruits of the settlement, upon the ground L.R.A.1918C.

of duress. That case differs from the others in that the threat was not made directly against the one upon whom the demand was made. The contract, however, was not invalid for want of valuable considerations passing from each of the parties to the other, and rested upon a demand made in good faith.

In *Englert v. Dale*, 25 N. D. 587, 142 N. W. 169, we have a somewhat similar situation, in that the alleged threat was to have the son of the one upon whom the demand was made imprisoned if the demand was not complied with. The demand was, however, made in the assertion of a right which the one making it believed in good faith that he was entitled to. That case was tried and decided by the court without a jury, and it was found, as a question of fact, that the mortgage in question, claimed to have been procured by duress, was voluntarily executed.

The decisions in *Harrison Twp. v. Addison*, 176 Ind. 389, 96 N. E. 146, and *McCormick Harvesting Mach. Co. v. Miller*, 54 Neb. 644, 74 N. W. 1061, were rested upon the ground that there was no duress in law justifying the avoiding of the contracts, which were settlements of claims made in good faith for misappropriation of moneys. Another reason pointed out by the courts in both of these cases why the plaintiffs could not recover was that the contracts of settlement were unenforceable as being against public policy, in that they were, in effect, contracts to obstruct the administration of the criminal laws. Nothing said by the courts in those decisions, however, suggests that a contract, unenforceable as against public policy, might not also be void because of its being made under duress. If made under duress such as to render it void, the question of it being unenforceable because against public policy would not be of any consequence in so far as the recovery upon a right growing out of the transaction is concerned.

The decisions above noticed and relied upon by counsel for respondent deal with situations quite different from that here involved. In each of them, as already noticed, the one making the demand and accused of coercion was seeking to enforce rights which he, in good faith, believed he possessed, either for himself or for those for whom he was acting. The contracts and settlements so effected were not unlawful in themselves so far as the settlement of the private rights in question were concerned, nor were they invalid for want of consideration. Here we have a case where the respondent had no shadow of right to rest his demand upon. Not only did no right exist in him to make such demand,

but no right existed in anyone to make such demand. He could not have made the demand in good faith if the evidence introduced in appellant's behalf is true, and we must so regard it for present purposes. There is something else in this case beside the question of duress, as such question is presented and determined in cases like *Ingebrigt v. Seattle Taxicab & Transfer Co.* supra, and those therein cited and here relied upon by counsel for respondent.

The presumption of want of duress in the making of contracts, settlements, or compromises under the circumstances shown in those decisions does not apply to the payment of money under the circumstances here shown. Where contracts, settlements, and compromises are made between parties where there is a fair show of legal right, and where the contract, settlement, or compromise is not manifestly unfair, and is made in response to a demand made in good faith, it, of course, should require the most convincing proof of duress in order to warrant its avoidance on that ground; while the very fact that one yields to a demand made upon him without the shadow of right, and one which, under no circumstances, could be made in good faith, suggests, of itself, some degree of duress, inducing the yielding to such demand.

Counsel for respondent cite, and in some measure rely upon, our decisions in *Thorne v. Farrar*, 57 Wash. 441, 27 L.R.A.(N.S.) 385, 135 Am. St. Rep. 995, 107 Pac. 347, and *Cornwall v. Anderson*, 85 Wash. 363, 148 Pac. 1. Both of these cases were tried by the court without a jury, and the questions of duress were therein disposed of as questions of fact, and not as questions of law. In the *Thorne* Case, supra, Judge Gose, speaking for the court at page 444 of 57 Wash. said: "We are persuaded that the promptings of conscience, and not threats, moved him to marry the respondent and make the reparation that honorable conduct demanded."

In the *Cornwall* Case, supra, this court refused to disturb the findings of the trial court that appellant had executed the notes in question freely and voluntarily. In each of those cases there was a yielding to a demand made in good faith.

In much of the argument advanced by counsel for respondent they seemed to forget that this cause was being tried in the superior court before a jury whose province it was to decide the questions of fact involved. Now, keeping in mind the facts as shown by the evidence introduced in appellant's behalf, which we must, for present purposes, regard as true, let us notice some of the decisions dealing with demands which, in whole or in part, were without right and

known to be such by those making the demand. We think it will appear therefrom that the courts do not require such convincing proof of overcoming the free will of the person upon whom the demand is made as where it is made in good faith, with some show of legal right, and a recognition of that right by the person who yields thereto. In other words, there is running through all the decisions relied upon by counsel for respondent in this case the element of presumption that when one yields to a demand made upon him in good faith, accompanied by a fair show of legal right in the one making the demand, he does not yield because of duress in the legal sense. The case is manifestly quite different where one yields to demands made upon him without any show of legal right or good faith upon the part of the one making the demand. Indeed, the contrary presumption as to duress in such cases would seem more in agreement with common experience and common sense, since it would seem that one would not ordinarily yield to such a demand except he be influenced by some present overpowering necessity, viewed from his standpoint.

In *Pemberton v. Williams*, 87 Ill. 15, the evidence tended to show that the plaintiff was compelled to pay more than was plainly due upon the purchase price of a land contract to procure a deed, and that he was induced to do so in order to complete an advantageous resale of the land by him to another, this being known to the one who made the demand upon him for the excess amount. The duress involved manifestly consisted only of the necessity of his procuring a deed to the land in order that he might make the resale. The court directed the jury to find against him in an action brought by him to recover the excess so paid by him. In holding this to be error, Justice Breese, speaking for the supreme court, said: "It is very clear, we think, the court, in so interposing, invaded the rightful province of the jury. There was testimony before the jury tending to show that there were only \$50 due on the land, and when the appellee demanded \$365 as his due before he would deliver a deed, it was a fair question for the jury whether under the circumstances by which appellant was surrounded, by the sale of the land to Slinglove, which falling through a good sale might be lost, the payment was not involuntary—made under a sort of moral duress. The jury should have been left free to pass on that point."

Beath v. Chapoton, 115 Mich. 506, 69 Am. St. Rep. 589, 73 N. W. 806, was an action to recover upon notes executed in settlement of a charge of embezzlement.

The evidence seemed to show that the notes were given under a threat of criminal proceedings, for an amount greater than the sum embezzled. While the court held that, in so far as the giving of the notes in settlement, to the extent of the amount actually embezzled, was concerned, it was, as a matter of law, not a duress, it was held to be for the jury to decide to what extent the notes were given without consideration, and to render a verdict accordingly. In so deciding, Chief Justice Grant, speaking for the court, at page 510 of 115 Mich., said: "There is no evidence of any threats or restraint at that time, no prosecution had been commenced, nor was there any statement that any had been commenced, and he was free to go and come as he chose. It therefore appears that Chapoton, after the alleged charge and threats were made, took ample time to consider it, and then voluntarily settled by giving these notes. This is not the course pursued by a man conscious of his innocence and in the possession of his faculties. There is nothing to show that he was young or old, inexperienced, feeble in body or mind, or unable to indignantly deny and resist a false charge of embezzlement and felony. Under this record the only question to be submitted to the jury with regard to him was whether there was a failure, . . . in whole or in part, for the notes. Under the above decisions, he was liable upon them to the extent of moneys appropriated by him, if any were so appropriated; and it was the province of the jury to determine the amount. If he had appropriated none of the plaintiff's money, of course the notes were without consideration, and void."

In that case there was no commencement of any criminal proceedings nor any threat of immediate arrest. That case seems to hold that, in so far as the consideration failed, there could be no recovery upon the notes, regardless of the question of duress.

March v. Bricklayers' & P. Union, 79 Conn. 7, 4 L.R.A. (N.S.) 1198, 118 Am. St. Rep. 127, 63 Atl. 291, 6 Ann. Cas. 848, was an action brought by the plaintiff against the union to recover \$100 extorted from him under a threat of withdrawing his employees and thereby injuring his business. Here we have a case like the one before us, wherein the money was exacted without any legal right whatever, and without any possibility of its having been demanded in good faith. In awarding recovery of the money so exacted, Justice Prentice, speaking for the court, said: "The most elemental principles of justice and right, which have by universal consent been adopted into the common law, suffice for a conclusion that money cannot be lawfully

exacted of a man in the manner here successful."

Joannin v. Ogilvie, 49 Minn. 564, 16 L.R.A. 376, 32 Am. St. Rep. 581, 52 N. W. 217, was an action to recover money paid by the plaintiff to free his real property from a lien claim filed against it without any right whatever. It was there held that this was not such a voluntary payment on his part as to prevent his recovery of the money from the lien claimant who had thus induced its payment.

Chicago v. Northwestern Mut. L. Ins. Co. 218 Ill. 40, 1 L.R.A. (N.S.) 770, 75 N. E. 803, was an action by the insurance company to recover from the city payments made by it to the city upon demand for water rent due by previous owners or occupants of the building, and for which the insurance company was in no way liable, induced by threats of the city authorities that the water would be shut off until this demand was satisfied. This was held not to be a voluntary payment on the part of the insurance company, but that it was one made under duress such as enabled it to recover the money so paid.

Goddard v. Bulow, 1 Nott & M'C. 45, 9 Am. Dec. 663, was an action to recover excessive freight charges demanded as a condition that the freight be received and transported, the one upon whom the demand was made being then under great necessity of having the goods transported. This was held an exaction without legal right to the extent of giving the plaintiff a right of action for the recovery of the excess so paid, upon the theory that it was not voluntarily paid.

These are but a few of the many decisions which could be cited showing that the presumption against duress which the courts indulge in touching contracts and settlements induced by demands made in good faith are not applicable to the facts appearing in this record.

Our criminal statutes relating to extortion and providing punishment therefor, we think, also lend support to appellant's contention. Section 2610, Rem. & Bal. Code, so far as applicable here, reads: "Every person, who, under circumstances not amounting to robbery, shall extort or gain any money, property or advantage . . . by means of force or any threat, either (1) to accuse any person of a crime, or . . . to expose or impute to any person . . . disgrace, . . . shall be guilty of extortion and shall be punished by imprisonment in the state penitentiary for not more than five years." Rem. & Bal. Code, § 2610.

That respondent's words, written and spoken, and his attitude towards appellant, plainly evidence an accusation of crime

made against appellant, and a threat to cause him to be criminally prosecuted, and also a threat to expose him to disgrace, respondent having the apparent means at hand to so render appellant serious injury, though he be innocent, if he did not pay the money demanded, seems too plain for argument. It is true that this is a general criminal statute, and, of course, was enacted for the benefit of the public, but, since the extortion here defined is a crime against the person and works to his personal injury as well as that of the public, the commission of it would create a cause of action in favor of the person so injured. The right to recover money so extorted was learnedly reviewed by Justice Ailshie, speaking for the supreme court of Idaho, in *Wilbur v. Blanchard*, 22 Idaho, 517, 126 Pac. 1069. The plaintiff in that case, under a threat of criminal prosecution, paid \$2,150 in settlement of an embezzlement charge made against him, he having embezzled only \$150. The criminal extortion statute of Idaho is in substance the same as ours. The trial court instructed the jury, as stated in the opinion, in substance as follows: "That the defendant cannot defend this action upon the mere ground that the charge of theft which he made against plaintiff was true, or, in other words, the truth or falsity of that charge alone is wholly immaterial to this inquiry, as one is not justified in extorting money from even one guilty of crime, provided you find any extortion was practised."

The jury returned a verdict for \$2,000, evidently finding that only \$150 was appropriated by the plaintiff. In affirming this verdict and judgment and noticing numerous authorities touching the question of duress, the learned justice, among other things, said: "Now, reverting again to the provisions of our statute, we find that the fear 'such as will constitute extortion may be induced by threat,' and that such threat may be simply 'to accuse' the party of a crime. It is apparent that money or property might as readily be obtained by one who is in fact guilty of the crime by threatening to accuse him thereof as from one not guilty of a crime who is threatened with such accusation. It seems to us that justice demands that no one should be allowed to extort money from another which is not justly due or owing to him by overpowering the will and mental faculties of his adversary under threats of arrest or imprisonment, even though the party may in fact be guilty of such crime. Two wrongs do not make a right, and the fact that a man is guilty of larceny does not justify the man from whom the property has been stolen to use

that fact as a means or instrument of obtaining money or property from the thief which is not justly due and owing."

Manifestly, the judgment was affirmed upon the theory that the jury could well find that there was no duress in plaintiff's yielding to the demand, to the extent of his paying the \$150 actually due from him; indeed, it might have been so held as a matter of law; yet the jury could also well find that the additional \$2,000 was paid under duress. Manifestly, the court considered the question of duress, as to the \$2,000 so paid, as one of fact for the jury to decide.

It was suggested in oral argument, though not advanced in the briefs as a defense, that the payment of this money, under the circumstances as shown by appellant's evidence, was, in effect, the compounding of a felony, and for that reason the judgment of dismissal was not erroneous. This, upon the theory that the agreement was so tainted with wrong and illegality that the courts will not lend their aid to the enforcement of the right claimed by appellant. It hardly seems likely that respondent would, upon a new trial, care to invoke this defense, since it would imply that he was himself equally guilty of compounding the crime with which he charged appellant. That would seem to be an admission on his part that the money was received as well as paid, for that purpose. But even that theory would still leave open the question of appellant having paid the money under duress. Plainly a contract or settlement amounting to the compounding of a crime could be void because of duress as well as unenforceable because of being against public policy. If void because of duress it was not a binding contract or settlement under which appellant could retain the fruits thereof, even though it was also a contract which, but for the duress, would have been against public policy, and as such could not be the foundation of any right to be asserted in the courts. The trial judge did not take the case from the jury upon this ground, but solely because he decided as a question of law there was not such duress as entitled appellant to recover the money paid. This is rendered plain by remarks of the judge, made in announcing his decision, and preserved in this record. Clearly, it would have been erroneous for the trial court to have dismissed the action upon the ground that the payment of the money was for the compounding of a felony, in view of the evidence produced in appellant's behalf. This question will not likely arise upon a new trial for the reason above indicated; and besides,

respondent has pleaded that the money was paid to him for a lawful purpose. The question is here noticed only in the light of the present status of the case to show that this suggested theory does not support the judgment of dismissal.

The judgment is reversed, and the cause remanded to the Superior Court for a new trial.

Ellis, Ch. J., and Fullerton, Main, and Webster, JJ., concur.

Annotation—Right to recover back money paid to suppress a threatened prosecution for a crime.

For the subject of contracts procured by threats of prosecution of a relative, see the notes to 26 L.R.A. 48; 20 L.R.A. (N.S.) 484; 37 L.R.A. (N.S.) 539; and L.R.A.1915D, 1118. For effect of agreement to stifle prosecution upon contract to pay existing indebtedness or the value of property or money feloniously obtained, see the note to 16 L.R.A. (N.S.) 971. For validity and enforceability of contract to compensate the owner of property stolen or embezzled, in the absence of duress or agreement, express or implied, to stifle prosecution, see the note to Board of Education v. Angel, L.R.A.1915E, 139.

Contracts for the suppression of criminal prosecutions being unlawful, the courts will not lend aid to carry them out, but, in general, will leave the parties where they have placed themselves; as, being in *pari delicto*, *potior est conditio possidentis*. Where, however, the contract is made under circumstances of duress, oppression, or undue influence, the courts will permit the recovery of money paid on such contracts, or even, in some cases, cancel the obligations or conveyances made. This appears to be mainly upon the theory that where there is duress, oppression, or undue influence, the parties are not in *pari delicto*; but it is also based to some extent upon public policy, which would prevent the extortioner and oppressor from retaining the results of his wrongful act.

General rule.

It is a general rule that money paid to suppress a threatened prosecution for a crime cannot be recovered back. Collins v. Blantern (1767) 2 Wils. 341, 95 Eng. Reprint, 847 (obiter); Mervin v. Huntington (1817) 2 Conn. 209; Arter v. Byington (1867) 44 Ill. 468; Harrison Twp. v. Addison (1911) 176 Ind. 389, 96 N. E. 146; Harmon v. Harmon (1873) 61 Me. 227; Hilborn v. Buckman (1886) 71 Me. 482, 57 Am. Rep. 816, 7 Atl. 272; Campbell v. Chabot (1916) 115 Me. 247, 98 Atl. 746; Buchanan v. Sahlein (1881) 9 Mo. App. 552; Burnham v. Holt (1843) 14 N. H. 367; Collins v. Lane (1880) 80 L.R.A.1918C.

N. Y. 627; Adams v. Irving Nat. Bank (1889) 116 N. Y. 606, 6 L.R.A. 491, 15 Am. St. Rep. 447, 23 N. E. 7; Daimouth v. Bennett (1853) 15 Barb. (N. Y.) 541; Lutz v. Weidner (1866) 1 Woodw. Dec. (Pa.) 428; Comstock v. Tupper (1878) 50 Vt. 596; Wood v. Adams (1905) 10 Ont. L. Rep. 631; Chipman v. Whitman (1912) 11 East. L. R. (Can.) 313.

"Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again; you shall not have a right of action when you come into a court of justice in this . . . manner to recover it back." Wilmot, Ch. J., in Collins v. Blantern (1767) 2 Wils. 341, 95 Eng. Reprint, 847, in holding that there could be no recovery on a bond given to secure the plaintiff for a note he gave a prosecutor for not appearing and giving evidence of perjury.

Similarly, one was not permitted to recover back what he had paid on a note given to suppress a prosecution for embezzlement. Singer Mfg. Co. v. Ferrell (1899) 20 Ky. L. Rep. 1201, 48 S. W. 1078.

And a horse delivered in part payment of the money agreed upon could not be recovered. Dixon v. Olmstead (1837) 9 Vt. 310, 31 Am. Dec. 629.

In Ingebrigt v. Seattle Taxicab & Transfer Co. (1914) 78 Wash. 433, 139 Pac. 188, cited in BERTSCHINGER v. CAMPBELL, ante, 65, the court exonerated the defendants from any wrongful act in taking from their employee accused of embezzlement a transfer of a truck in settlement, although they pointed out to him at the time his liability to arrest and prosecution; and he was not permitted to recover his property.

It may be noted that it was held in Mayer v. Hoffman (1886) 67 Wis. 279, 30 N. W. 355, that money paid when under arrest on a charge of bastardy, to settle the matter, without threats, may not be recovered back.

(A fortiori where the defendants, at

the plaintiff's request, paid money they owed him to a third party to compound a felony with which the plaintiff was charged, he could not recover it from them. *Leonard v. Travis* (1863) 6 *Allen* (Mass.) 129.)

Duress, oppression, and undue influence.

The rule, however, is subject to this qualification, that if the payment has been extorted or induced by duress, oppression, or undue influence, it can be recovered back. *Wilbur v. Blanchard* (1912) 22 *Idaho*, 517, 126 *Pac.* 1069; *Schommer v. Farwell* (1869) 56 *Ill.* 542; *Baldwin v. Hutchison* (1893) 8 *Ind. App.* 454, 35 *N. E.* 711; *Nelson v. Leszczynski-Clark Co.* (1913) 177 *Mich.* 517, 143 *N. W.* 606; *Klein v. Pederson* (1902) 65 *Neb.* 452, 91 *N. W.* 281; *Richardson v. Duncan* (1826) 3 *N. H.* 508; *Severance v. Kimball* (1836) 8 *N. H.* 386; *Fillman v. Ryon* (1895) 168 *Pa.* 484, 32 *Atl.* 89; *BERTSCHINGER v. CAMPBELL*; *Heckman v. Swartz* (1885) 64 *Wis.* 48, 24 *N. W.* 473.

Thus, money was recovered, as paid under duress, when it was extorted under a threat of prosecution for larceny (*Wilbur v. Blanchard* (*Idaho*) *supra*), where it was paid for release by one in prison under a charge of embezzlement, and while he was refused access to a magistrate (*Schommer v. Farwell* (1869) 56 *Ill.* 542, *supra*), or when paid by one under arrest and without counsel (*Severance v. Kimball* (1836) 8 *N. H.* 386, *supra*).

In *Heckman v. Swartz* (*Wis.*) *supra*, it was held that one arrested on a charge of fornication, the purpose of the prosecution being to compel a settlement, who pays money for his release, pays it under duress of imprisonment, and may recover it back.

So, a promissory note payable the next day, made under threats of immediate arrest and prosecution for embezzlement and grand larceny, its payment being forced by attachment, was held by the jury to have been given and paid under duress, and the amount was recovered. *Nelson v. Leszczynski-Clark Co.* (1913) 177 *Mich.* 517, 143 *N. W.* 606.

In *Fillman v. Ryon* (1895) 168 *Pa.* 484, 32 *Atl.* 89, the court said: "The plaintiff was arrested on the charge of embezzlement and for the purpose of extorting money from him. The prosecution was abandoned when the purpose of it was accomplished. He parted with his property while under duress by L.R.A.1918C.

imprisonment and threats, and his right to recover it from the wrongdoer cannot, under the circumstances shown, be successfully questioned. We think, too, that as the act of which he complains was obviously unlawful and tortious, he may recover the property obtained by it in this form of action."

In *Wilbur v. Blanchard* (*Idaho*) *supra*, where the plaintiff alleged that the defendant had extorted \$2,150 from him by threatening to prosecute him for the crime of larceny, and the jury found a verdict for the plaintiff for \$2,000, the court held that this was a finding that \$150 had been wrongfully taken by the plaintiff, and that it was proper that the defendant should retain this, the plaintiff recovering back the balance.

Where a settlement of a charge of tearing down and burning a barn was made while the justice was making out a mittimus, by turning over goods later converted into money, it was held to be error to direct a nonsuit on assumption for money had and received, as the question of duress should have been left to the jury. *Richardson v. Duncan* (1826) 3 *N. H.* 508, where the court said: "It is now well settled that when there is an arrest for improper purposes, without a just cause; or where there is an arrest for a just cause, but without lawful authority; or where there is an arrest for a just cause, and under lawful authority, for unlawful purposes, it may be construed a duress."

(But fear of criminal prosecution inducing one who received a reward for finding money to return the reward is not compulsion, and he cannot recover back the reward. *Felton v. Gregory* (1881) 130 *Mass.* 176.)

Money paid has been similarly recovered back in cases of oppression of the weak and innocent.

Thus, money extorted by threats of a criminal prosecution from one of weak mind, who, as a witness, had testified against the character of the extorter's son, can be recovered back though no proceedings had been begun and there was no ground for them. *Baldwin v. Hutchison* (1893) 8 *Ind. App.* 454, 35 *N. E.* 711.

So, in *Klein v. Pederson* (1902) 65 *Neb.* 452, 91 *N. W.* 281, the plaintiff was held entitled to recover back money paid, where the evidence was sufficient to show that the defendant and another entered into a conspiracy to extort money from the plaintiff by making a false charge that he had sold adulterated butter, and the defendant persuaded the

plaintiff to give him money to induce an officer to drop the matter, this being the case of a strong mind taking advantage of a weaker. The court said: "That a party who is in *pari delicto* cannot make his illegal act the basis of a recovery has been definitely settled by this and many other courts. But where a strong mind takes advantage of a weaker, and by persuasion and influence procures the illegal act, this rule ceases to be applicable. The wrong then rests chiefly, if not solely, on the person by whom it was contrived, and his confederate is regarded as the mere instrument for accomplishing an end not his own. If a party should be allowed immunity under such circumstances he would be permitted to take advantage of his own wrong, and reap a benefit from his own fraud."

In *BERTSCHINGER v. CAMPBELL*, ante, 65, as will be seen, the court considered that in case of extortion and possible innocence the question of duress should have been left to the jury.

The doctrine of Haynes v. Rudd.

In some of the cases we find the expression "compounding a felony" applied to the circumstances involved; others use the expression, "stifling a criminal prosecution." Probably in from two thirds to three fourths of the cases the facts show clearly that a felony was compounded, and the courts in general appear to apply the doctrine of duress without regard to whether or not there was a technical compounding of a felony; but in *Haynes v. Rudd* (1886) 102 N. Y. 372, 55 Am. Rep. 815, 7 N. E. 287, the New York court lays down the doctrine that where the contract compounds a felony, duress is immaterial, as in such case the parties are in *pari delicto*; and that no amount of duress or oppression can alter the case or justify relief. The following year, however, the court granted equitable relief from a contract in which the facts seem similar. (See *Schoener v. Lissauer* (N. Y.) *infra*.) And a little later (*Adams v. Irving Nat. Bank* (N. Y.) *infra*) permitted the recovery of money back on the ground of undue influence, stating that the question of compounding a felony was not properly raised in the court below.

In *Haynes v. Rudd* (N. Y.) *supra*, the plaintiff sought to recover the amount of a promissory note given by him upon the settlement of a claim by the defendant that the plaintiff's son had stolen from him; the note had been transferred be-

fore maturity to a third party and the plaintiff had paid it. It was held that duress could not justify recovery. The court said: "While fraud, duress, and undue influence employed in procuring a contract for the payment of money may vitiate and destroy the obligation created, and render it of no effect, and the party who has been compelled to pay money on account thereof may maintain an action to recover the same, such a right does not exist and cannot be enforced where the consideration of the contract, thus made, arises entirely upon or is in any way affected by the compounding of a felony. When this element enters into the contract, it becomes tainted with a corrupt consideration and cannot be enforced. . . .

We cannot agree with the doctrine that if the plaintiff was influenced by the duress of the defendant, and at the same time both parties intended the compounding of a felony, that they were not in *pari delicto*. It is enough that the vice of compounding a felony was a part of the contract, operating upon the minds of both parties, and thus placing them upon an equality, to render the contract nugatory and of no effect."

In *Schoener v. Lissauer* (1887) 107 N. Y. 111, 13 N. E. 741, however, the court canceled a mortgage "procured by the defendants by their threats and menaces that unless she gave said mortgage they would cause her son to be sent to the state prison for the offense of larceny and embezzlement, which they charged him with having committed against them when in their employ, and for which he was under arrest and indictment on their complaint, and about to be tried." The court states that the judgment is not in conflict with *Haynes v. Rudd*.

In *Adams v. Irving Nat. Bank* (1889) 116 N. Y. 606, 6 L.R.A. 491, 15 Am. St. Rep. 447, 23 N. E. 7, it was held that money might be recovered back which was paid by a wife in consequence of threats and undue influence inducing the fear that if the money was not paid her husband would be arrested and imprisoned for concealing money from his creditors, he being in bankruptcy. The court of appeals refers to various cases of avoiding securities given to save relatives from lawful arrest, and states that the question of compounding a felony was not raised below and was not properly before it.

In *Jaeger v. Koenig* (1900) 30 Misc. 580, 62 N. Y. Supp. 803, it was held that a payment by a wife to "settle"

with the husband's employer for an alleged theft, under a threat that if the payment was not made, he would have her husband arrested, could be recovered back. The court stated that the argument advanced by the defendant, that the moneys in controversy were paid for the purpose of compounding a felony, was without reason, and said: "There is no evidence whatever that a criminal action was ever threatened by defendant, much less of an agreement on his part to abstain from prosecuting it. The reverse, however, is shown, the proof being that a civil suit only was contemplated by the parties when the settlement was effected. But, even had other procedure been contemplated, it would not, in my opinion, have affected plaintiff's right to recover. In the case relied upon to support this proposition, moneys were paid by a father, under an agreement that his son was not to be prosecuted criminally (Haynes v. Rudd (N. Y.) supra), and the proof showed that the moneys were paid voluntarily and without a coercion of force or threats, and the court rested its decision solely on the ground that the consideration mentioned in the contract was entirely affected by the compounding of a felony."

It is not clear how far the New Jersey court meant to go in *Jourdan v. Burstow* (1909) 76 N. J. Eq. 55, 139 Am. St. Rep. 741, 74 Atl. 124, affirmed in (1911) 78 N. J. Eq. 587, 81 Atl. 1133, where the vice chancellor, in dismissing a bill to recover property conveyed in satisfaction of the maker's embezzlement, said: "The decided weight of the evidence, so far as the facts are concerned, is with the defendants. It goes to sustain the charge of embezzlement and disproves the duress. The only question is the legal one: Whether a man who has actually conveyed property in satisfaction of an embezzlement, admitted to have been committed, can recover it back simply on the ground that the written agreement which he entered into with his employers to make restitution contains a clause against prosecution. Such an agreement is plainly illegal, and its performance could not be compelled. But, if actually performed, the grantor, suing to recover back his property, stands in the same situation that the grantee would have stood in had he sued on the agreement. He is in *pari delicto* and the maxim is, 'In *pari delicto*, *potior est conditio possidentis*.'" The court referred to the statement in *Haynes v. Rudd*, that the

parties were in *pari delicto*, and said: "Here the doctrine of *par delictum* was applied as against a third person. A *fortiori* must it be applied as against the alleged embezzler himself."

Practically the New York courts seem to grant relief about as readily as the courts of other jurisdictions, although technically, according to *Haynes v. Rudd*, relief is not to be afforded in cases of compounding a felony. In view of the fact that in most of the cases there is no practical doubt that a felony was compounded, it seems either that the New York courts consider that the compounding of a felony is a highly technical affair, or else that they have failed to pay due regard to the actual facts of the cases. That the courts in general will afford relief in cases of compounding a felony where there has been duress is clear from the early ejection case of *Worcester v. Eaton* (1814) 11 Mass. 377.

In *Worcester v. Eaton* (Mass.) supra, where a deed was given by a woman in consideration of a release from a charge of receiving stolen goods, *Parker, Ch. J.*, after stating that it had been held in numerous cases that money paid upon such a consideration as compounding a felony could not be recovered, stated: "It will appear that a distinction is maintained between those cases in which one of the parties has, by an illegal act, taken an advantage of and oppressed the other, and those in which it is not possible to distinguish between the parties as to the degree of their criminality."

The doctrine, as laid down by Lord Mansfield, is that, where certain acts are made unlawful by statute, to protect unwary and ignorant people from oppression and extortion, there, although both parties are guilty of violating the law, yet they are not equally guilty, and that, in such cases, the party from whom money is exacted shall recover it back from him who practises the oppression. . . . But that in all acts which are unlawful on account of their immorality, or because they are hostile to public policy, there the parties to the act are in *pari delicto* and *potior est conditio defendantis*. . . . If, then, the composition of a felony or of a larceny is an illegal consideration of any promise or obligation for money, the party claiming under such instrument cannot enforce it in a court of justice; nor can the other party, if he has paid it, recover it back again." But he sent the case back for a new trial on the ground that if the deed was extorted by

menaces of imprisonment, it would be avoided. And in *Worcester v. Eaton* (1816) 13 Mass. 371, 7 Am. Dec. 155, the deed was accordingly held for naught.

It will be observed that the court in *BERTSCHINGER v. CAMPBELL*, ante, 65, considers that if there was duress, the money paid could be recovered, although a felony was compounded. B. B. B.

WEST VIRGINIA SUPREME COURT OF APPEALS.

STATE OF WEST VIRGINIA EX REL.
GRAHAM SALE

v.

C. O. STAHLMAN, Mayor of Bluefield,
et al.

(— W. Va. —, 94 S. E. 497.)

Municipal corporation — regulating height of buildings.

1. Under a provision of its charter authorizing it "to regulate the height, construction, and inspection" of new buildings erected within its corporate limits, a city cannot prevent the owner of a lot situated in a built-up section and between three and four-story buildings, from erecting a one-story building thereon, by refusal of permission to erect it.

For other cases, see *Buildings, I. a*, in *Dig. 1-52 N. S.*

Same — construction of charter.

2. Properly construed, such charter provision confers authority respecting the height of buildings, only to limit or restrict it for the safety of persons and property.

For other cases, see *Buildings, I. a*, in *Dig. 1-52 N. S.*

Same — police power.

3. Prevention of the erection of buildings in a city, lower than adjacent and neighboring ones, has no such tendency to prevent danger from fire, or the spreading thereof, as will justify or validate it under the police power of the state.

For other cases, see *Constitutional Law, II. c*, in *Dig. 1-52 N. S.*

Eminent domain — private use.

4. A limitation upon an owner's use of his property cannot be imposed by law for the benefit of other property owners.

For other cases, see *Eminent Domain, III. c, 1*, in *Dig. 1-52 N. S.*

Same — ornament.

5. Nor can it be imposed only to effect symmetry or ornamentation of a city, street or section, otherwise than under the power of eminent domain, allowing compensation, if at all.

For other cases, see *Eminent Domain, III. c, 1*, in *Dig. 1-52 N. S.*

(November 13, 1917.)

Headnotes by POTTENBARGER, J.

Note. — As to constitutionality of statute or ordinance limiting height of building, see annotation following this case, post, 78.
L.R.A.1918C.

PETITION for a writ of mandamus to compel respondents to give to relator a permit to erect a one-story building on a lot owned by him. Writ awarded.

The facts are stated in the opinion.

Mr. John Randolph Tucker for petitioner.

Messrs. Ross & Kahle for respondents.

POTTENBARGER, J., delivered the opinion of the court:

Relying upon a provision of its charter (chapter 9, Acts of 1915), found in § 7 thereof, and conferring upon it, among others, the power "to regulate the height, construction, and inspection of all new buildings" thereafter to be erected within its territory, the city of Bluefield has refused to give the relator a permit to erect a building on a lot owned by him, situated in the business section of the city and fronting on Princeton avenue, one of its principal thoroughfares, on the sole ground of its character as to height, his purpose being the erection of a one-story building. By some regulation not fully disclosed in the pleadings, the city endeavors to enforce its policy of prevention of the erection of buildings less than three stories high, in that section, and has refused the permit in pursuance thereof. He seeks a writ of mandamus to compel issuance thereof.

Ordinarily, such charter provisions confer power to limit or restrict the height of buildings, not to require it, as a means of promotion or conservation of the value of adjacent or neighboring property, or attainment of esthetic ideals or purposes of the community or municipal authorities, and their justification and validity rest upon the police power of the state, under which the legislature may directly or indirectly provide for the public health, morals, safety, convenience, and prosperity. *Welch v. Swasey*, 193 Mass. 264, 23 L.R.A.(N.S.) 1160, 118 Am. St. Rep. 523, 79 N. E. 745; *Com. v. Boston Adv. Co.* 188 Mass. 348, 69 L.R.A. 817, 108 Am. St. Rep. 494, 74 N. E. 601; *People ex rel. Kemp v. D'Oench*, 111 N. Y. 359, 118 N. E. 862; *Fruth v. Board of Affairs*, 75 W. Va. 457, L.R.A.1915C, 981, 84 S. E. 105; *Eubank v. Richmond*, 226 U. S. 137, 57 L. ed. 156, 42 L.R.A.(N.S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192; *District of Columbia v. Brooks*, 214 U. S. 138, 53 L. ed. 941, 29 Sup. Ct. Rep. 500; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S.

561, 50 L. ed. 596, 28 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175.

Public safety from the danger of fire is the only ground upon which the city endeavors to justify and sustain its regulatory policy, and its position is well founded, if the regulation has any reasonable and substantial tendency to promote safety in that respect. The exercise of the police power must have a substantial basis. The power cannot be made a mere pretext for legislation that does not fall within it. Classification of property and rights for rate regulation, taxation, and the like cannot be made upon a mere arbitrary and groundless distinction between subjects. *Coal & Coke R. Co. v. Conley*, 67 W. Va. 129, 180, 67 S. E. 613; *Missouri, K. & T. R. Co. v. May*, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638; *Ozan Lumber Co. v. Union County Nat. Bank*, 207 U. S. 251, 52 L. ed. 195, 28 Sup. Ct. Rep. 89. The same principle governs in the test of validity, applied to statutes and ordinances ostensibly passed and adopted for promotion of the public health, comfort, and convenience. Its effect and its professed object must substantially agree and coincide. *Fulton v. Norteman*, 60 W. Va. 562, 9 L.R.A.(N.S.) 1196, 55 S. E. 658.

Artistic, civic, and economic views of a one-story building between three or four-story buildings in a section in which, as a rule, only the higher structures are put up, severely condemn it, but certain obvious laws of physics effectually exclude the assumption that it is substantially conducive to danger from fire. Of course, an open fire between tall buildings may be more dangerous, in the absence of resistance, than a smothered one; but a fire in a one-story

building would not be an open one. It would be subject to the restraining influence of the roof and walls, in a manner similar to that exerted by the walls, floors, and roof of a higher structure. Besides, a low building is more accessible to firemen than a high one. The combustible matter on which the fire feeds is all near the ground and within easy reach. Water may be poured directly upon it from the windows and roofs of the adjacent and neighboring buildings. Its low altitude decreases the danger to firemen and facilitates their work. There is nothing by which the fire can spread directly upward, the direction in which it runs most rapidly, and the volume of combustible matter is smaller than that of a higher building. Any slight tendency of a one-story building situated between higher ones to danger by fire is manifestly outweighed and reduced to nothing by these obvious and commonly known factors and principles.

The power and authority over the relator's property, claimed by the city, if allowed by law, would be a serious restraint upon his right of use and enjoyment. It cannot be imposed for the benefit of adjacent or neighboring property owners. *Eubank v. Richmond*, 226 U. S. 137, 57 L. ed. 156, 42 L.R.A.(N.S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192, cited. Nor can it be imposed to effect symmetry of the city, street or section, otherwise than under the power of eminent domain, allowing compensation, if at all. *Fruth v. Board of Affairs*, 75 W. Va. 457, L.R.A.1915C, 981, 84 S. E. 105, cited.

For the reasons stated, a peremptory writ of mandamus will be awarded agreeably to the prayer and motion therefor.

Annotation—Constitutionality of statute or ordinance limiting height of building.

This note is supplementary to that appended to *Welch v. Swasey*, 23 L.R.A.(N.S.) 1160, on the above question.

Generally as to exercise of police power for esthetic purposes, see notes to *People ex rel. Wineburgh Adv. Co. v. Murphy*, 21 L.R.A.(N.S.) 735; *Haller Sign Works v. Physical Culture Training School*, 34 L.R.A.(N.S.) 998; and *Byrne v. Maryland Realty Co.* L.R.A. 1917A, 1220.

It will be noticed that the charter provision involved in *STATE EX REL. SALE v. STAHLMAN*, ante, 77, authorizing a municipality to regulate the height, construction, and inspection of buildings within its limits, was construed to confer authority respecting the height of buildings only to limit or restrict them

for the safety of persons and property, and that it was held that a prevention of the erection of buildings in a city lower than those adjacent had no such tendency to prevent danger from fire or the spreading thereof as would justify or validate it under the police power.

The decision in *Welch v. Swasey* (1907) 193 Mass. 364, 23 L.R.A.(N.S.) 1160, 118 Am. St. Rep. 523, 79 N. E. 745, was relied upon in *Eubank v. Richmond* (1910) 110 Va. 749, 67 S. E. 376, 19 Ann. Cas. 186, in upholding the validity of an act giving municipalities the power to prescribe building lines and regulate the height of buildings, and also of an ordinance providing that whenever the owners of two thirds of

the property abutting on a street should request the committee on streets to establish a building line, the committee should establish a line not less than 5 nor more than 30 feet from the street line. This ordinance was held not to be a valid exercise of the police power, however, on an appeal to the United States Supreme Court (1912) 226 U. S. 137, 57 L. ed. 156, 42 L.R.A. (N.S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192, and the court there stated that it was unnecessary for them to consider the power of a city to regulate the height of buildings.

In *Williams v. Boston* (1906) 190 Mass. 541, 77 N. E. 509, and *American Unitarian Asso. v. Com.* (1907) 193 Mass. 470, 79 N. E. 878, in actions for damages, effect was given to statutes limiting the height of buildings in cer-

tain localities and providing for the recovery of certain damages by those whose property was injured thereby. The question of the constitutionality of the statutes was not, however, before the court for determination in these cases, although the court in the latter case intimated that such legislation, as an exercise of the police power, would be valid.

In *Kilgour v. Gratto* (1916) 224 Mass. 78, 112 N. E. 489, a statute giving cities and towns the right, among other things, to regulate the height of buildings, was before the court, but the question of its constitutionality was not raised, the point at issue being the validity of a by-law giving the selectmen of a town an uncontrolled discretion in allowing permits for the construction of factories.
J. T. W.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

MASSES PUBLISHING COMPANY

v.

THOMAS G. PATTON, Postmaster of the City of New York, Appt.

(248 Fed. 24.)

Postoffice — exclusion of nonmailable matter — constitutionality.

1. A statute excluding from the mails publications attempting to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, does not infringe the constitutional guaranty of freedom of the press or of liberty and property.

For other cases, see Constitutional Law, II. d, in Dig. 1-52 N. S.

Same — interference with discretion of Postmaster General.

2. The exercise of discretion by the Postmaster General in determining whether or not to transmit matter by mail which is alleged to be nonmailable under an act of Congress will not be interfered with by the courts unless clearly wrong.

For other cases, see Courts, I. c, 1, in Dig. 1-52 N. S.

Same — exclusion from mails — non-mailable matter.

3. The Postmaster General does not abuse his discretion in excluding from the mails, under the statute making nonmailable any matter intended to cause refusal of duty in

the military or naval forces of the United States, or to obstruct recruiting or enlistment in the service of the United States, a paper which idealizes those who resist the Conscription Law, commends as martyrs two persons convicted of conspiracy to induce persons not to register under the Conscription Act, encourages conscientious objection to such act, and by means of cartoons suggests disloyalty, represents government agents as trying to undermine democracy, and suggests that business interests brought on the war.

For other cases, see Postoffice, II. in Dig. 1-52 N. S.

Same — broken Liberty Bell.

4. A paper cannot be excluded from the mails merely because it contains a cartoon representing the Liberty Bell to be broken.

For other cases, see Postoffice, II. in Dig. 1-52 N. S.

Evidence — burden of proof — exclusion from mails.

5. One seeking to enjoin the exclusion of his paper from the mails by order of the Postmaster General has the burden of showing that such officer exceeded his power, or exercised it wantonly or maliciously.

For other cases, see Evidence, II. i, in Dig. 1-52 N. S.

Postoffice — nonmailable matter — suggestion.

6. If the natural and reasonable effect of what is said in a paper is to encourage resistance to the Conscription Law, and the words are used in an endeavor to persuade to resistance, the paper may be excluded from the mail under the Espionage Act, although the duty to resist is not mentioned, or the interest in resistance of persons addressed is not suggested.

For other cases, see Postoffice, II. in Dig. 1-52 N. S.

(November 2, 1917.)

Note. — As to exclusion of seditious matter from the mails under the Espionage Act, see annotation following this case, post, 89.

Generally as to power of courts to interfere with rulings of Postoffice Department, see note to *United States ex rel. Reinach v. Cortelyou*, 12 L.R.A. (N.S.) 186. L.R.A.1918C.

A PPEAL by defendant from an order of the District Court of the United States for the Southern District of New York, Hand, District Judge, granting a temporary injunction restraining him from treating a certain issue of plaintiff's magazine as non-mailable matter, and commanding him to transmit it through the mails. Reversed.

The facts are stated in the opinion.

Argued before Ward and Rogers, Circuit Judges, and Mayer, District Judge.

Mr. Francis G. Caffey for appellant.

Mr. Gilbert E. Roe for appellee.

Rogers, Circuit Judge, delivered the opinion of the court:

The complainant seeks an injunction restraining the defendant, as postmaster of the city of New York, from treating the August issue of a magazine known as *The Masses* as nonmailable matter under the Act of Congress of June 15, 1917, commonly known as the "Espionage Act," and commanding him to transmit the said magazine through the mail in the usual way.

Upon the filing of the complaint an order was entered requiring the defendant to show cause why the injunction should not issue. At the hearing affidavits were presented on behalf of the complainant to show that, if the magazines should be excluded from the mails, the business of the complainant would be practically ruined. An affidavit of the Postmaster General of the United States was presented on behalf of the defendant.

Under the provisions of Espionage Act, title 12, it became the official duty of the Postmaster General to determine what matter is nonmailable, and that official had instructed the postmaster of New York that *The Masses* was nonmailable. It appears that before this order was issued the solicitor for the Department, the Attorney General of the United States, and the Judge Advocate General of the Army, the latter being a lawyer and charged with the administration of the Draft Act of May 18, 1917, were consulted, and that they each advised that the circulation of the issue in question would constitute an offense under the Espionage Act. And the Judge Advocate General informed the Department that it was his opinion that the necessary effect of the issue of this August number would be to cause insubordination, disloyalty, mutiny, and refusal of duty in the naval and military forces of the United States, and that it would obstruct the recruiting and enlistment service of the United States. The learned district judge, in a carefully prepared opinion, reached the conclusion that the August issue of the publication in question did not contain any illegal matter and that the injunction should issue.

L.R.A.1918C.

That part of the Espionage Act which is involved here is title 12, which relates to the use of mails, and it reads as follows:

"Sec. 1. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book or other publication, matter or thing, of any kind, in violation of any of the provisions of this act is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any postoffice or by any letter carrier: Provided, that nothing in this act shall be so construed as to authorize any person other than an employee of the Dead Letter Office, duly authorized thereto, or other person upon a search warrant authorized by law, to open any letter not addressed to himself.

"Sec. 2. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book or other publication, matter or thing, of any kind, containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, is hereby declared to be nonmailable."

Section 3 of title 12 relates to the punishment to be imposed upon any person who uses or attempts to use the mails for the transmission of any matter declared to be nonmailable, and is not involved in this proceeding. But, as § 1 of title 12 makes nonmailable any matter which is in violation of any of the provisions of the act, it will be necessary to consider § 3 of title 1, which reads as follows: "Sec. 3. Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both."

It is the clear intent of title 12 to close the United States mails to any letters or literature in furtherance of any acts prohibited under the other titles of the statute. It is said that the act violates the 1st Amendment to the Constitution, which declares that "Congress shall make no law . . . abridging the freedom of speech, or of the press." It is also said that the act violates the 5th Amendment, which provided that "no person shall be . . . deprived

of life, liberty, or property, without due process of law."

In his Commentaries on the Laws of England Mr. Justice Blackstone, in speaking of the liberty of the press, declares that it is "essential to the nature of a free state." It consists, he says, "in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; . . . but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity." Vol. 4, p. 151. And Mr. Justice Story, in his Commentaries on the Constitution, states that "every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press." Vol. 2, 4th ed. § 1884.

In *Patterson v. Colorado*, 205 U. S. 454, 462, 51 L. ed. 879, 881, 27 Sup. Ct. Rep. 558, 10 Ann. Cas. 689 (1907), the court, speaking through Mr. Justice Holmes, declares that the main purpose of the constitutional provision as to free press is "to prevent all such previous 'restraints' upon publications as had been practised by other governments," and they do "not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." Now clearly the Espionage Act imposes no restraint prior to publication, and no restraint afterwards, except as it restricts circulation through the mails. Liberty of circulating may be essential to freedom of the press, but liberty of circulating through the mails is not, so long as its transportation in any other way as merchandise is not forbidden.

The act of Congress now called in question does not undertake to say that certain matter shall not be published nor that it shall not be transmitted in interstate commerce. It simply declares that such matter shall not be carried in the United States mails. In *Ex parte Jackson*, 96 U. S. 727, 24 L. ed. 877 (1877), the Supreme Court held that the power vested in Congress to establish postoffices and post roads embraces the regulation of the entire postal system of the country; and that, under it, Congress can designate what may be carried in the mail and what excluded. In that case Mr. Justice Field, speaking for the court, said: "In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people, but to refuse its facilities for the distribution of matter deemed injurious to the public morals."

A conviction for depositing in the mail a lottery circular contrary to an act of Con-

gress was sustained. And that decision was adhered to in *Re Rapiér*, 143 U. S. 110, 134, 36 L. ed. 93, 102, 12 Sup. Ct. Rep. 374 (1892). In the latter case Mr. Chief Justice Fuller said: "The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged within the intent and meaning of the constitutional provision unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matters condemned by its judgment, through the governmental agencies which it controls. That power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all."

In *Public Clearing House v. Coyne*, 194 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789 (1904), the court had before it the constitutionality of a law which authorized the Postmaster General, "upon evidence satisfactory to him," and which did not provide for any trial, hearing, or inquiry of any kind, to shut out of the mails the letters of any person or company conducting a lottery or any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses. Mr. Justice Brown, writing for the court, said: "In establishing such [postal] system Congress may restrict its use to letters, and deny it to periodicals; . . . it may admit books to the mails and refuse to admit merchandise, or it may include all of these and fail to embrace within its regulations telegrams or large parcels of merchandise, although in most civilized countries of Europe these are also made a part of the postal service. It may also refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy, as dangerous to its employees or injurious to other mail matter carried in the same packages. The postal regulations of this country, issued in pursuance of act of Congress, contain a long list of prohibited articles dangerous in their nature, or to other articles with which they may come in contact; such, for instance, as liquids, poisons, explosives, and inflammable articles, fatty substances, or live or dead animals, and substances which exhale a bad odor. It has never been supposed that the exclusion of these articles denied to their owners any of their constitutional rights. While it may be assumed, for the purpose of this case, that Congress would have no right to extend to one the benefit of its postal service,

and deny it to another person in the same class and standing in the same relation to the government, it does not follow that under its power to classify mailable matter, applying different rates of postage to different articles, and prohibiting some altogether, it may not also classify the recipients of such matter, and forbid the delivery of letters to such persons or corporations as, in its judgment, are making use of the mails for the purpose of fraud or deception or the dissemination among its citizens of information of a character calculated to debauch the public morality. For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitutionality of this law we believe has never been attacked. The same provision was by the same act extended to letters and circulars connected with lotteries and gift enterprises, the constitutionality of which was upheld by this court in *Re Rapier*, 143 U. S. 110, 36 L. ed. 93, 12 Sup. Ct. Rep. 374.

The court held that the fact that the Postmaster General could act and that no judicial hearing was provided for was not a fatal objection to the act. It declared: "That due process of law does not necessarily require the interference of the judicial power as laid down in many cases and by many eminent writers upon the subject of constitutional limitations. . . . If the ordinary daily transactions of the departments, which involve an interference with private rights, were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of the government."

The opinion of Judge Cooley in *Weimer v. Bunbury*, 30 Mich. 201, is cited approvingly, in which he said: "There is nothing in these words ('due process of law'), however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would afford redress."

This court holds, therefore, that the Espionage Act, in so far as it excludes from the mails certain matter declared to be unmailable, is constitutional.

The provisions contained in title 12 of the Espionage Act respecting the use of the

mails do not abridge the freedom of the press, nor deprive the complainant of its property, within the meaning of the 1st and 5th Amendments. Congress has not attempted to prevent the transportation of this publication as merchandise by the railways or by the express companies, and it has not authorized the confiscation of it, neither has it in any way prohibited publication.

In 1798 Congress enacted what is known as the Sedition Law, Act July 14, 1798, chap. 74, 1 Stat. at L. 596. It provided, among other things, for the punishment of any person who published any false and malicious thing against the government of the United States, or any matter intended to excite the people to oppose any law or act of the President in pursuance of law, or to resist or oppose or defeat any law. The act provoked great resentment throughout the country, and when it expired by its own limitation in 1801 it was not renewed. From that time until the present no similar legislation, so far as we are aware, has been enacted.

The Espionage Act now under consideration bears slight resemblance to the Sedition Law of 1798. The act as originally drafted provided that every publication "containing any matter of a seditious, anarchistic, or treasonable character" should be nonmailable. But when the act was under discussion in the Senate the words above quoted were stricken out; it having been objected that they were too indefinite and left too much room for construction. In Cooley's *Constitutional Limitations*, page 429, that distinguished authority says: "Repression of full and free discussion is dangerous in any government resting upon the will of the people. The people cannot fail to believe that they are deprived of rights, and will be certain to become discontented, when their discussion of public measures is sought to be circumscribed by the judgment of others upon their temperance or fairness. They must be left at liberty to speak with the freedom which the magnitude of the supposed wrongs appears in their minds to demand; and if they exceed all proper bounds of moderation, the consolation must be, that the evil likely to spring from the violent discussion will probably be less, and its correction by public sentiment more speedy, than if the terrors of the law were brought to bear to prevent the discussion."

In May's *Constitutional History*, chap. 10, p. 379, it is said that "when the press errs, it is by the press itself that its errors are left to be corrected. Repression has ceased to be the policy of rulers, and statesmen have at length fully realized the wise maxim of Lord Bacon, that 'the punishment of wits

enhances their authority, and a forbidden writing is thought to be a certain spark of truth that flies up in the faces of them that seek to tread it out."

The policy of the government of the United States has conformed to the doctrine above laid down. But the fact that the policy of the government of the United States has been adverse to limiting freedom of discussion affords little assistance in construing the particular act now under consideration. In *Hadden v. The Collector* (*Hadden v. Barney*) 5 Wall. 107, 18 L. ed. 518 (1866), the court, speaking through Mr. Justice Field, declared that "what is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes."

And in *Dewey v. United States*, 178 U. S. 510, 521, 44 L. ed. 1170, 1174, 20 Sup. Ct. Rep. 985, the court, speaking through Mr. Justice Harlan, declared that "this court has nothing to do with questions of mere policy that may be supposed to underlie the action of Congress. . . . Our province is to declare what the law is."

And in *White v. United States*, 191 U. S. 545, 551, 48 L. ed. 295, 297, 24 Sup. Ct. Rep. 172 (1903), Mr. Justice Day declared: "It is equally true that it is the business of courts to decide what the law is, and not by consideration or surmises as to the policy of the government have the effect to adjudge that to be law which has not been so enacted by the legislature."

Moreover, courts have nothing to do with the wisdom or unwisdom of a legislative act. It is the function of the legislative department to enact law, and of the judicial department to construe and apply it. The judges cannot pass upon the wisdom or the justice of the statute, but are simply to ascertain the intent of the lawmakers as expressed in the enactment, and to give effect thereto. *United States v. First Nat. Bank*, 234 U. S. 260, 58 L. ed. 1304, 34 Sup. Ct. Rep. 846. For reasons satisfactory to the lawmaking body the Espionage Act has been adopted, and, being valid, is the law of the land.

It is not intended by what has just been said to imply any doubt as to the wisdom of Congress in the enactment of the Espionage Act. The purpose of the act, as we understand it, was not to repress legitimate criticism of Congress or of the officers of the government, or to prevent any proper discussion looking to the repeal of any legislation which may have been enacted. The L.R.A.1918C.

United States being at war in defense of American rights, Congress intended by this act to prevent any use being made of the mails for the dissemination and distribution of publications intended to embarrass and defeat the government in its effort to prosecute the war to a successful termination. The statute is one of great importance and under it the Postmaster General, whose duty it is to execute all laws relating to the postal service, had to determine whether the particular publication in question was mailable or unmailable matter as defined in the act.

The Espionage Act being constitutional, the question which arises, then, is whether the action of the Postmaster General in excluding *The Masses* from the mails warranted the district judge in issuing an injunction commanding him to allow it to be transmitted by mail. The Postmaster General is the head of the Postoffice Department. The obligations of his oath of office oblige him to see that the provisions of the Espionage Act are carried into effect, so far as they relate to the use of the mail, and that matter declared by the act to be non-mailable shall be excluded from the mails. The performance of that duty involves the exercise of his judgment and discretion. To what extent can the courts control him by injunction in the performance of this duty?

In *Decatur v. Paulding*, 14 Pet. 497, 599, 10 L. ed. 559, 609 (1840), a mandamus to compel the Secretary of the Navy to comply with a resolution passed by Congress granting a pension was refused. The Secretary, acting under the advice of the Attorney General, decided that Mrs. Decatur was not entitled to claim the pension under the resolution, as she had applied for and received her pension under the general law, and she could not have both. The opinion was by Chief Justice Taney, who said: "The duty required by the resolution was to be performed by him [the Secretary of the Navy] as the head of one of the executive departments of the government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise [his] judgment and discretion."

. . . The court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it, by mandamus, act directly upon the officer and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties."

In *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 32 L. ed. 354, 9 Sup. Ct. Rep. 12 (1888), the court held that a mandamus to the Commissioner of Pensions was properly refused. The Commissioner had decided adversely an application for an increase of a pension under 21 Stat. at L. 281, chap. 236, Comp. Stat. 1916, § 8951. The opinion was by Mr. Justice Bradley, who said: "The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is imposed upon them, that is, as service which they are bound to perform without further question, then, if they refuse, a mandamus may be issued to compel them."

In *American School v. McAnnulty*, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33 (1902), the Supreme Court reversed the court below, which had dismissed a bill asking for an injunction to restrain a postmaster from carrying out an order of the Postmaster General withholding mail on the ground that the person to whom it was addressed was engaged in a scheme for obtaining money through the mails by means of fraudulent pretenses. The Supreme Court, in reversing the judgment, did so with instructions to issue the temporary injunction as applied for. The case was decided upon a demurrer, so that the allegations in the bill of complaint were taken as true, and the bill averred facts showing that the complainant's business was legitimate, and not fraudulent. If the business was not fraudulent, the Postmaster General had no authority under the act to withhold the mail.

In *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 47 L. ed. 1074, 23 Sup. Ct. Rep. 698 (1903), it was held that neither an injunction nor a mandamus would lie against an officer of the Land Department to control him in discharging an official duty which required the exercise of his judgment and discretion. Mr. Justice Peckham, writing for the court, said: "Whether he [the Secretary of the Interior] decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty, to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. . . . The responsibility, as well as the power, rests with the Secretary, uncontrolled by the courts."

In *Bates & G. Co. v. Payne*, 194 U. S. 106, 48 L. ed. 894, 24 Sup. Ct. Rep. 595 (1904), L.R.A.1918C.

the bill asked for an injunction to compel the Postmaster General to transmit through the mails, as matter of the second class, a publication alleged to be a periodical, and to enjoin him from enforcing an order made by him, denying it entry as such. The bill was dismissed and the injunction denied. Mr. Justice Brown, writing for the court, said that "where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong."

Again he says: "The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive, and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right, of so doing."

And he concludes: "While, as already observed, the question [that decided by the Postmaster General] is one of doubt, we think the decision of the Postmaster General, who is vested by Congress with the power to exercise his judgment and discretion in the matter, should be accepted as final."

In *Public Clearing House v. Coyne*, 194 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. Rep. 798 (1904), the court held that it was within the power of Congress to intrust the Postmaster General with the power of seizing and detaining letters upon evidence satisfactory to himself, and that his action would not be reviewed by the court in doubtful cases. The act authorized the Postmaster General, upon evidence satisfactory to him that any person was conducting a scheme or device for obtaining money or property through the mails by fraudulent pretenses, to instruct postmasters at any postoffice at which registered letters arrived, directed to any such person, to return the same to the postmaster at the office at which they were originally mailed with the word "Fraudulent" stamped upon the outside.

In *Smith v. Hitchcock*, 226 U. S. 53, 57 L. ed. 119, 33 Sup. Ct. Rep. 6 (1912), a bill was filed to restrain the Postmaster General from revoking orders according second-class mail privileges to the plaintiffs. The ground of the bill was that the privileges had been annulled without granting the hearing required by the act (31 Stat. at L.

1099, 1107, chap. 851, Comp. Stat. 1916, § 7312) and that the publications were periodical publications within the meaning of the act (20 Stat. at L. 355, 358, 359, chap. 180). The Postmaster General had decided that the publication was not a "periodical" and could not be carried as second-class matter, but would have to go as third-class and pay the higher rate. Mr. Justice Holmes, speaking for the court, said: "Thus a question of law is raised, although, as suggested in *Bates & G. Co. v. Payne*, 194 U. S. 106, 108, 48 L. ed. 894, 895, 24 Sup. Ct. Rep. 595, we should not interfere with the decision of the Postmaster General, unless clearly of opinion that it was wrong. . . . We have no such clear opinion."

See also *Lewis Pub. Co. v. Morgan*, 229 U. S. 288, 57 L. ed. 1190, 33 Sup. Ct. Rep. 867; *United States ex rel. Parish v. MacVeagh*, 214 U. S. 124, 131, 53 L. ed. 986, 938, 29 Sup. Ct. Rep. 556; *Johnson v. Drew*, 171 U. S. 93, 43 L. ed. 88, 18 Sup. Ct. Rep. 800; *Burfenning v. Chicago*, St. P. M. & O. R. Co. 163 U. S. 321, 323, 41 L. ed. 175, 176, 16 Sup. Ct. Rep. 1018.

This, court holds, therefore, that if the Postmaster General has been authorized and directed by Congress not to transmit certain matter by mail, and is to determine whether a particular publication is nonmailable under the law, he is required to use judgment and discretion in so determining, and his decision must be regarded as conclusive by the courts, unless it appears that it is clearly wrong.

We come, therefore, to consider the authority vested by Congress in the Postmaster General to determine whether he acted within his jurisdiction when he excluded the complainant's magazine from the mails. The Espionage Act is entitled: "An Act to Punish Acts of Interference with the Foreign Relations, the Neutrality, and the Foreign Commerce of the United States, to Punish Espionage, and Better to Enforce the Criminal Laws of the United States, and for Other Purposes."

Title 12 of the act is the only one relating to the use of the mails. And § 1 of that title expressly declares that "every . . . publication . . . of any kind, in violation of any of the provisions of this act is hereby declared to be nonmailable matter and shall not be conveyed in the mails."

As any publication which is in violation of any provision of the act is nonmailable, an examination of the act as a whole is necessary, and shows that the following matter is made nonmailable:

(1) Any matter advocating or urging treason or forcible resistance to any law of the United States. Title 12, § 3.

(2) Any matter containing information

respecting the national defense and which is intended to be used to the injury of the United States or to the advantage of any foreign nation. Title 1, § 1.

(3) Any matter containing information, intended to be communicated to the enemy, with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, air craft, or war materials of the United States, or with respect to the plans or conduct of the war, or the plans or conduct of any naval or military operations, or with respect to any measures undertaken or intended for the fortification or defense of any place, or any other information relating to the public defense which might be useful to the enemy. Title 1, § 2.

(4) Any matter, when the United States is at war, containing false statements wilfully intended to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, and matter wilfully intended to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, and matter wilfully intended to obstruct the recruiting or enlistment service of the United States. Title 1, § 3.

The excluded publication is a magazine known as *The Masses*. By its own statement it is a radical and revolutionary publication, not revolutionary, however, in that it desires to overturn existing forms of government by force of arms, as it is opposed to war. It is revolutionary, not only in matters political, but in art and literature and religion as well. It is a monthly publication of about 50 pages, and has a circulation of from 20,000 to 25,000 copies each month. For a number of years it has passed freely through the mails to its subscribers throughout the United States.

The objectionable matter was contained in the August issue and consisted of certain articles. These were entitled: "A Question," "A Tribute," "Conscientious Objectors," "Friends of American Freedom." Besides these articles, there were four cartoons, which were also objected to. These were entitled: "Liberty Bell," "Conscription," "Making the World Safe for Capitalism," and "Congress and Big Business."

In the article entitled "A Question" the editor writes: "I would like to know to-day how many men and women there are in America who admire the self-reliance and sacrifice of those who are resisting the conscription law on the ground that they believe it violates the sacred rights and liberties of man. How many of the American population are in accord with the American press when it speaks of the arrest of these

men of genuine courage as a 'Round-up of Slackers?' Are there none to whom this picture of the American Republic adopting toward its citizens the attitude of a rider toward cattle is appalling? I recall the Essays of Emerson, the poems of Walt Whitman, which sounded a call never heard before in the world's literature, for erect and insuppressible individuality, the courage of solitary faith and heroic assertion of self. It was America's contribution to the ideals of man. . . . I wonder if the number is few to whom this high resolve was the distinction of our American idealism, and who feel inclined to bow their heads to those who are going to jail under the whip of the state, because they will not do what they do not believe in doing. Perhaps there are enough of us, if we make ourselves heard in voice and letter, to modify this ritual of contempt in the daily press, and induce the American government to undertake the imprisonment of heroic young men with a certain sorrowful dignity that will be new in the world."

The article idealizes those who resist the Conscription Law, and it represents them as heroic. In saying that the law violates sacred rights and is contrary to liberty, and that those who refuse to submit to it are heroes, it incites disobedience to the statute.

The poem entitled "A Tribute" represents as martyrs worthy of admiration two notorious persons who had just been convicted under an indictment charging them with conspiracy to induce persons not to register under the Conscription Act. It reads in part as follows:

Emma Goldman and Alexander Berkman
Are in prison to-night.
But they have made themselves elemental
forces,
Like the water that climbs down the rocks,
Like the wind in the leaves,
Like the gentle night that holds us.
They are working on our destinies,
They are forging the love of the nations.

The statement that these two individuals have made themselves elemental forces akin to the rocks and trees and rivers, under ordinary circumstances, would be harmless; but coming at this particular time, and after their conviction, the inference being that their greatness grows out of their offense, and that they are worthy of admiration and honor, it is equivalent to saying that their unlawful conduct is worthy to be followed.

The article "Conscientious Objectors" refers to a number of letters written from English prisons by conscientious objectors. These letters are printed in the same issue of the magazine, and the article recommends L.R.A.1918C.

those in this country who intend "to stick it out to the end" (resist conscription to the end) to read thoroughly the letters. The article declares: "We believe that our protesters against government tyranny will be as steadfast as their English comrades. It is not by any means as certain that they will be as polite to their guards and tormentors, but we hope they will remember that these are acting under official compulsion, and not as free men. . . . There are some laws which the individual feels that he cannot obey, and which he will suffer any punishment, even that of death, rather than recognize as having authority over him. The fundamental stubbornness of the free soul, against which all the powers of the state are helpless, constitutes a conscientious objection, whatever its original sources may be in political or social opinion. It remains to be demonstrated that a political disapproval of this war can express itself in the same heroic firmness that has in England upheld the Christian objectors to war as murder." The article, taken as a whole, may well be regarded as intended to encourage objectors to be as steadfast protesters against "government tyranny" as their English comrades. In other words, it is an encouragement to disobey the law.

The article "Friends of American Freedom" is devoted to Alexander Berkman and Emma Goldman, already commented upon in this opinion as having been convicted of a conspiracy to induce persons not to register. The article pays them "tribute of admiration for their courage and devotion." There is an allusion to the fact that Berkman and Goldman had advocated in their paper, Mother Earth, that those liable to the military draft, who do not believe in the war, should refuse to register. The natural effect of it is to encourage those who have objections to war not to register as the Conscription Act requires. Admiration of conspirators convicted of the offense of seeking to defeat the operation of the Conscription Act is equivalent to an approval of their crime and an encouragement to others to disobey the law in like manner.

In considering the cartoons, we may observe that political cartoons have long been used as a very effective means of political propaganda. They were so employed in France during the French Revolution and in England as early as the days of Walpole. In this country they were used during the Revolution, in the War of 1812, and in the Civil War. The brilliant cartoons of Nast, satirizing the Tweed ring in the city of New York, were conceded at the time to have exerted a powerful influence in the destruction of that corrupt combination. A cartoon may be a leading article. It has

been described as "a leading article transformed into a picture." It can express ideas as lucidly and clearly as printed words, and there is no escape from legal responsibility because pictures, rather than words, are used.

In the cartoon entitled "Liberty Bell," the Liberty Bell is presented in a broken form. The idea meant to be conveyed may be that there is no such thing as liberty left in the United States. But whatever it means, taken by itself, it would afford no ground for exclusion from the mails.

The cartoon entitled "Conscription" portrays a youth lying across the mouth of a cannon with his arms chained to the wheels of the gun carriage. "Democracy," in the form of a nude woman, is tied by her extended arms and her crossed feet to a wheel. And "Labor," crouched down on the gun carriage, a pitiable object, is fastened in like manner. A woman is on her knees on the earth at the side of the cannon in utter despair, with her head bent back and her arms uplifted, while a child lies neglected at her side. The counsel for the complainant admits in his brief that this cartoon "is a powerful argument against the Conscription Law. It says, in effect, that the youth of the land are by it forced into military service; that the law binds labor to military service as well; that it causes great agony and suffering to the womanhood of the country, and that the mothers of the country with children too small to be subject to the 'Draft' pray to God that the Draft Law may be repealed before their children come to military age, and that democracy is trampled under foot by such a law. That is what this picture says."

But that is not what it says to us. It seems to us to say: This law murders youth, enslaves labor to its misery, drives womanhood into utter despair and agony, and takes away from democracy its freedom. Its voice is not the voice of patriotism, and its language suggests disloyalty. If counsel wished the court to understand that, in his opinion, the effect of the cartoon would not be to interfere with enlistment, we are not able to agree with him. That it would interfere, and was intended to interfere, was evidently the opinion of the Postmaster General; and this court cannot say that he was not justified in his conclusion.

The cartoon "Making the World Safe for Capitalism" shows a Russian absorbed in studying a paper marked "Plans for a Genuine Democracy." On one side of him Japan and England appear in a threatening attitude, and on the other Mr. Root and Mr. Russell, members of the commission sent by the United States to Russia, appear in the guise of advisers. Mr. Root has in his

hands a noose, labeled "Advice," with which it is intended to entrap or choke to death the Russian democracy. The court cannot say that the Postmaster General was not warranted in concluding that this cartoon was intended to arouse the resentment of some of our citizens of foreign birth and prevent their enlistment.

In the cartoon "Congress and Big Business" Congress is represented by a disconsolate individual who is ignored by a number of overdeveloped men of Big Business gathered around a table inspecting a large paper spread over it and labeled "War Plans." Congress is quoted as saying: "Excuse me, gentlemen, where do I come in?" "Big Business" replies: "Run along now; we got through with you when you declared war for us." This cartoon is intended to stir up class hatred of the war and to arouse an unwillingness to serve in the military and naval forces of the United States. The clear import is, if the war was brought on by "Big Business," then let "Big Business" carry it on, and let Labor stand aloof. The court cannot say that the Postmaster General was clearly wrong in concluding that it would interfere with enlistments.

In the case at bar, giving to the complainant the most favorable construction, the burden is upon it to overcome the presumption that the Postmaster General's conclusion is right, or that he has exceeded his power or exercised it wantonly or maliciously. See Judge Mayer's opinion in *Sanden v. Morgan* (1915; D. C.) 225 Fed. 266, 269. This the complainant should do by a preponderance of evidence. And this the complainant has not done.

It may be conceded that the language of the statute cannot have one meaning in an indictment and another when the question arises respecting the exclusion of matter from the mail as containing that which violates the provisions of § 3 of title 1. If the magazine is nonmailable under that section, it may be that the editor has committed a crime in publishing it, for which, upon conviction, he may be fined not more than \$10,000, or imprisoned for not more than twenty years, or both. The district judge thought no crime had been committed, and that the magazine was therefore mailable, because the publication did not in so many words directly advise or counsel a violation of the act. He declared that "if one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under this section every political agitation which can be shown to be

apt to create a seditious temper is illegal. I am confident that, by such language, Congress had no such revolutionary purpose in view." [244 Fed. 540.]

This court does not agree that such is the law. If the natural and reasonable effect of what is said is to encourage resistance to a law, and the words are used in an endeavor to persuade to resistance, it is immaterial that the duty to resist is not mentioned, or the interest of the persons addressed in resistance is not suggested. That one may wilfully obstruct the enlistment service, without advising in direct language against enlistments, and without stating that to refrain from enlistment is a duty or in one's interest, seems to us too plain for controversy. To obstruct the recruiting or enlistment service, within the meaning of the statute, it is not necessary that there should be a physical obstruction. Anything which impedes, hinders, retards, restrains, or puts an obstacle in the way of recruiting, is sufficient. In granting the stay of the injunction until this case could be heard in this court upon the appeal, Judge Hough declared that "it is at least arguable whether there can be any more direct incitement to action than to hold up to admiration those who do act. *Oratio obliqua* has always been preferred by rhetoricians to *oratio recta*; the Beatitudes have for some centuries been considered highly hortatory, though they do not contain the injunction, 'Go thou and do likewise.'" [— C. C. A. —, 245 Fed. 106.]

With this statement we fully agree. Moreover, it is not necessary that an incitement to crime must be direct. At common law the "counseling" which constituted one an accessory before the fact might be indirect. See Whart. Crim. Law, 11th ed. § 266. Bishop lays down the rule thus: Every man is responsible criminally "for what of wrong flows directly from his corrupt intentions. . . . If he awoke into action an indiscriminate power, he is responsible. If he gave directions vaguely and incautiously, and the person receiving them acted according to what he might have foreseen would be the understanding, he is responsible." 1 Bishop, Crim. Law, § 641.

And in *Reg. v. Sharpe*, 3 Cox, C. C. 288, it is laid down that "he who inflames people's minds and induces them by violent means to accomplish an illegal object is himself a rioter, though he take no part in the riot."

In conclusion, we are satisfied that the publication involved contains no matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, in violation of § 2 of title 12. The Postmaster General's exclusion of the publication from the mails is not put on the

ground that it contained any such matter. It is not so clear that the publication is free from matter which involves an attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States. The Postmaster General thought it contained matter objectionable on that ground, and a difference of opinion upon that phase of the matter is possible.

The question whether the publication contained matter intended wilfully to obstruct the recruiting or enlistment service is less doubtful. Indeed, the court does not hesitate to say that, considering the natural and reasonable effect of the publication, it was intended wilfully to obstruct recruiting; and even though we were not convinced that any such intent existed, and were in doubt concerning it, the case would be governed by the principle that the head of a Department of the government in a doubtful case will not be overruled by the courts in a matter which involves his judgment and discretion, and which is within his jurisdiction.

The order granting the preliminary injunction is reversed.

Ward, Circuit Judge, concurring:

I think the sole ground on which the order of the Postmaster General can be sustained is that some parts of the August number of *The Masses* were intended to obstruct and do obstruct the recruiting or enlistment service of the United States. This involves a conclusion of fact to be drawn by him from the cartoons and text of this particular number. Advice to resist the law may be indirect as well as direct, and the conclusion of the Postmaster General in matters of fact, whether we agree with him or not, is final. I think it important, however, to say that not every writing, the indirect effect of which is to discourage recruiting or enlistment, is within the statute. In addition to the natural effect of the language on the reader, the intention to discourage is essential. Arguments in favor of immediate peace, or in favor of repealing the Conscription Act, do this indirectly. It is, notwithstanding, the constitutional right of every citizen to express such opinions, both orally and in writing, and Congress cannot be presumed to have intended by the Espionage Act to authorize the Postmaster General to exclude such articles, written honestly and without the intention of advising resistance to the law. His authority in the premises depends exclusively upon the statute, as was well stated by Mr. Justice Peckham in *American School v. McAnnulty*, 187 U. S. 109, 47 L. ed. 96, 23 Sup. Ct. Rep. 39: "Here it is contended

that the Postmaster General has, in a case not covered by the acts of Congress, excluded from the mails letters addressed to the complainants. His right to exclude letters, or to refuse to permit their delivery to persons addressed, must depend upon some law of Congress, and, if no such law exist, then he cannot exclude or refuse to deliver them. Conceding, arguendo, that when a question of fact arises, which, if found in one way, would show a violation of the statutes in question in some particular, the decision of the Postmaster General that such violation had occurred, based upon some evidence to

that effect, would be conclusive and final, and not the subject of review by any court, yet to that assumption must be added the statement that if the evidence before the Postmaster General, in any view of the facts, failed to show a violation of any Federal law, the determination of that official that such violation existed would not be the determination of a question of fact, but a pure mistake of law on his part, because the facts being conceded, whether they amounted to a violation of the statutes would be a legal question, and not a question of fact."

Annotation—Exclusion of seditious matter from the mails under the Espionage Act.

As may be seen from the opinion in *MASSER PUB. CO. v. PATTON*, ante, 79, the court below took the view that the publications complained of did not violate the statute. (1917) 244 Fed. 535. Pending the appeal a stay was granted by a judge of the appellate court. (1917) — C. C. A. —, 245 Fed. 102.

In commenting on *MASSER PUB. CO. v. PATTON*, the Central L. J. vol. 86, p. 132, says, not without pertinence: "It would seem quite a claim for one having views that might be deemed opposed to the policy of our government in the prosecution of the war to claim that the government must aid him in their dissemination."

In *Jeffersonian Pub. Co. v. West* (1917) 245 Fed. 585, the court refused to enjoin the postmaster at Thomson, Georgia (acting on the order of the Postmaster General), from withdrawing the second-class mailing privileges of *The Jeffersonian*, a newspaper. The court agreed with the Postmaster General that the matter printed in the publication was unmailable, as evincing a purpose on the part of the publisher to make false statements with intent to interfere with "the operation and success of the military or naval forces of the United States, to wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service," etc. Among the matters objected to were the following statements: "Men conscripted to go to Europe are virtually condemned to death and everybody knows it. President Wilson admitted as much in his Flag Day address. . . . Why is your boy condemned to die in Europe? . . . Woodrow Wilson did swear to support the Constitution. And now, within six months after taking that solemn and public oath, the Congressmen and Presi-

dent, who did so, are treating the Constitution exactly as the Kaiser treated the Belgium treaty. . . . These are the Representatives in Congress, Lower House, who confiscated the liberty and the lives of your sons. . . . I advise . . . the conscripts to await the decision of the United States Supreme Court, and not to be clubbed by the fact of conscription into enlistment. Once you volunteer and sign up, you can be sent anywhere, and the law can't help you."

It may be noted that in *United States v. Pierce* (1917) 245 Fed. 878, the court overruled a demurrer to an indictment under the Criminal Code and the Espionage Act for conspiracy in publishing a pamphlet or circular. After quoting at length therefrom, the court characterizes some of the quotations as follows: "We have here, not only lurid and exaggerated pictures of the horrors of war, possible and impossible, but many false statements calculated to incite opposition to the war and opposition to the government, and also calculated to interfere with the morale of our armies, discourage enlistments, registration, and willing service in our armies, and encourage desertion. These false statements are also calculated to encourage our enemies and discourage and intimidate our own citizens and soldiers, and thereby promote the success of our enemies. It is not true that the recruiting officers will take our sons of military age and 'impress them into the army.' It is not true that 'you are being dragged, whipped, lashed, hurled into it' (the Army or the war). It is not true that 'the Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played that he has no time to protect the food supply from

gamblers.' The Attorney General of the United States is not doing anything of the kind. It is not true that 'we are beholding the spectacle of whole nations working as one person for the accomplishment of a single end, namely, killing.' It is not true that 'now you call every person traitor, slacker, pro-enemy who will not go crazy on the subject of killing; and you have turned the whole energy of all the nations of the world into the service of their kings for the purpose of killing, killing, killing.' It is not true that 'our entry into it (this war) was determined by the certainty that if the allies do not win, J. P. Morgan's loan to the allies will be repudiated and those American investors who bit on his promises would be hooked.' Here is a plain assertion to every intelligent mind that the declaration of war to which reference has been made contains a falsehood, and that such declaration was made because of the fear that the allies might not win, and that in such

case J. P. Morgan's loans to the allies would be repudiated, payment refused, and the American investors would lose their loans and suffer loss. In other words, that our entry into this war with Germany was determined upon by Congress to insure, if possible, the success of the allies, to the end that they would fulfil their contracts and pay the loans made them by individuals in the United States. The purposes and motives of our President and of Congress are impugned and grossly misrepresented and falsified. What reports or statements can be more or better calculated to interfere with the operation and success of our military and naval forces in this war, or more or better calculated to promote the success of the enemies of the United States?"

Generally as to power of courts to interfere with rulings of Postoffice Department, see the note to *United States ex rel. Reinach v. Cortelyou*, 12 L.R.A. (N.S.) 166.

B. B. B.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

DELLA THRAILKILL, Plff. in Err.,
v.
CROSBYTON-SOUTHPLAINS RAILROAD
COMPANY et al.

(246 Fed. 687.)

Principal and agent — liability for compensation of broker's agent.

1. A property owner who has contracted with a broker for a sale is not liable for the compensation of the broker's agent by accepting the benefit of his services without knowing that he was acting on behalf of the owner, and not of the broker.

For other cases, see *Brokers*, II. b, 1, in Dig. 1-52 N. S.

Contract — signature by agent — wrong designation.

2. That an agent uses the wrong term to designate the capacity in which he is acting when executing a contract on behalf of his principal does not affect the validity of the contract.

For other cases, see *Principal and Agent*, II. a, in Dig. 1-52 N. S.

Note. — The implied power of a railroad company to engage in or guarantee an enterprise other than the transportation of goods or passengers is treated in the notes to *Western Maryland R. Co. v. Blue Ridge Hotel Co.* 2 L.R.A. (N.S.) 887, and *Louisville Property Co. v. Com.* 38 L.R.A. (N.S.) 830; and see later case, *Minnesota, D. & P. R. Co. v. Way*, L.R.A. 1915B, 925. L.R.A. 1918C.

Railroad — commission for selling land — ultra vires.

3. A railroad company has, for the purpose of increasing its business and revenues, the power to pay a commission upon the sale of unimproved lands of individuals along its route to other individuals who will locate upon and improve them.

For other cases, see *Corporations*, IV. d, 1, in Dig. 1-52 N. S.

(Hook, Circuit Judge, dissents.)

(October 15, 1917.)

ERROR to the District Court of the United States for the Southern District of Iowa, Martin J. Wade, District Judge, to review a judgment in favor of defendants in an action brought to recover commissions for selling land. Reversed as to defendant railroad. Affirmed as to other defendant.

The facts are stated in the opinion.

Argued before Hook, Smith, and Carland, Circuit Judges.

Messrs. Earl R. Ferguson and C. R. Barnes, for plaintiff in error:

The attorney general or the government is the only proper party to attack the validity of a contract providing for the ownership of real estate by a railroad corporation in Texas outside of right of way and station grounds, on the grounds of ultra vires.

Fritts v. Palmer, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93; *Ray v. Foster*, — Tex. Civ. App. —, 53 S. W. 54; *Buchanan v. Houston & T. C. R. Co.* — Tex. Civ. App. —, 180 S. W. 625; *Russell v. Texas & P. R.*

Co. 68 Tex. 646, 5 S. W. 686; *Schneider v. Sellers*, 98 Tex. 380, 84 S. W. 420; *Texarkana & Ft. S. R. Co. v. Texas & N. O. R. Co.* 28 Tex. Civ. App. 551, 67 S. W. 525; *Natoma Water & Min. Co. v. Clarkin*, 14 Cal. 552; *Mallett v. Simpson*, 94 N. C. 37, 55 Am. Rep. 595; *Southern P. R. Co. v. Orton*, 6 Sawy. 157, 32 Fed. 457; *State Bd. of Agri. v. Citizens' Street R. Co.* 47 Ind. 407, 17 Am. Rep. 702; *American Credit & Trust Co. v. Worthington*, 191 Ill. App. 177.

It is not ultra vires for a railroad corporation to assist and join in a collateral enterprise which is incidental thereto, which helps build up and develop its property, when the same is not too remote from its corporate aims and objects, and the public is not prejudiced thereby.

Jacksonville, M. P. R. & Nav. Co. v. Hooper, 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. Rep. 379; *New York v. Interborough Rapid Transit Co.* 53 Misc. 126, 104 N. Y. Supp. 161; *Teele v. Rockport Granite Co.* 224 Mass. 20, 112 N. E. 497; *Beck v. Pennsylvania R. Co.* 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908, 6 Am. Neg. Rep. 601; *Donald v. Chicago, B. & Q. R. Co.* 93 Iowa, 284, 33 L.R.A. 492, 61 N. W. 971; *Burns v. St. Paul City R. Co.* 101 Minn. 363, 12 L.R.A.(N.S.) 757, 112 N. W. 412; *Indian River S. B. Co. v. East Coast Transp. Co.* 28 Fla. 387, 29 Am. St. Rep. 258, 10 So. 480; *Abraham v. Oregon & C. R. Co.* 41 Or. 552, 69 Pac. 653; *Green Bay & M. R. Co. v. Union S. B. Co.* 107 U. S. 98, 27 L. ed. 413, 2 Sup. Ct. Rep. 221; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693; *Shelby v. Chicago & E. I. R. Co.* 143 Ill. 385, 32 N. E. 438; *Richellieu Hotel Co. v. International Military Encampment Co.* 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044; *Steinway v. Steinway & Sons*, 17 Misc. 43, 40 N. Y. Supp. 718; *State Bd. of Agri. v. Citizens' Street R. Co.* 47 Ind. 407, 17 Am. Rep. 702; *Reese, Ultra Vires*, § 14; *Bedford Belt Line R. Co. v. McDonald*, 17 Ind. App. 492, 60 Am. St. Rep. 172, 46 N. E. 1022; 1 Wood, *Railway Law*, § 169.

The corporation is estopped to deny a contract on the grounds of ultra vires, if the same has been fully performed and benefits received and retained by the corporation, and such plea would work an injustice.

Ft. Worth City Co. v. Smith Bridge Co. 151 U. S. 294, 38 L. ed. 167, 14 Sup. Ct. Rep. 339; *Zabriskie v. Cleveland, C. & C. R. Co.* 23 How. 381, 16 L. ed. 488; *Chesapeake & O. R. Co. v. Howard*, 178 U. S. 153, 44 L. ed. 1015, 20 Sup. Ct. Rep. 880; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693; *Holt v. Winfield Bank*, 25 Fed. 812; *Camden & A. R. Co. v. May's Landing & E. H. City R. Co.* 48 N. J. L. 530, 7 Atl. 323; *Pittsburg, J. E. & E. R. Co. v. Altoona & L.R.A.* 1918C.

B. C. R. Co. 196 Pa. 452, 46 Atl. 431; *Dewey v. Toledo, A. A. & N. M. R. Co.* 91 Mich. 351, 51 N. W. 1063; *Lucas v. White Line Transfer Co.* 70 Iowa, 541, 50 Am. Rep. 449, 30 N. W. 771; *Timm v. Grand Rapids Brewing Co.* 160 Mich. 371, 27 L.R.A.(N.S.) 186, 125 N. W. 357; *Luca Furniture Co. v. Almini Co.* 192 Ill. App. 386; *Taylor Feed Pen Co. v. Taylor Nat. Bank*, — Tex. Civ. App. —, 181 S. W. 534; *News-Register Co. v. Rockingham Pub. Co.* 118 Va. 140, 86 S. E. 874; 3 *Thomp. Corp.* 2d ed. § 287; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Chicago & A. R. Co. v. Derkes*, 103 Ind. 520, 3 N. E. 239; *Church v. Johnson Bros.* 93 Iowa, 544, 61 N. W. 916.

A railroad company which, with knowledge and without objection, allows a person to rent an office on its right of way, and put up a sign styling it the office of the company, is liable for the property purchased by such person in its name.

Florida Midland & G. R. Co. v. Varnedoe, 81 Ga. 175, 7 S. E. 129; *Vermont State Baptist Convention v. Ladd*, 58 Vt. 95, 4 Atl. 634; *Church v. Johnson Bros.* 93 Iowa, 544, 61 N. W. 916.

A corporation is liable for services rendered after incorporation.

Weatherford, M. W. & N. W. R. Co. v. Granger, 86 Tex. 350, 40 Am. St. Rep. 837, 24 S. W. 795.

A real estate agent who, pursuant to contract, finds a purchaser for land, is entitled to the stipulated commission from his principal, though the latter does not own the land himself, and the title is in another's name.

Rounds v. Alee, 116 Iowa, 343, 89 N. W. 1098; *Church v. Johnson Bros.* 93 Iowa, 544, 61 N. W. 916.

Where parties or corporations knowingly permit persons, including agents, to work for them, and acquiesce therein and accept the fruits of their services without any express contract, such persons or agents are entitled to just compensation for such service rendered, based upon the reasonable value thereof in that community, irrespective of contractual relation.

Pullman's Palace Car Co. v. Central Transp. Co. 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808; *Salt Lake City v. Hollister*, 118 U. S. 256, 30 L. ed. 176, 6 Sup. Ct. Rep. 1055; *Crocker v. United States*, 240 U. S. 74, 60 L. ed. 533, 36 Sup. Ct. Rep. 245; *Reese, Ultra Vires*, § 74.

A defendant is liable under quantum meruit, though the contract is void.

Dreyfuss v. Jones, 116 Ill. App. 75; *Leonard v. Boyd*, 24 Ky. L. Rep. 1320, 71 S. W. 508; *Woods v. Walsh*, 7 N. D. 376, 75 N. W. 767.

Messrs. D. W. Higbee and J. W. Burton, for defendants in error:

Persons dealing with an assumed agent, whether the assumed agency is a general or special one, are bound at their peril, if they would hold the principal, to ascertain not only the fact of the agency, but the nature and extent of the authority; and in case either is controverted, the burden of proof is upon them to establish it.

Tompkins Machinery & Implement Co. v. Peter, 84 Tex. 627, 19 S. W. 860; Chaffe v. Stubbs, 37 La. Ann. 656; Gore v. Canada Life Assur. Co. 119 Mich. 136, 77 N. W. 650; 1 Mechem, Agency, § 750.

The defendant railroad company cannot, under its charter and the laws governing railroads, enter into the real estate brokerage business and employ agents to sell land not belonging to it. Such a contract is against public policy and ultra vires.

Jacksonville, M. P. R. & Nav. Co. v. Hooper, 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. Rep. 379; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 59, 60, 35 L. ed. 68, 69, 11 Sup. Ct. Rep. 478; Lyde v. Eastern Bengal R. Co. 36 Beav. 10, 55 Eng. Reprint, 1059; Green Bay & M. R. Co. v. Union S. B. Co. 107 U. S. 98, 100, 27 L. ed. 413, 414; Zabriskie v. Cleveland, C. & C. R. Co. 23 How. 381, 398, 16 L. ed. 488, 497; Salt Lake City v. Hollister, 118 U. S. 250, 263, 30 L. ed. 176, 178, 6 Sup. Ct. Rep. 1055; Pearce v. Madison & I. R. Co. 21 How. 441, 16 L. ed. 184.

No recovery could be had by plaintiff unless it might be on the quantum meruit, properly pleaded and proved.

Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 61, 35 L. ed. 55, 69, 11 Sup. Ct. Rep. 478; Pullman's Palace Car Co. v. Central Transp. Co. 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808.

The mere fact that one performing a service intended to charge therefor is in itself insufficient. It must appear that, under all the facts and circumstances, both he and the beneficiary understood or ought to have understood that compensation was to be made for his services.

Wojahn v. National Union Bank, 144 Wis. 646, 129 N. W. 1068; Harley v. United States, 198 U. S. 229, 49 L. ed. 1029, 25 Sup. Ct. Rep. 634; 2 Elliott, Contr. pp. 608, 609.

Where a contract is illegal or ultra vires, the proper remedy is for the party aggrieved to disaffirm the contract and sue to recover, as on a quantum meruit, the value of what the defendant has actually received.

Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. Rep. 770; Pullman's Palace Car Co. v. Central Transp. Co. supra.
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Smith, Circuit Judge, delivered the opinion of the court:

In July, 1900, there was organized under the laws of Illinois the defendant the C. B. Live Stock Company, with its principal place of business at Chicago, Illinois. It originally had a capital stock of \$100,000, divided into shares of \$100 each, held as follows:

Julian M. Bassett	.....200 shares	\$20,000
L. A. Coonley, ward	....150 shares	15,000
Howard Coonley	..... 75 shares	7,500
Avery Coonley	.....200 shares	20,000
Edward P. Bailey	....100 shares	10,000
John Stuart Coonley	...200 shares	20,000
Sarah Coonley	..... 75 shares	7,500

This company had acquired by 1912 about 87,000 acres of land in Crosby county, Texas. In the meantime railroads had been built through the region, but none striking the lands of the defendant the C. B. Live Stock Company. It was about 40 miles to the nearest point on the railroad. Then the owners of the C. B. Live Stock Company decided to build a railroad. An Illinois corporation, and least of all one organized to engage in the live stock business, could not build a railroad in Texas, and it was decided to organize a new corporation for that purpose. It was necessary for a majority of the directors of the railroad company to reside in Texas, and for the reasons stated and to get more capital five or six new stockholders were taken into the new company, not in the old. On March 28, 1910, the articles of incorporation of the Crosbyton-Southplains Railroad Company were acknowledged, and on April 2, 1910, the majority of the board of directors made affidavit that the capital stock had been subscribed to an amount in excess of \$1,000 per mile of the proposed railroad and 5 per cent thereof had been paid in cash. On April 6, 1910, the attorney general certified that the articles were in accordance with the provisions of chapter 1, title 94, of the Revised Statutes of Texas, and not in conflict with the laws of the United States or the state of Texas. On the same day the articles were filed for record with the secretary of state and recorded. On May 10, 1911, the first train was operated over the road, which extended from Spur, in Dickens county, across Crosby county, to Lubbock, in Lubbock county, and it has been continuously operated ever since. On May 9, 1912, the C. B. Live Stock Company entered into a contract with the Realty Realization Company of Chicago, Illinois, by which the former put all its lands in the hands of the latter company for sale, agreeing to pay \$5 per acre for the expense of sale, and 30 per

cent of the purchase money above a stipulated net price as a commission for making the sale. The Crosbyton-Southplains Town Site Company and the Realty Realization Company entered into a contract, adopting the contract between the C. B. Live Stock Company and the Realty Company, save a change as to the amount of the commission on the sale of town lots. On the same day, but whether before or after the two contracts just referred to, does not appear, and perhaps that is immaterial, at a special meeting of the board of directors of the Crosbyton-Southplains Railroad Company: "The chairman stated to the board that, on account of the vast unsettled country through which the road is operating and will operate if extended, it had become necessary to establish an emigration department in order to get into communication with settlers, emigration companies, agents, and landowners, and to assist in advertising and settling farmers and others in Crosby and adjoining counties. He stated that, as the company had for its object the transportation of freight and passengers, it was incumbent upon the board to do all in its power to help create this business in every legitimate manner, and that he believed that an emigration department would greatly increase traffic of all kinds of the railroad, by aiding in settling the country and creating a publicity department, such as is usual with the present-day railroad. Whereupon, on motion duly made and seconded, the board did unanimously create and establish, for this company and for the purposes mentioned by the chairman, an emigration department, and appointed Clinton S. Woolfolk general emigration agent, and did authorize the vice president-general manager to pay said general emigration agent whatever salary deemed necessary by said vice president-general manager; said general emigration agent to work under the authority of the vice president-general manager, with power to appoint special emigration agents, under the advice and with the consent of the vice president-general manager."

The salary of Clinton S. Woolfolk as "general emigration agent" was subsequently fixed at \$1 a month and an annual pass on the railroad. Numerous persons were appointed special emigration agents, as provided for in the action of the board of directors. Among these was George W. Butler, W. J. Brunson, F. W. Wilsey, and probably Fred H. Johns. Their salary was also fixed at \$1 a month and a pass over the road. On August 24, 1912, a contract was entered into, signed by the "Land and Colonization Department, Crosbyton-Southplains Railroad Company, by George W. Butler, Land Commissioner," and the plain-

tiff, Della Thrailkill. This contract recited that the railroad controlled the sale of certain lands in Crosby and Dickens counties, Texas, and desired to secure the services of Mrs. Thrailkill in the sale and disposition of the same, and appointed and designated her as agent at Clarinda, Iowa, for the sale of said lands. "The party of the first part [the Railroad Company] agrees to pay to the party of the second part [Mrs. Thrailkill] as compensation for services in the premises a commission equaling \$3 per acre up to \$40 per acre and 7½ per cent on land above \$40 of the purchase price at which any lands are sold by or through the efforts of such second party at prices and terms acceptable to said first party."

There is no evidence that this contract was ever terminated, but on August 24, 1913, a new and similar contract was executed in the name of the Orchards Heights Development Company, the Crosbyton-Southplains Railroad Company, by Fred H. Johns, manager, and by Mrs. Thrailkill. The plaintiff went ahead and sold considerable quantities of the lands of the C. B. Live Stock Company under these contracts, and brought suit against it and the Railroad Company to recover for the stipulated commissions. The case was tried to a jury, and at the conclusion of all the evidence the court said: "In the cause on trial . . . there has been submitted to the court in the course of the evening a motion to direct this jury to return a verdict for the defendants, and that has been fully argued by counsel on both sides, and on the submission of the motion I have deemed it my duty to instruct you to return a verdict for both defendants in this case for two reasons, along with other reasons: First, that the Railroad Company—that as to any contract or obligation of the Railroad Company—made to take care of commission of agents working for the Realization Company, that the Railroad Company has no power to make such a contract, being a public service corporation, the rates being fixed by the law, by the Interstate Commerce Commission. It has no money except what people pay for transporting goods over the railroad. It has only power to use money for legitimate railroad purposes, and not for speculation of this kind, and any contract made would be absolutely void, if a contract was made. As to the Cattle Company, I should say that the evidence here is that the Realization Company did sell this land for them, and that she, the plaintiff, was working for the Realization Company, and of course the Live Stock Company would not be held to pay the agents—the men employed to sell the land under a contract by which that agent, the Realization Company, agreed it would pay

all the expense itself, any more than if [you] hired a man to sell your farm for you, and agreed to pay him \$200, and he went out and hired another man, and agreed to give him \$50; you would not be bound to pay the \$50 and also the \$200. So for those two reasons the motion is sustained. You are directed to return a verdict for the defendants, and you may sign this."

To this instruction the plaintiff excepted, and, after judgment rendered upon a verdict returned in accordance with the instruction, the plaintiff sued out this writ of error.

Let us first see if the ruling of the district court is correct as to the C. B. Live Stock Company. There is no claim there is any express contract between plaintiff and it. Reliance is had as against that corporation upon the right to recover under a quantum meruit. When, as in this case, the C. B. Live Stock Company had a contract with the Realty Realization Company to sell its lands, and there is nothing to indicate that it knew that the plaintiff was selling the lands in its own behalf, or not as a subagent of the Realty Realization Company, there is nothing upon which an implied contract of the C. B. Live Stock Company to pay her can rest. The court was right in directing a verdict for the C. B. Live Stock Company. Very different is the situation with reference to the Crosbyton-Southplains Railroad Company.

With that corporation the plaintiff had what appeared to be an express written contract to pay her \$3 per acre commission upon all lands controlled by them sold by her. Two questions naturally arise: First, did the agent who signed her contract have authority to do so? Second, was said contract ultra vires?

The first contract in the name of the Railroad Company was signed, "The Land and Colonization Department, Crosbyton-Southplains Railroad Company, by George W. Butler, Land Commissioner." This was manifestly signed by the Railroad Company, by Butler, and, if he had authority to make the contract, the mere fact that he signed it "Land Commissioner," in place of "Special Emigration Agent," would not defeat a recovery. It is evident that the contract was signed by the company by Butler, and if Butler had authority to sign the contract for the corporation it could make no difference if he signed it "Land Commissioner," in place of "Special Emigration Agent."

We therefore turn to the question whether he had the power, as special emigration agent, to sign the contract. The chairman L.R.A.1918C.

of the board of directors told the board that on account of the vast unsettled country through which the railroad was operating it became necessary to establish an emigration department in order to get into communication with settlers, emigration companies, agents, and landowners, and to assist in advertising and settling farmers and others in Crosby and adjoining counties. It was accordingly unanimously resolved to establish for the purposes mentioned by the chairman an emigration department, and Clinton S. Woolfolk was appointed general emigration agent, with power to appoint special emigration agents upon the advice and with the approval of the vice president-general manager. Under the resolution Butler was appointed special emigration agent, and as such, under the title of "Land Commissioner," he signed the contract. The words "Land Commissioner" are descriptive persons, and the contract, if signed in the name of the Crosbyton-Southplains Railroad Company, by George W. Butler, without more, would be sufficient, if it appeared that George W. Butler was an agent of the Crosbyton-Southplains Railroad Company, authorized to make the contract. The creation of the emigration department, to get into communication with settlers and to assist in settling farmers and others in Crosby and adjoining counties, and the appointment of Mr. Butler as special emigration agent, apparently vested in him the authority to make the contract in question.

We come now to the question as to whether said contract was ultra vires. There is no express prohibition of such a contract by a railroad company in the laws of Texas. It is customary for railroad companies, for the purpose of developing freight and passenger business, to maintain immigration departments. No authority has been called to our attention which prohibits such departments or the paying of reasonable compensation for securing settlers. The doctrine of ultra vires, whether invoked for or against a corporation, is not favored in the law. *San Antonio v. Mehafty*, 96 U. S. 312, 315, 24 L. ed. 816, 817; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 267, 24 L. ed. 693, 695; *St. Avit v. Kettle River Co.* 133 C. C. A. 76, 216 Fed. 872.

Could the Railroad Company lawfully contract to pay commissions upon the sale of lands which it did not own, but along its route, by individuals to other individuals, the Railroad Company being neither vendor nor vendee?

It seems to us that this is a question as to

whether the Railroad Company has a right to advertise the lands along its route to bring settlers; and, if it can, why can it not pay a reasonable sum to someone to secure purchasers rather than to expend a large sum in advertising in the hope of securing purchasers? The question must ordinarily be resolved into one of whether the contract is fair and reasonable. In *Heinz v. National Bank*, 150 C. C. A. 592, 237 Fed. 942, this court said: "It is elementary that the corporate powers of a national bank, as well as of other corporations, are of two classes: (1) Those expressly granted; and (2) those impliedly granted, as reasonably incident and necessary to the carrying out of the powers expressly granted. The former have to do largely with the main business objects and purpose of the corporation; the latter largely with the means and methods of attaining those objects and carrying out those purposes. The former are determined once and for all by the language of the charter or the fundamental law; the latter may change according to time, place, and surrounding circumstances. The test of the former is whether they are found in the words of the charter or law; the test of the latter is whether they are fairly incident to the former, and reasonably necessary to carrying them out. In determining whether a given act is within the former, the judgment and actions of the directors and stockholders have no legal weight or bearing. In determining whether a given act is within the latter, the judgment of the directors and stockholders, while not conclusive, is entitled to consideration. *Morse, Banks & Bkg.* § 54; 1 *Machen, Corp.* §§ 68, 87-90; *Thomp. Corp.* 2d ed. §§ 2100-2129. In *Burnes v. Burnes*, 70 C. C. A. 357, 137 Fed. 781, this court said, speaking of the implied powers of a private corporation: 'While the powers of a corporation are limited to those expressly granted and those fairly incidental thereto, they include the latter as completely as the former, and they always include the indispensable and the suitable means to exercise the granted powers.' In *Colorado Springs Co. v. American Pub. Co.* 38 C. C. A. 433, 97 Fed. 843, this court said, in speaking of the same subject: 'To sustain an act done by a private corporation as a valid exercise of corporate power, it is only necessary, where the act is not challenged by the state, to show that the act in question was not prohibited by the company's charter, and that it had a natural and reasonable tendency to aid in the accomplishment of one or more of the objects for which the corporation was created.' That the word 'necessary,' when used in *ref. L.R.A.1918C.*

erence to implied powers, does not mean indispensable, and is not to be given a narrow, restricted meaning, it is only necessary to refer to *McCulloch v. Maryland*, 4 Wheat. 316, 413, 414, 4 L. ed. 579, 603."

In *Jacksonville, M. P. R. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. Rep. 379, the court quotes with approval the language of Lord Chancellor Selborne in *Atty. Gen. v. Great Eastern R. Co.* L. R. 5 App. Cas. 473, 478: "This doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not, unless expressly prohibited, to be held, by judicial construction, to be ultra vires."

In *Union P. R. Co. v. Chicago, R. I. & P. R. Co.* 163 U. S. 564, 581, 41 L. ed. 263, 271, 16 Sup. Ct. Rep. 1180, the court said: "But where the subject-matter of the contract is not foreign to the purposes for which the corporation is created, a contract embracing 'whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not, unless expressly prohibited, to be held by judicial construction to be ultra vires.'"

A railroad company may enter into contracts not expressly nominated in its charter, if they are reasonably incidental to its objects or subsidiary to its chief purposes. Whatever transactions are fairly incidental or auxiliary to the main business of the corporation and necessary or expedient in the protection, care, and management of its property, may be undertaken by the corporation and be within the scope of its corporate powers. *Teale v. Rockport Granite Co.* 224 Mass. 20, 112 N. E. 497.

The Railroad Company ran for many miles through the lands of the C. B. Live Stock Company. It could obtain no business, freight or passenger, through that territory, except as it derived it directly or indirectly from the Live Stock Company. It was deeply interested from every financial point in having these lands divided up. The commissions agreed to be paid were, as shown by the evidence, very low for that region. We are of the opinion that, to secure the dividing up of these lands, one of the incidental powers of the Railroad Company was to agree to pay reasonable commissions for the sale of these lands, and the contract made in the name of the company by Butler was not ultra vires.

It is true the district court treated this as a contract to take care of commissions of agents working for the Realty Realization Company. This contract did not so provide.

There is no evidence that the plaintiff was in these matters the agent of the Realty Realization Company.

Our conclusion is that the judgment must be affirmed as to the C. B. Live Stock Company and reversed as to the Crosbyton-Southplains Railroad Company, with direc-

tions to set aside the verdict as to that corporation and grant a new trial.

Hook, Circuit Judge, dissents.

Petition for rehearing denied January 16, 1918.

CONNECTICUT SUPREME COURT OF ERRORS.

JOHN F. CRANEY

v.

JOHN DONOVAN.

(— Conn. —, 102 Atl. 640.)

Libel — charging adultery.

1. Charging adultery is actionable per se. For other cases, see *Libel and Slander*, II. b, in *Dig. 1-52 N. S.*

Evidence — speaking defamatory words — sufficiency to support recovery.

2. The speaking of defamatory words raises the presumption of falsity and absence of legal excuse and will justify recovery in the absence of proof of truth or privilege.

For other cases, see *Evidence*, II. c, 8, in *Dig. 1-52 N. S.*

Damages — publication of libel — exemplary.

3. Exemplary damages may be awarded for the publication of a libel with actual malice.

For other cases, see *Damages*, II. a, in *Dig. 1-52 N. S.*

Same — compensation for slander.

4. The damages for slander include compensation for all injuries done to the reputation and feelings of the person slandered and for all mental sufferings which are the proximate results of the defamation.

For other cases, see *Damages*, III. c, 2, a, in *Dig. 1-52 N. S.*

Note. — The majority opinion in *CRANEY v. DONOVAN* is a very clear and enlightening exposition of the relation of actual malice to the subject of damages, particularly compensatory damages in actions for libel or slander, and especially as to the possible effect of actual malice upon the element of damages which arises from mental suffering and injury to the feelings. It will be observed that the dissenting opinion does not question the correctness of the principles formulated in the majority opinion, but merely takes the view that the instructions of the trial court when considered as a whole were not out of harmony with those principles and were not likely to have misled the jury. The portion of the charge of the trial court which is quoted in the dissenting opinion does, indeed, seem to bring out very clearly the point which is made in the majority opinion, that actual malice may, in some in-

Same — amount of exemplary damages.

5. Exemplary damages for slander are limited to the expenses of the litigation less taxable costs.

For other cases, see *Damages*, II. a, in *Dig. 1-52 N. S.*

Same — effect of malice.

6. The compensatory damages for libel or slander cannot be enhanced by proof of actual malice beyond the actual increase of injury because of it.

For other cases, see *Damages*, III. t, in *Dig. 1-52 N. S.*

Same — future injury.

7. The damages for slander may include an allowance for future injury.

For other cases, see *Damages*, III. h, in *Dig. 1-52 N. S.*

Appeal — instructions — right to disregard testimony.

8. Failure to limit the false testimony which will justify the discrediting of a witness to that knowingly given is not reversible error if the jury is told that his testimony may be disregarded if the jury is satisfied that he is unworthy of belief.

For other cases, see *Appeal and Error*, VII. m, 4, a, (4), in *Dig. 1-52 N. S.*

(Prentice, Ch. J., and Beach, J., dissent.)

(December 15, 1917.)

A PPEAL by defendant from a judgment of the Superior Court for New London County denying his motion to set aside the verdict in plaintiff's favor and for a new

stances at least, be properly considered in determining the extent of the mental suffering and injury to the feelings which constitute an element of compensatory damages. As pointed out in the majority opinion, however, there were some parts of the charge from which the jury might have gained the impression that compensatory damages might, even independently of this consideration, be enhanced by virtue of actual malice. In many jurisdictions, of course, the rule as to exemplary or vindictive damages in actions for libel is much more liberal than the rule which prevails in Connecticut; and in such jurisdictions actual malice is an important factor in determining the amount of such damages; but, allowing for the difference in rules as to such damages, the discussion of the subject in the majority opinion is so clear as to amount almost to a demonstration of its own correctness.

trial in an action brought to recover damages for alleged slander and libel. Reversed.

The facts are stated in the opinion.

Messrs. John H. Barnes and J. J. Desmond, for appellant:

In actions for libel and slander in this state only compensatory damages are allowed when only general damages are claimed.

Hassett v. Carroll, 85 Conn. 37, 81 Atl. 1013, Ann. Cas. 1913A, 333.

Plaintiff, if the verdict is in his favor, is entitled to recover such actual damages as the jury may find to be the direct and proximate result of the publication, but not speculative or remote damages.

25 Cyc. 530.

Where special damage is not essential to the action it may still, of course, be proved at the trial to aggravate the damages, if it has been properly pleaded. The same particularity is required whether the words be actionable per se or not.

Odgers, Libel & Slander, 2d ed. p. 230.

When the plaintiff claims compensation for consequences of the injury which he has not yet experienced, he must prove with reasonable certainty that such consequences are to happen.

25 Cyc. 535; Sedgw. Damages, 9th ed. § 172.

The plaintiff does not allege in his complaint that he was damaged or injured in his reputation. His demand is only for such damages as follow from the uttering of the false words charged in the complaint, and the damages are therefore compensatory only.

Hanna v. Sweeney, 78 Conn. 493, 4 L.R.A. (N.S.) 907, 62 Atl. 785.

The court should not refer to a particular fact for consideration as to the credibility of a witness.

Taylor v. State, 50 Tex. Crim. Rep. 500, 100 S. W. 393; 12 Thomp. Trials, §§ 2304, 2421.

The judge is at liberty, in the exercise of a sound discretion, both in civil and criminal cases, to give to the jury a caution touching the credence to be given to the testimony of witnesses who have sworn falsely, in conformity with the maxim, "Falsus in uno, falsus in omnibus."

12 Thomp. Trials, § 2423; State v. McDevitt, 69 Iowa, 549, 29 N. W. 459.

Messrs. Roderick M. Douglass and Joseph T. Fanning, for appellee:

Truth is always a justification of the spoken or written words, but it must be pleaded if the defendant would take advantage of it in his defense.

Bailey v. Hyde, 3 Conn. 463, 8 Am. Dec. 202; Williams v. Miner, 18 Conn. 464; L.R.A.1918C.

Swift v. Dickerman, 31 Conn. 285; Donaghue v. Gaffy, 53 Conn. 51, 2 Atl. 397; Atwater v. Morning News Co. 67 Conn. 520, 34 Atl. 865; 2 Greenl. Ev. 15th ed. pp. 418, 424, §§ 424, 425.

No evidence was produced as to plaintiff's character.

Goodno v. Hotchkiss, 88 Conn. 656, 92 Atl. 419; Swift v. Dickerman, 31 Conn. 293; Flint v. Clark, 13 Conn. 387.

Repetitions of the slander showed malice in speaking and writing the words complained of.

Ward v. Dick, 47 Conn. 303, 36 Am. Rep. 75; Austin v. Remington, 46 Conn. 116; Moffitt v. Connecticut Co. 85 Conn. 531, 86 Atl. 16.

If defendant had not attempted a justification by pleading the truth of his statements, such statements would have to be considered false and as being beyond the reach of any evidence intended to establish their truth. If the statements cannot be proved to be true, then there is nothing to be done except to take them as being false, and no attempt to prove them true can be made unless the truth is alleged.

Swift v. Dickerman, 31 Conn. 285; Donaghue v. Gaffy, 53 Conn. 51, 2 Atl. 397.

The damages may include compensation for future injury from the evil words.

1 Joyce, Damages, § 383; Johnson v. Connecticut Co. 85 Conn. 441, 83 Atl. 530; 25 Cyc. 535; 18 Am. & Eng. Enc. Law, 2d ed. 1085.

Upon the question of damages, the malice of the defendant suggests considerations which could not with propriety be overlooked in trying to reach a just decision in a case of slander or libel.

Treat v. Browning, 4 Conn. 417, 10 Am. Dec. 156; Flint v. Clark, 13 Conn. 381; Williams v. Miner, 18 Conn. 472; Woodruff v. Richardson, 20 Conn. 288; Height v. Hoyt, 50 Conn. 586; Rogers v. Fitzgerald, 72 Conn. 731, 43 Atl. 551.

It was not error to consider mental suffering and injury to the feelings of the plaintiff in estimating general and compensatory damages.

18 Am. & Eng. Enc. Law, 2d ed. p. 1083; 1 Joyce, Damages, § 387; Seger v. Barkhamsted, 22 Conn. 298; Swift v. Dickerman, 31 Conn. 294; Gihney v. Lewis, 68 Conn. 396, 36 Atl. 799; Hassett v. Carroll, 85 Conn. 36, 81 Atl. 1013, Ann. Cas. 1913A, 333.

Wheeler, J., delivered the opinion of the court:

The complaint charges in the first three counts three separate slanders and in the fourth count a libel. As to the first, sec-

ond, and fourth counts, the defendant admits the speaking and writing alleged.

The charge in each count is adultery, and hence constitutes words actionable in themselves.

The legal consequence of the speaking of the defamatory words was the creation of a legal presumption that the slanders were false, and made without legal excuse, that is, with malice; and hence the plaintiff, in the absence of proof of the truth of the charge or that it was a privileged communication, would be entitled to general damage.

As to the libel, the defendant having given proof of his intention, and it not appearing that the defendant was requested in writing to retract the charge and had failed to comply, the plaintiff could not recover damages unless he proved that the defendant published the libel with actual malice; that is, with malice in fact. Upon such proof, and in the absence of proof of the truth of the charge, and that it was a privileged communication, the plaintiff would be entitled to recover not only his actual or compensatory damages, but also what we term punitive or exemplary damages. The law presumes some damage from the use of defamatory words, and the person slandered is entitled to recover damages for all the injury done his reputation and his feelings, and for all the mental suffering, which are the proximate result of the defamation.

In addition to the recovery of these general or compensatory damages, if the plaintiff prove that the defamatory words were uttered with actual malice, he may recover what is termed in our law punitive or exemplary or vindictive damages,—damages by way of punishment,—which by our rule are limited to the expenses of the litigation less the taxable costs. In fact and effect, these damages also are compensatory, as Chief Justice Torrance pointed out in *Hanna v. Sweeney*, 78 Conn. 492, 4 L.R.A.(N.S.) 907, 62 Atl. 785.

The jury found the issues for the plaintiff, and the findings present the case of unfounded charges of adultery persistently made against the plaintiff, and with vindictive malice. If deductions for punitive damages of the most generous estimate be made, it would leave the general or compensatory damages at a very large sum. There is no claim of special damage, and there are no facts recited in the findings which show any disturbance of the feelings or the mind of the plaintiff.

Assuming the plaintiff's character as of the best, the actual or compensatory damages for injury to his reputation and feelings and for mental suffering were assessed

by the jury at a higher value than any similar case in our jurisdiction.

In view of the conclusion we have reached in regard to the charge on the subject of damages, and to the fact that the evidence is not a part of the record, we omit passing upon the claim that the damages are excessive.

In different parts of the charge the trial court instructed the jury as to the subjects of compensatory damages and exemplary damages in accordance with our rule, and substantially as stated in *Hassett v. Carroll*, 85 Conn. 37, 81 Atl. 1013, Ann. Cas. 1913A, 333. The trial court went further, and, among other things, said: "If the plaintiff is not satisfied with such damages (that is, actual or compensatory damages), then the burden is on him to prove actual malice, or malice in fact, for the purpose of enhancing or increasing the damages."

Again: "Malice issued to be the principal ingredient in actions of slander, and damages to a great extent depend upon its existence in fact."

Again: "Actual malice may be proved, however, in such a case, for the purpose of enhancing or increasing the damages, and the jury may consider all of the evidence in the case in order to determine whether there was actual malice, to determine the degree of malice which prompted the defendant's conduct."

Again: "The absence of malice in fact in those cases where the law presumes malice is not a defense to the action. However honest may have been the motive, if the words are in themselves slanderous the fact that they were uttered without malice is never a full defense to the action. It is simply to be considered by you upon the question of damages. So that if there is much malice it is proper for you to assess more damages. If there is little or no malice, the damages should be only actual or nominal."

Again: "If the jury find that the defendant has in bad faith pleaded a justification of the words uttered and published by him, and if he has attempted to support that plea by false testimony in court, it is proper for the jury to give, and it may give at its discretion, increased damages therefor."

Again: "Upon the question of damages, the malice of the defendant will likely cut the largest figure in your deliberations."

Again: "If you find for the plaintiff, the damages, being almost entirely within your judgment, may range anywhere from merely nominal to what is sometimes called exemplary or vindictive damages, according to the degree of the malice."

And then follows a correct statement of our rule of exemplary damages.

Two principles of guidance, it is more than likely, the jury obtained from these instructions: (1) The greater the malice the greater the damage; (2) the amount of the damage is within the discretion of the jury.

Neither is sound. They savor of the common-law rule of punitive damages, which does not prevail in this state. Compensation, not punishment, is the foundation of our action of slander and libel. These quotations from the charge sustain the defendant's criticism that these instructions left it open to the jury to aggravate or increase the actual or compensatory damages if they found the charges to have been made with actual malice. The correctness of this instruction is the main ground of the appeal. If the actual or compensatory damages can be thus increased, it must follow that their absence would mitigate the actual damage. While malice is said to be a necessary ingredient of the action of slander and libel, it has, except in the aggravated cases of actual malice, no significance save to mark the defamation as one without legal excuse. It does not lessen one's injury to know that the slanderer did not intend the injury, or that he acted in good faith. No amount of proof that the slander was without actual malice will lessen the injury, and no amount of proof that it was made with actual malice can increase or enhance the damage which measures the reasonable compensation for the injury done. "The time, place, manner, and other circumstances of the preparation and publication of defamatory charges," as well, as the language of the charge, are admissible facts, tending to prove the extent of the injury to the reputation and feelings, and tending to prove the malice of the charge. *Hassett v. Carroll*, 85 Conn. 23, 37, 81 Atl. 1013, Ann. Cas. 1913A, 333.

The existence of actual malice is one of the relevant and material circumstances in an action of slander or libel. It may tend to spread the charge of the slander or libel, or it may induce the hearers or readers to treat it more lightly than they would an utterance from a less prejudiced source. It may be that the reputation will not suffer as much if the hearers and readers know the motive of the charge to be actual malice as when they believe the charge is made in good faith and without malice, or it may be exactly the reverse. Each case must be governed by its own circumstances and setting. Further proof of actual malice may disclose the injury to be greater in consequence of the publication of the charge in actual malice, and hence the compensa-

tory damages will be greater because assessed in proportion to the actual injury.

The effect upon the feelings of him against whom the charge is made may be greater where he knows and must carry with him the knowledge that another entertains actual malice against him. So his mental suffering from the defamation may be greater from his consciousness of the malicious motive behind the charge. And such injury to his feelings and his mental suffering may arise whenever the knowledge that this charge was made in actual malice comes home to him. The injury may be increased by the presence of actual malice, and hence it is said that proof of actual malice may aggravate the damage. What it does is to increase the injury, and the damage which accrues is compensation for the increased injury.

This is the doctrine of the Massachusetts court; damages allowed are compensatory, punitive damages are never allowed. *Faxon v. Jones*, 176 Mass. 206, 208, 57 N. E. 359. In *Burt v. Advertiser Newspaper Co.* 154 Mass. 238, 245, 13 L.R.A. 97, 28 N. E. 5, Judge Holmes summarized their rule: "The damages recovered are measured in all cases by the injury caused. Vindictive or punitive damages are never allowed in this state. Therefore any amount of malevolence on the defendant's part, in and of itself, would not enhance the amount the plaintiff recovered by a penny, and reasonable cause to believe the charges, or absolute good will, would not cut it down."

Idem, *Schattler v. Daily Herald Co.* 162 Mich. 115, 128, 127 N. W. 42.

The true rule is that actual damages cannot be mitigated or enhanced, but every fact which tends to show that the injury was less or more than if these facts did not exist is admissible, for these show the extent of the actual injury, and that measures the limit of the compensatory damages.

The terms "aggravation" and "mitigation" of damages are used in the books and in our own reports in connection with actual damage or actual compensation. Such a use of these terms is confusing. For example, it is often said that evidence of the plaintiff's character is admissible either in aggravation or mitigation of the damages. What is meant is that the character of the plaintiff is one of the essential facts affecting the extent of the injury done. If it is good, the damage is greater; if bad, less.

Our rule of punitive or exemplary damages has been applied from an early date to all tortious injuries which are wanton or malicious. *Linsley v. Bushnell*, 15 Conn. 225, 236, 38 Am. Dec. 79; *Beecher v. Derby Bridge & Ferry Co.* 24 Conn. 491, 498. We applied it in actions of negligence, trespass,

deceit, and assault; but perhaps the first instance in a libel or slander action was in *Ward v. Dick*, 47 Conn. 300, 304, 36 Am. Rep. 75. We have not always made the distinction between compensatory and punitive damages with clearness. Nor have we at all times kept clear the limitations which our rule places upon the award of punitive damages. Thus, in *Haight v. Hoyt*, 50 Conn. 583, 586, it is stated: "Malice is a principal ingredient in the action of slander, and damages to a great extent depend upon its existence in fact." And in *Arnott v. Standard Asso.* 57 Conn. 86, 93, 3 L.R.A. 69, 17 Atl. 361, it is said: "Damages are to be graduated by the degree to which the motive is unjustifiable and improper." In the first instance the court was treating of punitive damages, and what was said in this connection shows that the court had a clear conception of the distinction between compensatory and punitive damages. In the second instance the question of damages formed no part of the appeal, and whether the remark is applicable to compensatory damage or to punitive we cannot tell. In *Ward v. Dick*, 47 Conn. 304, 36 Am. Rep. 79, we said proof of malice in speaking the words charged is admissible, "and may tend indirectly to increase the damages for speaking the slanderous words charged in the declaration by showing the degree of malice in speaking them. It is a circumstance to be considered in estimating damages for the cause of action alleged in the declaration and proved, but is not of itself a cause for which damages may be directly assessed in that suit." This may have referred to punitive damages, but if not, it does not permit the actual or compensatory damages to be increased. It says that the proof of malice may indirectly increase the damages, and this would be true in case the injury to the feelings was augmented or mental suffering increased by the fact that the charge was made in actual malice. That would be measuring the extent of the actual damage and giving compensation for it. It would not authorize an increase of the compensatory damages beyond the point of compensation for the injury done. Properly read, we think that neither *Ward v. Dick* nor any of our decisions reaches the point of saying that the compensatory damages may be increased if actual malice be found.

Very generally the authorities hold that good intention, good faith, and the absence of actual malice are not admissible in mitigation of the actual or compensatory damage. *Taylor v. Hearst*, 118 Cal. 366, 50 Pac. 541; *Callahan v. Ingram*, 122 Mo. 369, 374, 43 Am. St. Rep. 583, 26 S. W. 1020; *Young v. Fox*, 26 App. Div. 261, 271, 49 N. Y. Supp. 634; *Rearick v. Wilcox*, 81 L.R.A. 1918C.

Ill. 77, 81; *Garrison v. Robinson*, 81 N. J. L. 497, 501, 79 Atl. 278; *Camdrian v. Miller*, 98 Wis. 164, 171, 73 N. W. 1004; *Clair v. Battle Creek Journal Co.* 168 Mich. 467, 473, 134 N. W. 443; *Massee v. Williams*, 124 C. C. A. 492, 207 Fed. 235; *Palmer v. Mahin*, 57 C. C. A. 41, 120 Fed. 741.

Some of the authorities thus holding assert generally that actual malice has no place in a trial for the actual or compensatory damages and is only important in the claim for punitive damages. But this leaves out of consideration the fact that malice is one of the circumstances surrounding the defamation, and all such are necessary considerations in estimating the compensatory damage, and may affect the extent of the mental suffering and injury to the feelings.

The trial court did not limit the estimate of the compensatory damages in the case of proof of actual malice. On the contrary, it left open to the jury the extent of the increase of damages due to actual malice. It made the presence or absence of malice the factor upon which all but nominal damages should hang. And it left the amount of the damage to be measured wholly by the discretion of the jury if actual malice was found. This was erroneous, and the extraordinary damages found demonstrate that they accepted the instructions as conferring upon them a discretion without limit.

The other exceptions require but brief notice. The charge that the jury might consider future damages as one of the elements of recovery was correct. The damages were to be assessed once for all. The court did not err in indirectly expressing its opinion in its comments upon the evidence. Nor were the instructions so argumentative in character as to be erroneous. The trial court was within our rule, so frequently announced as to forbid present repetition.

Complaint is made of the charge: "But if you do find that he wrote them, and has testified here falsely about it, then you are at liberty to consider that circumstance in weighing his other testimony, for it is always proper for the jury, if they find a witness has testified falsely in one particular, to consider that in deciding what weight they will give to his other testimony. The doctrine is sometimes referred to as *falsus in uno, falsus in omnibus*; that is, false in one thing, false in all. But it is not a principle of law that if you find a witness false in one particular that you should disregard his testimony entirely. You may do so if you are satisfied from it that he is unworthy of belief, but it does not follow that you must do so."

It is said that the failure to state that

the false testimony must have been made knowingly, wilfully, or intentionally made this instruction erroneous. While this addition would have conformed the instruction to that usually given, it was not essential in view of what the trial court did say. It said that if the jury found that the defendant had "testified falsely" in some particular they might "consider that in determining what weight they will give to his other testimony," and that they might disregard the defendant's testimony "if satisfied from it that he is unworthy of belief." This latter phrase was the full equivalent of the phrase, "that he had knowingly testified falsely."

There is error and a new trial is ordered.

Roraback and Shumway, JJ., concur.

Beach, J., dissenting:

I dissent because the charge of the court on the subject of damages appears to me to be correct. The court said, *inter alia*: "Under our law it is not the purpose of this action, that is, an action of libel and slander, to punish the defendant for his offense, but to compensate the plaintiff for his injuries. . . . If you come to the question of damages, you will give the plaintiff such damages as in your opinion will fairly compensate him for the injury done to his reputation by reason of the defamatory words."

Then, after correctly pointing out the considerations which might influence the jury in estimating general compensatory damages, and repeating the rule that "if the jury finds that the statements were false as claimed by the plaintiff, the plaintiff is entitled to such damages as would be a

compensation for the injury sustained as the natural or probable consequence of the slander or libel," the court charged the jury upon the relation of actual malice to compensatory damages, as follows: "When the words uttered or published are in themselves actually libelous or slanderous, the mental suffering occasioned by the publication of the defamatory words may be taken into consideration by the jury for the purpose of estimating general and compensatory damages. And it has been held that, because a libel or slander involves an injury to the feelings of the plaintiff as well as to his reputation, his injury may be greater if the defamatory words are uttered with express malice than if there is only the malice which the law implies from intentionally doing that which in its natural tendency is injurious."

It was after thus correctly instructing the jury on the subject of general compensatory damages that the court told the jury that the damages, "being almost entirely within your judgment, may range anywhere from merely nominal to what is sometimes called exemplary or vindictive damages, according to the degree of malice," and then properly instructed them that "damages beyond the actual compensation for the injury" were to be limited to the expenses of litigation, less taxable costs.

When the above-quoted portions of the charge are added to the collection of excerpts contained in the opinion, it seems to me that no logical basis is left for the conclusion that the court did not surround its charge upon the subject of damages with proper and sufficient limitations.

Prentice, Ch. J., concurs.

KENTUCKY COURT OF APPEALS.

JOSEPH SALINGER, Appt.,
v.

FIDELITY & CASUALTY COMPANY OF
NEW YORK.

(178 Ky. 369, 198 S. W. 1163.)

Insurance — loss of sight — lodgment of embolus.

Loss of the sight of an eye because of the lodgment in the artery of an embolus due to a bodily condition, while insured is under strain in lifting, is not within a policy insuring against loss by accident exclusive

of all other causes, although the result might not have occurred in the absence of the exertion.

For other cases, see Insurance, VI. b, 3, a, in Dig. 1-52 N. S.

(December 14, 1917.)

APPEAL by plaintiff from a judgment of the Circuit Court for Shelby County in favor of defendant in an action brought to recover the amount allowed under an insurance policy, for the loss of an eye. Affirmed.

The facts are stated in the opinion.

Note. — The question when death or injury may be deemed to have been caused by accidental means though the voluntary act of the insured was the primary cause thereof is covered in the notes to Fidelity & C. Co. L.R.A.1918C.

v. Carroll, 5 L.R.A.(N.S.) 657; Hutton v. States Acci. Ins. Co. L.R.A.1915E, 127; and New Amsterdam Casualty Co. v. Johnson, L.R.A.1916B, 1021; and see the later cases of Stone v. Fidelity & C. Co. L.R.A.1916D,

Messrs. Beard & Pickett for appellant.
Mr. Ralph W. Gilbert for appellee.

Miller, J., delivered the opinion of the court:

The appellee company insured the appellant, Joseph Salinger, "against bodily injury sustained . . . through accidental means . . . and resulting directly, independently, and exclusively of all other causes," in total or partial disability. Salinger was a merchant in Shelbyville, and, while in the act of lifting a bundle of boxes filled with corsets, and weighing about 24 pounds, to a shelf somewhat higher than his head, he noticed that he could not distinctly see the numbers upon the boxes. Thinking the trouble was with his glasses, Salinger removed them for the purpose of cleaning them, and found that he had lost the sight of one of his eyes. He was sixty years old, was in good health, and suffered no pain.

Salinger filed this action against the company to recover \$2,500, the amount fixed by the policy for the loss of an eye, claiming that he had lost his eye through accidental means resulting directly, independently, and exclusively of all other causes. The answer traversed the petition and affirmatively alleged that Salinger was afflicted with embolus, and that said disease and his bodily condition resulting therefrom were the causes of the loss of his eye. At the conclusion of all the testimony the court peremptorily instructed the jury to find for the defendant, and Salinger appealed.

Four witnesses testified, Salinger and Dr. Buckner for the plaintiff, and Drs. Heflin and Pfingst for the company. All of these physicians examined Salinger. Salinger testified to the loss of his eye in the manner and on the occasion above narrated. The physicians agreed that Salinger lost his eye from embolus, which is the technical name for a floating clot in the blood vessels. It caused the blindness of appellant by lodging in the central artery of his eye, thus cutting off the blood supply and preventing circulation.

When asked if the effort which Salinger had made in placing the boxes upon the shelf could have caused the loss of his eye, Dr. Buckner testified that it might have been a factor in bringing about the result; that it might not have occurred if Salinger had not made the exertion, and that Salin-

ger might have lost his eye from embolus if he had not made the exertion. Upon cross-examination Dr. Buckner further stated that if it had not been for the existence of this foreign substance in the artery, causing embolus, then no manner of exertion or force that Salinger might have employed in putting the boxes on the shelf would have caused the loss of his sight, and he would not say that the plaintiff's loss of his sight was independent of all other causes. It was Dr. Buckner's professional opinion that the exertion upon the part of the plaintiff had to co-operate with his bodily condition in order to cause the loss of his sight, and that Salinger would not have lost his sight from the effort he made in placing the boxes, independently of his bodily condition.

Dr. Heflin, a physician of nineteen years' experience, testified that he found Salinger's condition was due to embolus in the central artery of the left eye; that his condition would exist irrespective of any external force or violence; that his loss of sight was caused from the condition of his body, and not from the exertion he had made, and that it would not be possible for an exertion of that kind to cause the loss of an eye independently of any other cause.

Dr. Pfingst, a physician in active practice for more than twenty-two years, corroborated Dr. Heflin. Indeed, there is practically no substantial difference in the testimony of Drs. Buckner, Heflin, and Pfingst concerning the cause of the plaintiff's misfortune; they substantially agree that it was brought about by his bodily condition, and that it would not have been possible for him to lose his sight by the slight exertion he exercised independently of his bodily infirmity.

So the question for decision is reduced to this proposition, Does an intentional exertion constitute "accidental means" of injury within the provision of the policy? It may be treated as established by the great weight of authority that an injury is not produced by accidental means within the terms of an accident insurance policy, where it is the direct, though unexpected, result of an ordinary act in which the insured intentionally engages. The rule is stated as follows in 1 C. J. page 426: "If a result is such as follows from ordinary means, employed voluntarily, and in a not unusual or un-

536, and Rock v. Travelers' Ins. Co. L.R.A. 1916E, 1196.

As to injury or disability from strain as within provision of accident policy as to external violent and accidental means, see note to Lehman v. Great Western Acci. Asso. 42 L.R.A.(N.S.) 562.
L.R.A.1918C.

As to previous diseased condition as affecting liability for death or injury from accident, see notes to Stanton v. Travelers' Ins. Co. 34 L.R.A.(N.S.) 445, and Moon v. Order of United Commercial Travelers, 52 L.R.A.(N.S.) 1203.

expected way, it cannot be called a result effected by accidental means."

In *Clidero v. Scottish Acci. Ins. Co.* [1892] 19 R. 355, 29 Scot. L. R. 303, Lord Adam said: "A person may do certain acts, the result of which acts may produce unforeseen consequences, and may produce what is commonly called accidental death, but the means are exactly what the man intended to use, and did use, and was prepared to use. The means were not accidental, but the result might be accidental. Now if that is so, where does the question of accident come in here? There is no evidence that anything unusual or exceptional occurred as to the means or cause of this death. The man was just doing what he meant to do, and apparently a most unfortunate and unexpected result happened, —the man's death."

In *Shanberg v. Fidelity & C. Co.* 19 L.R.A. (N.S.) 1206, 85 C. C. A. 343, 158 Fed. 1, where the policy insured against disability or death, "resulting directly, and independently of all other causes from bodily injuries sustained through external, violent, and accidental means," it was held that the company was not liable for the death of the insured from a rupture of the heart, the walls of which had been weakened from fatty degeneration, the immediate inciting cause of the rupture being either overexertion while assisting in carrying a heavy door, or deep breathing following the exertion, neither of which was accidental. In that case the court said: "Had the assured, while assisting in carrying the door, lost his balance and fallen and struck upon some unforeseen object, or slipped on the ice, his death might be said to have resulted from violent or accidental means, and, assuming that there was no want of due diligence on his part, would doubtless be covered by the policy. But, from the facts as disclosed by the record in this case, we do not think it can be said that the rupture of the assured's heart, and which caused his death, was in any sense the result of an accident. He engaged in carrying this door for his own convenience; he encountered no obstacle in doing so; he accomplished just what he intended to, in the way he intended to, and in the free exercise of his choice. No accident of any kind interfered with his movements, or for an instant relaxed his self-control."

Again, in *Schmid v. Indiana Travelers' Acci. Asso.* 42 Ind. App. 493, 85 N. E. 1032, where Schmid was insured against injuries arising from physical bodily injury through external, violent, and accidental means, and died as a result of physical exertion and the rarefied conditions of the atmosphere, while climbing the steps of a Colorado hotel, L.R.A.1918C.

it was said he died from doing what he intended to do, although the result was not anticipated, and that his death was not the result of accidental means.

Likewise, in *Rock v. Travelers' Ins. Co.* 172 Cal. 462, L.R.A.1916E, 1196, 156 Pac. 1029, the insured undertook to carry a heavy casket down a flight of stairs. The exertion which he assumed was, however, beyond his strength, and imposed on his vital organs a burden they could not bear. The result of his exertion was a dilation of the heart, resulting in death. In carrying the casket he did not slip or stumble, nor did it fall against him; his entire purpose was carried out, in precisely the manner designed and intended by Rock. Under these circumstances it was held that Rock's death was not caused through accidental means.

Lehman v. Great Western Acci. Asso. 155 Iowa, 737, 42 L.R.A. (N.S.) 562, 193 N. W. 752, is a well-considered case. There the policy insured plaintiff "against the effects of personal injury caused solely by external, violent, and accidental means," and the question was whether disability from appendicitis caused by overexertion in bowling arose from accidental means within the terms of the policy. In holding the plaintiff could not recover the court said: "The act of bowling in itself was not an accidental means, for it was voluntary. The act in itself did not cause the appendicitis. There is no evidence tending to show that without the intervening accidental result of swollen and strained muscles, causing friction of the appendix by their irregular action, the disability complained of could have resulted. The accidental means, therefore, causing the disability was not the external and violent act of bowling, but the internal condition of swollen and strained muscles. . . . Finally, it is to be borne in mind that in this case there is no evidence whatever of any slipping or falling, or of any straining of the muscles other than the intentional strain put upon them in the voluntary and intentional act of bowling. Such a strain was not an accidental strain; and if it produced an unintentional result and consequent injury, nevertheless the resulting injury, and not the means producing it, was accidental."

To the same effect, see *Appel v. Aetna L. Ins. Co.* 86 App. Div. 83, 83 N. Y. Supp. 238, id. 180 N. Y. 514, 72 N. E. 1139.

After reviewing the cases, the supreme court of Iowa in the *Lehman Case*, speaking through Judge McClain, further said: "In all of these cases we have recognized the necessity of proximate connection between some accidental means and the injurious result complained of, and according to the great weight of authority such

proximate connection must appear. It is not sufficient that there be an accidental—that is, an unusual and unanticipated—result. The means must be accidental; that is, involuntary and unintended. Thus, in *United States Mut. Acci. Asso. v. Barry*, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755, it was held that, 'if a result is such as follows from ordinary means voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual, occurs, which produces the injury, then the injury has resulted through accidental means;' and the court sustained a recovery in that case for an injury following the voluntary jumping from a platform, on the ground that the evidence tended to show some unforeseen or involuntary movement, turn, or strain of the body, or some unforeseen circumstance causing the injured person to alight in a different position or way from that which he intended or expected. And this case is followed, under quite similar circumstances and reasoning, in *Standard Life & Acci. Ins. Co. v. Schmaltz*, 66 Ark. 588, 53 S. W. 49, 74 Am. St. Rep. 112, in which our case of *Feder v. Iowa State Traveling Men's Asso.* 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St. Rep. 212, 78 N. W. 252, was distinguished on the ground that no unusual or unexpected exertion there appeared."

Smouse v. Iowa State Traveling Men's Asso. 118 Iowa, 436, 92 N. W. 53; *Cobb v. Preferred Mut. Acci. Asso.* 96 Ga. 818, 22 S. E. 976; and *Streeter v. Western U. Mut. Life & Acci. Soc.* 65 Mich. 199, 8 Am. St. Rep. 882, 31 N. W. 779, are to the same effect.

In *Smith v. Travelers' Ins. Co.* 219 Mass. 147, L.R.A.1915B, 872, 106 N. E. 607, it was held that the death of the insured from spinal meningitis, caused by the penetration of streptococcus germs into the brain as a result of snuffing through a nasal douche too violently, was not caused by accidental means, the court saying: "The deceased did exactly what he intended to do. This particular act of inhalation, though harder or more violent than usual, was not, so far as appears, harder or more violent than he intended it to be. There was no shock or surprise during the inhalation which made him draw a deeper breath than he intended to draw, nothing strange or unusual about the circumstances. The external act was exactly what he designed it to be, though it produced some internal consequences which he had not foreseen. Accordingly, there was no bodily injury effected through a means which was both external and accidental. But it is only for a death resulting

from injury effected through such means that the defendant is made responsible by the policy. It is not sufficient that the death, or the illness that caused the death, may have been an accidental result of the external cause, but that cause itself must have been, not only external and violent, but also accidental."

Many illustrative cases are collected in *Stone v. Fidelity & C. Co.* 133 Tenn. 672, L.R.A.1916D, 536, 182 S. W. 252, Ann. Cas. 1917A, 86, a case strikingly like the case at bar in its controlling facts. In that case the policy, like the one at bar, insured Stone "against bodily injury sustained . . . through accidental means, and resulting directly, independently, and exclusively of all other causes, in immediate, continuous, and total disability." Stone contracted a cold while attending a football game in November, 1913, which resulted in lumbago. After medical treatment and the debility resulting from a purgative, and while lying in bed, Stone had a paper brought, reached for it, and raised it suddenly above his head, when his strong blood pressure caused a rupture of the retina, destroying the sight of one eye. There, as here, the loss of sight was caused by a "clot of blood resting upon the nerve of the eye or in the retina," and it was claimed that the loss of sight resulted wholly from accidental means. It was held that Stone could not recover under his policy because, while the result was not foreseen, the cause that produced the result was not an accident, but an ordinary movement executed as intended. In the course of the opinion the court said: "The general rule is that an injury is not produced by accidental means, within the meaning of this policy, where the injury is the natural result of an act or acts in which the insured intentionally engages. A person may do certain acts the result of which produces unforeseen consequences resulting in what is termed an accident; yet it does not come within the terms of this contract. The policy does not insure against an injury that may be caused by a voluntary, natural, ordinary movement, executed exactly as was intended. Therefore, to determine the matter, we look, not to the result merely, but to the means producing the result. It is not sufficient that the injury be unusual and unexpected, but the cause itself must have been unexpected and accidental. Re *Scarr* [1905] 1 K. B. 387, 2 B. R. C. 358, 92 L. T. N. S. 128, 21 Times L. R. 173, 74 L. J. K. B. N. S. 237, 1 Ann. Cas. 787; *Clidero v. Scottish Acci. Ins. Co.* [1892] 19 R. 355, 29 Scot. L. R. 303; *Smith v. Travelers' Ins. Co.* supra; *Feder v. Iowa State Traveling Men's Asso.* 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St.

Rep. 212, 78 N. W. 252; *Shanberg v. Fidelity Co.* (C. C.) 143 Fed. 651, affirmed in 19 L.R.A.(N.S.) 1206, 85 C. C. A. 343, 158 Fed. 1; *Lehman v. Great Western Acci. Asso.* 155 Iowa, 737, 42 L.R.A.(N.S.) 563, 133 N. W. 752; *Smouse v. Iowa State Traveling Men's Asso.* supra; *McCarthy v. Travelers' Ins. Co.* 8 Biss. 362, Fed. Cas. No. 8,692; *Niskern v. United Brotherhood, C. J.* 93 App. Div. 364, 87 N. Y. Supp. 640; *Hastings v. Travelers' Ins. Co.* (C. C.) 190 Fed. 258; *Cobb v. Preferred Mut. Acci. Asso.* 96 Ga. 818, 22 S. E. 976; *Travelers' Ins. Co. v. Selden*, 24 C. C. A. 92, 42 U. S. App. 253, 78 Fed. 285; *Southard v. Railway Pass. Assur. Co.* 34 Conn. 576, Fed. Cas. No. 13,182. Attention is especially directed to the very excellent notes on the subject in 42 L.R.A.(N.S.) 563, and 1 Ann. Cas. 787. These notes illustrate the subject by statements of the facts. In the foregoing cases

no liability was found, because the injury was not produced by accidental means."

The note to the above case in Ann. Cas. 1917A, page 88, contains a collection of the cases upon the subject. See also annotation in 2 B. R. C. 367.

As above stated, there is no real contradiction in the testimony in this case as to what caused the loss of plaintiff's eye, the three physicians agreeing that Salinger would not have lost his sight in the absence of his bodily condition caused by the clot in the blood vessels. Consequently, under the rule above announced, his injury was not caused by accidental means within the terms of the policy.

In peremptory instructing the jury to find for the defendant the Circuit Court ruled correctly.

Judgment affirmed.

KENTUCKY COURT OF APPEALS.

LANDESMAN-HIRSCHHEIMER COMPANY, Aplt.,
v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

(— Ky. —, 199 S. W. 1050.)

Carrier — baggage — sample trunks.

1. A carrier which, in accordance with custom, knowingly accepts and checks as baggage a drummer's sample trunks, is liable for their loss to the same extent as if they contained personal baggage.

For other cases, see Carriers, II. o, in Dig. 1-52 N. S.

Same — absence of notice of contents — effect.

2. A carrier is not liable for loss of a drummer's sample trunk accepted as baggage without notice of the character of its contents.

For other cases, see Carriers, II. o, in Dig. 1-52 N. S.

(January 18, 1918.)

APPEAL by plaintiff from a judgment of the Common Pleas Branch, Third Division, of the Circuit Court for Jefferson County, sustaining a demurrer to the amended petition and dismissing an action brought to recover damages for the loss of a trunk of samples, alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Note. — As to liability of carrier for loss of drummer's baggage, see annotation following this case, post, 108. L.R.A.1918C.

Mr. O. H. Harrison, for appellant:

The delivery of baggage of a passenger to a railroad is a bailment for hire, and the carrier is responsible for ordinary negligence, and unquestionably liable for gross negligence.

Louisville & N. R. Co. v. Miller, 156 Ky. 680, 50 L.R.A.(N.S.) 819, 162 S. W. 73.

It is now the custom of the railroads to receive sample trunks of the commercial traveler exactly on the same terms, conditions, and charges as personal baggage, and for this reason they are responsible to the same extent in each case; and especially is this the case when they have knowledge of the contents of the trunks.

Trimble v. New York C. & H. R. R. Co. 162 N. Y. 84, 48 L.R.A. 115, 56 N. E. 532; *New Orleans & N. E. R. Co. v. Shackelford*, 87 Miss. 610, 4 L.R.A.(N.S.) 1035, 112 Am. St. Rep. 461, 40 So. 427, 6 Ann. Cas. 826; *Texas & P. R. Co. v. Capps*, 2 Tex. App. Civ. Cas. (Willson) 35; *Saleeby v. Central R. Co.* 99 App. Div. 163, 90 N. Y. Supp. 1042; *Ft. Worth & R. G. R. Co. v. I. B. Rosenthal Millinery Co.* — Tex. App. Div. —, 29 S. W. 196; *Bergstrom v. Chicago, R. I. & P. R. Co.* 134 Iowa, 223, 10 L.R.A.(N.S.) 1119, 111 N. W. 818, 18 Ann. Cas. 239; 6 Cyc. 667, 668; *Louisville, C. & L. R. Co. v. Switzerland Marine Ins. Co.* 131 U. S. 440, 33 L. ed. 204, 9 Sup. Ct. Rep. 800.

Messrs. B. D. Warfield and Helm & Helm, for appellee:

Plaintiff, without giving notice to defendant of the contents of his trunk, which was merchandise, checked the trunk as baggage, which was equivalent to a representation by

the passenger that the trunk belonged to him and contained only such articles as are properly classed as personal baggage.

Humphreys v. Perry, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 711; *Illinois C. R. Co. v. Matthews*, 114 Ky. 973, 60 L.R.A. 846, 102 Am. St. Rep. 316, 72 S. W. 302; *Haines v. Chicago*, St. P. M. & O. R. Co. 29 Minn. 160, 43 Am. Rep. 199, 12 N. W. 447; *Michigan C. R. Co. v. Garrow*, 73 Ill. 348, 24 Am. Rep. 248.

A carrier of passengers is not responsible for the loss of a trunk containing drummer's samples when it accepts them for transportation as baggage, without knowledge of their character.

Chesapeake & O. R. Co. v. Hall, 136 Ky. 379, 124 S. W. 372, Ann. Cas. 1912A, 364; *Humphreys v. Perry*, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 711; *Cahill v. London & N. W. R. Co.* 10 C. B. N. S. 154, 142 Eng. Reprint, 409, 30 L. J. C. P. N. S. 289, 7 Jur. N. S. 1164, 4 L. T. N. S. 246, 9 Week. Rep. 653, affirmed in 13 C. B. N. S. 818, 143 Eng. Reprint, 322, 31 L. J. C. P. N. S. 271, 8 Jur. N. S. 1063, 10 Week. Rep. 321; *Louisville, C. & L. R. Co. v. Switzerland Marine Ins. Co.* 131 U. S. 440, 33 L. ed. 204, 9 Sup. Ct. Rep. 800; *Lake Shore & M. S. R. Co. v. Hochstim*, 67 Ill. App. 514; *Michigan C. R. Co. v. Garrow*, 73 Ill. 348, 24 Am. Rep. 248; *Southern Kansas R. Co. v. Clark*, 52 Kan. 398, 34 Pac. 1054; *Missouri P. R. Co. v. Liveright*, 7 Kan. App. 772, 53 Pac. 763; *Illinois C. R. Co. v. Matthews*, 114 Ky. 973, 60 L.R.A. 846, 102 Am. St. Rep. 316, 72 S. W. 302; *Stimson v. Connecticut River R. Co.* 98 Mass. 83, 93 Am. Dec. 140; *Ailing v. Boston & A. R. Co.* 126 Mass. 121, 30 Am. Rep. 667; *Amory v. Wabash R. Co.* 130 Mich. 404, 90 N. W. 22, 12 Am. Neg. Rep. 61; *McKibbin v. Great Northern R. Co.* 78 Minn. 232, 80 N. W. 1032, 7 Am. Neg. Rep. 80; *Rider v. Wabash*, St. L. & P. R. Co. 14 Mo. App. 529; *Rossier v. Wabash R. Co.* 115 Mo. App. 515, 91 S. W. 1018; *Hawkins v. Hoffman*, 6 Hill, 586, 41 Am. Dec. 767; *Gurney v. Grand Trunk R. Co.* 59 Hun, 625, 37 N. Y. S. R. 155, 14 N. Y. Supp. 321, affirmed in 138 N. Y. 638, 34 N. E. 512; *Saleeby v. Central R. Co.* 99 App. Div. 163, 90 N. Y. Supp. 1042, affirmed in 184 N. Y. 597, 77 N. E. 1196; *Stoneman v. Erie R. Co.* 52 N. Y. 429; *Charlotte Trouser Co. v. Seaboard Air Line R. Co.* 139 N. C. 382, 51 S. E. 973; *Toledo & O. C. R. Co. v. Bowler & B. Co.* 63 Ohio St. 274, 58 N. E. 813, 9 Am. Neg. Rep. 156; *Pennsylvania Co. v. Miller*, 35 Ohio St. 541, 35 Am. Rep. 620; *Greenwich Ins. Co. v. Memphis & C. Packet Co.* 4 Ohio S. & C. P. Dec. 405; *Texas & P. R. Co. v. Capps*, 2 Tex. App. Civ. Cas. (Willson) 35; *Hoeger v. Chicago, M. & St. P. R. L.R.A.1918C.*

Co. 63 Wis. 100, 53 Am. Rep. 271, 23 N. E. 435.

If a carrier has no notice of the contents of a trunk, which are other than baggage, it is not liable even "for its negligence, or other cause."

Chesapeake & O. R. Co. v. Hall, 136 Ky. 379, 124 S. W. 372, Ann. Cas. 1912A, 364.

The presentation of a trunk to the baggage agent as containing personal baggage, which in fact contains merchandise samples, precludes recovery for the loss of such contents of the trunk.

Ibid.; *Humphreys v. Perry*, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 711; *Belfast & B. R. Co. v. Keys*, 9 H. L. Cas. 556, 11 Eng. Reprint, 846, 8 Jur. N. S. 367, 4 L. T. N. S. 841, 9 Week. Rep. 793; *Cahill v. London & N. W. R. Co.* 13 C. B. N. S. 818, 143 Eng. Reprint, 322, 31 L. J. C. P. N. S. 271, 8 Jur. N. S. 1063, 10 Week. Rep. 321; *Illinois C. R. Co. v. Matthews*, 114 Ky. 973, 60 L.R.A. 846, 102 Am. St. Rep. 316, 72 S. W. 302; *Collins v. Boston & M. R. Co.* 10 Cush. 506; *Kansas City. P. & G. R. Co. v. State*, 65 Ark. 363, 41 L.R.A. 333, 67 Am. St. Rep. 933, 46 S. W. 421; *Ailing v. Boston & A. R. Co.* 126 Mass. 121, 30 Am. Rep. 667; *Mississippi C. R. Co. v. Kennedy*, 41 Miss. 671; *Macrow v. Great Western R. Co.* L. R. 6 Q. B. 612, 40 L. J. Q. B. N. S. 300, 24 L. T. N. S. 618, 19 Week. Rep. 873; *Hawkins v. Hoffman*, 6 Hill, 586, 41 Am. Dec. 767; *Hutchings v. Western & A. R. Co.* 25 Ga. 61, 71 Am. Dec. 156; *Texas & P. R. Co. v. Capps*, 2 Tex. App. Civ. Cas. (Willson) 35; *Michigan C. R. Co. v. Garrow*, 73 Ill. 348, 24 Am. Rep. 248; *Strouss v. Wabash*, St. L. & P. R. Co. 17 Fed. 209; *Pennsylvania Co. v. Miller*, 35 Ohio St. 541, 35 Am. Rep. 620; *Southern Kansas R. Co. v. Clark*, 52 Kan. 398, 34 Pac. 1054; *Hutchinson, Carr. §§ 679, 685*; *Thomp. Carr. p. 510*; *Haines v. Chicago*, St. P. M. & O. R. Co. 29 Minn. 160, 43 Am. Rep. 199, 12 N. W. 447; *Blumantle v. Fitchburg R. Co.* 127 Mass. 322, 34 Am. Rep. 376; *Chicago, R. I. & P. R. Co. v. Collins*, 56 Ill. 212; *Moore, Carr. p. 707*; *Brick v. Atlantic Coast Line R. Co.* 145 N. C. 203, 122 Am. St. Rep. 440, 58 S. E. 1073, 13 Ann. Cas. 328.

If the trunk contains anything other than personal baggage, and the owner does not expressly so state to the agent, or obtain a special contract for such transportation, the carrier is not presumed to know the contents which are not disclosed, and it is a fraud, or unfair inducement, which will exempt the carrier from all responsibility under the contract.

Humphreys v. Perry, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 711; *Story, Bailm. 9th ed. § 565*; *Illinois C. R. Co. v.*

Matthews, 114 Ky. 973, 60 L.R.A. 846, 102 Am. St. Rep. 316, 72 S. W. 302.

Sampson, J., delivered the opinion of the court:

A drummer carrying a trunk of samples bought of the appellee, Louisville & Nashville Railroad Company, a ticket from Madisonville, Kentucky, to Hopkinsville, Kentucky, and caused his trunk of samples to be checked as baggage. On arrival at Hopkinsville he presented his check and requested the trunk of samples, and it was discovered that the railroad company had negligently delivered the trunk with its contents to some third person without a check. Thereupon the wholesale company for whom the drummer was the salesman instituted this action against the railroad company, averring ownership of the samples, of the value of \$586.50, and the trunk, of the value of \$20, and that it was paying the expenses of its traveling salesman, and the same amounted to at least \$50, and that it lost business on account of the railroad company's failure to deliver the trunks, from which it would have realized a profit of \$500.

The railroad company denies its responsibility, because, it asserts, a passenger may only carry as baggage such articles as he requires for his personal use and convenience in the nature of wearing apparel and such other articles as may not unreasonably be designed for his pleasure, business, or convenience on a journey which he is prosecuting, and that merchandise or drummers' samples cannot be included.

Upon motion several paragraphs were stricken from plaintiffs' petition, and a demurrer sustained to the remainder thereof, with leave to amend. Amendment was filed, and a demurrer against sustained, and, plaintiff declining to plead further, the action was dismissed.

The petition as amended, omitting the formal parts showing the right of plaintiff to sue, the value of the trunk and contents, and the capacity of the defendant railroad company to sue and be sued, and prayer for relief, avers that it was a universal custom of the defendant railroad company, a common carrier, at the time of the checking of the trunk in question, to receive and check trunks containing merchandising samples upon exactly the same terms and conditions as the personal baggage of the traveling public, and that the trunk of the plaintiff, when delivered at the depot in Madisonville and offered to the depot agent to be checked, was in appearance one employed to carry drummers' samples, and not personal baggage, and that the agent then knew that said trunk contained

merchandise samples, and not personal baggage, at the time same was received and checked to be carried from Madisonville to Hopkinsville; that thereafter the defendant company, by its gross negligence and by and through the gross negligence of its depot agent at Hopkinsville, delivered said trunk and its contents to some third person without demanding or receiving from said third person a check or receipt for the same, and that to so deliver a trunk bearing a check was gross negligence for which the company was responsible.

"Baggage" is defined to be the necessary appendages of a traveler,—personal apparel, and such effects as a passenger requires for his personal use and convenience in the prosecution of a journey. As an incident to the passenger's contract for transportation the carrier transports a certain reasonable amount of baggage. It is a part of the contract as much as the transportation of the person. It is, however, sometimes incorrectly referred to as free baggage. In the case of *Illinois C. R. Co. v. Matthews*, 114 Ky. 979, 60 L.R.A. 846, 102 Am. St. Rep. 316, 72 S. W. 302, this court held:

"If the carrier elects to receive and transport that as baggage which in fact is freight, and which it would have the right to refuse to take as baggage on its passenger trains, it ought to be liable therefor upon the same terms as if it were baggage. But this is not because of its common-law liability therefor, but because it has agreed by special contract for a consideration to be so bound. The elements of such a contract are sufficiently satisfied by an acceptance of the package or trunk by the carrier for transportation as baggage, with knowledge of its contents. *Hutchinson, Carr.* 1st ed. § 685; *Texas & P. R. Co. v. Capps*, 2 Tex. App. Civ. Cas. (Willson) 35; *Jacobs v. Tutt* (C. C.) 33 Fed. 412; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* (C. C.) 39 Fed. 417; *Humphreys v. Perry*, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 711.

"If the carrier accepts as baggage articles or merchandise not properly having that character, with knowledge that they are offered for transportation as baggage, he thereby waives any objection on that ground, and his liability therefor is the same as that with reference to baggage in general. The carrier is under no obligation, however, to make inquiry as to the contents of trunks offered to be checked as baggage. And if merchandise is checked under the form of baggage or mingled with articles of baggage without the carrier's knowledge, he is not liable therefor. While actual knowledge is not necessary to charge the carrier with liability for merchandise checked as baggage, if the circumstances are such as to indicate

the fact, yet the mere appearance of the trunk or case offered to be checked as one ordinarily in use for carrying merchandise or samples will not in itself charge the carrier with knowledge that it does contain merchandise rather than personal baggage." 6 Cyc. 668.

At common law the carrier is responsible as an insurer only for the personal baggage of the passenger, and not for merchandise or such articles as properly constitute freight. It has even been held that, where the trunk or receptacle contains other articles than personal baggage, and the carrier is not informed of the fact, it is a deception upon the carrier as to such articles, and as to such they are not covered by the carrier's contract. This rule, however, has been modified to some extent by custom. A very great part of the business between manufacturers and wholesalers, on the one hand, and retail merchants, on the other, is carried on through the medium of traveling salesmen or drummers carrying samples in trunks or cases. Where by general custom a railroad carries trunks containing merchandise samples as the personal baggage of drummers, it will be liable, as a common carrier, in the same manner and to the same extent as for personal baggage; or, if a railroad company receive trunks containing merchandise samples as the personal baggage of a drummer at the time knowing the contents of the trunks, it expressly contracts to transport the same and be responsible therefor in the same manner and to the same extent as if the same were personal baggage.

In this case it is alleged that the railroad

company received and accepted the trunk containing the samples with full knowledge of the contents of the trunk, and, further, that it was the universal custom of the defendant railroad company to so receive and carry drummer's samples. In either event the railroad company would be responsible for the samples in the same manner and to the same extent as if they were properly personal baggage. The rule is different, however, where a deception is practiced, or where the real nature of the contents of the trunk or case is withheld. Nor can it be said that the railroad must take notice of the nature and contents of a trunk merely from its outside appearance. The rule seems to be that, where a trunk is presented as baggage, it may be received by the railroad company upon the implied assurance that the same contains only personal baggage belonging to the passenger; and if it afterwards appear that the trunk or package contained merchandise or other articles not properly coming within the term "baggage," the carrier will not be responsible even though the so-called baggage be wholly lost, and that through the ordinary negligence of the carrier. Some of the states by statutes have modified this common-law rule, but it remains unchanged in this jurisdiction, except in some slight degree. Such an act was passed in 1914 by our general assembly, but without an enacting clause, and was held invalid for that reason only.

The petition, as amended, stated a cause of action, and the demurrer should have been overruled.

Judgment reversed for proceedings consistent herewith.

Annotation—Liability of carrier for loss of drummer's baggage.

The earlier cases upon this question will be found in a note to *New Orleans & N. E. R. Co. v. Shackelford*, 4 L.R.A. (N.S.) 1035.

For cases involving the liability of a carrier for the loss of sample merchandise which turn upon the fact that the merchandise was not the property of the passenger, rather than upon its nature, see the note to *Lusk v. Bloch*, post, 114.

A carrier is not bound to carry an agent's samples as baggage; but when it does so without any special contract, it is liable for the loss thereof. *Wilkinson v. Lancashire R. Co.* [1906] 2 K. B. (Eng.) 619, 75 L. J. K. B. N. S. 603, 94 L. T. N. S. 820, 22 Times L. R. 591.

So, the courts will take notice of a custom of railroads to carry samples as baggage, and in so carrying them, the L.R.A.1918C.

railroads place such trunks on the same footing as other baggage, and must be held to the same liability. *Fleischman v. Southern R. Co.* (1907) 76 S. C. 237, 9 L.R.A. (N.S.) 519, 56 S. E. 974.

A contract on a mileage ticket providing that "merchandise of any description is not considered as baggage, and none of the carriers honoring this ticket are liable in any way for the promptness or condition of any samples which may be carried by the purchaser thereof," was held to differentiate between merchandise in the usual acceptance of the term and agent's samples, and not to exclude a trunk containing samples from being considered as baggage. *Southern R. Co. v. Dinkins & D. Hardware Co.* (1912) 139 Ga. 332, 43 L.R.A. (N.S.) 806, 77 S. E. 147.

In *Wingate v. Pere Marquette R. Co.*

(1912) 172 Ill. App. 314, photographs of furniture which had valuable notes on the back as to the wood, etc., which covered the entire line a salesman, was selling, and which are not otherwise completely covered by catalogue or samples, were held to be baggage, for the loss of which the carrier was liable. However, see *McElroy v. Iowa C. R. Co.* (Iowa) *infra*.

And while goods or samples carried for the purpose of making sales are not baggage in the ordinary sense of the term, a carrier may become liable as for ordinary baggage by accepting such articles with knowledge. *Southern R. Co. v. Dinkins & D. Hardware Co. (Ga.) supra*. See also *LANDESMAN-HIRSCHHEIMER CO. v. LOUISVILLE & N. R. Co. ante*, 108.

So, where the carrier's baggageman was informed when he checked plaintiff's baggage that plaintiff was a salesman and the baggage consisted of samples, its contention that the samples were not baggage was entirely without merit. *St. Louis & S. F. R. Co. v. Lilly* (1911) 1 Ala. App. 320, 55 So. 937. And in *McKibbin v. Wisconsin C. R. Co.* (1907) 100 Minn. 270, 8 L.R.A.(N.S.) 489, 110 N. W. 964, it was held that a carrier was liable where there was a general custom to check sample trunks as baggage, and the size and shape of the trunks were such that the baggageman must have known of their nature.

And in *Tamarin v. Pennsylvania R. Co.* (1914) 244 Pa. 100, 90 Atl. 433, affirming (1913) 53 Pa. Super. Ct. 83, where sample trunks were received by an agent without inquiry as to their contents, and with no representation by the passenger as to the matter, a small excess weight charge being paid, it was held that the carrier was liable for negligent injury, at least as a bailee for hire.

And under a statute requiring a carrier to carry sample baggage up to 150 pounds in weight free for adult passengers, it is liable for the loss of samples where negligence is shown, even though it might not be liable as an insurer. *Baack D. & B. Millinery Co. v. Chicago & A. R. Co.* (1914) 177 Mo. App. 282, 164 S. W. 175.

But in *Doherty v. Grand Trunk Western R. Co.* (1915) 194 Ill. App. 354, it was held that a commercial traveler could not recover for the loss of merchandise carried by him for delivery to customers, in an action for loss of baggage.

In *Merritt v. Lehigh Valley R. Co.* (1912) 49 Pa. Super. Ct. 219, it was held that the carrier was under no obligation L.R.A.1918C.

to carry merchandise in the form of agents' samples as baggage, and it was not liable for the loss of such samples without its negligence; but there were other elements to relieve it from liability as an insurer, such as the fact that the passenger did not accompany the trunk to its destination; and, in any event, the liability of the carrier at the time the trunk was destroyed by fire in its baggage room was only that of a warehouseman.

In *Nathan v. Woolverton* (1910) 69 Misc. 425, 127 N. Y. Supp. 442, affirmed in (1911) 147 App. Div. 908, 131 N. Y. Supp. 1130, an action for the loss of merchandise consisting of a large quantity of jewelry, in which it does not appear whether or not the jewelry was salesman's samples, it was held that the carrier was not liable for the loss when the nature of the articles was not disclosed.

In *McElroy v. Iowa C. R. Co.* (1907) 133 Iowa, 544, 110 N. W. 915, under a statute requiring a carrier to accept and carry ordinary baggage, it was held that a carrier is not liable for the loss of photographs of furniture, carried by a salesman to represent the goods he was selling. See, however, *Wingate v. Pere Marquette R. Co. (Ill.) supra*.

In *McCoy v. Atlantic Coast Line R. Co.* (1909) 84 S. C. 62, 65 S. E. 939, an action for the loss of plaintiff's trunks containing samples, while in the carrier's depot, the only question discussed was as to whether the company was liable as a carrier or as a warehouseman only.

R. L. S.

OKLAHOMA SUPREME COURT.

JAMES W. LUSK et al., Receivers of the St. Louis & San Francisco Railroad Company, Plffs. in Err.,
v.

ABE BLOCH et al., Doing Business under the Firm Name and Style of Abe Bloch & Company.

(— Okla. —, 168 Pac. 430.)

Carrier — baggage — property of stranger.

1. The carriage of baggage is a mere incident to the carriage of the owner as a passenger.

Headnotes by HOOKER, C.

Note. — As to liability of carrier in respect to property of third person in passenger's baggage, see annotation following this case, post, 114.

senger; and ordinarily a carrier is liable alone to the owner thereof for the loss or damage to property, as carrier of baggage, when the relation of carrier and passenger exists between it and such owner, unless at the time of the receipt of such property as baggage the carrier is informed that the same is owned by another.

For other cases, see Carriers, II. o, 1, in Dig. 1-52 N. S.

Same — liability for loss.

2. Where a passenger procures the property of another to be carried as baggage, the carrier, if without knowledge of the true ownership, is a gratuitous bailee thereof, and liable to the owner only for loss or damage occasioned by gross negligence or wilful misconduct.

For other cases, see Carriers, II. o, 1, in Dig. 1-52 N. S.

(May 22, 1917.)

ERROR to the County Court for Oklahoma County to review a judgment in plaintiffs' favor in an action brought to hold defendants liable for the loss of certain baggage. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. W. F. Evans, R. A. Kleinschmidt, and Fred E. Suits, for plaintiffs in error:

Where a passenger carries as baggage property belonging to another person, the carrier, as to such property, is deemed to be merely a gratuitous bailee, and is liable to the owner only for the loss of property by gross negligence or wilful misconduct.

Brick v. Atlantic Coast Line R. Co. 145 N. C. 203, 122 Am. St. Rep. 440, 58 S. E. 1073, 13 Ann. Cas. 328; Cattaraugus Cutlery Co. v. Buffalo, R. & P. R. Co. 24 App. Div. 267, 48 N. Y. Supp. 451; Stimson v. Connecticut River R. Co. 98 Mass. 83, 93 Am. Dec. 140; Alling v. Boston & A. R. Co. 126 Mass. 121, 30 Am. Rep. 667; Southern Kansas R. Co. v. Clark, 52 Kan. 398, 34 Pac. 1054; Missouri P. R. Co. v. Liveright, 7 Kan. App. 772, 53 Pac. 763; 6 Cyc. 667; 3 Am. & Eng. Enc. Law, 2d ed. 553.

A carrier may, by a special contract, in consideration of reduced charges or special concessions, agree upon the value of the thing shipped as the measure of damages, whether the loss results from negligence or not, provided the valuation agreed upon is not such as to render the contract unreasonable.

Alabama G. S. R. Co. v. Knox, 184 Ala. 485, 49 L.R.A. (N.S.) 411, 63 So. 538; Zetler v. Tonopah & G. R. Co. 35 Nev. 381, L.R.A. 1916A, 1270, 129 Pac. 299; Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; 2 Fetter, Carr. Pass. ¶ 627; St. Louis & S. F. R. Co. v. Bilby, 35 L.R.A. 1918C.

Okl. 589, 130 Pac. 1089; Missouri, O. & G. R. Co. v. Porter, 41 Okla. 702, 139 Pac. 954; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A. 1915B, 450, Ann. Cas. 1915D, 593.

No relation of passenger and carrier existing, defendants' liability to the plaintiffs is that of warehousemen only; and having failed to produce any evidence of negligence, plaintiffs' action must fail.

Hutchinson, Carr. 3d ed. §§ 1274, 1275; Elliott, Railroads, 1st ed. § 1656; Beale & W. Rate Regulation, § 147; Marshall v. Pontiac, O. & N. R. Co. 126 Mich. 45, 55 L.R.A. 650, 85 N. W. 242; Wood v. Maine C. R. Co. 98 Me. 98, 99 Am. St. Rep. 339, 56 Atl. 457, 15 Am. Neg. Rep. 306; Wilson v. Grand Trunk R. Co. 56 Me. 60, 96 Am. Dec. 435; Collins v. Boston & M. R. Co. 10 Cush. 506; Bradley v. Chicago & N. W. R. Co. 147 Ill. App. 397.

Messrs. Hainer, Burns, & Toney, for defendants in error:

Plaintiffs were the proper parties to maintain this action.

Kansas City, M. & O. R. Co. v. Shutt, 24 Okla. 96, 128 Am. St. Rep. 870, 104 Pac. 51, 20 Ann. Cas. 255; 6 Cyc. 510, 676; Congar v. Galena & C. U. R. Co. 17 Wis. 477; Harvey v. Terre Haute & I. R. Co. 74 Mo. 538; Kansas City, M. & O. R. Co. v. Fugatt, 47 Okla. 727, L.R.A. 1916A, 545, 150 Pac. 669; Ft. Worth & R. G. R. Co. v. I. B. Rosenthal Millinery Co. — Tex. Civ. App. —, 29 S. W. 196; Hutchinson, Carr. § 722; Trimble v. New York C. & H. R. R. Co. 162 N. Y. 84, 48 L.R.A. 115, 56 N. E. 532; Congar v. Galena & C. U. R. Co. 17 Wis. 477.

The indorsement on the back of the baggage check which served to give notice to passengers of the limitation of liability does not constitute a part of the passenger's contract with the railroad company, or limit the liability of the carrier.

Blossom v. Dodd, 43 N. Y. 264, 3 Am. Rep. 701; Rawson v. Pennsylvania R. Co. 48 N. Y. 212, 8 Am. Rep. 543; Wilson v. Chesapeake & O. R. Co. 21 Gratt. 654; Brown v. Eastern R. Co. 11 Cush. 97; Malone v. Boston & W. R. Corp. 12 Gray, 388, 74 Am. Dec. 598; Baltimore & O. R. Co. v. Campbell, 36 Ohio St. 647, 38 Am. Rep. 617; Kansas City, St. J. & C. B. R. Co. v. Rodebaugh, 38 Kan. 45, 5 Am. St. Rep. 715, 15 Pac. 899; Indianapolis & C. R. Co. v. Cox, 29 Ind. 360, 95 Am. Dec. 640.

Hooker, C., filed the following opinion:

This case was tried upon the following agreed statement of facts:

"It is hereby agreed by and between the undersigned, attorneys for both plaintiffs and defendants, that if witnesses were pro-

duced in open court in this case the evidence would be as follows:

"That on the 15th day of February, 1914, Albert R. Lee, traveling salesman in the employment of plaintiffs, purchased a ticket for first-class passage over the lines of the defendants from Madill, Oklahoma, to Hugo, Oklahoma; that the said Albert R. Lee delivered to the said defendants at Madill, Oklahoma, for transportation to Hugo, Oklahoma, his baggage, consisting of a sample trunk; and that said defendants received said baggage and promised and agreed to deliver the same to said Albert R. Lee, together with the contents thereof; that the said baggage was safely transported from Madill, Oklahoma, to Hugo, Oklahoma, and safely reached its destination at Hugo, Oklahoma at 11:35 A. M. on said 15th day of February, 1914, and was immediately placed in the baggage room. Thereafter, at about 12:10 P. M. of said date, the depot at Hugo was burned, and the said sample trunk and contents thereof destroyed.

"It is further agreed that the value of said trunk and contents was \$568.15.

"It is further agreed that said sample trunk and contents was insured by the Hartford Fire Insurance Company of Hartford, Connecticut, and that on March 31, 1914, said insurance company paid to the plaintiffs the value of the trunk and contents, to wit: \$568.15, and that the plaintiffs were the owners thereof.

"It is further understood that this suit is brought for the use and benefit of the Hartford Fire Insurance Company of Hartford, Connecticut, to reimburse it for the amount paid for the loss of said trunk and contents.

"It is further agreed that at the time the said Albert R. Lee delivered his sample trunk and contents thereof to the defendants, he was delivered a duplicate baggage check, being numbered A-359,324, which shows upon its face that said sample trunk contained excess weight of 100 pounds, for which the said Albert R. Lee paid 30 cents as excess baggage; said baggage check is hereto attached, marked 'Exhibit A' and made a part of this agreed statement of facts.

"It is further agreed that at the time said sample trunk and contents were delivered to the defendants at Madill, Oklahoma, the defendants had on file with the Corporation Commission of the state of Oklahoma their local passenger tariff, covering all its lines within the state of Oklahoma, a copy of which is hereto attached, marked 'Exhibit B,' and made a part of this stipulation.

"It is further agreed that the cause of the said fire which destroyed the depot at Hugo is unknown.

"Dated this 9th day of September, 1915."
L.R.A.1918C.

Judgment was rendered in favor of the defendants in error against the railroad company, from which judgment an appeal is had to this court. It is asserted that this judgment is erroneous for two reasons: First, a carrier transporting merchandise of a principal as the baggage of his traveling agent without notice of the principal's ownership cannot be held liable for the loss of such baggage in a suit by the principal, unless the carrier is guilty of gross negligence or wilful misconduct; second, that recovery here is limited to \$100 for the reason that the baggage check issued to Albert R. Lee, the traveling salesman, at the time the trunk in question was delivered by him to the company for transportation as baggage, placed a limitation in value thereon in the sum of \$100. And tariff No. 117, which was in effect at the time thereof, on file with the Corporation Commission, also placed a limitation of \$100, unless a greater valuation was declared by the passenger at the time the baggage was presented for transportation (which the agreed statement of facts does not show). For these two reasons the company denies liability here. If the contention of the company upon the first proposition named above is sustained, it will be unnecessary to consider the two reasons assigned by it.

Under the authority of this court in *Kansas City, M. & O. R. Co. v. Fugatt*, 47 Okla. 727, L.R.A.1916A, 545, 150 Pac. 669, the following principles are announced which may be accepted as the law of this state:

"A carrier, with respect to baggage accompanying a passenger, intrusted to its custody, incurs the responsibility of a common carrier of goods, and is liable as an insurer of the baggage, except where the loss or damage is caused by the act of God, the act of the owner, or by the public enemy.

"It is a matter of general knowledge, of which courts will take judicial notice, that common carriers by rail make a practice of carrying as baggage the sample trunks of traveling salesmen.

"Where a carrier accepts as baggage the sample trunks of a traveling salesman, with knowledge of their character, it thereby waives any objection on the ground that such trunks and contents are not properly baggage, and its liability therefor is the same as that with reference to baggage as defined in § 806, Rev. Laws, 1910."

This authority decides the question that the trunk here is property capable of being transported as baggage.

The company asserts that, in the absence of wilful misconduct, or gross negligence, it cannot be held responsible for the loss of this baggage, for the reason that the re-

relationship of the passenger and carrier between it and the defendant in error did not exist at the time the trunk was delivered by Albert R. Lee, the traveling representative of the defendants in error, to it for transportation as baggage. Numerous authorities are cited here to support this contention, all of which are to the effect that before the carrier can be liable as an insurer, this personal relationship of passenger and carrier must exist. The rule on this question is stated in Hutchinson on Carriers, §§ 1274, 1275, as follows:

"Sec. 1274. The owner of the property must, of course, stand in the relation of passenger to the carrier in order to fix upon him liability as a carrier of baggage. The carriage is *ex vi termini* incidental to the carriage of the owner as a passenger. If, therefore, that which would have been properly baggage had it been accompanied by the owner as a passenger, should, by accident or mistake, be accepted by the carrier for transportation without being accompanied by the owner, and when he is not or does not become a passenger, the carrier would not have it in his custody in the character of baggage, and would not be responsible for it as such. Of course, if he accepted such baggage for transportation, knowing that the owner was not and did not intend to become a passenger, he would accept it to be carried as freight, and would be liable for it as a common carrier of goods. But if he accepted it as baggage, supposing the owner to be a passenger, or about to become one, and it should turn out that he was not and did not become a passenger upon the journey upon which the goods were taken, the question would arise: In what character and under what responsibilities was it carried?"

"Sec. 1275. Having accepted it to be carried as baggage, will the law imply or impose upon him a different contract or duty from that which he undertook? For although the measure of the liability of the carrier of the baggage is the same as that of the common carrier of goods as freight, the risk incurred by the carrier in the two cases is not always the same. When the baggage is accompanied by the owner, as the carrier has the right to suppose will be the case, emergencies may arise in which his care and attention to it may preserve it from loss; and when his journey has been safely made, the carrier may at once deliver to him his baggage, instead of being obliged to keep it for him and thereby prolong his own responsibility. Therefore, to make him responsible as a common carrier of freight for that which he has accepted for carriage as baggage would be imposing upon him a somewhat different undertaking

from that to which he had agreed. . . . Where, therefore, the owner of goods who has secured the right to be carried as a passenger tenders his goods as baggage, and the carrier, believing that they are to be accompanied by him, accepts them as such, he will thereby incur with respect to their safety the responsibility of a gratuitous bailee only if, through no fault of his, the owner does not become a passenger upon the journey upon which they are taken. And if the carrier should receive goods as baggage under circumstances which lead him to suppose that their owner has secured the right to be carried as a passenger, when in fact no such right has been or is intended to be acquired, the only duty, it is held, which the carrier would owe the owner, would be to abstain from wilfully or wantonly causing them injury."

Also the same author, in § 1276, says: "Since the carriage of baggage is incidental to the contract for the transportation of the passenger, it follows that if the property accepted by the carrier as the personal baggage of the passenger does not belong to him, but to another with whom no contract for transportation has been made, the owner, in the absence of proof that the carrier has been guilty of negligence, cannot recover for its loss or injury. . . ."

In Ruling Case Law, vol. 5, p. 178, it is stated: "In view of the character of baggage as property carried under, or as an incident to, the contract of transportation of the owner as a passenger, a general rule has been developed by the decisions to the effect that property moved by express, or otherwise, apart from the transportation of the person who owns it, cannot properly be considered as baggage, nor can the carrier be held liable therefor as such; and where a passenger carries as baggage property belonging to another person, the carrier, as to such property, is ordinarily deemed to be merely a gratuitous bailee, and is liable to the owner only for the loss of the property by gross negligence or wilful misconduct. In accordance with this rule a carrier cannot be held liable to a partnership for injury to firm property where it was carried as the personal baggage of one member."

In *Bradley v. Chicago & N. W. R. Co.* 147 Ill. App. 397, it is held: "The carrier's responsibility for baggage does not attach unless the relation of passenger and carrier has been established. One having a ticket cannot leave his baggage with the carrier and provide for its transportation in due course unless he himself intends at such time to proceed upon his journey. The carrier's liability with respect to baggage is an incident to the relationship of passenger and carrier, and if such relationship does

not exist at the time of the carriage of the baggage, the only responsibility of the carrier is that of a warehouseman."

The supreme court of Kansas, in *South-ern Kansas R. Co. v. Clark*, 52 Kan. 398, 34 Pac. 1054, said: "The first question presented by the plaintiff in error is whether the railroad company sustained the relation of a common carrier to the plaintiffs, and is therefore liable for the loss of baggage stolen, without any claim of negligence on its part. . . . Personal baggage limited in quantity is usually transported by carriers of passengers as an incident to the transportation of the person, without extra charge. The contract to transport a passenger is usually a personal contract. If injury results to his person, or his personal effects, transported as baggage, there can be no doubt that the railroad company is liable to him, and him alone, when occurring under such circumstances as to create liability. The fact that he is engaged in the service of another at the time, and that his transportation is paid for by his employer, cannot diminish his individual right to safe transportation. We fail to perceive that the facts that his fare is paid for by his employer, and that the occasion for his making the journey is the prosecution of the business of his employer, in any manner affect the contract with, or liability of, the railroad company. It does not appear in this case that, at the time he purchased his ticket, anything was said with reference to his employment, nor that, at the time he checked his baggage, any mention was made of the fact that the samples he carried belonged to the plaintiffs."

Likewise the court of appeals of Kansas in *Missouri P. R. Co. v. Liveright*, 7 Kan. App. 772, 53 Pac. 763, held: "Where the traveling salesman of a firm purchases two first-class tickets, and on these tickets procures trunks or sample cases, belonging to the firm, to be checked and transported by a railroad company as his personal baggage, without informing the railroad company as to the contents, value, or ownership of the trunks, held, that the railroad company is not liable to the firm if injury results to the contents of the trunks so transported as the personal baggage of their traveling salesman."

In *Stimson v. Connecticut River R. Co.* 98 Mass. 83, 93 Am. Dec. 140, it is held: "The defendants had no contract with the plaintiffs. Their contract was with Edwards, the plaintiffs' agent; and it was a strictly personal contract, for his safe transportation over the railroads, to which the carriage of suitable personal baggage was merely incidental. Edwards had no right to transport merchandise under cover of his L.R.A.1918C.

personal baggage; much less could he take merchandise in that manner which belonged to other persons, and thereby give them the rights of a contracting party against the defendants. . . . The count upon a contract, therefore, cannot be supported."

And in the syllabus the rule is announced: "Railroad company cannot be held liable, either to owner or agent, on its ordinary contract to carry a passenger, for losing samples of merchandise delivered into its charge by the agent of the owner as his personal baggage; nor in tort, except for gross negligence."

The doctrine announced in the *Stimson Case* was followed by the supreme court of Massachusetts in *Alling v. Boston & A. R. Co.* 126 Mass. 121, 30 Am. Rep. 667. In *Wood v. Maine C. R. Co.* 98 Me. 98, 99 Am. St. Rep. 339, 56 Atl. 457, 15 Am. Neg. Rep. 306, it is said: "Where the owner did not intend to accompany his baggage the entire distance of his route, and it is admitted that he did not, in fact, accompany it over any part of the defendant's railroad, held, that the defendant did not incur the full responsibility of a common carrier of goods, and that at the time the trunk was rifled of its contents, the defendant was only liable as a gratuitous bailee."

In *Brick v. Atlantic Coast Line R. Co.* 145 N. C. 203, 122 Am. St. Rep. 440, 58 S. E. 1073, 13 Ann. Cas. 328, the supreme court of North Carolina said: "Where a passenger carries as baggage property belonging to another person, the carrier, as regards such property, is a gratuitous bailee only, and is liable only for the loss of the property by gross negligence or wilful misconduct."

From the foregoing authorities it is a settled doctrine of the law that the owner of the property must stand in the relation of passenger to the carrier in order to fix upon the carrier the liability as a carrier of baggage, unless the carrier is advised of the fact and accepts the property as baggage with full knowledge. And, inasmuch as that relation under the agreed statement of facts here is not shown to have existed between the plaintiff below and the company here at the time the goods were destroyed, nor any claim of knowledge on the part of the company stated, the plaintiff is not entitled to recover in the absence of gross negligence or wilful misconduct.

The judgment of the lower court is therefore reversed, and this cause is remanded.

Per Curiam:

Adopted in whole.

Petition for rehearing denied November 6, 1917.

Annotation—Carriers: liability in respect to property of third person in passenger's baggage.

This note does not include liability for articles intended as gifts when carried in passengers' baggage, such cases being collected in a note to *Kansas City Southern R. Co. v. Skinner*, 21 L.R.A.(N.S.) 850.

Property of members of family.

A husband may recover for the loss of his wife's clothing which was contained in his trunk along with his own. *Rogers v. Long Island R. Co.* (1873) 1 *Thomp. & C. (N. Y.)* 396. Especially is this so where he paid for the clothing of the wife, and considered it a part of her necessary apparel. *Burnes v. Chicago, R. I. & P. R. Co.* (1912) 167 *Mo. App.* 62, 150 S. W. 1100.

And in *Withey v. Pere Marquette R. Co.* (1905) 141 *Mich.* 412, 1 L.R.A.(N.S.) 352, 113 *Am. St. Rep.* 533, 104 *N. W.* 773, 7 *Ann. Cas.* 948, 19 *Am. Neg. Rep.* 309, it was held that a husband could recover for articles belonging exclusively to his wife, which were contained in his baggage and checked on tickets bought by him, the contract to carry him and his wife and their common baggage being a contract with the husband.

In *Jones v. Cincinnati, H. & D. R. Co.* (1913) 184 *Ill. App.* 287, it was held that a small amount of jewelry which had belonged to the passenger's deceased wife was baggage.

A woman may recover in contract for her own clothing and that of infant children traveling with her, but not for her husband's clothing, household effects, and dresses of a daughter who did not accompany her. *Callan v. Canada Northern R. Co.* (1909) 19 *Manitoba L. R.* 141.

And books bought by a wife for her husband with money sent to her by him for that purpose constitute no part of her baggage. *Hurwitz v. Hamburg-American Packet Co.* (1899) 27 *Misc.* 814, 56 *N. Y. Supp.* 379.

A father clearly has a right to recover for the loss of wearing apparel of an infant. *Curtis v. Delaware, L. & W. R. Co.* (1878) 74 *N. Y.* 116, 30 *Am. Rep.* 271. Such articles are the property of the father, in his possession, and are properly a part of his baggage. *Withey v. Pere Marquette R. Co.* (*Mich.*) *supra*.

And where a father and minor daughter are traveling together, the contract for transportation being made by him and the baggage checks being delivered to him, he may sue for the loss of wear-

ing apparel of the daughter even if it is conceded that the daughter has the sole right of using such apparel, as, legally being obliged to provide her with clothing, he would have such interest in it as to entitle him to sue. *Baltimore Steam Packet Co. v. Smith* (1865) 23 *Md.* 402, 87 *Am. Dec.* 575.

Plaintiff could not recover for the loss of a dress belonging to her mother, who was not traveling with her, and which was admitted not to be for plaintiff's use. *Bullard v. Delaware, L. & W. R. Co.* (1902) 21 *Pa. Super. Ct.* 583.

Property belonging to employer.

The following cases dealing with the liability of a carrier for the loss of sample merchandise carried by a traveling salesman and belonging to his employer include only such cases as involve the question of liability as depending upon ownership. For other cases involving liability for salesman's samples, see notes to *New Orleans & N. E. R. Co. v. Shackleford*, 4 L.R.A.(N.S.) 1035, and *Landesman-Hirschheimer Co. v. Louisville & N. R. Co.* *ante*, 108.

It is generally held that the employers of a salesman cannot, at least in an action on the contract, recover for loss of or injury to sample merchandise checked by the salesman with no notice to the carrier that the baggage was not his own. *Southern Kansas R. Co. v. Clark* (1893) 52 *Kan.* 398, 34 *Pac.* 1054; *Missouri P. R. Co. v. Liveright* (1898) 7 *Kan. App.* 772, 53 *Pac.* 763; *Stimson v. Connecticut River R. Co.* (1867) 98 *Mass.* 83, 93 *Am. Dec.* 140; *Alling v. Boston & A. R. Co.* (1879) 126 *Mass.* 121, 30 *Am. Rep.* 667; *Merritt v. Lehigh Valley R. Co.* (1912) 49 *Pa. Super. Ct.* 219; *Lusk v. Bloch*, *ante*, 109.

Thus, in *Stimson v. Connecticut River R. Co.* (1867) 98 *Mass.* 83, 93 *Am. Dec.* 140, *supra*, the court said that the salesman had no right to transport merchandise under cover of his personal baggage; much less could he take merchandise in that manner which belonged to other persons, and thereby give them the right of contracting parties against the carrier. And in *Talcott v. Wabash R. Co.* (1892) 66 *Hun*, 456, 21 *N. Y. Supp.* 318, an action for the loss of baggage consisting of sample trunks, etc., of a salesman, the court, though deciding that the baggage agent had no authority to accept merchandise as baggage, gave

as another ground for denying recovery that no attempt was made to show that the baggage agent was notified that the samples were the property of anyone but the passenger. And in *Cattaraugus Cutlery Co. v. Buffalo, R. & P. R. Co.* (1897) 24 App. Div. 267, 48 N. Y. Supp. 451, and *Brick v. Atlantic Coast Line R. Co.* (1907) 145 N. C. 203, 122 Am. St. Rep. 440, 53 S. E. 1073, 13 Ann. Cas. 323, it was held that a carrier is liable only as a gratuitous bailee to the owner of property carried as baggage by its salesman.

While in *Doherty v. Grand Trunk Western R. Co.* (1915) 194 Ill. App. 354, it was held that a commercial traveler carrying as baggage articles of merchandise of his employer for delivery to customers could not recover for their loss in an action for loss of baggage.

But, in *Illinois C. R. Co. v. Matthews* (1903) 114 Ky. 973, 60 L.R.A. 846, 102 Am. St. Rep. 316, 72 S. W. 302, an action by a traveling salesman for injury to merchandise carried as baggage for his employers, partly as samples and partly for sale, the court said: "While it is true that a carrier cannot be made liable for the goods of another than the passenger or a member of his family traveling with him which may be included in the passenger's baggage, yet the facts in this case tend to show that, although the goods belonged to the wholesale merchants, by an agreement between them and appellee he had such an interest in them, by reason of his being responsible to them for their loss or damage, and required to replace them in such event, that they may fairly be treated as his for the purposes of this action. The damage fell upon him. They were being carried for him. He was the passenger."

And in *Trimble v. New York C. & H. R. R. Co.* (1899) 39 App. Div. 403, 57 N. Y. Supp. 437, and *Ft. Worth & R. G. R. Co. v. I. B. Rosenthal Millinery Co.* (1895) — Tex. Civ. App. —, 29 S. W. 196, it was held that an employer may recover for the loss of baggage owned by it and carried by its salesman, in an action on the contract, although the contract for carriage was made by the agent, and no notice of the ownership of the property was given to the railroad company. See also *Sloman v. Great Western R. Co.* (1876) 67 N. Y. 208. *Trimble v. New York C. & H. R. R. Co.* (N. Y.) supra, was affirmed in (1900) 162 N. Y. 84, 48 L.R.A. 115, 56 N. E. 532, but the question of ownership was not discussed.

And in *Lake Shore & M. S. R. Co. v. Hochstim* (1896) 67 Ill. App. 514, it was L.R.A.1918C.

held that a carrier which checked as baggage the sample cases of a salesman, after being informed of the nature of their contents, is liable for their loss; and the fact that the articles lost were not the property of the agent purchasing the ticket, but of his employer, is immaterial to defendant, and the real owner could sue for the loss.

In *Grant v. Newton* (1850) 1 E. D. Smith (N. Y.) 95, it was held that a father who employed his son in his own business and sent him on a journey, placing in his possession for use while so employed a trunk, clothing, etc., for the purposes of the journey, may maintain an action on the case for the carrier's neglect of duty, resulting in the loss of the trunk.

The papers carried by an insurance agent, relating to the business of and belonging to the insurance company are not baggage. *Yazoo & M. Valley R. Co. v. Georgia Home Ins. Co.* (Yazoo & M. Valley R. Co. v. Blackmar) (1904) 85 Miss. 7, 67 L.R.A. 646, 107 Am. St. Rep. 265, 37 So. 500, 17 Am. Neg. Rep. 306.

The owner of baggage could not recover for its loss when it was taken as the personal baggage of a servant, the owner going on another train. *Becher v. Great Eastern R. Co.* (1870) L. R. 5 Q. B. (Eng.) 241, 39 L. J. Q. B. N. S. 122, 22 L. T. N. S. 299, 18 Week. Rep. 627.

Miscellaneous cases.

In *Pennsylvania R. Co. v. Knight* (1895) 58 N. J. L. 287, 33 Atl. 845, it was held that a partnership could not, in an action on the contract, recover for injury to a typewriter carried by one of the partners as baggage, the contract of carriage being with the partner, and the firm not being in privacy.

In *Louisville & N. R. Co. v. Dickson* (1916) — Ala. App. —, 73 So. 750, certiorari denied in (1917) — Ala. —, 74 So. 1005, where one of two joint owners of several dogs purchased tickets to be used by themselves and others composing a hunting party, and arranged for the transportation of the dogs, it was held that the contract for transportation of the dogs was, in effect, for the sole benefit of the two owners, and they were authorized to sue for the carrier's breach of duty growing out of the contract.

In *Dunlap v. International S. B. Co.* (1867) 98 Mass. 371, it was held that where a passenger carried in his baggage property belonging to another passenger, who apparently had no baggage, the carrier was not liable for the loss of such property. R. L. S.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL. VIRGINIA & RAINY LAKE COMPANY

v.

DISTRICT COURT OF ST. LOUIS COUNTY et al.

(— Minn. —, 164 N. W. 585.)

Workmen's compensation — freezing.

1. Freezing is a personal injury caused by "accident," within the meaning of the Workmen's Compensation Act.

For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.

Same — sufficiency of evidence.

2. A workman froze his thumb while working as a swamper. His work required him to cut and handle timber, and his hands came in contact with the snow. His work was several miles from camp, and there were no facilities for warming. The weather was severely cold. A finding that the freezing arose out of the employment is sustained by the evidence.

For other cases, see Evidence, XII. b, in Dig. 1-52 N. S.

(Bunn, J., dissents.)

(October 12, 1917.)

PETITION for a writ of certiorari to review a judgment of the District Court for St. Louis County, awarding compensation under the Workmen's Compensation Act to an employee of relator. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Abbott, MacPherran, Lewis, & Hilbert, for relator:

An injury consisting of freezing is not an injury by accident, within the meaning of that phrase as used in the Minnesota Workmen's Compensation Act.

United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; Sinclair v. Maritime Passengers' Assur. Co. 3 El. & El. 478, 121 Eng. Reprint, 521, 30 L. J. Q. B. N. S. 77, 7 Jur. N. S. 367, 4 L. T. N. S. 15, 9 Week. Rep. 342; Dozier v.

Headnotes by DIBELL, C.

Note.—The general subject of Workmen's Compensation Acts is treated in annotations in L.R.A.1916A, 23, and L.R.A.1917D, 80. The right of an employee to recover for injuries because of weather or climatic conditions is discussed on pages 66 and 43 of the annotation in L.R.A.1916A, and on pages 108 and 129 of the annotation in L.R.A.1917D.

For later cases and annotations, consult the L.R.A. Indexes for volumes subsequent to L.R.A.1917D, under the title, "Workmen's Compensation." L.R.A.1918C.

Fidelity & C. Co. 13 L.R.A. 114, 46 Fed. 446; Elsev v. Fidelity & C. Co. — Ind. App. —, 109 N. E. 413; Continental Casualty Co. v. Pittman, 145 Ga. 641, 89 S. E. 716; Schmid v. Indiana Travelers' Acci. Asso. 42 Ind. App. 483, 85 N. E. 1032; Shanberg v. Fidelity & C. Co. 19 L.R.A.(N.S.) 1206, 85 C. C. A. 343, 158 Fed. 1; Feder v. Iowa Traveling Men's Asso. 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St. Rep. 212, 78 N. W. 252; Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398, 10 N. C. C. A. 1; Robbins v. Original Gas Engine Co. 191 Mich. 122, 157 N. W. 437; Boody v. K. & C. Mfg. Co. 77 N. H. 208, L.R.A.1916A, 10, 90 Atl. 859; Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; Fenton v. J. Thorley & Co. [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684, 5 W. C. C. 1; Liondale Bleach, Dye & Paint Works v. Riker, 85 N. J. L. 426, 80 Atl. 929, 4 N. C. C. A. 713; Eke v. Hart-Dyke [1910] 2 K. B. 677, 80 L. J. K. B. N. S. 90, 103 L. T. N. S. 174, 26 Times L. R. 613, 3 B. W. C. C. 482, 3 N. C. C. A. 230; McMillan v. Singer Sewing Mach. Co. [1913] S. C. 346, 50 Scot. L. R. 220, [1912] Scot. L. T. 484, 6 B. W. C. C. 345.

The injury in this case did not arise out of and in the course of the employment.

Warner v. Couchman [1912] A. C. 35, 81 L. J. K. B. N. S. 45, 105 L. T. N. S. 676, 28 Times L. R. 58, 56 Sol. Jo. 70, 49 Scot. L. R. 681, 5 B. W. C. C. 177, [1911] 1 K. B. 351, 80 L. J. K. B. N. S. 526, 103 L. T. N. S. 693, 27 Times L. R. 121, 55 Sol. Jo. 107, 4 B. W. C. C. 32, 1 N. C. C. A. 51; Karemaker v. The Corsican, 4 B. W. C. C. 295; Blakey v. Robson, E. & Co. [1912] S. C. 334, 49 Scot. L. R. 254, 5 B. W. C. C. 536; Rodger v. Paisley School Board [1912] S. C. 584, 49 Scot. L. R. 413, 5 B. W. C. C. 547.

Messrs. Edward L. Boyle, J. F. Boyle, and E. J. Kenny, for the employee:

Frostbite as suffered by the employee here was an event happening suddenly and violently.

Bacon v. United States Mut. Acci. Asso. 44 Hun, 599; Macon, Ben. Soc. p. 967; Paul v. Travelers' Ins. Co. 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347; Pickett v. Pacific Mut. L. Ins. Co. 144 Pa. 79, 13 L.R.A. 661, 27 Am. St. Rep. 618, 22 Atl. 871.

Recovery may be had for injury from freezing.

Days v. S. Trimmer & Sons, 176 App. Div. 124, 162 N. Y. Supp. 603; Larke v. John Hancock Mut. L. Ins. Co. 90 Conn. 303, L.R.A.1916E, 584, 97 Atl. 320, 12 N. C. C. A. 308; McManaman's Case, 224 Mass. 554, 113 N. E. 287; Canada Cement Co. v. Pazuk,

Rap. Jud. Quebec 22 B. R. 432, 7 N. C. C. A. 982.

The injury suffered by the employee arose both out of and in the course of his employment.

Larke v. John Hancock Mut. L. Ins. Co. 90 Conn. 303, L.R.A.1916E, 584, 97 Atl. 320, 12 N. C. C. A. 308; McManaman's Case, 224 Mass. 554, 113 N. E. 287; Mahowald v. Thompson-Starrett Co. 134 Minn. 113, 158 N. W. 913; State ex rel. Duluth Brewing & Malting Co. v. District Ct. 129 Minn. 176, 151 N. W. 912; State ex rel. People's Coal & Ice Co. v. District Ct. 129 Minn. 502, L.R.A.1916A, 344, 153 N. W. 119, 9 N. C. C. A. 129; State ex rel. Puhlmann v. District Ct. — Minn. —, 162 N. W. 678.

Dibell, C., filed the following opinion:

Certiorari to review the judgment of the district court of St. Louis county awarding compensation under the Workmen's Compensation Act to Joe Niemi, an employee of the relator, Virginia & Rainy Lake Company. The injury for which the award was made was the freezing of the employee's thumb, which resulted in its amputation. The questions are these:

(1) Whether freezing is a personal injury caused by accident, within the meaning of the Compensation Act.

(2) If so, whether the accident arose out of the employment, within the meaning of the act.

1. The statute exacts from the employer compensation "in every case of personal injury or death of his employee, caused by accident, arising out of and in the course of employment." Gen. Stat. 1913, § 8203. The term "accident" is defined as follows: "The word 'accident' as used in the phrases 'personal injuries due to accident' or 'injuries or death caused by accident' in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event, happening suddenly and violently, with or without human fault and producing at the time, injury to the physical structure of the body." Gen. Stat. 1913, § 8230 (h).

That freezing is a personal injury within the meaning of the Compensation Act is not open to question. McManaman's Case, 224 Mass. 554, 113 N. E. 287; Larke v. John Hancock Mut. L. Ins. Co. 90 Conn. 303, L.R.A.1916E, 584, 97 Atl. 320, 12 N. C. C. A. 308. Nor is it to be questioned that within the statutory definition it is an "unexpected and unforeseen event," nor that it is an event "producing at the time injury to the physical structure of the body." It has been held an accident within a statute giving compensation in case of an accidental injury, but not defining accident. Days v.

S. Trimmer & Sons, 176 App. Div. 124, 162 N. Y. Supp. 603; Canada Cement Co. v. Pazuk, Rap. Jud. Quebec 22 B. R. 432, 12 D. L. R. 303, 7 N. C. C. A. 982. So has a sunstroke, which affords a helpful, though not perfect, analogy. Ismay v. Williamson [1908] A. C. 437, 77 L. J. P. C. N. S. 107, 99 L. T. N. S. 595, 24 Times L. R. 881, 52 Sol. Jo. 713, 42 Ir. L. T. 213; Morgan v. The Zenaida, 25 Times L. R. 446, 2 B. W. C. C. 19; Davies v. Gillespie, 105 L. T. N. S. 494, 28 Times L. R. 6, 56 Sol. Jo. 11, 5 B. W. C. C. 64. The difficult question is whether the requirement that the event be one "happening suddenly and violently" excludes it. Freezing comes suddenly and violently, as distinguished from gradually and naturally or in ordinary course. In common talk a sudden or violent death is one occurring unexpectedly, and not naturally or in the ordinary course of events. In some such sense the words are used in the statute. Their effect is not to exclude from accidental injuries all except such as result from physical force applied from without. It is suggested in argument that these particular words, with others employed in the same connection, were used in caution to exclude occupational and other diseases. Whether such is their effect is not for decision here. We think that a fair construction of the statutory definition does not exclude freezing, and we hold that it is a personal injury caused by accident, within the meaning of the act.

2. It is not questioned that the employee received his injury in the course of his employment. It is contended that it did not arise out of his employment. It is not enough that it occurred while work was in progress. It must have arisen under such circumstances that a causal connection is traceable between the employment and the freezing, and the freezing must be more than a consequence, shared by the community in general, of exposure to cold.

The freezing occurred in January, 1916. The workman was employed by the relator as a swamper in the woods in the northern part of St. Louis county. He was cutting and handling timber and making roads for swamping. He used an ax, handled the timber with his hands, and they came in contact with the snow. The weather was severely cold. He was some 4 or 5 miles from camp. There were no facilities for warming. The building of fires was not permitted. The evidence fairly sustains the view that the character of the employee's work subjected him to a risk of freezing not shared by the generality of the community, and sustains the finding that the freezing arose out of the employment. In the following cases, all involving injuries by freezing, and

ings that the freezing arose out of the employment were sustained: *McManaman's Case*; *Larke v. John Hancock Mut. L. Ins. Co.*; *Days v. S. Trimmer & Sons*; and *Canada Cement Co. v. Pazuk*,—*supra*. In the following findings that it did not were sustained: *Warner v. Couchman* [1911] 1 K. B. 351, 80 L. J. K. B. N. S. 526, 103 L. T. N. S. 693, 27 Times L. R. 121, 55 Sol. Jo. 107, 1 N. C. C. A. 51, 4 B. W. C. C. 32; *Karemaker v. The Corsican*, 4 B. W. C. C. 295.

The general question of what constitutes an accident arising out of employment has had consideration by this and other courts. See *State ex rel. Duluth Brewing & Malting Co. v. District Ct.* 129 Minn. 176, 151 N. W. 912; *State ex rel. People's Coal & Ice Co. v. District Ct.* 129 Minn. 502, L.R.A.1916A,

344, 153 N. W. 119, 9 C. C. A. 129; *Mahowald v. Thompson-Starrett Co.* 134 Minn. 113, 158 N. W. 913, 159 N. W. 565; 1 *Bradbury, Workmen's Compensation*, 398 et seq.; 1 *Honnold, Workmen's Compensation*, §§ 101 et seq.; notes in L.R.A.1916A, 40, Ann. Cas. 1913C, 4, Ann. Cas. 1914B, 498, and Ann. Cas. 1916B, 1293; 25 *Harvard L. Rev.* 401, 517. The case in review does not call for a discussion of the cases. It is enough to say that the finding that the injury was an accident arising out of the employment is sustained.

Judgment affirmed.

Bunn, J., dissenting:

I am not clear that it can be fairly said that freezing comes "suddenly and violently."

MINNESOTA SUPREME COURT.

EMMA J. HARWOOD et al., Respts.,
v.

JOSEPH MELONEY et al., Doing Business
as Meloney Brothers, Appts.

(— Minn. —, 166 N. W. 125.)

Landlord and tenant — retaining portion of premises.

Where at the end of the term a lessor takes possession of a part of the leased premises not then occupied by the lessee, but the lessee retains possession of the remainder and refuses to vacate, the lessor may treat him as holding over under the lease as to the part retained by him, and may collect a proportionate part of the rental for the term during which he continues to occupy it.

For other cases, see *Landlord and Tenant*, II. d, in *Dig.* 1-52 N. S.

(January 18, 1918.)

APPEAL by defendants from a judgment of the District Court for Beltrami County sustaining plaintiffs' motion for judgment in their favor upon the pleadings, in an action brought to recover the alleged proportionate rental value of a certain tract of land. Affirmed.

The facts are stated in the Commissioner's opinion.

Headnote by TAYLOR, C.

Note. — As to effect of tenant holding part only of premises after expiration of term, see annotation following this case, post, 120.
L.R.A.1918C.

Messrs. S. M. Koefod and W. E. Rowe,
for appellants:

Plaintiffs evicted defendants from a portion of the premises, depriving them of the beneficial use of the loading grounds to such an extent that they were damaged in a sum greater than the annual value of the use of the premises. Under such circumstances the plaintiffs are not entitled to recover any rent.

Briggs v. Hall, 4 Leigh, 484, 26 Am. Dec. 326; *Christopher v. Austin*, 11 N. Y. 216; *Perniciaro v. Veniero*, 90 N. Y. Supp. 369; *Moore v. Mansfield*, 182 Mass. 302, 94 Am. St. Rep. 657, 65 N. E. 398; *Halligan v. Wade*, 21 Ill. 470, 74 Am. Dec. 108; *New York Dry Goods Store v. Pabst Brewing Co.* 50 C. C. A. 295, 112 Fed. 381; *Kuschinsky v. Flannigan*, 170 Mich. 245, 41 L.R.A. (N.S.) 430, 136 N. W. 362, Ann. Cas. 1914A, 1228; *Morris v. Kettle*, 57 N. J. L. 218, 30 Atl. 879; *Eldred v. Leahy*, 31 Wis. 546.

Mr. Walter L. Chapin, for respondents:

Defendants originally took possession as tenants of plaintiffs and held for several years, paying rent until the written lease on new terms was entered into. Possession continued under it and the year's rent was paid. Defendants cannot therefore be heard to deny the plaintiffs' title, as they have retained possession.

Sage v. Halverson, 72 Minn. 294, 75 N. W. 229; *Fleming v. Mills*, 182 Ill. 464, 55 N. E. 373; *Vancleave v. Wilson*, 73 Ala. 387; *Morrison v. Bassett*, 26 Minn. 235, 2 N. W. 851; *Love v. Law*, 57 Miss. 596; *Robinson v. Holt*, 90 Ala. 115, 7 So. 441; *Casey v. Hanrick*, 69 Tex. 44, 6 S. W. 405; *Towne v. Butterfield*, 97 Mass. 105; *Mackin v. Haven*, 187 Ill. 480, 58 N. E. 448; *Littleton v. Clay-*

ton, 77 Ala. 571; *Juneman v. Franklin*, 67 Tex. 411, 3 S. W. 562; *Underhill, Land. & T.* § 551; *Bullard v. Hudson*, 125 Ga. 393, 54 S. E. 132; *McKissick v. Ashby*, 98 Cal. 422, 33 Pac. 729; *Allen v. Hall*, 64 Neb. 256, 89 N. W. 803; *Nehr v. Krewzberg*, 187 Pa. 53, 40 Atl. 810; *Russell v. Fahyan*, 27 N. H. 529; *Allen v. Chatfield*, 8 Minn. 435, Gil. 386; *Morrison v. Bassett*, 26 Minn. 235, 2 N. W. 851; *Anderson v. Winton*, 136 Ala. 422, 34 So. 962; *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446; *Vernam v. Smith*, 15 N. Y. 327; *Sharpe v. Kelley*, 5 Denio, 431; *Nissen v. Turner*, 50 Neb. 272, 69 N. W. 778; *Mosher v. Cole*, 50 Neb. 636, 70 N. W. 275; *Taylor, Land. & T.* 629, 705.

The lease covenants for a right of re-entry for breach of conditions without forfeiture of rents or covenants to be performed. Plaintiffs had a right of re-entry of this land under these conditions.

Heims Brewing Co. v. Flannery, 137 Ill. 309, 27 N. E. 286; *Grommes v. St. Paul Trust Co.* 147 Ill. 634, 37 Am. St. Rep. 248, 35 N. E. 820; *Central Invest. Co. v. Melick*, 267 Ill. 564, 108 N. E. 681; *Galbraith v. Wood*, 124 Minn. 210, 50 L.R.A. (N.S.) 1034, 144 N. W. 945, Ann. Cas. 1915B, 609.

Taylor, C., filed the following opinion: Defendants appeal from a judgment rendered on the pleadings.

The complaint sets forth a written lease by which plaintiffs rented to defendants a tract of land having a frontage of 400 feet in the townsite of New Roosevelt for the term of one year from and after the 1st day of November, 1911, for the sum of \$320. The lease contained the usual provisions for re-entry, and the usual covenant by the lessees to surrender the possession of the premises to the lessors at the end of the term. The complaint further alleged that defendant took possession of the premises under the lease, occupied them during the year, and paid the rent therefor; that at the end of the year defendants surrendered the west 50 feet of the premises, but remained in possession of all the remainder thereof, and occupied and used the same for a period of four years after the term named in the lease had expired; and that the proportion of rent for the part of the premises retained by defendants was seven eighths of the rent for the entire premises; and demanded judgment therefor. The answer alleged that before making the written lease defendants had occupied the premises from time to time for short periods with the permission of plaintiffs, and had paid plaintiffs therefor; that at the time of making the written lease they had a large amount of

timber products stored upon the premises; that they were required by plaintiffs either to take a lease for one year for \$320 or to remove their property; that plaintiffs falsely represented that they were the owners of the land and entitled to the exclusive possession thereof; that the rent demanded was exorbitant, but to avoid the expense of removing their property defendants executed the lease, occupied the premises during the year, and paid the rental therefor; that before the end of the year they notified plaintiffs in writing that they would not surrender possession at the end of the term, would not renew the lease with plaintiffs, and would not recognize plaintiffs as the owners of the premises or entitled to possession thereof, but would recognize the Minnesota & Manitoba Railroad Company as owner of the land and would take a lease from that company therefor; that on November 1, 1912, defendants leased the premises from the railroad company, and have ever since held possession and occupied them under the railroad company; that after the 1st day of November, 1912, plaintiffs took possession of the west 50 feet of the land at a time when defendants were not occupying that part of the premises, and have ever since retained possession of such 50 feet; that the rental value of the part of the premises of which defendants retained possession did not exceed three fourths of the rental value of the whole premises; and that the value of the use of the whole premises did not exceed \$40 per year. The answer further alleged that an action is pending, undecided, between the railroad company and plaintiffs to determine the title to the land; and that defendants are informed, and believe, that the railroad company is the owner thereof.

Plaintiffs made a motion for judgment on the pleadings for \$240 per year, being three fourths of the rental value as fixed by the lease. This motion was granted, and judgment rendered accordingly.

Defendants do not question the rule that a tenant who has received possession of the leased premises from his landlord cannot dispute the title of the landlord until he has returned possession to the landlord or has been compelled to yield to a paramount title. Defendants concede that they received possession from plaintiffs, and make no claim that they have been compelled to yield to a paramount title. They rely for reversal upon the well-established rule of the common law that where a landlord wrongfully evicts his tenant from a part of the demised premises the whole rent is suspended until the possession of such part has been restored to the tenant. *Christopher v. Austin*, 11

N. Y. 216; *Morris v. Kettle*, 57 N. J. L. 218, 30 Atl. 879; *Kuschinsky v. Flanigan*, 170 Mich. 245, 41 L.R.A. (N.S.) 430, 136 N. W. 362, Ann. Cas. 1914A, 1228; *Halligan v. Wade*, 21 Ill. 470, 74 Am. Dec. 108; *Moore v. Mansfield*, 182 Mass. 302, 94 Am. St. Rep. 657, 65 N. E. 398; 16 R. C. L. 953, § 461.

They contend that plaintiffs, by taking possession of the west 50 feet of the land, in effect evicted them therefrom, and in consequence thereof are not entitled to recover rent for the remainder of the premises. But the facts do not bring the case within the rule invoked. At the end of the year plaintiffs were entitled to the possession of the entire tract and defendants had covenanted to restore it to them. Plaintiffs found the west 50 feet unoccupied and took possession of it, as they had a right to do, but defendants retained possession of the remainder, and wrongfully refused to vacate. The landlord does not forfeit his rent under the rule invoked unless he has dispossessed the tenant of a part of the premises in violation of the terms of the lease. Here there has been no violation of the terms of the lease by plaintiffs. The only violation of the terms of the lease was the refusal of defendants to surrender the remainder of the leasehold at the end of the term. Retaining a portion of the premises gave plaintiffs the right to treat defendants as holding over, and except for the fact that plaintiffs took possession of a part of the land, they would have the right to collect the full amount of the rent, although defendants retained only a portion of the premises. *Bless v. Jenkins*, 129 Mo. 647, 31 S. W. 938; *Ballance v. Peoria*, 180 Ill. 29, 54 N. E. 428; *Cavanaugh v. Clinch*, 88 Ga. 610, 15 S. E. 673.

But plaintiffs, having taken possession of the unoccupied part of the land, must make a proportionate reduction in the rent. Defendants allege that the rental value of the whole tract is much less than the rental which they had agreed to pay, but, as they saw fit to remain in possession in violation

of their covenant, and concede that the rental value of the portion retained by them is three fourths of the rental value of the whole tract, they are not in position to complain because plaintiffs elected to treat them as tenants holding over, and accepted their own apportionment of the rent by taking judgment for only three fourths of the rent reserved by the lease.

Without appearing to place much reliance thereon, defendants also invoke the rule that a tenant who has been induced to enter into the lease by fraud may attack his landlord's title if necessary to enable him to protect rights of which he is being deprived by the fraud. The facts do not bring the present case within this rule. The only misrepresentation charged is that plaintiffs asserted that they were the owners of the land, but the truth of this assertion is denied only upon information and belief; and it is admitted that plaintiffs are asserting their title and seeking to establish it in court against the adverse claimants. Defendants neither have nor claim any interest in the land, except such as they acquired under the lease from plaintiffs and the subsequent lease from the railroad company. While plaintiffs were in unquestioned possession of the land under claim of ownership, defendants voluntarily leased it from them, received possession from them, and have ever since retained such possession without interference by anyone. The lease impaired no rights of defendants in the land, and defendants, having taken possession under it, must restore such possession to plaintiffs before they can be heard to dispute plaintiffs' title. *Sage v. Halverson*, 72 Minn. 294, 75 N. W. 229; also numerous cases cited in note found in 4 Ann. Cas. at pages 108 et seq. If the mere fact that the landlord asserted that he was the owner when in truth he was not was sufficient ground for permitting the tenant to attack his landlord's title, the rule that a tenant is estopped from denying the title of his landlord would be well-nigh abrogated.

Judgment affirmed.

Annotation—Landlord and tenant: tenant holding part only of premises after expiration of term.

Various phases of holding over by tenant are treated in notes listed in the L.R.A. Indexes under "Landlord and Tenant."

In 2 *Taylor on Landlord & Tenant*, § 524, it is said: "If he has let the whole or any part of the premises to an undertenant who is in possession at the termination of the lease, he must eject him; otherwise he cannot render up that com-

plete possession to which the landlord is entitled. And unless the entire possession is delivered up the tenant's responsibility for rent will continue, although it may have become impossible for him to give the landlord full possession, in consequence of the obstinacy or ill will of an undertenant to whom he has let a part or the whole of the premises, and who refuses to quit; for in such case the

landlord may refuse to accept possession, and hold the original tenant liable."

A tenant who without the consent of the landlord retains possession of part of the premises must be considered as holding over as to all. *Cavanaugh v. Clinch* (1891) 88 Ga. 610, 15 S. E. 673 (see citation of same case, *infra*); *Balance v. Peoria* (1899) 180 Ill. 29, 54 N. E. 428; *Nachbour v. Wiener* (1889) 34 Ill. App. 237; *Longfellow v. Longfellow* (1864) 54 Me. 240; *Bless v. Jenkins* (1895) 129 Mo. 647, 31 S. W. 938 (see comment upon same case, *infra*); *Dorr v. Barney* (1877) 12 Hun (N. Y.) 259; *Katz v. Schreckinger* (1906) 52 Misc. 160, 101 N. Y. Supp. 743; *HARWOOD v. MELONEY*, ante, 118.

In *Bless v. Jenkins* (1895) 129 Mo. 647, 31 S. W. 938, the principle that a tenant holding over part of the premises at the expiration of the term is liable for the whole rent is stated with approval, although the decision appears to be based upon the finding that there was a new lease, under which the landlord had a right to refuse to accept a surrender of all or part of the premises.

A lessee from year to year of a store and wharf in connection therewith who, on the day the lease expired, vacated the store and tendered the keys to the lessor, but remained in possession of the wharf for about two weeks while selling the coal that he had previously placed thereon, must be considered as a tenant holding over, so as to incur liability for another full year's rent for the whole premises. *Cavanaugh v. Clinch* (1891) 88 Ga. 610, 15 S. E. 673. The court apparently based this decision upon the theory that a tenant who holds over on part of the premises holds over as to all, although there were facts involved which

perhaps might have been sufficient to form an independent basis for the holding. The lessor had refused to accept the keys to the store on the ground that an agreement had been made for a continuance of the tenancy.

From what has been said it seems clear that had the landlord in *HARWOOD v. MELONEY*, 118, refrained from taking possession of any part of the demised premises he could have consistently claimed the whole rental as fixed in the lease, thus electing to treat the tenant as one holding over. But that does not prove his innocence of wrongful eviction as to part of the premises. If he elected to treat the tenant as one holding over at the rental fixed in the lease,—and his bringing the action shows that he did,—it would seem inconsistent to use his right to evict generally as a cover for the wrongfulness of his act in evicting from a part, because that right exists only on the assumption that he is not treating the tenancy as continuing under the lease. Consistency would seem to require the payment of rent for the use and occupation of the part retained without regard to the amount fixed in the lease, unless the facts clearly indicate a voluntary surrender of part of the premises by the tenant. If the case was one of voluntary surrender of a part, a proportionate part of the rent as fixed by the lease would perhaps be the correct measure, but the language used by the court seems to indicate that the landlord was permitted to play fast and loose by electing to treat the tenant as a hold-over and at the same time do with impunity acts that could be justified only upon the theory that there was no hold-over recognized by the landlord.

J. W. M.

NEBRASKA SUPREME COURT.

HENRY MACKE

v.

JOHN W. JUNGELS

and

MARY WAGENER, Appt.

(— Neb. —, 186 N. W. 191.)

Label — slander — note in satisfaction.

1. Language, if used attributing to an-

Headnotes by CORNISH, J.

Note. — For suspension of operation of Statute of Limitations as incident to grant or denial of equitable relief, see annotation following this case, post, 123.
L.R.A.1918C.

other an uncontrollable sexual desire that caused her to commit an unmannerly and unwomanly act, is slanderous, and a note freely given in settlement of a claim for damages to her reputation resulting from such slander is not without consideration.

For other cases, see *Bills and Notes*, I. o; *Libel and Slander*, II. b, in *Dig.* 1-52 N. S.

Duress — social influence.

2. Where coercion is not sufficient to amount to duress, but a social or domestic force is exerted on a party, which controls the free action of his will, and prevents voluntary action in the giving of a note and mortgage, equity may relieve against the same on the ground of undue influence.

For other cases, see *Equity*, I. d, in *Dig.* 1-52 N. S.

Limitation of actions — pendency of suit.

3. A note, given in settlement of a claim of damages for tort, is held void because procured by undue influence exerted by others than the payee thereof. In this, a suit seeking to enjoin the collection of the note because procured by undue influence, the payee defended in good faith, believing that undue influence had not been exerted. Held, that the payee should, in an action in equity, be permitted to prosecute her claim of damages for tort, and that the Statute of Limitations does not run during the period covering the pendency of said action. *For other cases, see Limitation of Actions, IV. b, in Dig. 1-52 N. S.*

(Rose, J., dissents. Morrissey, Ch. J., and Letton, J., dissent in part.)

(January 21, 1918.)

APPEAL by defendant Wagener, from a judgment of the District Court for Boone County, in favor of plaintiff, in an action brought to enjoin defendant from collecting or transferring certain notes and mortgage given by plaintiff and his wife to her in settlement of a claim for damages. Modified and affirmed.

The facts are stated in the opinion.

Messrs. Allen & Dowling and Vail & Flory, for appellant:

The want or failure of consideration in the absence of fraud is not sufficient ground upon which the court could render a decree of cancellation on an executed contract.

Thompson v. Jackson, 3 Rand. (Va.) 504, 15 Am. Dec. 721; Jackson v. Jackson, 222 Ill. 46, 6 L.R.A.(N.S.) 785, 78 N. E. 19; Cancellation of Instruments, 4 R. C. L. § 14; Stacey v. Walter, 125 Ala. 291, 82 Am. St. Rep. 235, 28 So. 89.

The language used by plaintiff was slanderous per se and inexcusable.

Battles v. Tyson, 77 Neb. 563, 24 L.R.A. (N.S.) 577, 110 N. W. 299, 15 Ann. Cas. 1241; Piper v. Woolman, 43 Neb. 280, 61 N. W. 588; Waugh v. Waugh, 47 Ind. 580; Ronnie v. Ryder, 28 N. Y. S. R. 141, 8 N. Y. Supp. 5; Mason v. Stratton, 17 N. Y. S. R. 302, 1 N. Y. Supp. 511; Malone v. Stewart, 15 Ohio. 319, 45 Am. Dec. 577; Derham v. Derham, 123 Mich. 451, 82 N. W. 218; McDonald v. Nugent, 122 Iowa. 651, 98 N. W. 506; Lorager v. Lorager, 115 Mich. 681, 74 N. W. 228; Fitzgerald v. Young, 89 Neb. 693, 132 N. W. 127.

The compromise and settlement between the parties was valid.

Massillon Engine & Thresher Co. v. Prouty, 65 Neb. 496, 91 N. W. 384; Chicago, R. I. & P. R. Co. v. Buckstaff, 65 Neb. 334, 91 N. W. 426; Carter White Lead Co. v. Kinlin, 47 Neb. 409, 66 N. W. 536; Harri-

son v. Dewey, 46 Mich. 173, 9 N. W. 152; Copeley v. Hyland, 46 Minn. 205, 48 N. W. 777; Stoeckle v. Hahn, 158 Ill. 79, 42 N. E. 150; 1 Parsons, Contr. 439, § 4; Callisher v. Bischoffsheim, L. R. 5 Q. B. 449, 39 L. J. Q. B. N. S. 181, 18 Week. Rep. 1127; Wehrum v. Kuhn, 61 N. Y. 623.

The action is based upon the theory of duress; that is, that the plaintiff was coerced into the execution of the contract of settlement and of the notes and mortgage; but there is no evidence to sustain such an allegation.

Pryor v. Hunter, 31 Neb. 678, 48 N. W. 736; Kiler v. Wohletz, 79 Kan. 716, L.R.A. 1915B, 11, 101 Pac. 474; Galusha v. Sherman, 105 Wis. 263, 47 L.R.A. 417, 81 N. W. 495; Perkins v. Trinka, 30 Minn. 241, 15 N. W. 115; Lindquist v. Bradley, 161 Wis. 175, 152 N. W. 827; Zent v. Lewis, 90 Wash. 651, 156 Pac. 848.

Messrs. Benjamin S. Baker, W. R. Patrick, and A. E. Garten, for appellee:

Courts of equity will grant relief on the ground of undue influence, even where coercion is not sufficient to amount to duress, where such undue influence controls the free action and will, and prevents free and voluntary action in the making of a contract.

Munson v. Carter, 19 Neb. 293, 27 N. W. 208; Taylor v. Taylor, 8 How. 183, 12 L. ed. 1040; McCormick v. Malin, 5 Blackf. 509; Whitehorn v. Hines, 1 Munf. 557; Slocum v. Marshall, 2 Wash. C. C. 397, Fed. Cas. No. 12,953; Sands v. Sands, 112 Ill. 225; Kleeman v. Peltzer, 17 Neb. 381, 22 N. W. 793; Huguenin v. Baseley, 14 Ves. Jr. 273, 33 Eng. Reprint, 526, 9 Revised Rep. 148, 276, 6 Eng. Rul. Cas. 834; Smith v. Kay, 7 H. L. Cas. 779, 11 Eng. Reprint, 299, 30 L. J. Ch. N. S. 45; Hansen v. Berthelsen, 19 Neb. 433, 27 N. W. 423; Hartnett v. Hartnett, 42 Neb. 23, 60 N. W. 362; Watkins v. Brant, 46 Wis. 419, 1 N. W. 66; 1 Elliott, Contr. § 155; Good v. Zook, 116 Iowa, 582, 88 N. W. 376; Dowie v. Driscoll, 203 Ill. 480, 68 N. E. 56; Finegan v. Theisen, 92 Mich. 173, 52 N. W. 619; Barnes v. Brown, 32 Mich. 146; Nebraska Cent. Bldg. & L. Asso. v. McCandless, 83 Neb. 536, 120 N. W. 134; Hargreaves v. Korcek, 44 Neb. 660, 62 N. W. 1086; Morse v. Woodworth, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; Hullhordt v. Scharner, 15 Neb. 57, 17 N. W. 259.

Cornish, J., delivered the opinion of the court:

This is an action in equity in which the plaintiff asked that the defendant be enjoined from collecting or transferring certain notes and mortgage given by plaintiff and his wife to defendant, in settlement of

a claim for damages, on the ground that they were without consideration and obtained by duress and by undue influence and fraud. The trial court found that the notes were without consideration, canceled the instruments, and granted a perpetual injunction. Defendant appeals.

The controversy arose out of an occurrence at a church meeting, in which the plaintiff used language towards the defendant which she contended was slanderous and damaging. We are unable to agree with the trial court that the incident was of such trifling nature that the court can say, as a matter of law, that the words used were not slanderous, nor sufficient to base a claim for damages. What they were is in dispute. As interpreted from the German by some of the witnesses, they amounted to an accusation that defendant had an uncontrollable sexual desire, causing her to do an unmannerly and unwomanly act in forcing her way to a seat supposed to be occupied only by men.

We are of opinion, however, that, taking all the facts and circumstances into consideration, coercion was exercised upon the plaintiff by persons connected with the church other than defendant, to procure him to give the notes and mortgage in satisfaction of the demand, which, while not amounting to duress, did amount to a social and mental force exerted upon him, controlling the free action of his will, and preventing that voluntary action in the giving of the notes which equity will relieve against on the ground of undue influence. *Hartnett v. Hartnett*, 42 Neb. 23, 60 N. W. 362. The notes should be canceled and the plaintiff released from all liability thereon.

The event occurred March 31, 1915. This action, enjoining the defendant from bringing suit on the note, was begun April 14, 1915. It would be inequitable that defendant's claim for damages should be lost by the running of the Statute of Limitations during the time this action has been pending. The nature and extent of her claim

have depended upon the results of this litigation. During its pendency she has not been free to otherwise prosecute it. While in this action she has defended upon the ground that undue influence was not exerted, she appears to have prosecuted her defense in good faith. Her situation may be likened to that of the person who has by mistake altered an instrument and yet may recover upon it. The principle is recognized in the rule that, because there may be a good-faith dispute whether an instrument was procured by fraud or duress, the party intending to rescind must do so within a reasonable time, if at all. The defendant, so electing, should in equity be permitted to plead, setting up her alleged cause of action against the plaintiff, and, upon issues being joined, the cause tried as a law action for damages. *First Nat. Bank v. Gibson*, 74 Neb. 236, 104 N. W. 174, 105 N. W. 1081.

The judgment of the District Court is modified and affirmed, and the cause remanded for further proceedings, as herein indicated.

Rose, J., dissents.

Letton, J., concurring in affirmance and dissenting from modification of decree:

I concur in the affirmance, but dissent from the modification of the decree. The result of the modification is to hold that one who ratifies an illegal act, by seeking to sustain in court the validity of notes improperly extorted by duress, may, even after the Statute of Limitations has run by reason of the delay caused by the suit, recover upon the original cause of action, if any. It gives one who ratifies the act of a wrongdoer the option to stand upon the notes, and, if unsuccessful, to retrace his steps and begin again after the statute has run.

Morrissey, Ch. J., concurs in this special concurrence and dissent.

Annotation—Equity: suspension of operation of Statute of Limitations as incident to grant or denial of equitable relief.

Upon the general question as to the effect of an injunction against legal proceedings to suspend the operation of the Statute of Limitations, see notes appended to *Hunter v. Niagara F. Ins. Co.* 3 L.R.A.(N.S.) 1187, and *Lagerman v. Casserly*, 23 L.R.A.(N.S.) 673. Cases of this kind are not included herein.

It is a general rule that equity will not suffer a debtor who procures and keeps in force an injunction against the col-

lection of a debt which he ought to pay until it is barred at law by the Statute of Limitations to avail himself of the statute. *Union Mut. L. Ins. Co. v. Dice* (1882) 11 Biss. 373, 14 Fed. 523; *Sugg v. Thrasher* (1855) 30 Miss. 135; *Wilkinson v. Flowers* (1859) 37 Miss. 579, 75 Am. Dec. 78; *Marshall v. Minter* (1870) 43 Miss. 666; *Tishimingo Sav. Inst. v. Buchanan* (1882) 60 Miss. 496; *Doughty v. Doughty* (1854) 20 N. J. Eq. 347;

Lamb v. Ryan (1885) 40 N. J. Eq. 67; Barker v. Millard (1837) 16 Wend. (N. Y.) 572 (rule stated). In the application of this rule it has been held that where the holder of a paramount title to real estate was enjoined from asserting the same, equity will suspend the operation of the Statute of Limitations as to the person in possession of the land at whose instance action on the paramount title was enjoined. Kelly v. Donlin (1873) 70 Ill. 382.

Where a complainant was denied any relief, but the defendant established a note against him which he had been enjoined from disposing of or bringing action upon, the defendant will be given a judgment for the amount of the note, with interest, notwithstanding that during the pendency of the proceeding any remedy at law thereon had become barred by the Statute of Limitations. Yzaguirre v. Garcia (1915) — Tex. Civ. App. —, 172 S. W. 139.

And see *MACKE v. JUNGELS*, ante, 121, holding that although a note is set aside on the ground that it was procured through duress, nevertheless, in giving such relief, equity may provide that the relief shall be without prejudice to the right to maintain an action at law upon the original cause of action to settle which the note was given, even though any remedy at law to enforce this cause of action would otherwise be barred by the Statute of Limitations.

But the mere mistaken belief on the part of the creditor, not induced by the debtor, that he has been enjoined from proceeding at law to collect his claim, is no ground for equitable relief enjoining the debtor from pleading the Statute of Limitations as a bar to any remedy on the claim. Chilton v. Scruggs (1880) 5 Lea (Tenn.) 308.

Equity, upon giving relief to the beneficiary by requiring a trustee of land to convey the same, may require such beneficiary to pay for improvements thereon by the trustee, even though action to recover the same would be barred at law by the operation of the Statute of Limitations. DeWalsh v. Braman (1896) 160 Ill. 415, 43 N. E. 597.

And likewise, where a conveyance of land was made to secure the payment of a loan, equity will make repayment of such money a condition of relief, although any remedy at law to enforce the loan is barred by the Statute of Limitations. Whitmore v. San Francisco Sav. Union (1875) 50 Cal. 145; Grant v. Burr (1880) 54 Cal. 298; DeCazara v. Orena (1889) 80 Cal. 132, 22 Pac. 74; L.R.A.1918C.

Hall v. Arnott (1889) 80 Cal. 348, 22 Pac. 200; Speet v. Speet, 88 Cal. 437, 13 L.R.A. 137, 22 Am. St. Rep. 314, 26 Pac. 203; Rodriguez v. Haynes (1890) 76 Tex. 225, 13 S. W. 296. And, as a condition of quieting the title to real estate as to an unpaid mortgage, equity may require payment of the mortgage, although any remedy to enforce payment thereof is barred by the Statute of Limitations. DeCazara v. Orena (1889) 80 Cal. 132, 22 Pac. 74; Booth v. Hoskins (1888) 75 Cal. 271, 17 Pac. 225.

In a proceeding to foreclose an equitable mortgage, equity may, as a condition of relief, provide that a portion of the proceeds of the foreclosure sale shall be paid to the holder of a legal mortgage on the property, the proceeds of whose loan were used to enhance the value of the property. The right to such relief is not affected by the failure of the holder of such mortgage to file a cross-bill, nor by the fact that any remedy on the mortgage was barred by the Statute of Limitations. Farmers' Loan & T. Co. v. Denver, L. & G. R. Co. (1903) 60 C. C. A. 588, 126 Fed. 46.

Where possession of land was decreed to the complainant, and the defendants, while in possession, had, in good faith, paid off and discharged certain mortgages on the land, relief to the complainant was conditioned on his paying these mortgages, although any remedy to enforce the same was barred by the Statute of Limitations. Hobson v. Huxtable (1908) 79 Neb. 340, 112 N. W. 658, 116 N. W. 278. A. G. S.

UNITED STATES SUPREME COURT.

FIDELITY & COLUMBIA TRUST COMPANY, Exr., etc., of L. P. Ewald, Deceased, Plff. in Err.,
v.

CITY OF LOUISVILLE.

(245 U. S. 54, 62 L. ed. —, 38 Sup. Ct. Rep. 40.)

Taxes — situs of property — bank deposits.

Deposits in a bank in the city in which the depositor carried on a business from which such deposits are derived, but belonging absolutely to him, and not used in the business, are subject to a tax upon the person against him in the city of his residence

Note. — The question whether personalty which has a situs for taxation elsewhere is subject to taxation in the state of the owner's domicile is discussed in the note to Com.

in another state, whether or not they are subject to tax in the state where the business is carried on.

For other cases, see Taxes, II. in Dig. 1-52 N. 8.

(Mr. Chief Justice White dissents.)

(November 5, 1917.)

ERROR to the Court of Appeals of the State of Kentucky to review a judgment of the Chancery Branch of the Circuit Court for Jefferson County, holding personal property omitted from the original assessment of the deceased owner subject to a tax. Affirmed.

The facts are stated in the opinion.

Mr. William W. Crawford, for plaintiff in error:

Bank deposits growing out of business done in a state have a situs there, and nowhere else.

Com. v. Dun, 126 Ky. 111, 10 L.R.A. (N.S.) 920, 102 S. W. 859; Com. v. Peebles, 134 Ky. 121, 23 L.R.A. (N.S.) 1180, 119 S. W. 774, 20 Ann. Cas. 724; Com. v. West India Oil Ref. Co. 138 Ky. 828, 36 L.R.A. (N.S.) 295, 129 S. W. 301; Com. v. Kentucky Distilleries & Warehouse Co. 148 Ky. 314, 136 S. W. 1032; Hillman Land & Iron Co. v. Com. 148 Ky. 331, L.R.A. 1915C, 929, 146 S. W. 776; Com. v. B. F. Avery & Sons, 163 Ky. 829, 174 S. W. 518.

Intangible property may acquire a business situs apart from the domicile of the owner and be taxable there and nowhere else.

Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 218-223, 41 L. ed. 976-978, 17 Sup. Ct. Rep. 604; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 397, 47 L. ed. 518, 23 Sup. Ct. Rep. 463; Sellinger v. Kentucky, 213 U. S. 200, 58 L. ed. 761, 29 Sup. Ct. Rep. 449; New Orleans v. Stempel, 175 U. S. 313, 44 L. ed. 177, 20 Sup. Ct. Rep. 110; Metropolitan L. Ins. Co. v. New Or-

v. West India Oil Ref. Co. 36 L.R.A. (N.S.) 295; and see other notes there referred to.

The specific question whether deposits in a bank in one state are subject to property taxation at the domicile of the owner in another is considered at page 938 of the note in L.R.A. 1915C, 903, on the general subject of situs, as between different states or countries, of personal property for purposes of taxation. The question as to an independent situs of debts or credits for purposes of taxation is considered at page 919 of the note last referred to; and the subject of a "business situs," so-called, of credits which are employed in a business conducted in a state other than that of the domicile of the owner, is considered at pages 923 et seq. of that note. L.R.A. 1918C.

leans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; Wheeler v. Sohmer, 233 U. S. 434, 58 L. ed. 1030, 37 Sup. Ct. Rep. 607.

The Kentucky court of appeals, having, both before and after the decision of this case, held that § 4020 of the Kentucky Statutes does not apply to bank deposits having a business situs outside of Kentucky, cannot apply it to the bank deposits here.

Com. v. West Virginia Oil Ref. Co. 138 Ky. 828, 36 L.R.A. (N.S.) 295, 129 S. W. 301; Com. v. Prudential L. Ins. Co. 149 Ky. 380, 149 S. W. 836; Com. v. B. F. Avery & Sons, 163 Ky. 828, 174 S. W. 518.

Messrs. Pendleton Beckley, George Cary Tabb, and Stuart Chevalier, for defendant in error:

The money on deposit in St. Louis belonged to a resident of Louisville; it had been accumulated from surplus earnings, and no part of it was used in, or connected with, any business in Missouri. Under these circumstances the principle of "mobilia sequuntur personam" applies, and the taxable situs of these deposits was Louisville, Kentucky.

Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; Board of Assessors v. New York L. Ins. Co. 216 U. S. 515, 54 L. ed. 597, 30 Sup. Ct. Rep. 385; Pacific Coast Sav. Soc. v. San Francisco, 133 Cal. 14, 65 Pac. 16; Pyle v. Brennehan, 60 C. C. A. 409, 122 Fed. 787; Pendleton v. Com. 110 Va. 229, 65 S. E. 536; State v. Clement Nat. Bank, 84 Vt. 167, 78 Atl. 944, Ann. Cas. 1912D, 22; Grundy County v. Tennessee Coal, Iron & R. Co. 94 Tenn. 295, 29 S. W. 116.

Money on deposit must either arise out of business done within the state with the residents thereof; or be under the control of a local agent, if it is to acquire a business situs.

New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; Bristol v. Washington County, 177 U. S. 133, 44

The question whether a bank deposit to the credit of a nonresident is subject to local property taxation is considered in the note to New Zealand Mut. L. Ins. Co. v. Board of Assessors, 26 L.R.A. (N.S.) 1120; and see also in this connection the cases cited at page 939 of the note in L.R.A. 1915C.

Similar questions with reference to the situs of personal property for purposes of transfer, inheritance, or succession taxes are considered in the note in 46 L.R.A. (N.S.) 1167.

Many other annotations on related questions in regard to taxation may be found by consulting the L.R.A. Indexes under the title, "Taxes."

L. ed. 701, 20 Sup. Ct. Rep. 585; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 55 L. ed. 762, L.R.A.1915C, 903, 31 Sup. Ct. Rep. 550; Walker v. Jack, 31 C. C. A. 462, 60 U. S. App. 124, 88 Fed. 576; Bluefields Banana Co. v. Board of Assessors, 49 La. Ann. 43, 21 So. 627.

As to the contention that the deposits were permanent deposits, it has never been held that the mere presence of a deposit in a state gives that state a right to levy a property tax upon it, no matter how long continued.

Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; Com. v. Northwestern Mut. L. Ins. Co. 32 Ky. L. Rep. 796, 107 S. W. 233; Wheeler v. Sohmer, 233 U. S. 434, 58 L. ed. 1030, 34 Sup. Ct. Rep. 607.

Intangible property, such as is involved here, may be taxed by the state of the domicile of the owner, even though another state might have imposed a tax.

Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Southern P. Co. v. Kentucky, 222 U. S. 63, 56 L. ed. 96, 32 Sup. Ct. Rep. 13; Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 218, 41 L. ed. 976, 17 Sup. Ct. Rep. 604; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 397, 47 L. ed. 518, 23 Sup. Ct. Rep. 463; Ewald Iron Co. v. Com. 140 Ky. 692, 131 S. W. 774; Com. ex rel. Alexander v. Haggin, 30 Ky. L. Rep. 788, 99 S. W. 906; Com. v. Dun, 126 Ky. 109, 10 L.R.A.(N.S.) 920, 102 S. W. 859; Higgins v. Com. 126 Ky. 211, 103 S. W. 306; Com. v. Northwestern Mut. L. Ins. Co. 32 Ky. L. Rep. 796, 107 S. W. 233; Com. v. Peebles, 134 Ky. 121, 23 L.R.A.(N.S.) 1130, 119 S. W. 774, 20 Ann. Cas. 724; Com. v. West India Oil Ref. Co. 138 Ky. 828, 36 L.R.A.(N.S.) 295, 129 S. W. 301; Com. v. Kentucky Distilleries & Warehouse Co. 143 Ky. 314, 136 S. W. 1032; Hillman Land & Iron Co. v. Com. 148 Ky. 331, L.R.A.1915C, 929, 146 S. W. 776; Com. v. Prudential L. Ins. Co. 149 Ky. 380, 149 S. W. 836; Com. v. B. F. Avery & Son, 163 Ky. 828, 174 S. W. 518.

The city is entitled to recover the amounts of the tax bills herein irrespective of the taxing situs of the money in St. Louis.

Louisville v. Louisville Courier-Journal Co. 140 Ky. 664, 131 S. W. 509; Bell v. Lexington, 120 Ky. 199, 85 S. W. 1081; Security Trust & S. V. Co. v. Lexington, 203 U. S. 323, 51 L. ed. 204, 27 Sup. Ct. Rep. 87. L.R.A.1918C.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit brought by the city of Louisville, Kentucky, to recover annual taxes for the years 1907 and 1908 in respect of personal property omitted from the original assessments to the owner, L. P. Ewald, in his lifetime. The facts as simplified for the purposes of argument here are that Ewald was domiciled in Louisville, but continued to carry on a business in St. Louis, Missouri, where he formerly had lived. Deposits coming in part if not wholly from this business were made and kept in St. Louis banks, subject to Ewald's order alone. They were not used in the business and belonged absolutely to him. The question is whether they could be taken into account in determining the amount of his Louisville tax. It would seem that some deposits were represented by certificates of deposit, but it was stated at the argument that no point was made of that. See Wheeler v. Sohmer, 233 U. S. 434, 438, 58 L. ed. 1030, 1036, 34 Sup. Ct. Rep. 607. We are to take it that all the sums are to be dealt with as ordinary bank accounts. The decision of the state court upheld the tax. 168 Ky. 71, 181 S. W. 1095; 171 Ky. 509, 188 S. W. 652; 172 Ky. 451, 189 S. W. 438.

So far as the present decision is concerned, we may concede, without going into argument, that the Missouri deposits could have been taxed in that state, under the decisions of this court. Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 354, 55 L. ed. 762, 767, L.R.A.1915C, 903, 31 Sup. Ct. Rep. 550; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499. But liability to taxation in one state does not necessarily exclude liability in another. Kidd v. Alabama, 188 U. S. 730, 732, 47 L. ed. 669, 672, 23 Sup. Ct. Rep. 401; Hawley v. Malden, 232 U. S. 1, 13, 58 L. ed. 477, 483, 34 Sup. Ct. Rep. 201, Ann. Cas. 1916C, 842. The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the state so chooses, may be measured more or less by reference to the riches of the person taxed. Unless it is declared unlawful by authority, we see nothing to hinder the state from taking a man's credits into account. But, so far from being declared unlawful, it has been decided by this court that whether a state shall measure the contribution by the value of such credits and chooses in action, not exempted by superior authority, is the state's affair, not to be interfered with by the United States, and

therefore that a state may tax a man for a debt due from a resident of another state. *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558. See also *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. ed. 189.

It is true that the decision in *Kirtland v. Hotchkiss* concerned Illinois bonds, and that if they were physically present in the taxing state, Connecticut, a special principle might apply, as explained in *Wheeler v. Söhmer*, 233 U. S. 434, 438, 58 L. ed. 1030, 1036, 34 Sup. Ct. Rep. 607. See *Stamps Comr. v. Hope* [1891] A. C. 476, 484, 60 L. J. P. C. N. S. 44, 65 L. T. N. S. 268; *Dicey*, Conf. L. 2d ed. 312. But the decision was not made to turn upon such considerations; indeed, its reasoning hardly is reconcilable with them, or with anything short of a general rule for all debts. It is argued that in a later case this court has held the power of taxation not to extend to chattels permanently situated outside the jurisdiction although the owner was within it (*Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493); and that the power ought equally to be denied as to debts depending for their validity and enforcement upon a jurisdiction other than that levying the tax. But this court has not attempted to press the principle so far, and there is opposed to it the long-established practice of considering the debts due to a man in determining his wealth at his domicile for the purposes of this sort of tax.

The notion that a man's personal property upon his death may be regarded as a *universitas* and taxed as such, even if qualified, still is recognized both here and in England. *Bullen v. Wisconsin*, 240 U. S. 625, 631, 60 L. ed. 830, 835, 36 Sup. Ct. Rep. 473; *Eidman v. Martinez*, 184 U. S. 578, 586, 46 L. ed. 697, 702, 22 Sup. Ct. Rep. 515; *Atty-Gen. v. Napier*, 6 Exch. 217, 155 Eng. Reprint, 520, 20 L. J. Exch. N. S. 173, 15 Jur. 253. It has been carried over in more or less attenuated form to living

persons, and the general principle laid down in *Kirtland v. Hotchkiss*, *supra*, has been affirmed or assumed to be law in every subsequent case. *Bonaparte v. Appeal Tax Ct.* 104 U. S. 592, 26 L. ed. 845; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 29, 31, 35 L. ed. 613, 618, 619, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Savings & Loan Soc. v. Multnomah County*, 169 U. S. 421, 431, 42 L. ed. 803, 806, 18 Sup. Ct. Rep. 392; *New Orleans v. Stempel*, 175 U. S. 309, 321, 44 L. ed. 174, 180, 20 Sup. Ct. Rep. 110; *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 221 U. S. 346, 355, 356, 55 L. ed. 762, 767, 768, L.R.A.1915C, 903, 31 Sup. Ct. Rep. 550. It was admitted to apply to debts in *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 205, 50 L. ed. 150, 154, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493. It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like this. *Flint v. Stone Tracy Co.* 220 U. S. 107, 146, 162, et seq., 55 L. ed. 389, 411, 417, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312. Whichever this tax technically may be, the authorities show that it must be sustained.

It is said that the plaintiff in error has been denied the equal protection of the laws because, if the argument is correct, which we have not considered, the decision in this case is inconsistent with earlier decisions of the Kentucky court. But with the consistency or inconsistency of the Kentucky cases we have nothing to do. *Lombard v. West Chicago Park*, 181 U. S. 33, 44, 45, 45 L. ed. 731, 738, 21 Sup. Ct. Rep. 507. We presume that, like other appellate courts, the Kentucky Court of Appeals is free to depart from precedents if, on further reflection, it thinks them wrong.

Judgment affirmed.

The Chief Justice dissents.

WISCONSIN SUPREME COURT.

MARGARET B. A. WOODS, Exrx., etc., of
Edmund F. Woods, Deceased, Reapt.,
v.

STANDARD ACCIDENT INSURANCE
COMPANY OF DETROIT, MICHIGAN,
Appt.

(— Wis. —, 166 N. W. 20.)

Insurance — accident — drowning —
ship sunk by submarine.

The drowning of an insured by the sinking of the vessel on which he is a passenger, L.R.A.1918C.

by the explosion of a torpedo from a submarine, is within a policy insuring against injuries effected solely by external, violent, and accidental means, and is not within a condition relieving an insurer from liability for injuries from explosives or those inflicted by any other person.

For other cases, see *Insurance*, VI. b, 5, c, in *Dig. 1-52 N. S.*

(January 5, 1918.)

Note. — For war casualties as within accident insurance, see annotation following this case, post, 130.

APPEAL by defendant from a judgment of the Circuit Court for Rock County in favor of plaintiff in an action brought to recover the amount alleged to be due on an accident insurance policy. Affirmed.

Statement by **Kerwin, J.:**

The plaintiff, executrix of the will of Dr. Edmund F. Woods, deceased, brings this action to recover for the death of Dr. Woods, who had a policy of accident insurance in defendant company, upon the ground that he died from injuries effected solely by external, violent, and accidental means which caused his immediate death. The answer admits that the defendant carried said insurance policy, and sets up various defenses, and specifically alleges that the occurrence falls within certain exceptions to liability, stated in the contract of insurance.

The facts are substantially undisputed and were stipulated upon the trial. Dr. Woods was a passenger upon the steamship *Arabic*, which sailed from Liverpool, England, for New York on August 18, 1915; that said steamship *Arabic* was an unarmed passenger and mail boat, flying the English flag and plying between the cities of New York and Liverpool, England; that said *Arabic*, while proceeding through the Atlantic ocean and about 60 miles off the southwest coast of Ireland, was fired upon by a submarine with the purpose and intention of sinking said ship, said torpedo being fired with hostile intent and without notice or warning to the officers of said *Arabic* or anyone aboard of her; that the torpedo discharged at the *Arabic* struck below the water line and exploded, causing said *Arabic* to sink within six minutes after being struck; that the effect of the tearing and breaking upon said steamship *Arabic*, caused by the explosion of the torpedo, was below the decks of said steamship occupied by passengers; that shortly thereafter most of the passengers and crew were put into lifeboats and left the sinking ship. One lifeboat, containing some of the passengers and crew, did not get loose from said steamship and was sucked under or thrown into the water when the ship sank. The *Arabic*, after leaving Liverpool, did not stop at any point prior to the time when it was struck by the torpedo. Some time thereafter the body of said Woods was found on the southwest coast of Ireland, with a life preserver on, the body fully dressed, and upon the clothing on said body were papers, a watch, and other jewelry belonging to said Woods. A state of war at said time and for some time prior to said 18th day of August, 1915, existed and still exists between Germany, Austria, and other countries on the

one side, and Great Britain (including England) and other countries on the other.

The insuring clause of the contract in suit reads as follows: The Standard Accident Insurance Company "hereby insures the individual who purchases this ticket in person against the effects of bodily injuries received during the term of this insurance and effected solely by external, violent, and accidental means, subject to all the conditions and limitations hereinafter contained."

Under the title "Additional Provisions," subdivision F, appears the following: "This ticket is issued by the company and accepted by the insured with the understanding and agreement that no benefits will be paid for injuries, resulting fatally or otherwise, received under or in consequence of any of the following conditions:

(3) While engaged in arial navigation, hunting, fishing, or on exploring expeditions, or under any circumstances from firearms of any kind or from explosives; or (4) from wrestling, lifting, racing or competitive games, or when inflicted upon the insured by himself or any other person, or received by the insured while insane, or inflicted by the insured upon himself while insane."

The case was tried by the court, and the court found that the plaintiff was entitled to recover. Judgment was entered accordingly in favor of the plaintiff and against the defendant, from which this appeal was taken.

Messrs. Lines, Spooner, & Quarles, for appellant:

The death of Dr. Woods, proximately following as a result of the discharge of firearms, brings the case squarely under § 3, subdivision F, of the policy, which provides: ". . . or under any circumstances from firearms of any kind or from explosives."

Cary v. Preferred Acci. Ins. Co. 127 Wis. 67, 5 L.R.A. (N.S.) 926, 115 Am. St. Rep. 997, 106 N. W. 1055, 7 Ann. Cas. 484; *French v. Fidelity & C. Co.* 135 Wis. 259, 17 L.R.A. (N.S.) 1011, 115 N. W. 869; *Ryan v. Continental Casualty Co.* 94 Neb. 35; 48 L.R.A. (N.S.) 524, 142 N. W. 288, Ann. Cas. 1914C, 1234; *Shader v. Railway Pass. Assur. Co.* 66 N. Y. 441, 23 Am. Rep. 65; *Furry v. General Acci. Ins. Co.* (Grinnell v. General Acci. Ins. Co.) 80 Vt. 526, 15 L.R.A. (N.S.) 206, 130 Am. St. Rep. 1012, 68 Atl. 655, 13 Ann. Cas. 515; *Standard Life & Acci. Ins. Co. v. Jones*, 94 Ala. 434, 10 So. 530; *Mossop v. Continental Casualty Co.* 127 Mo. App. 399, 118 S. W. 680; *Peck v. Equitable Acci. Assn.* 62 Hun. 265, 5 N. Y. Supp. 215; *Jones v. Metropolitan Casualty Ins. Co.* 144 Wis. 66, 128 N. W. 280, Ann.

Cas. 1912A, 1091; *Button v. American Mut. Acci. Asso.* 92 Wis. 83, 53 Am. St. Rep. 900, 65 N. W. 861; *Matson v. Travelers' Ins. Co.* 93 Me. 469, 74 Am. St. Rep. 368, 45 Atl. 518; *Travelers' Protective Asso. v. Weil*, 40 Tex. Civ. App. 629, 91 S. W. 886; *Andrews v. United States Casualty Co.* 154 Wis. 82, 142 N. W. 487; *Fidelity & C. Co. v. Carroll*, 5 L.R.A.(N.S.) 657, 74 C. C. A. 409, 143 Fed. 271, 6 Ann. Cas. 955; *Butero v. Travelers' Acci. Ins. Co.* 96 Wis. 536, 65 Am. St. Rep. 61, 71 N. W. 811; *General Acci. F. & L. Assur. Corp. v. Stedman*, — Tex. Civ. App. —, 153 S. W. 692; *Orr v. Travelers' Ins. Co.* 120 Ala. 647, 24 So. 997; *Travelers' Protective Asso. v. Langholz*, 29 C. C. A. 628, 52 U. S. App. 643, 86 Fed. 60; *Johnson v. Travelers' Ins. Co.* 15 Tex. Civ. App. 314, 39 S. W. 972; *Fisher v. Travelers' Ins. Co.* 77 Cal. 246, 1 L.R.A. 572, 19 Pac. 425; *Fidelity & C. Co. v. Smith*, 31 Tex. Civ. App. 111, 71 S. W. 391; *Gaines v. Fidelity & C. Co.* 111 App. Div. 386, 97 N. Y. Supp. 836; *Stevens v. Continental Casualty Co.* 12 N. D. 463, 97 N. W. 862; *Railway Officials & E. Acci. Asso. v. Drummond*, 56 Neb. 235, 76 N. W. 562; *Jarnagin v. Travelers' Protective Asso.* 68 L.R.A. 499, 66 C. C. A. 622, 133 Fed. 892; *Railway Officials & E. Acci. Asso. v. McCabe*, 61 Ill. App. 565.

There is no proof that Dr. Woods died as a result of an accident.

Shevlin v. American Mut. Acci. Asso. 94 Wis. 180, 36 L.R.A. 52, 68 N. W. 866; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; *Cilley v. Preferred Acci. Ins. Co.* 109 App. Div. 394, 96 N. Y. Supp. 282.

Messrs. Jeffris, Mounat, Oestretch, & Avery, for respondent:

The injury was not "inflicted" on Dr. Woods by "any other person," within the meaning of the exemption provision of the policy.

Kortendiek v. Waterford, 142 Wis. 413, 125 N. W. 945; *Pierce v. Travelers' Ins. Co.* 34 Wis. 389; *Cady v. Fidelity & C. Co.* 134 Wis. 322, 17 L.R.A.(N.S.) 260, 113 N. W. 967; *Button v. American Mut. Acci. Asso.* 92 Wis. 83, 53 Am. St. Rep. 900, 65 N. W. 861; *Fidelity & C. Co. v. Johnson*, 72 Miss. 333, 30 L.R.A. 206, 17 So. 2.

Kerwin, J., delivered the opinion of the court:

It is contended on the part of the appellant that the killing of Dr. Woods by the discharge of the torpedo falls within the excepted provisions of the policy referred to in the statement of facts. It is argued that the accident falls within the provision of the policy which excepts injuries resulting fatally or otherwise under any circumstances from firearms of any kind or other

explosives, and it is contended that the death of Dr. Woods brings the case under subdivision F of the policy, which provides, ". . . Or under any circumstances from firearms of any kind or other explosives," and where the injury is inflicted upon the insured "by any other person."

We are satisfied upon the conceded facts that the contention of appellant cannot be sustained. It was found by the court below that deceased came to his death by drowning, and we think this finding is amply supported by the evidence. Whether he escaped from the ship and was subsequently drowned or was pulled under the vessel as one of the occupants of the last lifeboat does not appear, but it is quite clear from the evidence that he was not killed or injured by the explosion of the torpedo, therefore the explosion was not the direct cause of his death. It quite conclusively appears that he did not go down with the ship, so it follows that he must have come to his death, by "external, violent, and accidental means" within the meaning of the policy,—not by the explosion. It being established that the deceased came to his death by drowning, the drowning was either accidental or suicidal, and it cannot be said to be suicidal under the facts of this case because the law is well settled that there is a presumption against suicide; hence the conclusion must follow from the established fact that the cause of the drowning was accidental.

If, as the proof here warrants, Dr. Woods had gotten into one of the lifeboats that arrived safely, he would not have lost his life. Nor does the fact that he lost his life by being drowned after the explosion bring the accident within the exception in the policy referred to. The inference to be drawn from the evidence is that after the *Arabic* was struck Dr. Woods adjusted upon himself a life preserver, got into a lifeboat, and by some accident thereafter was drowned. There is no evidence that he was injured by contact with any explosive or any object displaced or put in motion by the explosive. No inference can be drawn that the injury which caused the death of Dr. Woods was inflicted upon him by himself or by any other person. It may well be said that had no explosion occurred which resulted in sinking the *Arabic*, Dr. Woods would not have lost his life; but it cannot be said under the circumstances of the case that the explosion was the direct cause of his death within the meaning of the exception in the policy. In order to escape liability under the policy, it must appear that the explosion was the direct cause of the injury to the insured.

We do not regard it necessary to discuss

authorities referred to in appellant's brief. It is sufficient to say that they are not applicable to the situation here. The material facts in the instant case are undisputed,

and upon these facts we think the judgment of the court below was right, and should be affirmed.

Judgment affirmed.

Annotation—War casualties as within accident insurance.

It will be noticed that the court in *WOODS v. STANDARD ACCI. INS. CO.* ante, 127, decided that the drowning of the insured by the sinking of the vessel on which he was a passenger, by the explosion of a torpedo from a submarine, was within a policy insuring against injuries effected solely by external, violent, and accidental means, and that it was not within a condition of the policy relieving the insurer from liability for injuries from explosives, or those inflicted by any other person.

Although there is, as yet, little authority upon the question here annotated, considerable litigation similar to that involved in the *WOODS CASE* will undoubtedly result from the present war, and already there has been some adjudication along this line.

In *Letts v. Excess Ins. Co.* (1916) 32 Times L. R. (Eng.) 361, a broker through whom the insured had previously obtained insurance was instructed to renew an accident policy at the former rate, and filed a slip for a policy that excluded war risks. A policy was issued at the old rate, insuring against accident directly causing death, which provided that the insurer should not be liable in respect of death "directly or indirectly caused or contributed to by war or by death resulting from disease or natural causes," etc., and that the insurer should not be "liable in respect of any death of the assured by an accident happening outside the limits of Europe unless same be agreed by special indorsement," and a typewritten slip was attached to the policy, providing that "notwithstanding anything herein contained, the assured is fully covered while on a journey from the United Kingdom to the United States of America and/or Canada, while there, and on return." The insured, while on his way from the United States to England, was drowned when the *Lusitania* was torpedoed. The insurer defended on the ground that the insured's death was directly and indirectly caused or contributed to by war within the meaning of the first conditions of the policy, while the plaintiff contended that the typewritten clause showed that that condition had no application to the case of a death caused during a voyage L.R.A.1918C.

from the United States. The defendant made the further contention that the policy should be rectified so as to give effect to the slip presented by the broker, which expressly excluded war risks. The court held that the broker was the insured's agent, and refused to construe the typewritten slip as fully covering the insured against war risks, stating that the first condition included a number of accidents from other causes besides war risks in which the insurer was not to be held liable, and that it did not think that it was the intention of the insurer that the insured was to be covered against all those cases of accident while he was on a journey to the United States, and that it could not distinguish between those classes of accidents and accidents caused by war, and stating that it read the clause as meaning that the insured was to be as fully covered while on his journey to America and back as he would have been if the accident had happened in Europe. It was also held that there was a common intention shown to make a contract on the terms of the broker's slip, which asked for a policy excepting war risks, and that if the policy did not carry out these terms it ought to be rectified.

In another case, *Coxe v. Employers' Liability Assur. Corp.* [1916] 2 K. B. (Eng.) 629, a policy insured an army officer against death caused accidentally within the Kingdom, but contained a provision that it did "not insure against death or disablement, directly or indirectly caused by, arising from, or traceable to . . . war," and it appeared that after the outbreak of war the insured was assigned to protect a certain railway in England by means of guards; that it was his duty to visit the guards at night, and that it was necessary for him in doing so to walk alongside the rails; that while he was doing this he was accidentally struck by an engine and killed; that the general public had no right to walk where the accident occurred; that in normal times the spot was illuminated, but at the time of the accident the lights were obscured, in compliance with the Defense of the Realm Act. The court held that by the words "directly or indirectly"

the maxim "*causa proxima non remota spectatur*" was excluded, and that a more remote link in the chain of causation was contemplated than the proximate and immediate cause, and held that the arbitrator's finding upon the facts that the insured's death was indirectly caused by war should be sustained. The court said: "The words in the condition 'caused by' and 'arising from' do not give rise to any difficulty. They are words which always have been construed as relating to the proximate cause. I am not sure whether the words 'traceable to' would of themselves necessarily go any further. They are very vague words, and I should have been disposed to hold, if those were the only words, that, if the defendants choose to employ very vague words of that kind, the words must be read strictly against them and in accordance with the ordinary maxim. But the words which I find it impossible to escape from are 'directly and indirectly.' There does not appear to be any authority in which those words have been considered, and I find it impossible to reconcile them with the maxim '*causa proxima non remota spectatur*.' If it were contended that the result of the words is that the proximate cause, whether direct or indirect, is to be looked at, I should reply that that result does not appear to me to be consistent or intelligible. I am unable to understand what is an indirect proximate cause, and in my judgment the only possible effect which can be given to those words is that the maxim '*causa proxima non remota spectatur*' is excluded, and that a more remote link in the chain of causation is contemplated than the proximate and immediate cause. But a line must be drawn somewhere. For instance, the birth of Captain Ewing, even though it may be said to have led in the chain of causation to his being in the position in which he was killed, could not be considered as causing his death; and if on the facts it was possible to hold, in accordance with the principles I have enunciated, that the clause was not applicable, I should have been able to find that his representatives had a claim. But I am unable to hold that any principle excludes, upon these facts, a possible finding by the arbitrator that war was the indirect cause of this accident. If war had merely placed Captain Ewing in a position not specially exposed to any danger, and in that position a particular incident not connected with war caused his death, I think that most probably in that case

the matter would not come within the condition. For instance, suppose that, in connection with the war, the assured had gone to a military camp not in any way specially exposed to lightning, but where lightning had struck and killed him; I should be disposed to think that the war was so remote from the death that in that case it could not be said that the death was indirectly caused by the war. If, however, the war had placed the assured in a position specially exposed to danger, as, for instance, in a place where he was specially exposed to being struck by lightning,—if such a place can be conceived,—and he was there struck and killed by lightning, it appears to me to be a question of fact, not of construction, whether the death was indirectly caused by war. In the present case the arbitrator has found, as a fact, that the assured's death was indirectly traceable to war; and it is clear upon the facts that he was placed in a position of special danger; namely, he had to be about the railway line, performing his military duties, at night, with the lights turned down, in consequence of war, and while doing his military duties in that position of special danger he was killed by reason of the special danger which prevails at that particular place, and to which he was exposed by reason of his military duties. In those circumstances I am unable to hold that the arbitrator could not reasonably find, as a matter of fact, that the death was indirectly caused by war."

The case of *Utter v. Travelers' Ins. Co.* (1887) 65 Mich. 545, 8 Am. St. Rep. 913, 32 N. W. 812, is not directly within the scope of this note, but may be of some value in this connection. The accident policy in that case excluded liability in case of death while the insured was engaged in, or in consequence of, any unlawful act, and also provided that it should not cover death unless it was established by direct and positive proof that the death was not the result of design, either of the insured or any other person. It appeared that the insured was a deserter from the Army, and that while in a house of ill fame, upon opening a door, was shot by an officer who sought to arrest him, and there was evidence that the officer did not know that he was the man he wanted. It was held that the "design" intended by the policy was a design which intended the actual result accomplished, and not the design of the act itself, which act resulted in the killing of one contrary to the design of the act,

and that if, when the officer fired, he did not know that the man he fired at was the insured, and did not intend to kill him, it could not be said that the insured lost his life by the design of the officer. It was also held in this case that it could not be held as a matter of law that the insured was engaged in an unlawful act within the meaning of the policy. The court said: "If he had been shot in the act of deserting, this claim might be made with some reason and propriety, but such was not the case here. Neither was he shot because he was a deserter, nor because he was in a house of ill fame. He was shot, if Berry is to be believed, because he did not throw up his hands when commanded to, and was in the act of drawing a pistol. He was killed, if Branagan is to be be-

lieved, without provocation, and in a wanton and murderous manner, as soon as his head appeared in the door. Whether he was doing anything unlawful at the time of the shooting was also a question for the jury, to be determined by them under all the circumstances of the case. If, on being refused admittance after rapping on the door, the officer had fired through the door, and killed Utter, it could not be claimed that Utter was killed by design, or because he was engaged in any unlawful act; nor if Berry fired at the first head he saw poked out of the door, not knowing or caring who it was, can it be held that the death was by design against Utter, or in consequence of any unlawful act on his part."

J. T. W.

ARKANSAS SUPREME COURT.

M. M. NORTON, Appt.,

v.

C. E. HEFNER and Wife.

(— Ark. —, 198 S. W. 97.)

Physician — liability for negligence of interne.

A surgeon is not liable for the negligence of an interne in the hospital in which he has performed an operation in looking after the dressing of the wound if he was not negligent in the selection of the interne who should perform that duty.

For other cases, see Physicians and Surgeons, II. in Dig. 1-52 N. S.

(October 15, 1917.)

APPEAL by defendant from a judgment of the Circuit Court for Crittenden County in favor of plaintiffs in an action brought to recover damages for injuries resulting from improper treatment by another physician after the performance of a surgical operation by defendant. Reversed.

The facts are stated in the opinion.

Mr. James R. Yerger for appellant.

Messrs. Rhoton & Helm and Berry & Wheeler for appellees.

McCulloch, Ch. J., delivered the opinion of the court:

The defendant, M. M. Norton, is a physician and surgeon, and this is an action instituted against him by the plaintiff C. E. Hefner and his wife, Theresa, to recover

damages on account of injuries resulting from improper treatment following a surgical operation performed by the defendant. It is not claimed that there was any unskilfulness or negligence in the performance of the surgical operation; but the contention is that the injury resulted from inattention or unskilfulness on the part of another physician left in charge of the patient by Dr. Norton after the operation was complete. There was a jury trial, which resulted in a verdict in favor of each of the plaintiffs. The material facts necessary to consider in disposing of the case here are as follows:

The defendant is a physician and surgeon, and was engaged in the practice of his profession at Lake Village, Arkansas. The plaintiffs resided at Marianna, Arkansas, and Mrs. Hefner was afflicted in a way that required a surgical operation involving an incision and entrance into the abdominal cavity. The plaintiffs met a young medical student, named Curran, with whom they were acquainted, and he recommended the employment of Dr. Norton to perform the operation. There is no evidence, however, that there was any business relation existing between Curran and Dr. Norton; but the former was merely a volunteer in recommending the latter as a suitable surgeon to perform the operation. He talked with Dr. Norton over the telephone, and made the arrangements for the latter to come to Little Rock and perform the operation at a hospital in this city. The plaintiffs came to Little Rock, and Mrs. Hefner was placed in the hospital, and Dr. Norton performed the operation with entire success, according to the testimony. Another surgeon of recog-

Note. — As to liability of operating surgeon for negligent act of interne or hospital nurse caring for patient, see annotation following this case, post, 134.
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nized ability in Little Rock was present and witnessed the operation, and there is no question made that it was not skillfully performed. There was also present another young physician, who was then an interne in the hospital. In finishing up the operation it became necessary to leave a piece or pieces of gauze in the wound for draining purposes, and this was done. After the operation had been completed, Dr. Norton announced that he could not remain in Little Rock any longer, but would have to return to his home at Lake Village, and the question arose between the parties as to who should look after the patient and dress the wound. There was testimony adduced by the plaintiff which tended to show that Dr. Norton arranged with a young physician, who was acting as interne in the hospital, to look after the patient until she recovered, and the recovery in this case was based entirely on the theory that the interne was guilty of negligence in failing to remove the gauze at the proper time, and that Dr. Norton was liable in damages because of the alleged negligence of the interne. The court, over the objection of the defendant, instructed the jury, in substance, that if Dr. Norton employed the interne to take charge of the patient for the purpose of dressing the wound and removing the gauze at the proper time, and the interne was guilty of negligence in failing to properly remove the gauze, the defendant would be liable, and that it was wholly immaterial whether the defendant paid or agreed to pay the interne for his services. There was no testimony in the case that Dr. Norton employed the interne, in the sense that he was to pay him anything for his services; but the evidence merely tends to show that the interne, at the request of Dr. Norton, agreed to take care of the patient. According to the undisputed evidence Dr. Norton left Little Rock shortly after the operation was completed, and did not see the patient any more; nor is there any testimony tending to show that Dr. Norton was guilty of any negligence in the selection of the interne as a proper person to look after the patient and remove the gauze. The interne was a physician who had been selected by the hospital management to attend patients in the hospital, and there was nothing to indicate that he was lacking in qualification for the position.

The evidence adduced and the instructions of the court present squarely the question whether or not a physician is liable in damages on account of negligence of another physician who takes charge of a patient at his request. That question seems to have been settled against the right to recover under those circumstances by a decision of L.R.A.1918C.

this court in the case of *Keller v. Lewis*, 65 Ark. 578, 47 S. W. 755. The facts of that case were that the son of the plaintiff sustained a dislocation of one of the joints in his arm and was taken to Dr. Keller, the defendant, for treatment. Keller was about to leave the city, but gave the dislocated arm temporary treatment, and recommended that the patient be taken to another physician, with whom Dr. Keller had arranged to look after his patients in his absence. One of the theories in the case was that the other physician was guilty of negligence in failing to treat the dislocated joint at the proper time, and the defendant asked the court to give an instruction telling the jury that the defendant could not be held liable for the negligence or want of skill of the other physician. The court refused to give the instruction and this court reversed the judgment on that account. In disposing of the case this court said: "The employment of Dr. Minor constituted an independent contract, and Dr. Keller is not responsible for his negligence or want of skill." The court cited in support of the opinion the case of *Myers v. Holborn*, 58 N. J. L. 193, 30 L.R.A. 345, 55 Am. St. Rep. 606, 38 Atl. 389, where, under somewhat similar circumstances, the New Jersey court held that "a party employing a person who follows a distinct and independent occupation of his own is not responsible for the negligent or improper acts of the other."

This view of the law is based upon the theory that the doctrine of respondeat superior applies only in case of the negligence of a servant who acts under the direction and control of the master (*De Forrest v. Wright*, 2 Mich. 368), and does not apply to a physician or other professional man, who, when employed, acts upon his own initiative and without direction from others. That idea was clearly expressed by this court in the case of *Arkansas Midland R. Co. v. Pearson*, 98 Ark. 399, 34 L.R.A.(N.S.) 317, 135 S. W. 917, where it was said: "A physician cannot be regarded as an agent or servant in the usual sense of the term, since he is not, and necessarily cannot be, directed in the diagnosing of diseases and injuries and prescribing treatment therefor; his office being to exercise his best skill and judgment in such matters, without control from those by whom he is called or his fees are paid."

Applying that principle to the case in hand, it is clear that the instructions of the court as to liability on the part of the defendant were erroneous. Appellant was not guilty of negligence in the performance of the operation, nor in the selection of a physician to continue the treatment after he left the city. Not being negligent in

those respects, he cannot be held responsible for the negligence of the other physician, who was left in charge, merely because the other physician took charge on his suggestion and arrangement.

There was testimony adduced tending to establish an express agreement on appellant's part to look after the treatment in

connection with the other physician, who was left in charge of the patient, and to make himself responsible for the latter's conduct and treatment of the patient; but the instructions given by the court do not make appellees' right of recovery depend on the existence of such contract.

Reversed and remanded for a new trial.

Annotation—Liability of operating surgeon for negligent act of interne or hospital nurse caring for patient.

Earlier cases which have considered the question under annotation will be found in the note to *Harris v. Fall*, 27 L.R.A.(N.S.) 1174.

As to liability of physician or surgeon for acts of associate, see the note to *Morey v. Thybo*, 42 L.R.A.(N.S.) 785.

As to liability of physician or surgeon where foreign material is left in incision, see the note to *Davis v. Kerr*, 48 L.R.A.(N.S.) 611.

As to liability of proprietor of private sanitarium or hospital for negligence of nurse or attendant, see the notes to *Stanley v. Schumpert*, 6 L.R.A.(N.S.) 306, and *Broz v. Omaha Maternity & General Hospital Asso.* L.R.A.1915D, 334.

Harris v. Fall, to which the earlier note is attached, is cited with special approval in *Hunner v. Stevenson* (1913) 122 Md. 40, 89 Atl. 418, which held that an operating physician should not be held responsible for the negligence, if any, of a hospital physician, nurse, or interne in the dressing of wounds after the operation was performed, where he did not know of or was not privy to such negligence, and it was not discoverable by him in the exercise of ordinary care. The court stated that "at this day, when it is well known that there are physicians and surgeons of special skill in particular branches of their profession, it could not safely be announced as a general rule of law, applicable to such cases as this, that a surgeon who performs an operation is liable for the negligence of other physicians, nurses, or internes in hospitals in the after treatment, unless he specially undertakes such employment. A surgeon may be called many miles from his residence to perform an operation, and if he is to be held responsible for the negligence of others after the operation it might mean either that one of special skill would refuse to perform such operation at such distant points, or that his charges would be such that no one of moderate means could employ him. It might be detrimental to the L.R.A.1918C.

public if such a surgeon was required to attend to the after treatment, as it would be impossible for him to do so, and perform as many operations as some of them do."

So a surgeon is not responsible for the negligence of a hospital nurse in leaving a hot water bottle in the patient's bed, by which the patient, after an operation, is burned, where for the services of such nurse the patient pays the hospital and the surgeon is under no duty to supervise her work, and would not be permitted to do so. *Stewart v. Manasses* (1914) 244 Pa. 221, 90 Atl. 574.

And see, to the same effect, *Morrison v. Henke* (1916) 165 Wis. 166, 160 N. W. 173.

And where a patient in a hospital is treated by a physician who does not manage or control the hospital, the physician is not, if he had no connection with the negligent act, liable for the negligence of the hospital nurses or internes in permitting the patient to obtain access to poison, nor for their negligent failure to administer proper remedies and antidotes. *Broz v. Omaha Maternity & General Hospital Asso.* (1914) 96 Neb. 648, L.R.A.1915D, 334, 148 S. W. 575, 7 N. C. C. A. 298.

While, as will be seen from the foregoing cases, the general rule is that a physician or surgeon is not liable for the negligence of a nurse or interne in the after treatment of a patient, there is a difference of opinion as to the liability of a physician for the failure of a nurse to properly account for all the instruments or materials used during an operation, as a result of which such instrument or material is left in the incision. The weight of opinion is that in such a case the physician or surgeon cannot escape liability.

Thus, a surgeon who leaves a sponge in an abdominal incision after an operation cannot escape liability for the resulting injury, notwithstanding he relied upon the count made by the attend-

ing nurses, unless it was so concealed that reasonable care on his part would not have disclosed it, or conditions were such that in his professional judgment further exploration for sponges would have endangered the safety of the patient. *Davis v. Kerr* (1913) 239 Pa. 351, 46 L.R.A.(N.S.) 611, 86 Atl. 1007.

Nor can a surgeon relieve himself from liability for injury to a patient in leaving a sponge in the wound after an operation, by the adoption of a rule requiring the attending nurse to count the sponges used and removed, and relying upon such count as conclusive that all sponges have been accounted for. *Ibid.*

And see *Palmer v. Humiston* (1913) 87 Ohio St. 401, 45 L.R.A.(N.S.) 640, 101 N. E. 283, which is to the effect that a nurse's count will not relieve a surgeon from liability for failure to remove sponges used in an operation.

To the same effect is *Barnett v. Brand* (1915) 165 Ky. 616, 177 S. W. 461. In this latter case, however, although the attending nurse was a trained nurse obtained from a hospital, the operation was performed at the patient's home, and not at the hospital.

In an action against a physician for negligence in leaving a rubber tube in a patient's body after an operation, it is no answer that such tube may have been left by a nurse or a resident physician. *Saucier v. Ross* (1916) 112 Miss. 306, 73 So. 49.

On the other hand, in *Jewison v. Hassard* (1916) — *Manitoba*, —, 28 D. L. R. 584, a surgeon was held not to be responsible for the negligence of a nurse furnished by the hospital in making count of the number of sponges used in an operation, as a result of which one was sewed up in the body. The court

stated that in such cases the surgeon is necessarily too busy with his other work to keep count of the sponges, and that the duty of so doing is properly delegated to the nurse in order to enable him to give his whole attention to his work.

In *Niebel v. Winslow* (1915) 88 N. J. L. 191, 95 Atl. 995, an action for damages for negligence in performance of an operation, it was held error for the court to give an instruction that "if you find that the gauze was left in the abdomen of the plaintiff and the incision sewed up or allowed to heal up over it, the burden of proof is on the defendant to show that it was not left there by any carelessness or negligence of his." The court stated that "the practically injurious nature of the request will at once be apparent when it is remembered that in the present case the operation, although performed by the defendant, a private practitioner, was performed by him in a hospital, where he was assisted by trained resident nurses, presumably in the employ of the hospital and familiar with their duties. While the testimony is meager as to the precise nature of these duties, it is inferable from the evidence and from the terms 'operator' and 'assistant' that it was the duty of the latter at or just before the close of the operation to count the sponges in use, which at that critical stage the operator himself could not do without jeopardy to his patient." It would appear from the above statement that the court inclined to the view that the physician had a right to rely upon the count made by the nurse, and that he would not be liable for any negligence on the part of the nurse in making the count. J. H. B.

MASSACHUSETTS SUPREME JUDICIAL COURT.

ABRAHAM SHUMAN et al., Appts.,
v.

GEORGE W. GILBERT, Chief of Police.

(— Mass. —, 118 N. E. 254.)

Injunction — multiplicity of suits — complaint against six.

1. A possibility that complaints may be

lodged against six persons is not enough to warrant an injunction to prevent a multiplicity of suits.

For other cases, see Injunction, I. a, in Dig. 1-52 N. S.

Same — prosecution for crime — delay at law.

2. That one attempting to do business without a license would be prevented from transacting such business for several months before the question of his right could be decided by the supreme court should a prosecution against him be permitted is no

Note. — As to injunction to restrain a prosecution of a criminal or quasi criminal nature, see notes to *Hall v. Dunn*, 25 L.R.A. (N.S.) 193; *Denton v. McDonald*, 34 L.R.A. (N.S.) 453; and *Alexander v. Elkins*, L.R.A. L.R.A.1918C.

1916C, 263; and see later cases, *Truax v. Raich*, L.R.A.1916D, 545; *Rast v. Van Deman & L. Co.* L.R.A.1917A, 421; *Adams v. Tanner*, L.R.A.1917F, 1163; and *Foley v. Ham*, post, 204.

ground for the issuance of an injunction against the prosecution.
For other cases, see Injunction, I. i, in Dig. 1-52 N. S.

(January 9, 1918.)

APP^{EAL} by plaintiffs from a decree of the Superior Court for Suffolk County dismissing a bill filed to enjoin defendant from interfering with the conduct of plaintiffs' business. Affirmed.

The facts are stated in the opinion.

Messrs. Arthur Williams and Henry F. Wood for appellants.

Messrs. John C. Hammond and Thomas J. Hammond for appellee.

Rugg, Ch. J., delivered the opinion of the court:

This is a suit in equity in which six plaintiffs join in alleging that they are merchants having permanent places of business, five of them in Boston and one in Springfield, and that occasionally at various times during the year they hire rooms in a hotel in Northampton and there display goods and merchandise as samples, making no sales from that stock, but taking orders at retail for future delivery from their places of business in Boston or Springfield. The defendant is chief of police of Northampton, who asserts that the plaintiffs have no right to conduct business in this manner without licenses, and threatens to institute complaints against them for violation of Rev. Laws, chap. 65, § 13. See Stat. 1916, chap. 242, whereby hawking and peddling and selling by itinerant vendors in general, with some exceptions, are prohibited. The prayers of the bill are that the defendant be forever enjoined from arresting their agents or otherwise interfering with the conduct of their business, and that the question whether they were violating the statute be determined. The defendant demurred upon several grounds. As he has not raised the point that the plaintiffs cannot join in such a suit, that is passed by. *Stevens v. Rockport Granite Co.* 216 Mass. 486, 493, 104 N. E. 371, Ann. Cas. 1915B, 1054.

The plaintiffs do not allege nor argue that the statute under which they aver that the defendant proposes to prosecute them is unconstitutional on any ground, nor that its enforcement as to them would be an unlawful interference with interstate commerce. Their simple contention is that their conduct as set forth in their bill is not a violation of the statute rightly construed.

It is the general rule that the prosecution and punishment of crimes will not be restrained by a court of chancery. But *L.R.A.1918C*.

there is an exception to this comprehensive statement. Jurisdiction in equity to restrain the institution of prosecutions under unconstitutional or void statutes or local ordinances has been upheld by this court when property rights would be injured irreparably, and when other elements necessary to support cognizance by equity are present. *Greene v. Fitchburg*, 219 Mass. 121, 127, 106 N. E. 573; *Moneyweight Scale Co. v. McBride*, 199 Mass. 503, 506, 85 N. E. 870. The statement of the law in England has been made rather broadly that there is no jurisdiction in equity (at all events since the abolition of the court of the Star Chamber, which exercised a jurisdiction of so-called criminal equity) to enjoin prosecution for crime. *Saull v. Browne*, L. R. 10 Ch. 64, 44 L. J. Ch. N. S. 1, 31 L. T. N. S. 493, 23 Week. Rep. 50, 13 Cox, C. C. 30; *Kerr v. Preston Corp.* L. R. 6 Ch. Div. 463, 466, 46 L. J. Ch. N. S. 409, 25 Week. Rep. 264. See also *Grand Junction Waterworks Co. v. Hampton Urban Dist. Council* [1898] 2 Ch. 381, 341, 67 L. J. Ch. N. S. 603, 62 J. P. 566, 78 L. T. N. S. 673, 14 Times L. R. 467, 46 Week. Rep. 644; *Merrick v. Liverpool Corp.* [1910] 2 Ch. 449, 460-462, 79 L. J. Ch. N. S. 751, 103 L. T. N. S. 399, 74 J. P. 445, 8 L. G. R. 966. But there seems to be a caution about saying that circumstances may not arise authorizing a close approach to such jurisdiction. *Aukland v. Westminster Local Bd. of Works*, L. R. 7 Ch. 597, 41 L. J. Ch. N. S. 723, 26 L. T. N. S. 961, 20 Week. Rep. 845, 16 Eng. Rul. Cas. 489; *Burghes v. Atty. Gen.* [1911] 2 Ch. 139, 156, 157, 80 L. J. Ch. N. S. 506, 105 L. T. N. S. 193, 27 Times L. R. 433, 55 So. Jo. 520. It was said in *Truax v. Raich*, 239 U. S. 33, 37, 38, 60 L. ed. 131, 133, 134, *L.R.A.1916D*, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283: "It is also settled that, while a court of equity, generally speaking, has 'no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors' (*Re Sawyer*, 124 U. S. 200, 210, 31 L. ed. 402, 405, 8 Sup. Ct. Rep. 482), a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property."

See *Philadelphia Co. v. Stimson*, 223 U. S. 605, 621, 56 L. ed. 570, 577, 32 Sup. Ct. Rep. 340.

That is the law of this commonwealth. Doubtless that principle is generally recognized by the courts of this country. It has been applied to the institution of proceedings under statutes and ordinances, the enforcement of which would result in unlawful deprivation of the right to labor (*Truax*

v. Raich, 239 U. S. 33, 60 L. ed. 131, L.R.A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; the illegal interference with the right to transact interstate commerce free from burdensome state restrictions (Western U. Tele. Co. v. Andrews, 216 U. S. 165, 54 L. ed. 430, 30 Sup. Ct. Rep. 286; Lee's Summit v. Jewell Tea Co. 133 C. C. A. 637, 217 Fed. 965; Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135, 54 L. ed. 970, 30 Sup. Ct. Rep. 633; Jewell Tea Co. v. Carthage, 257 Mo. 383, 391, 165 S. W. 743); the confiscation of property or property rights (Dobbins v. Los Angeles, 195 U. S. 223, 241, 49 L. ed. 169, 177, 25 Sup. Ct. Rep. 18; Home Teleph. & Tele. Co. v. Los Angeles, 227 U. S. 278, 293, 57 L. ed. 510, 517, 33 Sup. Ct. Rep. 312); the denial of due process of law (Hopkins v. Clemson Agri. College, 221 U. S. 636, 55 L. ed. 890, 35 L.R.A.(N.S.) 243, 31 Sup. Ct. Rep. 654); and the denial of the equal protection of the laws (Ex parte Young, 209 U. S. 123, 146, 147, 52 L. ed. 714, 723, 724, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764).

The jurisdiction in chancery thus recognized and exercised rests upon the fundamental and well-established equitable doctrine that private personal and property rights will be protected by injunction from threatened irreparable unlawful injury. The injunction against the institution of criminal proceedings is simply incidental to that main ground of equitable jurisdiction. Where the facts are such as to call for the exercise of the powers of a court of chancery according to its established principles, the mere fact that, in order to grant the remedy afforded by equity, it may be necessary as a subsidiary step to enjoin the institution of criminal proceeding or even the commission of a crime, is no bar to the jurisdiction of equity. That this is the underlying principle is manifest not only from an examination of the cases above cited, but of most cases where the injunction has been granted or jurisdiction assumed.¹ This is but another way of stating the principle that while as a general rule equity will not interfere by injunction with the prosecution of crimes, there is an exception where such prosecutions are founded on unconstitutional or void enactments and will result in immediate injury to property or property rights.

Some courts of equity have taken juris-

diction of causes on the ground of prevention of multiplicity of prosecutions, sometimes in combination with the circumstance that there was no relief by appeal. Franklin v. Lacey, 157 Ky. 261, 263, 162 S. W. 1126; Martin v. Baldy, 249 Pa. 253, 258, 94 Atl. 1091. It is possible that Huntworth v. Tanner, 87 Wash. 670, 152 Pac. 523, Ann. Cas. 1917D, 676, may stand on some such ground, although the discussion in that opinion goes much further than that in any other case of which we are aware. Other courts have taken jurisdiction because there was arbitrary, oppressive, and revengeful conduct amounting to a settled malicious purpose to cause irreparable damage to the property rights or personal liberty of the complainant by numerous or successive prosecutions. Cutsinger v. Atlanta, 142 Ga. 555, 573, 574, L.R.A.1915B, 1097, 83 S. E. 263, Ann. Cas. 1916C, 280; Alexander v. Elkins, 132 Tenn. 663, L.R.A. 1916C, 261, 179 S. W. 310; Baldwin v. Atlanta, 147 Ga. —, 92 S. E. 630. Without pausing to discuss or to consider the soundness of those principles, it is enough to say that there are no allegations to bring the case at bar within them. A possibility that complaints may be lodged against six persons is not enough under these circumstances to make out a case of multiplicity. The allegations as to repeated complaints are not sufficient to warrant the inference that the courts of this commonwealth will countenance continued and oppressive prosecutions when once a genuine test case open to fair question has been presented and is on its way to final decision.

The allegation of the bill in the case at bar is that, to determine the question whether they "come within the purview of the statutes," as contended by the defendant, "will take several months before a decision relative thereto can be had from the supreme court; that the said respondent has stated that he will arrest and prevent the complainants from exhibiting as aforesaid in said city of Northampton, even during the time a test case is awaiting a decision by the supreme court, unless the complainants are duly licensed forthwith by the said commissioner of weights and measures either as itinerant vendors or as hawkers and peddlers; that, by reason of the respondent's threats and arbitrary attitude relative thereto, the complaints would be prevented from carrying on their usual busi-

¹ Mobile v. Orr, 181 Ala. 308, 45 L.R.A.(N.S.) 575, 61 So. 920; Abbey Land & Improv. Co. v. San Mateo County, 167 Cal. 434, 52 L.R.A.(N.S.) 408, 139 Pac. 1068, Ann. Cas. 1915C, 804; Southern Exp. Co. v. Ty Ty, 141 Ga. 421, 81 S. E. 114; Brown v. Nichols, 93 Kan. 787, L.R.A.1915D, 327, L.R.A.1918C.

145 Pac. 561; Clark v. Hartford Agri. Breeders' Asso. 118 Md. 608, 615, 85 Atl. 503; Michigan Salt Works v. Baird, 173 Mich. 655, 139 N. W. 1030; Ideal Tea Co. v. Salem, 77 Or. 182, 150 Pac. 852, Ann. Cas. 1917D, 684; Weyman-Bruton Co. v. Ladd, 146 C. C. A. 94, 231 Fed. 898.

ness as aforesaid in said city of Northampton while the said question would be pending before the supreme court; and that the complainants would thereby sustain irreparable damage in that the seasons for exhibitions and sales by sample for future delivery as advertised will have passed, in that the profits therefrom would be wholly lost, and in that the complainants would be compelled at considerable expense to cancel reservations of accommodations heretofore made in said city of Northampton, and would otherwise be greatly damaged." This allegation is to a considerable extent respecting the course of law and proceedings in court in this commonwealth, and hence is not admitted by the demurrer. It assumes that, although plainly innocent of any infraction of the law, the plaintiffs will be found guilty by the district court and by the superior court, a presumption which as matter of law cannot be indulged, at least upon such general allegations.

The allegations as to property damage are nothing more than the ordinary aver-

ments which might be made by anybody engaged in business, undertaking a branch of commercial adventure believed by the officers charged with enforcing the law to be in contravention of some penal statute confessedly valid in itself. Simply that one is in business, and may be injured in respect of his business by prosecution for an alleged crime, is no sufficient reason for asking a court of equity to ascertain in advance whether the business as conducted is in violation of a penal statute.

The conclusion is that the allegations of the bill do not make out a cause for equitable relief, but fall within the general principle that courts of equity will not enjoin the institution of proceedings to punish alleged crimes. While there is some diversity in the application of the governing principles, this result appears to be in harmony with most of the decisions already cited, and is supported by the great weight of authority.²

Decree dismissing bill affirmed with costs.

² *Delaney v. Flood*, 183 N. Y. 323, 2 L.R.A. (N.S.) 678, 111 Am. St. Rep. 759, 76 N. E. 209, 5 Ann. Cas. 480; *Sennette v. St. Mary's Parish*, 129 La. 728, 56 So. 653; *Snouffer v. Tipton*, 161 Iowa, 223, L.R.A.1915B, 173, 142 N. W. 97; *Kleinke v. Oates*, 187 Mich. 548, 153 N. W. 675; *Milton Dairy Co. v. Great Northern R. Co.* 124 Minn. 239, 49 L.R.A. (N.S.) 951, 144 N. W. 764; *Southern Exp. Co. v. High Point*, 167 N. C. 103, 83 S. E. 254; *Claiborne County v. Owen*, 100

Miss. 462, 56 So. 525; *Turner v. Ardmore*, 41 Okla. 660, 130 Pac. 1156; *Sherod v. Aitchison*, 71 Or. 446, 142 Pac. 351, Ann. Cas. 1916C, 1151; *Bisbee v. Arizona Ins. Agency*, 14 Ariz. 313, 127 Pac. 722; *Brunstein v. Ft. Collins*, 53 Colo. 254, 125 Pac. 119; *Hoffman v. Tooele*, 42 Utah, 353, 45 L.R.A. (N.S.) 992, 130 Pac. 61. See cases collected in L.R.A.1916C, note, pages 263 to 273.

OKLAHOMA SUPREME COURT.

PIONEER TELEPHONE & TELEGRAPH
COMPANY, Appt.,
v.

STATE OF OKLAHOMA et al.

(— Okla. —, P.U.R.1918A, 465, 167 Pac. 995.)

Public service corporations — rates — basis.

1. What a telephone company is entitled to demand in order that it may have just compensation is a fair return upon the reasonable value of its property as a going concern, as distinguished from its physical value as a mere naked plant. This value

is not obtained by adding up a number of separate items, but by taking a comprehensive view of each and all of the elements of property, tangible and intangible, including property rights, and considering them all, not as separate things, but as inseparable parts of one harmonious entity, and exercising the judgment as to the value of that entity.

For other cases, see *Telephones*, in *Dig.* 1-52 N. S.

Same — local and general service — separation.

2. Where, in a rate case against a telephone company whose lines extend throughout the state, it is charged that the exchange rates of a single municipality are unreasonable, the Corporation Commission in finding a basis for the adjustment of such rate should, as far as practicable, separate

Note. — The authorities passing upon the treatment of going concern value in public service property valuations are presented in the annotation to *Omaha v. Omaha Water Co.* 48 L.R.A. (N.S.) 1092; and see *Public Service Gas Co. v. Public Utility Commission*, L.R.A.1917B, 930, and other cases referred to in the footnote.
L.R.A.1918C.

As to the necessity of providing for depreciation in fixing return, see annotation to *Kansas City Southern R. Co. v. United States*, 52 L.R.A. (N.S.) 18.

For discussion of authorities passing upon return to which public service corporations are entitled, see annotation to *Bellamy v. Missouri & N. A. R. Co.* L.R.A.1915A, 5.

the valuation of the toll plant from the value of the exchange plant, and equitably apportion between them the value of the property used in common in giving both classes of service.

For other cases, see *Telephones, in Dig.* 1-52 N. S.

Same — depreciation fund.

3. Where the evidence shows and the Commission finds that the plant is kept in a high state of efficiency, and charges are made in rates for the purpose of counteracting or preventing depreciation by replacement, no necessity exists for building up a fund to be used for the purpose of counteracting purely theoretical depreciation.

For other cases, see *Telephones, in Dig.* 1-52 N. S.

Constitutional law — Public Service Commission.

4. Section 22, art. 9, Williams's Constitution, provides: "In no case of appeal from the Commission, shall any new or additional evidence be introduced in the supreme court.

... The supreme court shall have jurisdiction, on such appeal, to consider and determine the reasonableness and justness of the action of the Commission appealed from, as well as any other matter arising under such appeal: Provided, however, that the action of the Commission appealed from shall be regarded as prima facie just, reasonable, and correct; but the court may, when it deems necessary, in the interest of justice, remand to the Commission any case pending on appeal, and require the same to be further investigated by the Commission, and reported upon to the court (together with a certificate of such additional evidence as may be tendered before the Commission by any party in interest), before the appeal is finally decided."

For other cases, see *Public Service Commissions, in Dig.* 1-52 N. S.

(September 25, 1917.)

APPEAL by defendants from an order of the Corporation Commission fixing a schedule of rates to be charged by it for exchange service in a certain city. Cause remanded.

The facts are stated in the opinion.

Messrs. S. H. Harris, Claude Nowlin, J. R. Spielman, and M. S. Singleton, for plaintiff in error:

In investigating the reasonableness of a rate or charge for the furnishing of exchange service the value of the property devoted to the furnishing of such service, the reasonable expense necessary in furnishing it, and a reasonable net income to the company for the service are important elements to be considered, and the value of property devoted to the furnishing of other service to other people, and the income derived therefrom, are not proper elements to be considered.

L.R.A.1918C.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Re Southern Bell Teleph. & Teleg. Co. 11 N. C. C. C. 243; Re Interurban Teleph. Co. 6 Wis. R. C. 647; Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 57 L. ed. 1571, 33 Sup. Ct. Rep. 975; Kennebec Water Dist. v. Waterville, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804.

The going value or cost of establishing business is a proper element to be considered.

Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 439, 38 L. ed. 1041, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122; National Waterworks Co. v. Kansas City, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853; Knoxville v. Knoxville Water Co. 212 U. S. 1, 9, 53 L. ed. 371, 378, 29 Sup. Ct. Rep. 148; Omaha v. Omaha Water Co. 218 U. S. 180, 202, 54 L. ed. 991, 1000, 48 L.R.A. (N.S.) 1084, 30 Sup. Ct. Rep. 615; Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655, 56 L. ed. 594, 32 Sup. Ct. Rep. 389; Gloucester Water Supply Co. v. Gloucester, 179 Mass. 365, 60 N. E. 977; Newburyport Water Co. v. Newburyport, 168 Mass. 541, 47 N. E. 533; Bristol v. Bristol & W. Waterworks, 23 R. I. 284, 49 Atl. 974; Mathews v. Corporation Comrs. 106 Fed. 7; San Diego Land & Town Co. v. Jasper, 110 Fed. 702; Pennsylvania R. Co. v. Philadelphia County, 220 Pa. 100, 15 L.R.A. (N.S.) 108, 68 Atl. 676; Danville v. Southern R. Co. 8 Inters. Com. Rep. 409; Milwaukee Electric R. & Light Co. v. Milwaukee, 87 Fed. 577; Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; Underwood Lumber Co. v. Pelican Boom Co. 76 Wis. 76, 45 N. W. 18; State ex rel. N. C. Foster Lumber Co. v. Williams, 123 Wis. 61, 100 N. W. 1048; Chicago & N. W. R. Co. v. State, 128 Wis. 553, 108 N. W. 557; Washburn v. Washburn Waterworks Co. 120 Wis. 575, 98 N. W. 539; State ex rel. Milwaukee Street R. Co. v. Anderson, 90 Wis. 550, 63 N. W. 746; Monroe Waterworks Co. v. Monroe, 110 Wis. 11, 85 N. W. 685; Spring Valley Waterworks Co. v. San Francisco, 124 Fed. 594; Metropolitan Trust Co. v. Hons-ton & T. C. R. Co. 90 Fed. 683; Norwich Gas & E. Co. v. Norwich, 78 Conn. 565, 57 Atl. 746; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; Galena Water Co. v. Galena, 74 Kan. 644, 87 Pac. 735;

Columbus R. & Light Co. v. Columbus (June, 1906, U. S. C. C.) Whitten, Pub. Service Corp. p. 468; C. H. Venner Co. v. Urbana Waterworks, 174 Fed. 349; Missouri, K. & T. R. Co. v. Love, 177 Fed. 493; Spring Valley Waterworks Co. v. San Francisco, 192 Fed. 137; Des Moines Water Co. v. Des Moines, 192 Fed. 193; Des Moines Gas Co. v. Des Moines, 199 Fed. 204; Pioneer Teleph. & Teleg. Co. v. Westenhaver, 29 Okla. 429, 38 L.R.A.(N.S.) 1209, 118 Pac. 354; Public Service Gas. Co. v. Public Utility Comra. 84 N. J. L. 463, 87 Atl. 651; Appleton Waterworks Co. v. Railroad Commission, 154 Wis. 121, 47 L.R.A.(N.S.) 770, 142 N. W. 476, Ann. Cas. 1915B, 1160.

Depreciation accrues upon every part of the plant, whether inside or outside, and the plant was not maintained at its full value at all times by maintenance.

State Journal Printing Co. v. Madison Gas & E. Co. 4 Wis. R. C. 501; Re Cumberland Municipal Electric Lighting Plant, 4 Wis. R. C. 214; Cunningham v. Chippewa Falls Waterworks & Lighting Co. 5 Wis. R. C. 302; Puget Sound Electric R. Co. v. Railroad Commission, 65 Wash. 75, 117 Pac. 742, Ann. Cas. 1913B, 763; People ex rel. Manhattan R. Co. v. Woodbury, 203 N. Y. 231, 96 N. E. 420; People ex rel. Third Ave. R. Co. v. State Tax Comrs. 136 App. Div. 155, 120 N. Y. Supp. 528; Cumberland Teleph. & Teleg. Co. v. Louisville, 187 Fed. 637; Pioneer Teleph. & Teleg. Co. v. Westenhaver, 29 Okla. 429, 38 L.R.A.(N.S.) 1209, 118 Pac. 354.

Messrs. S. P. Freeling, Attorney General, and John B. Harrison, Assistant Attorney General, for appellees:

The reasonableness of the rates fixed must depend upon the dominant fact whether they are so low as to deprive defendant of a reasonable income from its investments, which fact is to be determined from the actual fair value of the property used in the service, together with the actual and reasonable cost of using such property in such service.

Steenerson v. Great Northern R. Co. 69 Minn. 353, 72 N. W. 713; Detroit & M. R. Co. v. Michigan R. Commission, 171 Mich. 335, 137 N. W. 329; Kennebec Water Dist. v. Waterville, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 434, 57 L. ed. 1556, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; Railroad Commission v. Cumberland Teleph. & Teleg. Co. 212 U. S. 414, 53 L. ed. 577, 29 Sup. Ct. Rep. 357. L.R.A.1918C.

Kane, J., delivered the opinion of the court:

This is an appeal from an order of the Corporation Commission fixing a schedule of rates to be charged by the Pioneer Telephone & Telegraph Company for exchange service in the city of Ada. At the time the complaint herein was filed the telephone company was charging for exchange service at Ada the following rates per month:

For business single line	\$2 50
For business extension line	1 00
For PBX sets, per line	1 00
For residence single line	1 50
For residence two-party line	1 25
For residence extension sets	50

The complainant alleged that these rates were unreasonable, and prayed the Corporation Commission to reduce them to an equitable basis. The answer of the defendants specifically denied that the rates charged for exchange service in the city of Ada were unreasonable, and alleged that, on the contrary, said rates were inadequate to insure the company a fair return upon the reasonable value of its property used for the purpose of giving such service. Wherefore it prayed to be permitted to increase its exchange rates in the city of Ada to \$2.50 per month for single line business telephones, \$2 per month for single line residence telephones, and \$1.50 per month for two-party line residence telephones. After very full hearings, held at several convenient points in the state, the Corporation Commission promulgated an order fixing the rates to be charged per month as follows:

For business single line phone	\$2 00
For business extension line	1 00
For business PBX line	1 00
For residence single line	1 00
For residence two-party line	75
For residence extension line	50

This order is the one here for review in this proceeding. The evidence adduced at the trial on behalf of the complainant consisted of certain statistical exhibits prepared by the company and filed with the Corporation Commission for its information, which purport to cover all details of the operation of the telephone exchange of the defendant in the city of Ada, including the value of its entire system, and the comparative value of its property used in the public service at Ada, and the relation between the business of the Ada exchange and that of the telephone company as a whole. Mr. George P. Player, the telephone expert and engineer of the Corporation Commission, explained these statistical exhibits, and drew certain expert deductions there-

from as to the valuation of the defendant's property, the proportion thereof that was employed for the public service at Ada, and the returns thereon received by the company. The evidence offered in behalf of the company consisted of tabulated statements prepared by the company for this particular case, which purported to constitute a complete inventory of its property connected with its exchange at Ada; also all property in or immediately connected with the Ada exchange that was used in connection with the toll plant, separating in the schedule the property that was used for toll purposes from that used for exchange purposes. These tabulated statements were supplemented by deductions drawn therefrom by the company's experts and engineers. All of these statements introduced in evidence by the respective parties and the oral evidence of the experts in relation thereto, together with the elaborate findings and conclusions of the Corporation Commission, are set out in full in the briefs, and, with arguments of counsel, make two quite pretentious volumes of 353 and 110 pages, respectively, of printed matter. From a careful study of this mass of learning and expert opinion on the subject of telephony and rate regulation we gather that there is no difference of opinion between counsel for the respective parties as to the right of the telephone using inhabitants of Ada to have a reasonable rate fixed by the telephone company for exchange service at that point, or that, on the other hand, the company is entitled to demand for such service a fair return upon the reasonable value of its property as a producing factor at the time it is being used by the public. Both parties also seem to recognize the practical necessity for establishing and maintaining level rates for exchange service.

The parties being in accord as to these points, we will confine ourselves as nearly as may be to the specific elements considered by the Commission in fixing the valuation of the plant which counsel contend are erroneous. The Corporation Commission, it appears, proceeded upon the theory that to the value of the property devoted to the giving of exchange service at Ada should be added a proportionate part of the entire value of the property of the defendant devoted to the furnishing of long-distance or toll service in the entire state; in other words, that the total value of the property devoted purely to exchange service, and a proportionate part of the value of the property devoted to the giving of long-distance or toll service, would be the amount upon which the company was entitled to returns for the furnishing of exchange service, and that to the revenues from exchange service

at Ada should be added all revenues derived from toll service in and out of that city. The reason given by the Commission for this basis of apportionment is that, inasmuch as the company owns and operates as a whole all of the exchanges and its toll plants within the state, and the revenues accruing from both classes of service are placed to the credit of the company, and all expenses incident to the maintenance and operation of both toll and exchange plants are paid out of such revenues, the toll and exchange properties of the company should be regarded as inseparable factors or elements in the general property, both making a single industrial and commercial entity. Upon this point the contention of counsel for the company is that in passing upon the reasonableness of the exchange rates the value of the property devoted to the giving of exchange service should be separated from the value of the property devoted to giving toll or any other service at Ada, and that in considering this value of the Ada exchange plant no additions should be made thereto on account of the toll property within the Ada exchange, or anywhere else in the state.

Generally, in fixing rates for a telephone company engaged in furnishing services throughout the state, regard must be had at the outset for the value of the property of the company as a whole. If the return on the value of the property as a whole is found to be reasonable, it then becomes necessary to determine whether the rate classifications are proper and reasonable as between the various classes of users and the different communities or municipal units served within the state. This for the reason that it is desirable that rates as a whole be made uniform and reasonable as between individuals and communities of the same class. Whilst it may be difficult to fix rates for any particular exchange based upon the actual investment in that exchange at any given time, it is conceivable that in the process of general rate making the inhabitants of one of the municipal units connected with the service system as a whole may be unreasonably discriminated against. This, we understand, it is alleged is the situation at Ada. It is merely the rate for exchange service at Ada that is alleged to be unreasonable, and the question is, What elements should be considered in ascertaining the value of the plant for the adjustment of this rate, if found to be unreasonable? Generally, when rates for a specific service are in controversy, there must be assigned to each business carried on by the public service corporation that proportion of the total value of the property which will correspond to the extent of

its employment in that business. *Minnesota Rate Cases* (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18. The rule as applicable to telephone companies is frequently found stated somewhat as follows: In order that local exchange rates may be reasonably adjusted, it is desirable that as far as possible they shall not be entangled with the cost of the long-distance service, and therefore the valuation of the toll plant should be separated from the valuation of the exchange plant as far as practicable. Report of B. C. and William B. Jackson, experts to the Massachusetts Highway Commission, 17 Mass. H. C. R. 2 R. 11; *Re Southern Bell Teleph. & Teleg. Co.* 11 N. C. C. C. 243; *Re Interurban Teleph. Co.* 6 Wis. R. C. 647. Such a separation of investment and revenue and expense accounts is required by the Interstate Commerce Commission by rule as follows:

"Accounts should show fixed capital, operating revenues, and operating expenses pertaining solely to any exchange or toll system or common to two or more systems.

... (a) Telephone companies should keep their fixed capital accounts in such manner as will enable them to show, when so required by the Commission, (1) the cost of fixed capital devoted solely to any exchange system, (2) the cost of fixed capital devoted solely to any toll system, and (3) the cost of fixed capital used in common by two or more exchange or toll systems.

"(b) The classification of operating revenues provides separate accounts for exchange revenue and for toll revenue. Where it is necessary to apportion the revenue between these accounts telephone companies should be prepared, when so required by the Commission, to furnish the basis used in making such apportionment.

"(c) Telephone companies should keep their operating expense accounts in such manner as will permit them to show, when so required by the Commission, (1) the operating expenses pertaining solely to any exchange system, (2) the operating expenses pertaining solely to any toll system, and (3) the operating expenses which are common to two or more exchange or toll systems."

We therefore conclude that where, as in the case at bar, it is charged that the exchange rates of a single municipality are unreasonable, the Corporation Commission in finding a basis for the adjustment of such rates should, as far as practicable, separate the valuation of the toll plant from the value of the exchange plant and equitably apportion between them the value of the property used in common in giving both L.R.A.1918C.

classes of service. But by this we do not wish to be understood as approving the conclusion reached by the company, its counsel and experts, as to the comparative value of the property used in common for both classes of service. In apportioning toll line property to the Ada plant they adopt as a basis for apportioning the value of the property used in common the comparative use made of the common switchboard. This switchboard consists of seven sections, three of which are devoted to caring for exchange, and four for toll line business. By this process they find three sevenths of the property of the Ada plant to be chargeable to exchange business, and four sevenths to the toll business. This, the Commission correctly finds, is a purely arbitrary basis for apportionment. It seems to us that the values of the property used in common should be, as far as practicable, apportioned between the exchange service and toll service on actual service requirements, and the cause will be remanded to the Commission for re-examination on this point for the purpose of making findings and conclusions upon this basis.

Another ground for complaint is based upon the claim that the Corporation Commission refused to allow the company a sufficient reserve for depreciation. The Commission held that, inasmuch as the evidence showed that the physical plant was kept up to a high degree of efficiency by replacements paid for out of current revenue, and that any deterioration covered by obsolescence would not affect the result in the case at bar, there was no depreciation, and therefore an allowance for a reserve fund to take care of depreciation was not necessary, and should not be allowed. The contention of the company on this point is that, notwithstanding every part of a properly constructed and well-equipped telephone system may be maintained in good condition from year to year out of the maintenance fund, yet the time inevitably comes with every building and unit of equipment when it can no longer be kept serviceable by repairs or current maintenance, and when it must be replaced substantially in its entirety. Therefore, they say, since the total life expectancy of the parts of the entire plant may be measured in years on something similar to a mortality table basis, unless a depreciation fund is provided for from year to year out of earnings, sufficient to replace the plant substantially in its entirety at the end of each life expectancy period, the dividends paid will before long represent the better part of the stockholders' investment. A great many authorities and opinions of experts are cited by counsel for the company which they say conclusive-

ly show the economic necessity for the principle contended for, among which are the following: Pioneer Teleph. & Teleg. Co. v. Westenhaver, 29 Okla. 429, 38 L.R.A. (N.S.) 1209, 118 Pac. 354; State Journal Printing Co. v. Madison Gas & E. Co. 4 Wis. R. C. 501; Re Cumberland Municipal Electric Lighting Plant, 4 Wis. R. C. 214; Cunningham v. Chippewa Falls Water & Lighting Co. 5 Wis. R. C. 302; Puget Sound Electric R. Co. v. Railroad Commission, 65 Wash. 75, 117 Pac. 739, Ann. Cas. 1913B, 763; People ex rel. Manhattan R. Co. v. Woodbury, 203 N. Y. 231, 96 N. E. 420; People ex rel. Third Ave. R. Co. v. State Tax Comrs. 136 App. Div. 155, 120 N. Y. Supp. 528.

The expert opinion relied upon consists of an article by Mr. William B. Jackson, entitled "Depreciation and Reserve Funds of Electrical Properties," published in the Electrical Review of May 7, 1910, page 934, the report of William J. Hagenah in his Investigation of the Chicago Telephone Company, 1910, and in the second volume of Telephony, page 102. After examining such of these authorities as are available to us, and others on the same subject not cited, we find ourselves unable to agree with counsel in their assumption that the doctrine of depreciation, as contended for by them, meets with the universal approval of the courts and the economists. From our investigation of the problem of depreciation we are convinced that precedent on this question is varying, and that there is also great contrariety of opinion among the heads of public service corporations themselves, some companies believing that their best interests lie in adopting the largest possible depreciation charge and in the consequent accumulation of a permanent fund in the future, whilst others contend that the application of the doctrine amounts to a virtual confiscation of their property. Without attempting to set out herein our analysis of these discordant views, it is sufficient to say that we have reached the conclusion that in plants of considerable size that have attained their gait, to which class the plant herein is conceded to belong, there is both theoretically and actually a normal condition in which the replacements come along with comparative evenness, and where there can be no possible use for a so-called depreciation fund of any considerable amount.

In the case at bar, as we have seen, the Commission made no deduction from the value of the plant on account of depreciation, but allowed returns upon its value as a going concern, kept up to a high degree of efficiency by replacements paid for out of current revenue. There is no principle L.R.A.1918C.

of public regulation more firmly established than the right of the company to charge in its rate an amount which will enable it to make these replacements, and, as investors put their money into public utilities for the sake of the returns they will be able to obtain, if the allowance for replacements is sufficient to keep up a high degree of efficiency and prevent a lowering of the ability of the plant to earn returns, we are unable to perceive the necessity for building up a fund to be used for the purpose of counteracting a purely theoretical depreciation. The theory of the Commission seems to be that charges should be made in rates sufficient to counteract or prevent depreciation by replacements, and that when replacements are thus fully provided for, depreciation is counteracted. We see no error in this; at least, none of which the appellant company has any just cause to complain.

Under the heading, "Going Value or Cost of Establishing Business," counsel for the telephone company in their brief say: "The Commission refused to allow anything to cover what is sometimes referred to as 'going value,' but more properly designated 'cost of establishing the business,' holding that, while the item had been referred to in Whorton's exhibit 'C,' where Mr. Whorton stated that the amount of \$30,010 did not include going concern value, was the only reference in the record to the subject of going concern value as applied to the defendant's property in Ada; that if there is such an element of value in the plant in question, it would appear that the burden would rest upon the defendant corporation to show the amount thereof if the same is to be accepted as a legitimate factor in the valuation of investment upon which the defendant is entitled to earn."

If counsel mean by this that in addition to the actual value of the plant as a producing factor they are entitled to returns on a definite sum as the measure of going value, or that the record shows that the Corporation Commission did not consider the plant of the telephone company as a going concern in fixing the value thereof, we cannot agree with them. It is well settled, as we have seen, that what the company is entitled to demand in order that it may have just compensation is a fair return upon the reasonable value of its property used by it for the convenience of the public as a producing factor at the time it is being used. In rate-making cases the corporation whose rates are under consideration is always a going concern, and it is inconceivable to think of it in any other light. In such cases the term "going concern value" simply means the value of

the plant as a whole upon which the company is entitled to a fair return, as distinguished from its bare physical value. We think there can be no doubt that the Corporation Commission found and fixed a valuation upon the property of the company as a going concern, as distinguished from its value as a mere naked plant. The Commission is not required—indeed, it would not be practicable—to set aside a definite sum as the measure of going value. As was said by Mr. Chief Justice Winslow in *Appleton Water Co. v. Railroad Commission*, 154 Wis. 121, 47 L.R.A. (N.S.) 770, 142 N. W. 476, Ann. Cas. 1915B, 1160: "However, the fundamental difficulty with the attempt to set a definite sum as the measure of going value is that it is an attempt to divide a thing which is in its nature practically indivisible. The value of the plant and business is an indivisible gross amount; it is not obtained by adding up a number of separate items, but by taking a comprehensive view of each and all of the elements of property, tangible and intangible, including property rights, and considering them all, not as separate things, but as inseparable parts of one harmonious entity, and exercising the judgment as to the value of that entity."

We do not understand that the case of *Pioneer Teleph. & Telegr. Co. v. Westenhaver*, 29 Okla. 429, 38 L.R.A. (N.S.) 1209, 118 Pac. 354, is an authority in favor of what seems to be counsel's contention, that the company is entitled to have a definite sum found as a going concern value. On the contrary, we think that case supports what we deem to be the true rule, that going value necessarily inheres in and constitutes an inseparable part of the entire structure as a going concern; that is, that the value of the plant, and the business as a producing factor, is an indivisible gross amount, and any attempt to fix a definite sum as the measure of going value would be an attempt to divide a thing which is in its nature practically indivisible.

The findings and conclusions of the Corporation Commission as to the reasonableness of the proportion of its returns paid by the plaintiff in error to the American Telephone & Telegraph Company seem to be supported by the evidence in the record as it now stands. Of this item, counsel for plaintiff in error say in their brief: "Since the trial of this case the Commission has tried two or three other rate cases wherein the validity of this payment was questioned by the Commission, and, in order to show fully and leave no doubt in the minds of that body as to the reasonableness and fairness of this payment, the defendant has introduced the evidence of its engineer, cover-

ing more than 120 pages of solid typewritten matter, going into the subject exhaustively and in detail, and in addition to this has introduced in evidence the entire record covering the inquiry of the Public Service Commission of Washington, the Public Service Commission of California, and the Railroad Commission of Oregon into the arrangement between the Pacific Telephone & Telegraph Company and the American Telephone & Telegraph Company, with reference to the $4\frac{1}{2}$ per cent of its gross receipts paid by the former to the latter. This record covers 696 pages of printed matter, tables, and statistics, and on account of the fact that the record in this case is not in condition to present the entire matter to the court fully, we respectfully recommend that it render no decision in this case as to the validity of this payment, as it would no doubt be a precedent, and the matter should not, in our judgment, be finally passed upon in this legislative matter until the court has possession of all relevant facts. The amount involved in the present case is so small that we do not believe it would change the result one way or the other, as we are entirely satisfied that if no sum whatever is allowed as a proper expense for the property and benefits received, the rates in force at the time the order was made should not have been reduced."

If this item is material to the adjustment of the exchange rate at Ada, application may be made to introduce the additional evidence above adverted to when the cause goes back to the Commission for re-examination, which, no doubt, will be sustained by the Commission if it finds such additional evidence to be material to the matter now under consideration. We believe the foregoing discussion covers all the points of difference between the parties necessary to a correct understanding and determination of all questions in dispute herein when the cause comes on for further investigation before the Commission.

Section 22, art. 9, Williams's Constitution, provides: "In no case of appeal from the Commission, shall any new or additional evidence be introduced in the supreme court. . . . The supreme court shall have jurisdiction, on such appeal, to consider and determine the reasonableness and justness of the action of the Commission appealed from, as well as any other matter arising under such appeal: Provided, however, that the action of the Commission appealed from shall be regarded as prima facie just, reasonable, and correct; but the court may, when it deems necessary, in the interest of justice, remand to the Commission any case pending on appeal, and require the same to be further investigated by the Com-

mission, and reported upon to the court (together with a certificate of such additional evidence as may be tendered before the Commission by any party in interest), before the appeal is finally decided."

In view of the misconception of the Commission hereinbefore pointed out, the interest of justice requires the cause to be remanded to the Corporation Commission for further investigation, and to make findings of fact and conclusions of law based upon the theory herein outlined, and for the purpose of taking such additional evidence as may be deemed necessary by the Commission for a full and fair hearing of the question in controversy. It may be that the evidence now in the record is sufficient to enable the Corporation Commission to make findings and conclusions as to the value upon the basis herein approved. In that event, the only duty to be performed by the Commission will be to make findings and conclusions as to the specific points in controversy upon the approved basis outlined herein, and to return the same with the record.

It is true that counsel for the appellant in their brief and its experts at the trial, as we have seen, draw certain conclusions from the evidence as it stands as to the proper apportionment of exchange and toll property which if accepted would probably show the rate fixed to be unreasonable. The supreme court, however, in considering appeals from the Corporation Commission, is entitled to have before it a written statement, prepared by the Commission, of the

reasons upon which the action appealed from is based. Williams's Const. art. 9, § 22. And these reasons, of course, ought to be predicated upon a correct understanding of the legal principles involved. Notwithstanding the Commission committed error in the respect hereinbefore pointed out as to the proper basis for ascertaining the value of the property of the telephone company used for the convenience of its exchange patrons at Ada, it does not follow that the rate fixed by it for that service may be found to be unreasonable when predicated upon the basis herein approved.

The record before us clearly shows that the rates adopted by the Commission were based upon a full investigation, which involved the exercise of judgment and discretion by the Commission. In these circumstances, the action of the Commission appealed from must be regarded as *prima facie* just, reasonable, and correct, until such time as the cause can be considered upon full hearing.

It is therefore ordered that this cause shall be remanded to the Corporation Commission for further investigation and report on the points herein indicated, and that the record be returned to this court, together with the certificate of such additional evidence as may be tendered before the Commission, within sixty days from the date of this order.

All the Justices concur, except Miley, J., disqualified and not participating.

OKLAHOMA SUPREME COURT.

JAMES EGAN, Plff. in Err.,
v.

FIRST NATIONAL BANK OF TULSA.

(— Okla. —, 169 Pac. 621.)

Appeal — effect of finding of fact.

1. Where there is evidence reasonably tending to support the finding of the jury, such finding will not be disturbed by this court on appeal.

For other cases, see *Appeal and Error*, VII. 1, 2, a, in *Dig. 1-52 N. S.*

Trial — impeaching verdict.

2. Affidavits or testimony of jurors will not be received for the purpose of impeach-

ing the verdict which they have solemnly made and publicly returned into court.

For other cases, see *New Trial*, V. d, in *Dig. 1-52 N. S.*

Same — nonconcurring juror.

3. And the fact that the juror making the affidavit did not concur in the verdict returned does not change the rule, for the rule is based upon public policy, and is for the purpose of preventing litigants or the public from invading the privacy of the jury room, either during deliberations of the jury or afterwards. It is to prevent overzealous litigants and a curious public from prying into deliberations which are intended to be, and should be, private, frank, and free discussions of the questions under consideration.

For other cases, see *New Trial*, V. d, in *Dig. 1-52 N. S.*

Headnotes by BRETT, J.

Note. — As to impeachment of nonunanimous verdict by affidavits or testimony of dissenting jurors, see annotation following this case, post, 149.
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(Sharp, Ch. J., and Rainey, J., dissent. Thacker, J., dissents in part.)

(November 13, 1917.)

ERROR to the District Court for Tulsa County to review a judgment in favor of defendant in an action brought to recover an amount alleged to have been paid by it upon a certain check without the consent or knowledge of plaintiff. Affirmed.

The facts are stated in the opinion.

Mr. John F. Kerrigan, for plaintiff in error:

Testimony of plaintiff relative to the Deitchman check was improperly excluded.

1 Greenl. Ev. 15th ed. § 13a, note (b), § 48 note (a), subd. 4, §§ 51a, 53, note (b); 16 Cyc. 1110, 1111; Burtiss v. Lanyon Zinc Co. 68 Kan. 827, 75 Pac. 1030; Chicago, R. I. & P. R. Co. v. Wood, 66 Kan. 613, 72 Pac. 215; Mosby v. McKee, Z. & W. Commission Co. 91 Mo. App. 500; Holman v. Raynesford, 3 Kan. App. 676, 44 Pac. 910; Home Ins. Co. v. Weide, 11 Wall. 438, 20 L. ed. 197; Whart. Ev. §§ 259, 261, 262; Lewis v. State, 4 Kan. 296; Keel v. New York L. Ins. Co. 20 Okla. 195, 94 Pac. 177; Ward v. White, 86 Va. 212, 19 Am. St. Rep. 883, 9 S. E. 1021; Findlay Brewing Co. v. Bauer, 50 Ohio St. 560, 40 Am. St. Rep. 686, 35 N. E. 55; United States Fidelity & G. Co. v. Shirk, 20 Okla. 576, 95 Pac. 218; Cannon v. Territory, 1 Okla. Crim. Rep. 600, 99 Pac. 622; 11 Am. & Eng. Enc. Law, 2d ed. 514; Wigmore, Ev. § 2094, p. 2825; Barry v. Davis, 33 Mich. 515; O'Brien v. Cheney, 5 Cush. 148; Williamson v. Brown, 15 N. Y. 354; Cooper v. Flesner, 24 Okla. 58, 23 L.R.A.(N.S.) 1180, 103 Pac. 1016, 20 Ann. Cas. 29.

Before usage is admissible it must first be shown that the one sought to be charged with the usage had knowledge of it.

Talbot v. Mattox, D. & P. Realty Co. 26 Okla. 298, 109 Pac. 128; Zane, Banks & Bkg. § 117; McSherry v. Blanchfield, 68 Kan. 310, 75 Pac. 121; 19 Am. & Eng. Enc. Law, 2d ed. 417; First Nat. Bank v. Eldridge, 26 Okla. 538, 109 Pac. 62.

The relation between a bank and its depositor is one of quasi contract, one of debt, and also one of duty; and failing to follow orders of depositor, or negligence on the part of the bank, makes it liable for any loss.

Zane, Banks & Bkg. pp. 15-17, 120-122, 201; Story, Agency, § 219; Shipman v. Bank of State, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371; 9 Cyc. 243; 3 Am. & Eng. Enc. Law, 2d ed. 830; First Nat. Bank v. Tappan, 6 Kan. 456, 7 Am. Rep. 568; German Sav. Bank v. Citizens' Nat. Bank, 101 Iowa, 530, 63 Am. St. Rep. 405, 70 N. W. 769, 2 Am. Neg. Rep. 349; Weissner v. Denison, 61 Am. Dec. 731, and note, 10 N. Y. 68; Janin v. London & S. F. Bank, 92 Cal. 14, 14 L.R.A. 320, 27 Am. St. Rep. 82, 27 Pac. 1100; First Nat. L.R.A.1918C.

Bank v. Whitman, 94 U. S. 343, 344, 24 L. ed. 229, 231.

Comment by the court upon what the evidence was worth, what it tended to prove, and the inference which might be deduced, was error; this alone being for the jury.

Guthrie v. Carey, 15 Okla. 276, 81 Pac. 431; 38 Cyc. 1517, 1518, 1647, 1648; Atchison, T. & S. F. R. Co. v. Ayers, 56 Kan. 176, 42 Pac. 722.

The affidavits of the jurymen were admissible to show misconduct, as such misconduct did not inhere in the verdict, but was that which any and every jurymen could have testified to as having occurred or not, as the facts might be.

Brown Land Co. v. Lehman, 134 Iowa, 712, 12 L.R.A.(N.S.) 88, 112 N. W. 185; Douglass v. Agne, 125 Iowa, 67, 99 N. W. 550; Gottlieb Bros. v. Jasper, 27 Kan. 770; Whitmore v. Ball, 9 Lea, 35; Reese v. Creson, 1 Baxt. 229; Ritchie v. Holbrooke, 7 Serg. & R. 458; Pierce v. Brennan, 83 Minn. 422, 86 N. W. 417; Peppercorn v. Black River Falls, 89 Wis. 38, 46 Am. St. Rep. 818, 61 N. W. 79; Stevenson v. Tennessee Copper Co. 193 Fed. 268; State v. Lorenzy, 59 Wash. 308, 109 Pac. 1064, Ann. Cas. 1912B, 153.

The affidavits show such misconduct on the part of the jury as defeated a fair consideration of the cause; and, having worked to the prejudice of plaintiff, a new trial should be granted.

28 Cyc. 810E; State v. McCormick, 57 Kan. 440, 57 Am. St. Rep. 341, 46 Pac. 777.

The law, however, gives plaintiff recovery against the bank on an implied agreement between bank and depositor that the bank will not disburse the money standing to depositor's credit in the face of his order not to do so.

Janin v. London & S. F. Bank, 92 Cal. 14, 14 L.R.A. 320, 27 Am. St. Rep. 82, 27 Pac. 1100; Shipman v. Bank of State, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 822, 27 N. E. 371.

Messrs. George T. Brown and Rice & Lyons, for defendant in error:

No logical inference whatever can reasonably be drawn from the evidence excluded by the trial court as to the existence of the fact in issue. This being true, the testimony offered was irrelevant, and was, therefore, properly excluded.

T. S. Reed Grocery Co. v. Miller, 36 Okla. 134, 128 Pac. 271; Ernst v. Ganahl, 166 Cal. 493, 137 Pac. 257; Stoner v. Nall, 149 Ky. 124, 148 S. W. 8; Rosenberg v. People's Surety Co. 140 App. Div. 436, 125 N. Y. Supp. 257; Key v. Goodall, B. & Co. 7 Ala. App. 227, 60 So. 986; Newton v. Bayless Fruit Co. 155 Ky. 440, 159 S. W. 969;

Churchill v. Hebden, 32 R. I. 34, 78 Atl. 337; Coman v. Wunderlich, 122 Wis. 138, 99 N. W. 612.

Customs and usages of a bank may be shown to corroborate testimony already given.

Meighen v. The Bank, 25 Pa. 288; Walker v. Barron, 6 Minn. 508, Gil. 353; Mathias v. O'Neill, 94 Mo. 527, 6 S. W. 253; 1 Wigmore, Ev. § 92, p. 166; Nelson v. Grondahl, 13 N. D. 363, 100 N. W. 1093; Bouldin v. Massie, 7 Wheat. 153, 5 L. ed. 422.

The affidavits of the jurors were insufficient to tend to establish any ground for a new trial.

Vanderburg v. State, 6 Okla. Crim. Rep. 485, 120 Pac. 301; Spencer v. State, 5 Okla. Crim. Rep. 7, 113 Pac. 224; Pettitti v. State, 2 Okla. Crim. Rep. 131, 100 Pac. 1122; Colcord v. Conger, 10 Okla. 458, 62 Pac. 275; Overton v. State, 7 Okla. Crim. Rep. 203, 114 Pac. 1132, 123 Pac. 175; Keith v. State, 7 Okla. Crim. Rep. 156, 123 Pac. 172.

Brett, J., delivered the opinion of the court:

On October 17, 1908, James Egan drew two checks for the sum of \$3,250 each upon the First National Bank of Tulsa, payable to Peter Deitchman and D. M. Martindale, respectively. A few days after the execution and delivery of these checks Egan contends that he notified the bank not to pay either of said checks, and that the bank stopped payment of the Deitchman check, but that, on the 19th day of October, 1909, the bank paid the Martindale check without his knowledge or consent; and in November, 1910, he instituted this suit against the bank to recover the amount of money thus paid by it upon said check. The bank denied that the payment of this check was ordered stopped, and contends that James Egan, after the bank had paid this check, ratified the act of the bank in paying the same, in that he continued to transact business with the bank, deposit money, draw checks thereon, and that he did not institute this suit until more than thirteen months after the check had been paid; while Egan contends that he did not know that this \$3,250 check to Martindale had been paid until September, 1910.

The issues raised by the pleadings were presented to the jury under proper instructions of the court, and the jury decided adversely to Egan and in favor of the bank; and inasmuch as there is evidence here supporting both theories of the bank, that is, that the payment of the check was not ordered stopped, and that Egan had ratified the payment of the check by the bank, we L.R.A.1918C.

do not feel at liberty to disturb this verdict on account of insufficient evidence.

2. The most serious question raised in this case, and the only one requiring special attention, is whether or not a juror may impeach the verdict of the jury. Here there was a majority verdict, and two of the jurors who did not concur in the verdict returned made affidavits to the effect that the foreman of the jury, before a decision was reached, made the statement that "James Egan, the plaintiff, could have been shut out from testifying in the case; that he had been in prison and his statement was unworthy of belief."

The affidavits also state that certain other members of the jury made statements to the same effect. And plaintiff in error insists that these affidavits were admissible to impeach the verdict, and that the court erred in not granting a new trial on account of the facts stated in said affidavits.

We are aware that this presents a much-vexed question. But we are of the opinion that the position maintained by the majority of the courts that a juror cannot impeach the verdict of the jury furnishes a surer foundation for justice and is supported by better reason than is found in those cases which attempt to make distinctions and furnish qualified conditions under which a juror may impeach the verdict of his jury.

As was well said by the late Judge Furman in Keith v. State, 7 Okla. Crim. Rep. 156, 123 Pac. 172: "If, after being discharged and mingling with the public, jurors are permitted to impeach verdicts which they have rendered, judgments based upon verdicts of juries would rest upon a very uncertain foundation. Litigants against whom verdicts have been rendered would be continually importuning jurors, and attempting to obtain from them affidavits upon which such verdicts could be assailed. This would result in perjury and bribery. There would be no end of litigation in cases tried before juries. Therefore, for the security of litigants, and to prevent fraud and perjury, as well as for the protection of the jurors themselves, courts will not allow jurors to impeach their own verdict, unless they are permitted to do so by the express provisions of the statute. We have no statute permitting this to be done."

In Saltzman v. Sunset Teleph. & Teleg. Co. 125 Cal. 501, 58 Pac. 169, it is said: "The independence of the jury and the value of their discussions would be lessened if the reasons given by any juror for his opinions or for his verdict could be reported to the court and criticized, and his motives impugned for remarks made in the jury room. And such reports would be more likely to be made by dissenting jurors who had been

heated by earnest debate and defeated by the final vote. But the independence of the jury would be gone if a perfectly correct report could be made and the verdict attacked by showing that some jurors mistook the evidence or the law, or were actuated by other considerations. There would be no freedom of discussion in the jury room if they were subject to a possible censorship of this character. And the stability of judicial determinations would be as much imperiled by liability to attack by dissenting jurors as by the others. . . . The main reasons, I think, are these two: (1) That the jurors, who are practically the only witnesses in regard to the matter, may not be tampered with, and the verdicts by these means imperiled; and (2) to secure independence and freedom from improper restraint on the part of the jury."

In *McDonald v. Pless*, 238 U. S. 264, 59 L. ed. 1300, 35 Sup. Ct. Rep. 783, it is said:

"Let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication, and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation,—to the destruction of all frankness and freedom of discussion and conference.

"The rule on the subject has varied. Prior to 1785 a juror's testimony in such cases was sometimes received, though always with great caution. In that year Lord Mansfield, in *Vaise v. Delaval*, 1 T. R. 11, 99 Eng. Reprint, 944, refused to receive the affidavit of jurors to prove that their verdict had been made by lot. That ruling soon came to be almost universally followed in England and in this country. Subsequently, by statute in some states, and by decisions in a few others, the juror's affidavit as to an overt act of misconduct, which was capable of being controverted by other jurors, was made admissible. And, of course, the argument in favor of receiving such evidence is not only very strong, but unanswerable, when looked at solely from the standpoint of the private party who has been wronged by such misconduct. The argument, however, has not been sufficiently L.R.A.1918C.

convincing to induce legislatures generally to repeal or to modify the rule. For, while it may often exclude the only possible evidence of misconduct, a change in the rule 'would open the door to the most pernicious arts and tampering with jurors.' 'The practice would be replete with dangerous consequences.' 'It would lead to the grossest fraud and abuse,' and 'no verdict would be safe.' *Cluggage v. Swan*, 4 Binn. 155, 5 Am. Dec. 400; *Straker v. Graham*, 4 Mees. & W. 721, 150 Eng. Reprint, 1612, 7 Dowl. P. C. 223, 1 Horn & H. 449, 8 L. J. Exch. N. S. 86."

Besides, this court has repeatedly followed the well-established rule that affidavits or testimony of jurors will not be received for the purpose of impeaching the verdict which they have solemnly made, and publicly returned into court. *Colcord v. Conger*, 10 Okla. 458, 62 Pac. 276; *Barnes v. Territory*, 19 Okla. 373, 91 Pac. 848; *Pitchlynn v. Cherry*, 32 Okla. 77, 121 Pac. 196; *Tulsa Street R. Co. v. Jacobson*, 40 Okla. 118, 136 Pac. 410; *Glockner v. Jacobs*, 40 Okla. 641, 140 Pac. 142; *Chicago, R. I. & P. R. Co. v. Palmer*, — Okla. —, 154 Pac. 1163.

In *Glockner v. Jacobs*, 40 Okla. 641, 140 Pac. 142, *supra*, Justice Riddle quotes with approval the syllabus in *Tulsa Street R. Co. v. Jacobson*, *supra*, as follows: "Upon grounds of public policy, jurors will not be heard by affidavit, deposition, or other sworn statement to impeach or explain their verdict to show on what ground it was rendered, or that they made a mistake, misunderstood the law or the result of their finding, nor permitted to show what items entered into the verdict, nor how they arrived at the amount. Jurors will only be heard in support of their verdict or conduct when same is attempted to be impeached."

And this doctrine has uniformly been adhered to by this court, except in *Carter State Bank v. Ross*, — Okla. —, 152 Pac. 1113, and, in so far as the holding in that case is in conflict with the views herein expressed, the same is overruled.

And the fact that the juror making the affidavit did not concur in the verdict returned does not change the rule. For the rule is based upon public policy, and is for the purpose of preventing litigants or the public from invading the privacy of the jury room either during the deliberations of the jury or afterwards. It is to prevent overzealous litigants and a curious public from prying into deliberations which are intended to be, and should be, private,

frank, and free discussions of the questions under consideration.

The judgment is affirmed.

Sharp, Ch. J., and Rainey, J., dissent. Thacker, J., dissents from the rule announced in the second paragraph of the

syllabus, but concurs in the conclusion reached in the case.

All the other Justices concur.

Petition for rehearing denied January 8, 1918.

Annotation—Impeachment of nonunanimous verdict by affidavits or testimony of dissenting jurors.

This note is confined to cases where by law the verdict is not required to be unanimous, and a verdict not unanimous is attacked by affidavits or testimony of one or more dissenting jurors.

The general rule against the impeachment of a verdict by jurors applies in the case of dissenting jurors where there is a nonunanimous verdict, and the decision to this effect in *EGAN v. FIRST NAT. BANK*, ante, 145, is sustained by authority. *Saltzman v. Sunset Teleph. & Teleg. Co.* (1899) 125 Cal. 501, 58 Pac. 169; *Mobile & O. R. Co. v. Farrior* (1917) 115 Miss. 96, 75 So. 777; *Williamson v. Mullins* (1915) — Mo. App. —, 180 S. W. 395; *Vanderburg v. State* (1912) 6 Okla. Crim. Rep. 485, 120 Pac. 301; *Chicago, R. I. & P. R. Co. v. Brown* (1916) — Okla. —, 154 Pac. 1161; *Spain v. Oregon-Washington R. & Nav. Co.* (1915) 78 Or. 355, 153 Pac. 470, Ann. Cas. 1917E, 1104.

In *Saltzman v. Sunset Teleph. & Teleg. Co.* (Cal.) supra, the court affirmed an order refusing a new trial on affidavits of dissenting jurors as to misconduct of an assenting juror, not relating to assent by resort to chance, which, by statute, might be proved by affidavit of any juror, and stated in effect that the statute made an exception to the general rule, which proved it.

In *Mobile & O. R. Co. v. Farrior* (1917) 115 Miss. 96, 75 So. 777, where an attempt was made to impeach a verdict of nine jurors as quotient, by the testimony of one of the dissenting jurors, the court, while reversing the judgment on other grounds, held that the trial court rightly excluded the testimony of the juror.

So, where three dissenters made affidavits that the verdict was quotient, the court refused to consider them. *Williamson v. Mullins* (1915) — Mo. App. —, 180 S. W. 395.

In *Spain v. Oregon-Washington R. & Nav. Co.* (1915) 78 Or. 355, 153 Pac. 470, Ann. Cas. 1917E, 1104, the court, in reversing on another ground a case where a verdict had been returned by nine jurors, referred to the attempt to

show by the affidavit of the three dissenting jurors that the verdict was a quotient verdict, and said, *inter alia*: "The distinction attempted to be made by counsel between affidavits made by jurors where a unanimous verdict is required, and cases where the affidavits are made by nonconcurring jurors under statutes such as ours, where three fourths of the jurors may return a verdict, finds no support in the authorities. The rule is the same in either case."

In *Vanderburg v. State* (1912) 6 Okla. Crim. Rep. 485, 120 Pac. 301, the court, in affirming a conviction, said: "In support of a motion for a new trial the testimony of one of the jurors was taken, wherein he testified in substance that the verdict of the jury was not unanimous, and that he did not vote for a conviction. Two other jurors were permitted to testify that the question of taxes was discussed, and that the costs would be thrown on the state if they did not stick the defendant. It will be sufficient to say on this question that jurors will not be allowed to impeach their verdict by their affidavits or testimony after they have been discharged."

The affidavit of a nonassenting juror has been held not admissible on the ground that the alleged facts did not inhere in the verdict. *Marvin v. Yates* (1901) 26 Wash. 50, 66 Pac. 131, where, in affirming the striking out of an affidavit of a nonassenting juror as to the wrong method of calculating the amount of the verdict, the court said: "While it is true the one juror appears not to have joined in the verdict, still he was a member of the jury that returned the verdict, and we believe the same rule should apply to his affidavit as would apply to those of the other jurors. Affidavits of jurors will be received to show misconduct of the jury where they do not state alleged facts which necessarily inhere in the verdict itself. The affidavits must state facts concerning the acts of the jurors only. . . . This alleged misconduct inheres directly in the verdict itself, and cannot be considered."

B. B. B.

WEST VIRGINIA SUPREME COURT
OF APPEALS.

HENRY HENDRICKS

v.

THOMAS S. FORSHEY et al., Pliffs. in Err.

(— W. Va. —, 94 S. E. 747.)

Conspiracy — to breach contract — Liability.

Persons having similar individual contracts with a third person, who conspire together to breach them, and do breach them in pursuance of such conspiracy, whether for personal gain or sinister motives, are liable therefor in an action for tort in the nature of a conspiracy.

For other cases, see *Conspiracy, I. in Dig.* 1-52 N. S.

(November 6, 1917.)

ERROR to the Circuit Court for Wood County to review a judgment in favor of plaintiff in an action brought to recover damages for breach of a contract had by plaintiff with defendants to haul their milk. Affirmed.

The facts are stated in the opinion.

Messrs. R. E. Bills and C. M. Hanna for plaintiffs in error.

Mr. William Beard for defendant in error.

Williams, J., delivered the opinion of the court:

Plaintiff recovered a judgment against Thomas S. Forshey, Clarence E. Grewell, and M. W. Miller in the circuit court of Wood county, and they have brought the case here on writ of error.

The action is trespass on the case, and the declaration contains five counts. There was a demurrer to the declaration and to each count, which demurrer the court overruled as to the entire declaration and also as to the fourth and fifth counts, and sustained as to the first, second, and third counts. Plaintiff, by permission of court, amended his first count, and defendants again demurred to it as amended, which the court overruled. Defendants then pleaded not guilty, and issue was joined.

It is insisted the demurrer to the declaration should have been sustained, for the alleged reason that the fourth count avers a cause of action for breach of contract, whereas the other counts are in tort, and actions ex contractu and ex delicto cannot

be joined. While the proposition embodies a well-established rule of pleading, counsel have misconceived the true import of the fourth count. It avers a cause of action in the nature of a conspiracy. It charges substantially that plaintiff had contracts with defendants and with others, severally, to haul their milk from their places of residence in the country to the city of Parkersburg, for a year, at 10 cents per gallon, of which defendants had knowledge, and that they unlawfully and maliciously confederated and combined and entered into a conspiracy to refuse to permit plaintiff to haul their milk, and in pursuance thereof breached their several contracts, wherefore plaintiff's business as a hauler of milk has been destroyed, and he greatly injured. These averments state a good cause of action on the case in the nature of a conspiracy. Porter v. Mack, 50 W. Va. 581, 40 S. E. 459. The contracts were several, not joint, and the wrong alleged is not simply the breach by each one of the defendants of his individual contract, but the breach of all of them in consequence of the unlawful combination and conspiracy. "If one wantonly and maliciously, whether for his own benefit or not, induce a person to violate his contract with a third person to the injury of that third person, it is actionable." West Virginia Transp. Co. v. Standard Oil Co. 50 W. Va. 611, 56 L.R.A. 804, 88 Am. St. Rep. 895, 40 S. E. 591; Thacker Coal & Coke Co. v. Burke, 59 W. Va. 253, 5 L.R.A. (N.S.) 1091, 53 S. E. 161, 8 Ann. Cas. 885.

The first count is for slander, but the charge is not supported by the evidence, nor do plaintiff's counsel, in brief, contend that it is. But they do insist the verdict properly stands on the evidence supporting the charge in the fourth count.

Plaintiff testified that his contracts with the several defendants were made in the spring of 1915 and were for the period of a year; but defendants testified they were for no stated time, and they agree he was to receive 10 cents per gallon. Plaintiff was discharged on July 11, 1915, and defendants admit they met at the home of Mr. Butcher on the evening before, and talked over the matter of discharging plaintiff and hauling their milk themselves, each taking it by turns. Defendant Miller says: "We agreed to go trip about among ourselves." And defendant Forshey admits it was then agreed among them that he should call plaintiff on the phone the next morning and notify him not to come for the milk, that they were going to haul it themselves, which he did. He also admits he called up Mr. Thomas Hoffman, who he knew was plaintiff's customer, and solicited him to enter into the arrangement they had made to haul the milk

Headnote by WILLIAMS, J.

Note. — As to liability of individuals having contracts with the same person for combining to breach the same, see annotation following this case, post, 151. L.R.A.1918C.

in turns. This evidence supports the charge that defendants were induced to break their contracts by their concerted action and agreement among themselves to haul their own milk. The greater the number who could be induced to enter into that arrangement, the easier it would be for each of them, as each would then be required to make fewer trips. Probably no one of defendants, acting independently of the others, would have been willing to break his contract with plaintiff, if it necessitated his hauling his own milk, day after day.

Plaintiff proved he was earning about \$50 a month by hauling cream for defendants and others in the neighborhood, independent of what he was hauling for himself, and lost these earnings as a result of the breach of their contracts by defendants. This evidence supports the jury's assessment of \$263.83 as plaintiff's damages.

The judgment is affirmed.

Petition for rehearing denied January 15, 1918.

Annotation—Liability of individuals having contracts with the same person for combining to breach the same.

The general question of the right of action for damages for inducing a breach of a contract is treated in notes in 16 L.R.A.(N.S.) 746; 28 L.R.A.(N.S.) 615; and L.R.A.1915F, 1076.

The right to an injunction against inducing a breach of a contract or assisting in a continuance of such breach is discussed in notes in 11 L.R.A.(N.S.) 202, and L.R.A.1917C, 782.

As to the liability of a third person for interfering with and driving away the customers of another, see note in L.R.A.1915B, 1180.

And as to liability for inducing the discharge of an employee, see note in 48 L.R.A.(N.S.) 893.

The notes heretofore referred to on the question of the right of action for damages for inducing the breach of a contract show a gradual development of the question, and a growing inclination on the part of the courts to hold liable any person who knowingly induces a breach of a contract, even though the breach was merely the necessary result of the action of such person in promoting his own interests.

In the note appended to *Wheeler-Stenzel Co. v. American Window Glass Co.* L.R.A.1915F, 1076, in referring to this latter class of cases, it is said that "the doctrine that a contract between two persons precludes another from making an inconsistent contract with either of such parties without rendering himself liable with the other party for the injury resulting from the necessary breach of the contract involves dangerous possibilities, and, on the ground of expediency, if for no other reason, should not receive the sanction of the courts."

HENDRICKS v. FORSHEY, ante, 150, is a good illustration of the class of cases thus extending the rule, for while the doctrine is stated that if one wantonly L.R.A.1918C.

or maliciously, whether for his own benefit or not, induces a person to violate his contract with a third person, to the injury of that third person, it is actionable, yet the case in effect holds that a mere agreement between several persons employing the plaintiff to carry milk to thereafter carry their own milk, each taking it by turns, and their act in soliciting one of the plaintiff's customers also to enter into the arrangement, is evidence to support the charge that defendants were induced to break their contracts by a concerted action and agreement among themselves to haul their own milk, and this was apparently regarded as sufficient to show a conspiracy. It is not clear in this case whether the contracts to haul the milk were for a stated period or merely for an indefinite term.

While no other case closely resembling the *HENDRICKS CASE* as to its facts has been found, the following cases are sufficiently similar to be of interest:

In *West Virginia Transp. Co. v. Standard Oil Co.* (1902) 50 W. Va. 611, 56 L.R.A. 804, 88 Am. St. Rep. 895, 40 S. E. 591, in holding that an agreement between oil pipe companies and a refining company by which only oil transported through the pipes of such companies would be refined by the refining company did not constitute an unlawful conspiracy to injure a pipe line company not a party to the agreement, it is pointed out that if there had been subsisting contracts with oil producers for the conveyance of oil, and these contracts had been broken through a malicious conspiracy, it would be actionable.

In *Sleeper v. Baker* (1911) 22 N. D. 386, 39 L.R.A.(N.S.) 864, 134 N. W. 716, Ann. Cas. 1914B, 1189, it is held that an action cannot be maintained against different individuals for conspiracy to induce, by dealing between themselves, the

violation of separate contracts which the defendants had with the plaintiff. This decision, however, is based on the general ground that merely to induce a breach of a contract is not actionable, where the purpose was to promote the interest of the person who induced the breach.

It has been held that where, as a result of an agreement between insurance companies not to employ as agent any person who had been an agent of another company within a designated period of time, an agent employed for an indefinite time was discharged, he cannot hold the companies liable on the ground of conspiracy. *Baker v. Metropolitan L. Ins. Co.* (1901) 23 Ky. L. Rep. 1174, 55 L.R.A. 271, 64 S. W. 913.

And in the same jurisdiction it is held that tobacco buyers are not liable for injury to the business of a tobacco storage and sales house by agreeing among themselves that they will not attend sales at such place while a certain man is connected with the sales. *Leech v. Farmers' Tobacco Warehouse Co.* (1916) 171 Ky. 791, 188 S. W. 886.

In *Beechley v. Mulville* (1897) 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428, it is held that an insurance agent who was a member of

an unlawful combination to control the insurance business in a locality could not recover damages for the cancellation of his agency contract with the different companies, due to an agreement among the companies, incorporated in the general agreement, to dispense with the services of any agent under certain circumstances.

An agreement among buyers of grain and produce not to buy of or sell to a certain person has been held to constitute an unlawful conspiracy where the parties had no legitimate interests of their own to protect thereby, and the purpose of the agreement was to destroy the plaintiff's business as a commission merchant. *Ertz v. Produce Exch. Co.* (1900) 79 Minn. 140, 48 L.R.A. 90, 49 Am. St. Rep. 433, 81 N. W. 737.

In *Delz v. Winfree* (1891) 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111, it is held that it did not constitute an actionable wrong for cattle dealers to agree among themselves not to sell cattle to a butcher, but that they did render themselves liable if they undertook to induce others also to refuse to sell, since this constituted an unlawful interference with the plaintiff's business, and no justification of such interference was shown. A. G. S.

KENTUCKY COURT OF APPEALS.

E. W. BAKER et al., Appts.,
v.

WILLIE W. WEAKS et al.

(178 Ky. 515, 199 S. W. 53.)

Partition — right of infant to sue — absence of evidence — effect.

1. Nonresident infants for whom a statutory guardian has been appointed, who has been authorized by decree of court to institute proceedings for the partition of real estate on their behalf, have a right to sue, and a judgment entered on their petition is not void, although the evidence of the appointment and authority to sue is not filed in the partition proceedings until after judgment.

For other cases, see Infants, III. in Dig. 1-52 N. S.

Judicial sale — right of judge to purchase.

2. A judge who has ordered the sale of land for partition to be made by a commissioner cannot become purchaser at the sale,

Note. — As to purchase by judge at judicial sale, see annotation following this case, post, 157.
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although a special judge is called in to confirm it.

For other cases, see Partition, II. d, in Dig. 1-52 N. S.

(December 21, 1917.)

APPEAL by the purchasers of real estate from a judgment of the Circuit Court for McCracken County sustaining plaintiffs' exceptions to the report of, and setting aside, the sale of the land, in an action for partition. Affirmed.

The facts are stated in the opinion.

Mr. D. G. Parks for appellants.

Mr. Arthur Y. Martin for appellees.

Hurt, J., delivered the opinion of the court:

W. B. Weaks and J. P. Weaks, both of whom are now dead, were joint owners of each of seven lots in the city of Paducah. The lots adjoined and were unimproved. Six of the lots are each 50 feet in width, while the other one is 52 feet, and each has a depth of 152 feet. It does not certainly appear that the lots have a frontage on any established street, but at one end they approach an alleyway. At the death of

W. B. Weeks, his interest in the lands was inherited by his children, Cornelia E. Weeks and William C. Weeks, subject to a right of dower of their mother, Willie W. Weeks. At the death of J. P. Weeks, his interest in the lots was inherited by his children, Mabel C. Weeks, Marie Antoinette Weeks, and Beulah Weeks, subject to a right of dower in their mother, Nettie L. Weeks, who has since intermarried with H. E. Doss. Mabel C. Weeks is an adult, but Marie Antoinette, Beulah, Cornelia E., and William C. Weeks are infants. This action was instituted by Mabel C. Weeks, William C. Weeks, and Nettie L. Doss, in their own right, and by Cornelia E. and William C. Weeks, by their statutory guardian, Willie W. Weeks, and by Marie Antoinette and Beulah Weeks, by their statutory guardian, Nettie L. Doss, for a sale of each of the lots and a division of the proceeds, upon the ground that the lots were not susceptible of division between the owners, and an allotment to each of his portion in severalty, without materially impairing the value of the lots and of each interest therein. The proceeding was under § 490, of the Civil Code of Practice. Willie W. Weeks and Nettie L. Doss each consented to the sale and agreed to accept the value of their respective dowers in money out of the proceeds of the sale, in lieu of an allotment of dower in the realty. The infants Cornelia E. and William C. Weeks reside in the state of Kentucky, but the other infant plaintiffs, Marie Antoinette and Beulah Weeks, reside in the state of Tennessee.

The proceeding was *ex parte*, but the petition, in substance, averred that Willie W. Weeks had been duly appointed and qualified as the statutory guardian of Cornelia E. and William C. Weeks, by and in the county court of Christian county, Kentucky, which county was alleged to be that of their residence, and a certified copy of the orders of that court, showing the appointment and qualification, was filed with the petition. It was also averred that Nettie L. Doss was the duly qualified and acting guardian of Marie Antoinette and Beulah Weeks; that she had been appointed such by the county court of Wilson county, in the state of Tennessee, wherein they resided, and had duly qualified in that court, and that she had, upon a petition to the county court of McCracken county, Kentucky, wherein the lots are situated, been authorized, by an order of that court, to prosecute this action as the guardian of Marie Antoinette and Beulah Weeks, under the appointment of the county court in Tennessee. The title papers under which the property was held by the ancestors of the petitioners were filed with the petition. A copy of the

records of the county court in Tennessee, showing the appointment and qualification of Nettie L. Doss as the guardian of Marie Antoinette and Beulah Weeks, was filed before the submission of the action, and the correctness of the validity of it was certified by the clerk of that county court, with its seal attached, but it was not certified as required by the Federal law, nor as required by the statutes of this state, so as to authorize a court of this state to consider it as evidence of the truth of the facts therein stated. Ky. Stat. § 1636; *Williams v. Duncan*, 92 Ky. 125, 17 S. W. 330. A copy of the judgment of the McCracken county court which the petition alleged existed, and which authorized Nettie L. Doss to institute and prosecute this action as guardian, by the county court in Tennessee, as provided by § 2041, Kentucky Statutes, was not filed. Evidence was taken tending to prove that the lots were not divisible without impairment of their value, and of the respective interests therein. In this state of the record, the action was submitted and a judgment rendered in accordance with the prayer of the petition, decreeing a sale of the lots separately and then a sale of them as a whole, and directing the commissioner to accept and report the bid from which would be realized the largest sum of money. Before the sale the commissioner caused the lots to be appraised, and the appraisers fixed their value, as a whole, at the sum of \$2,000. A sale was regularly made, and the appellants became the purchasers of all the lots sold together as a whole for the sum of \$1,825. The sale was regularly reported and the appellees, who are the plaintiffs below, filed exceptions to the report of sale, and it is from the judgment sustaining two of the exceptions and setting aside the sale that this appeal is prosecuted.

(1) The court adjudged that the sale be set aside and vacated upon two grounds, one of which was that the judgment directing the sale was void, because the court, at the time the judgment was rendered, did not have jurisdiction of the infants Marie Antoinette and Beulah Weeks, nor of their guardian, by whom the two infants were prosecuting their suit, as there was no competent evidence on file at the rendition of the judgment showing that the guardian had been duly appointed and qualified, or had been authorized by a court in this state to prosecute the action, as provided by § 2041, Kentucky Statutes, *supra*. Of course, if the court which renders a judgment is without jurisdiction to do so, the judgment and all proceedings under it are void. However, pending the exceptions, the appellants, who were the purchasers at the sale, filed in the

case a properly certified copy of the order of the county court in Tennessee, and also of the judgment of the McCracken county court in Kentucky, which authorized Nettie L. Doss, as guardian under the appointment by the Tennessee court, to act as guardian for her wards in this state. These existed and were in full force and effect when the action was instituted. This is an action which can be instituted and prosecuted by an infant, by his guardian, when the guardian is legally authorized to act for him. The authority, without doubt, existed in the instant case. Ky. Stat. § 2041; Civ. Code Prac. § 35, subsec. 4; *Shelby v. Harrison*, 84 Ky. 144; *Bell v. Clark*, 2 Met. (Ky.) 573; *Williams v. Duncan*, 92 Ky. 125, 17 S. W. 330; *Watts v. Wilson*, 93 Ky. 495, 20 S. W. 505; *Woolridge v. Woolridge*, 26 Ky. L. Rep. 97, 80 S. W. 775. In *Shelby v. Harrison*, 84 Ky. 144, which was a suit under § 490, Civil Code, the guardian, who owed his appointment to a court in Illinois, where he and his wards resided, entered their appearance and joined in the prayer for the sale of the lands, and alleged that he had been authorized by the county court in the county where the lands were situated in Kentucky to act as guardian, under his foreign appointment. The purchasers at the sale of the land were the exceptors. This court said: "It is substantially stated in the petition and answer that Carter H. Harrison, the father of the two infant defendants, was, under the laws of the state of Illinois, appointed and qualified as their guardian; and, although the proper record evidence of his appointment and qualification was not filed in this case until after the sale of the property to appellants, still, the fact being established, the defect in their title, which might otherwise have existed, has been to that extent cured, and they have now no right to complain on that account."

In *Henning v. Barringer*, 10 Ky. L. Rep. 674, 10 S. W. 136, the mother was statutory guardian of all her children, except one, and sued, alleging that she was the guardian of all, and also as their next friend, but failed to file the affidavit required by § 37, Civ. Code, which is required to be done where one sues as a next friend. After the sale, but before confirmation of it, she was appointed statutory guardian for the one for whom she had not been theretofore appointed. The purchasers of the land were exceptors to the report of the sale, upon the ground that the above irregularities made the title they would receive defective. The court, after saying that, if all the parties were before the court, the title was good, added: "They were all before the court, because, in this particular state of case, an infant may bring the suit for the sale, and, J.L.R.A.1918C.

under the Code, can sue by his guardian or next friend, and that he sues both by his guardian and next friend would only be the subject of special demurrer, and could afford them no ground for reversal unless it appeared that the rights of the infant had been prejudiced by the proceeding."

Referring to the failure to file the affidavit, as a ground for claiming that the mother had no right to sue, the court said: "The affidavit is to the effect that there is no guardian—no one else to sue; but in this particular, when the fact is made to appear of the existence of the right to sue, before the purchaser acquires the title, it is not a jurisdictional fact, such as would destroy the judgment and render it void, but would be held bad on demurrer at the instance of the parties to the action."

The right of the two infant wards of Nettie L. Doss existed in this action to sue by her as their statutory guardian, when the action was instituted, and hence the infants, as well as the guardian, were before the court upon their petition, and the judgment was not void. When, before the sale was confirmed, the necessary evidences were filed to assure the purchaser a good title under the above-mentioned cases, the court was in error in holding that the judgment for the sale of the lands was void, and an exception based upon that ground should have been overruled. *Webb v. Webb*, 178 Ky. 152, 198 S. W. 736. It should be added that a purchaser at a sale of infant's real estate cannot be required to accept a deed and pay the price until the evidences of the right of the guardian to institute and maintain the suit appear in the record; but where the right of the guardian to maintain the suit existed, and, before the confirmation of the sale, the proper evidences of such right appeared in the record, the purchaser cannot complain. There does not appear to be any good reason why the guardian and his wards should complain of a judgment of the court which they have sought, when the right of the guardian to maintain the action existed, and, before a sale of the property is confirmed, the evidences of such right appear in the record, and the nature of the proceeding is such as to give the court jurisdiction of the parties preceding the rendition of the judgment.

(2) The other ground upon which the circuit court set aside the sale was that the regular judge of the circuit court, who rendered the judgment decreeing a sale of the lots, was a joint purchaser of them at the sale, and for such reason the sale was invalid. It appears from the proceedings that the judge, after he was reported to the court as one of the purchasers, declined to

further preside in the action, and a special judge was agreed upon, by him and his joint purchaser upon one side and the petitioners upon the other, to hear and determine the exceptions to the report of sale, and to make the necessary further orders in the action. For the first time in this jurisdiction the question is presented for determination as to what effect upon the validity of a decretal judicial sale of an infant's real property will be exerted by the fact that the judge who ordered the sale became the purchaser of the property when it was sold by the commissioner of the court, who is the agent of the court in effecting the sale. It is due to say, before entering upon a discussion of this question, that the judge who made the purchase in the instant case is of distinguished character and ability, and there is no ground, as appears from the record, to infer that in rendering the judgment for the sale of the property he was actuated by any motive other than a disinterested performance of a duty, or that he then had any purpose or design to become a purchaser of the property; and though he was the actual bidder at the sale for himself and his coappellant, his conduct did not evince any purpose to use his position as a high judicial officer for a personal advantage, nor did there appear upon his part any disposition to be other than fair toward other bidders and persons who might be bidders. Hence the only question here is, If a judge who, in the court over which he presides, orders the sale of infant's real property by the commissioner of the court, and then becomes the purchaser at the sale, will the sale be valid?

In 24 Cyc. 29, the general rule is declared to be as follows: "No person can become a purchaser at a judicial sale, who has a duty to perform in reference thereto which is inconsistent with the character of purchaser, or who is so connected with the sale that his individual interest as a purchaser might be inconsistent with his duty. Thus the person who sells at a judicial sale may not become the purchaser, either directly or indirectly. Neither can the judge who ordered the sale become the purchaser or be interested as a purchaser."

In 16 R. C. L. p. 107, the rule is declared to be as follows: "A judge of a court having some duty to perform in ordering, conducting, or confirming a judicial sale therein, the performance of which may conflict with the interests acquired by a purchase at the sale, occupies a position of a trustee, and a purchase by him is assailable, as in the case of any other trustee."

The principle upon which the above doctrine is asserted is that the judge who orders, conducts, or confirms a judicial sale

is an agent designated by law, or, in other words, a trustee, for the purpose of effecting the sale of an infant's real estate, and when the general doctrine of agency or trusteeship is applied to him, it renders him incapable of purchasing the property, which is by law confided to his discretion as to whether a sale of it shall be made; and this principle applies to an agent of any kind, because the doctrine is universal that an agent for the sale of his principal's property cannot sell it to himself. Where an agency is created by law for the sale of the property of those who are incapable of giving consent or contracting sales, or where the property is to be sold without the consent of the owner, the agents whom the law designates to perform the duties of making such sales cannot be purchasers at such sales. Trustees who make sales of trust estates cannot be purchasers, except for the benefit of the *cestuis que trustent*, or else for the protection of themselves. Guardians who make sales of their wards' estates, administrators and executors who make sales of decedents' estates, likewise fall under the inhibition of this rule. This rule is founded more upon general principles than upon the circumstances of any particular case, and, as said in *Stapp v. Toler*, 3 Bibb, 450: The doctrine "rests upon this, that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance, as no court is competent to the examination and ascertainment of the truth in much the greater number of cases."

The courts are the agencies provided by law for the sales of real property, the owners of which, from infancy or infirmity of mind, are incapable of making contracts for sales for themselves, and they are also the agents provided by law for enforced sales of property of debtors in satisfaction of claims of creditors. One class of sales is made under judicial decrees by commissioners of the court. Another class of sales is made by executive officers, under writs of execution issued by virtue of judgments rendered by the court. Sheriffs and other executive officers who make sales under execution, as well as those officers who collect the revenues by distraint, cannot become purchasers at the sales made by them. *Ibid.*; *Smith v. Pope*, 5 B. Mon. 337; *Devers v. Dallam*, 6 T. B. Mon. 102. In the instant case, however, the discussion of this question will be confined to sales made under judicial decrees by a commissioner, as the organ of the court, as in the instant case. The courts have sternly refused to allow their commissioners, who are the mere agents of the court, to carry into effect the orders made by the judges of the courts, to become purchasers

at judicial sales made by the commissioners. In *Price v. Thompson*, 84 Ky. 219, 1 S. W. 408, the commissioner of the court made a purchase of lands which the court had ordered to be sold, and in declaring the sale to be void the court used this language: "Officers whose powers are not merely persuasive, but coercive, ex parte, and arbitrary, should be held to strict impartiality, fidelity, and integrity in the discharge of their trusts. All temptation to make private gain [or] to take unfair advantage, directly or indirectly, should be removed. The most effective way to do so is to declare all such transactions conclusively invalid."

In *Bagby v. Eversole*, 6 Ky. L. Rep. 365, it was said: "A commissioner in chancery cannot become a purchaser at his own sales or reap any benefit from a purchase by another, under an agreement that he is to be regarded as a joint purchaser. Such contracts are against public policy."

To the same effect is *Penn v. Rhoades*, 124 Ky. 798, 100 S. W. 288; *Sears v. Collie*, 148 Ky. 444, 148 S. W. 1117; 24 Cyc. 29. All such purchases are at least voidable and will be set aside upon exceptions. It is true that this court has made a distinction between a purchase at a judicial sale by the commissioner who makes the sale, and a purchase by an appraiser of the property at such sale, who may be, in a way, considered one of the agents in effecting a judicial sale. It was held in *Barlow v. McClintock*, 10 Ky. L. Rep. 894, 11 S. W. 29, and in *Ison v. Kinnaird*, 13 Ky. L. Rep. 569, 17 S. W. 633, that an appraiser at a judicial sale might become a purchaser, and the sale would not be vacated, unless it could be shown by evidence that the appraiser intended to become a purchaser before or while engaged in his duties as an appraiser, thus making the validity of the purchase by an appraiser depend upon the fact of his having been actually fraudulent in the performance of his duties, while the rule as applied to a purchase by a commissioner making the sale, directly or indirectly, does not depend for its validity upon the ability of the parties to show any fraudulent conduct of the commissioner, but the sale is held invalid because of the office which he holds, and no investigation is necessary to be made into the circumstances of the sale. In the two cases, supra, the purchase by the appraiser was upheld, as the property in neither instance sold for as much as the appraisement, and the facts also demonstrated that the property had sold for its fair value. The reason for the distinction made between a sale to an appraiser and a sale by the commissioner to himself, or to someone for his benefit, arises, doubtless, from the difference in the duties of the appraiser and commis-

sioner, as the appraisement would not have any effect upon the price of the property if the sale was fairly made, and the only evil influence which an interested and designing appraiser could exert would be to fix the value of the property, by the appraisement, at a sum lower than its value, and thus probably deprive the owner of his equity of redemption; and, besides, the appraiser has no duty to perform in ordering or ratifying the sale, nor in its conduct, except to make the appraisement.

Thus it appears that if, in the instant case, the commissioner, who merely executed the judgment as the agent of the court, had, either directly or indirectly, become the purchaser of the lands, there would be no difficulty in holding, either upon principle or according to precedent, that the exceptions to the sale on account of his purchase should be sustained; but it is contended that, if the judge of the court who made and caused to be entered the judgment under which the commissioner acted should become the purchaser at the sale under the judgment, his purchase should be sustained, when it should be ratified by some other judge than himself. The adjudications in other jurisdictions growing out of the purchase at judicial sales by the judge who made the decree have been instances in which the judge was the purchaser, in person or through some other person, and thereafter confirmed the report of sale, and sales under these circumstances have been uniformly held to be void or voidable. It does not seem that anyone would controvert the conclusion in these cases. Such are the cases of *Hoskinson v. Jaquess*, 54 Ill. App. 59; *Livingston v. Cochran*, 33 Ark. 294; *Tracy v. Colby*, 55 Cal. 67; *Scott v. Calvit*, 2 La. 69. The above cases are decided upon the principle that the judge was a trustee for the parties to the suit, and that when he became a purchaser his interest as purchaser was antagonistic to his duties as an agent or trustee, and when he confirmed the sale that he was, furthermore, sitting as a judge in his own cause, and the agreement is made in the instant case, to distinguish it from cases similar to the ones above cited, that the judge who makes a purchase at a decretal sale, where the order for the sale was rendered by him, and the confirmation of the sale is made by another, thereby does not become a judge in his own cause, and the reason ceases for holding that he cannot become a purchaser. If, however, he should contemplate becoming a purchaser, before or at the time he enters the decree for the sale, it would be impossible for the parties to establish such fact by evidence, and the vice will be as great as when a judge actually sits in his own cause, as the interest with

which he would be invested as a prospective purchaser of the property would be antagonistic to the duties incumbent upon him as a trustee for the owner of the property. In *Livingston v. Cochran*, 33 Ark. 294, the court said: "A probate judge should not be permitted to purchase lands at a sale ordered by himself, for he might be tempted to order a sale to the prejudice of the persons interested in the estate."

In *Walton v. Torrey*, Harr. Ch. (Mich.) 259, a judge made an order for a sale of infant's property by their guardian, and then he became interested as a purchaser through another. The sale was held to be void, and in discussing the ground upon which the decision was rested the court said: "It is placed upon the grounds of disability to purchase, arising from the office which the purchaser held. And the case quoted by Chancellor Kent [*Davoue v. Fanning*, 2 Johns. Ch. 268], on that occasion, extends the disability to guardians, judicial officers, and all other persons who, in any respect, as agents, had a concern in the disposition and sale of the property of others, whether the sale was public or private, judicial or otherwise."

The case referred to was that of *Davoue v. Fanning*, 2 Johns. Ch. 268. In Texas it is held that a purchase made by a judge at a sale ordered by him is void. *Frieburg v. Isbell*, — Tex. Civ. App. —, 25 S. W. 988; *Halsey v. Jones*, — Tex. Civ. App. —, 25 S. W. 697; *Nona Mills Co. v. Wingate*, 51 Tex. Civ. App. 609, 113 S. W. 182. The case of *Thompson v. Buffalo Land & Coal Co.* 77 W. Va. 782, 88 S. E. 1040, does not militate against the views herein expressed. It will be observed that the courts in Texas and Michigan, and probably others, hold that a purchase made by a judge under a decree rendered by him is void, and the same contention was made in the case, *supra*, which was determined in the supreme court of West Virginia. In that case, the purchaser at the sale was the judge who rendered the

judgment for the sale, and the confirmation was by another judge. The sale had been confirmed and deed made. It is held in that jurisdiction that a decision rendered by an interested judge is not void, but only voidable, and that a sale made to a party to a suit who does not move the decree cannot be set aside for an error which is not jurisdictional, and hence the court determined that the sale in that case was not void, but was only voidable; and it would seem that it is the better doctrine,—that a purchase at a judicial sale, made by a person who is incapable of making the purchase, by law, is not void but voidable. 24 Cyc. 30; *Sears v. Collie*, *supra*.

The circuit court, as above stated, is the agency provided by law in which the necessary proceedings must be had and steps taken to effectuate the sale of infant's real estate; the judge of the court is the person designated by law to order such a sale and to have supervision over its conduct and confirmation; it is his duty to see that the interests of the infants are safeguarded and protected; the sales in such cases are made by the court, and its commissioner is its organ for that purpose, and the personnel of the commissioner is designated by the judge of the court; the bids are propositions for a purchase made to the court; the judge is the judicial officer of the court and is invested with the duties of a trustee in relation to the interests of the infants, and although he declines to preside upon the motion to confirm the sale made to him, under a decree rendered by him, he at least has had the ordering of the sale, and is so connected with the sale that his individual interest as a purchaser would be inconsistent with his duties, or might be so, and in such state of case the sale would be declared invalid, without reference to the particular facts and circumstances of the case, upon the application of interested parties.

The judgment is therefore affirmed.

Annotation—Purchase by judge at judicial sale.

The right of an executor or administrator to purchase at his own sale is treated in the note to *Haymond v. Hyer*, L.R.A.1918B, 7.

The authorities establish the proposition that the fact that the judge who ordered and confirmed the sale became the purchaser thereof is sufficient ground for setting the sale aside, without regard to the question of actual fraud. And some of the cases apparently regard such a sale as absolutely void, and not merely voidable. In *BAKER v. WEAKS*, ante, L.R.A.1918C.

152, the position is taken that a sale to the judge who ordered it is voidable, even if it is confirmed by another judge. This view does not seem necessarily in conflict with the cases cited in the note holding that such a sale is not void, and this distinction is pointed out in the *BAKER CASE*.

A sale of land under order of the probate court was held void in *Frieburg v. Isbell* (1894) — Tex. Civ. App. —, 25 S. W. 988, because the judge who ordered the sale became the purchaser

thereat, and confirmed the sale to himself.

And it was held in *Tracy v. Colby* (1880) 55 Cal. 67, that it was ground for setting aside an administrator's sale that the probate judge who ordered and confirmed the sale was a party interested in the purchase of the land by prior agreement made with the one to whom it was nominally sold. And it was held immaterial whether there was actual fraud.

Also in *Walton v. Torrey* (1836) Harr. Ch. (Mich.) 259, it was held that the fact that the probate judge who ordered the sale of land of an infant became a joint purchaser thereof was sufficient ground for setting aside the sale, although there was no evidence of an intention to commit a fraud.

And in *E. E. Forbes Piano Co. v. Hennington* (1910) 98 Miss. 51, 53 So. 777, Ann. Cas. 1913A, 1216, it was held that a sale on execution was invalid because the property was purchased by the justice of the peace who rendered the judgment on which the execution was issued. A statute required that in such a case the execution must be returned to the court rendering the judgment; and the court stated that if a justice were allowed to purchase at an execution sale under a judgment rendered by him, he might be called upon to sit in review upon the validity of the sale in which he was interested as purchaser. And the contention was overruled that the sale should be upheld on the theory that the rule prohibiting purchases by a judge applied only to judicial sales, and that a sale by a justice of the peace was not of this class.

So, where a land certificate issued to minor heirs was sold by their guardian under order of the probate court, the judge who ordered the sale becoming the purchaser and confirming the sale, and receiving a deed therefor, it was held in *Nona Mills Co. v. Wingate* (1908) 51 Tex. Civ. App. 609, 113 S. W. 182, that the sale was void as against parties claiming through the heirs, and that neither the lapse of time nor subsequent proceedings in the matter of guardianship could serve to validate the deed so as to predicate title thereon. In this case the guardian's account containing a report of the sale was approved, about three years after the sale, by another judge, and an ingenious but unsuccessful argument was made that this was in effect a confirmation of the sale; that although the confirmation by the judge who purchased the certificate was void L.R.A.1918C.

by reason of the constitutional provision that "no judge shall sit in any case wherein he may be interested," yet the judge who purchased was not disqualified when the order of sale was made, that such order was valid, and that he did not become disqualified until he became the purchaser at the sale which he had ordered; and that the subsequent approval of the guardian's final account by another judge as in effect a confirmation of the sale rendered it valid.

And where the county judge who ordered and approved a sale of land of an infant devisee procured an attorney to purchase the land in his wife's name, for his use, at a price which he knew was about half the inventory value of the land, and a few days after confirmation of the sale sold the land to a third party for more than twice the purchase price, it was held in *Hoskinson v. Jaquess* (1894) 54 Ill. App. 59, that he should be required to refund to the devisee, with interest and costs, the excess received by him over the purchase price at the sale.

It was held in *Livingston v. Cochran* (1878) 33 Ark. 294, that specific performance of a judicial sale at which the probate judge who ordered and approved the sale and others who entered into an agreement with him to make the purchase became the purchasers could not be enforced by one who, with full knowledge of the facts, purchased their bid. The court said: "A probate judge should not be permitted to purchase lands at a sale ordered by himself, for he might be tempted to order a sale to the prejudice of persons interested in the estate. Moreover, it is his duty to see that the sale has been conducted fairly, and in accordance with law and the order of sale. When the land is sold upon credit, as in this case, it is incumbent on him to see that the sureties of the purchasers are responsible, and finally to confirm the sale if properly made, or to set it aside and order a resale, if illegal or improvidently made. . . . He deposes that he approved the sale as probate judge. But he was not an impartial judge. He was interested in the sale. Had he disapproved the sale, set it aside, and ordered a resale, he and his partners would have been obliged to refund to the appellee the profit which they had made upon their bids. In approving the sale, he also passed upon his own solvency as a surety upon appellee's note for the purchase money, which was indelicate. . . . The conduct of the probate judge in relation to the sale was,

in the eyes of the law, fraudulent, and involved a breach of public trust, and such a sale cannot be enforced for the benefit of appellee, who purchased his bid with the full knowledge of the facts."

However, the fact that at a probate sale the brother of the judge who made the sale became the purchaser, and afterwards conveyed the land to the judge, was held in *Scott v. Calvit* (1830) 2 La. 69, not to show necessarily that the judge was in reality the purchaser, so as to render the sale void.

And the court was of the opinion in *Scott v. Calvit* (La.) supra, that even if the sale was a nullity because the purchase was in reality made by the judge who ordered the sale, such nullity was only relative, and could be taken advantage of only by the heirs or creditors of the succession.

Also in *Woods v. Monroe* (1868) 17 Mich. 238, it was contended that an administrator's sale of land was void on the ground that the property was bid off by a third party for the probate judge, and deeded to the latter before the sale was confirmed. But it was held that the proof did not support this contention, although the deed was dated prior to the confirmation and it was conceded that the judge had paid the purchase money to the administrator; the third party testifying that he purchased the land for himself, and that the sale was confirmed before any conversation on the subject occurred between him and the judge, and that the deed was not executed or delivered until after the confirmation.

Where several distinct tracts of land were sold by an administrator, it was held in *Bacon v. Morrison* (1874) 57 Mo. 68, that the validity of the sale of one of the tracts was not affected by the facts that another of the tracts was purchased by the probate judge, and that the judge approved the report of the sale, covering both tracts, even if the purchase by the judge was void.

The case of *Thompson v. Buffalo Land & Coal Co.* (1916) 77 W. Va. 782, 88 S. E. 1040, is sufficiently set out in *BAKER v. WEAKS*, ante, 152. The rule is laid down in the syllabus by the court in the *Thompson* Case that a judge who has no interest in decreeing a sale of land does not violate the principle that a judge should have no interest in the subject-matter of suits which he decides, by afterwards becoming the purchaser at the sale, provided it is fairly made and is confirmed by another judge.

And the fact that the presiding judge in the court in which the judgment was

rendered purchased an interest in the judgment after issuance of execution thereon, and was interested with the nominal purchaser in the purchase of the land on the sale under the execution, was held in *Cooper v. Galbraith* (1819) 3 Wash. C. C. 546, Fed. Cas. No. 3,193, not necessarily to render the sale void, where the judge who was thus interested did not confirm the sale. The court, in instructing the jury, said: "The lessor of the plaintiff is charged with judicial misconduct and gross fraud in acquiring the title on which this action is founded. Let it be premised that fraud and misconduct of the gross nature imputed to [the judge] are not to be presumed, but the reverse. He who makes these charges must establish them by evidence to your satisfaction. It should also appear that the fraud or misconduct imputed to him was of a nature to injure the defendant, and was applicable to the particular subject which you have to decide. . . . The assertions that a judge cannot legally become interested in an execution which has issued under the authority of the court of which he is a member, or in property sold under such execution, and that by making such acquisitions he is guilty of a breach of his duty as a judge, do not receive the sanction of this court. It may be indiscreet in him to do so; and it may be unbefitting the dignity of his station to speculate in purchases of this sort, unless under very peculiar circumstances. Whenever a question comes before a court, in which the judge knows that he has an interest of any kind, he violates decorum, morality, and law by remaining on the seat of justice and giving an opinion in the case. We should not hesitate in saying that a claim founded upon such a gross breach of duty ought not to receive the countenance of any court. But we do not understand, even from the defendant's counsel, that the plaintiff gave any judicial opinion respecting the sale of this property, or that any question was, at any time, brought before the court, which called for judicial interposition, except on [the date of confirmation], when he very properly retired from the bench."

Where a county judge who was directed by the commissioner's court of the county to sell land of a judgment debtor of the county to pay the judgment, having failed in his attempt to obtain authority to bid for the county or to get others to purchase the land, purchased it at the sale in his own name, in good faith, and thereafter offered to convey it

to the county, which refused the offer and credited the purchase price on an indebtedness of the county to the judge, it was held that the settlement thus made was valid and precluded the county from recovering the land four years there-

after, when the judge had sold part of it and placed improvements on the remainder. *Felts v. Bell County* (1910) 103 Tex. 616, 132 S. W. 123, reversing (1909) — Tex. Civ. App. —, 120 S. W. 1065.

R. E. H.

OKLAHOMA SUPREME COURT.

WHEELER & MOTTER MERCANTILE COMPANY

v.

T. W. KITCHEN et al., Doing Business as Kitchen & Sutton.

(— Okla. —, 169 Pac. 877.)

Assignment for creditors — receipt of check — effect.

Where a debtor assigned all his property to a trustee to be sold and the proceeds paid to his creditors in proportion to the amount of their several claims, and the assignment provided that the amount received by the creditors accepting thereunder would be in full settlement and satisfaction of all claims of said creditors, and where the trustee voluntarily sent to a creditor who had refused to agree to the assignment or participate therein his check for the amount the creditor would have been entitled to had he agreed to become a party thereto, which check the creditor offered to accept as part but not in full payment, if the debtor would consent, but which consent was refused, held, that the mere failure to return the check without presenting same for payment or making other affirmative use thereof did not amount to an acceptance of same as payment in full satisfaction of the debt.

For other cases, see Accord and Satisfaction, in Dig. 1-52 N. S.

(December 11, 1917.)

ERROR to the District Court for Ottawa County to review a judgment in favor of defendants in an action brought to recover the amount of an indebtedness alleged to be due plaintiff by defendants. Reversed.

The facts are stated in the opinion.

Mr. John L. Crank, for plaintiff in error:

Plaintiff is entitled to judgment for \$371.63 and for costs of suit, instead of \$155.08 and having to pay the costs.

A majority of creditors cannot force the minority to accept a small per cent of their claim, against their will and consent.

Reeves Realty Co. v. Brown, 45 Okla. 737, 147 Pac. 318; *Kermeyer v. Newby*, 14 Kan.

Headnote by MILEY, J.

Note. — For failure to return check as affecting question of payment, see annotation following this case, post, 161. L.R.A.1918C.

164; *Mullins v. Brown*, 32 Kan. 312, 4 Pac. 305.

Messrs. Horace B. Durant and Holmes, Yankey, & Holmes, for defendants in error:

The retaining by plaintiff of the check under the circumstances under which it received it was in the nature of an acceptance, the entire transaction being in the nature of an accord and satisfaction.

1 C. J. p. 563; *Day-Luellwitz Lumber Co. v. Serrell*, 177 Ill. App. 30.

Miley, J., delivered the opinion of the court:

This was an action upon an admitted debt amounting to \$371.63 and interest, alleged to be due the plaintiffs in error by defendants in error. The only defense was that the plaintiffs below before suit accepted a check for \$155.08 from a trustee to whom the defendants had assigned their property for the benefit of their creditors under circumstances which made it a discharge of the whole debt. The assignment provided that the amount received by the creditors accepting thereunder would be in full settlement and satisfaction of all claims of said creditors.

The cause was submitted in the court below upon an agreed statement of facts, from which it appears that the defendants were indebted to the plaintiffs in the amount claimed; that the assignment was executed as alleged, that practically all creditors, except the plaintiffs, agreed to the same, but that the plaintiffs refused to participate therein; that the trustee voluntarily sent to plaintiffs a check for \$155.08, being the pro rata share of their claim, which was received by the plaintiffs prior to the commencement of the action, and is still retained by them, but has never been cashed; and that the plaintiffs offered to accept the check and apply the proceeds on the amount of the indebtedness if the defendants would agree, but which they refused to do.

The trial court found that the "plaintiffs, by retaining said check and not returning same to the trustee prior to the trial, had accepted and agreed to the terms of the assignment and composition," and rendered judgment accordingly, to reverse which this

proceeding in error is prosecuted by the plaintiffs below.

It is unnecessary to determine in this action whether the receipt and acceptance by a creditor of a payment by the trustee of a less sum than that due, with knowledge of the condition named in the assignment that such payment should be in full settlement, would operate as a bar to an action for the recovery of the balance from the debtor. Assuming that it would be a bar, the question arises whether the mere failure to return the check amounted to an acceptance of same as such payment. We think not. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check (Rev. Laws 1910, § 4239), and, until presented and paid, or accepted or certified by the bank, is revocable by the drawer, who has the legal control of the moneys to his credit (*First Nat. Bank v. School Dist.* 31 Okla. 139, 39 L.R.A. (N.S.) 655, 120 Pac. 614). A check, without regard to whether that of the debtor or of a third person, does not constitute payment, unless it is agreed that it shall be taken as an absolute payment. 30 Cyc. 1207. While the agreement to so accept a check may be implied from the facts and circumstances of the transaction, to do so in this case would disregard the agreed facts, that the plaintiffs offered to allow the amount to apply on the indebtedness, but not as full satisfaction. If, after refusal to allow application of the amount as part payment, the plaintiffs had cashed the check, had the same certified, or made some affirmative use

of it, there might be force to the contention that they were bound by the conditions attached to the tender thereof. But, in our opinion, more than the mere receipt and retention of the check, with knowledge of the conditions under which it was sent, is essential to constitute acceptance thereof as full payment and satisfaction of the debt. *Groh v. Great Eastern Casualty & Indemnity Co.* 155 Ill. App. 18; *Emerson v. Gerber*, 178 Mass. 130, 59 N. E. 666. Defendants contend that delay for an unreasonable length of time to return the check will amount to an election to accept the same as payment in full settlement. This might be true if, in addition to retaining the check, the plaintiffs had failed to give notice of their refusal so to accept it. Furthermore, there was no evidence of the date the check was received by plaintiffs; hence it cannot be determined that it had been in their possession an unreasonable length of time when suit was commenced.

The right of the trustee to recover of the plaintiffs if he has suffered any injury by reason of their retention of the check, or the liability of the plaintiffs if any loss had been caused by delay in presenting or returning the check (Rev. Laws 1910, § 4236), is another matter.

We hold that the plaintiffs were upon the agreed facts entitled to recover the full amount of the indebtedness, and the judgment is accordingly reversed, and the cause remanded, with directions to enter judgment for plaintiffs for the amount of the debt and interest thereon.

All the Justices concur.

Annotation—Failure to return check as affecting question of payment.

Upon the general question of the payment of draft or bill, see note in 35 L.R.A.(N.S.) 26. As to tender by check, see note in 36 L.R.A.(N.S.) 232.

As to whether or not a check or draft is payment of an insurance premium, see note in L.R.A.1916A, 674.

Ordinarily the mere failure of a creditor to return a check sent him by the debtor in whole or partial payment of the debt does not constitute a payment of the debt, where the creditor does nothing indicating his intention and purpose to receive the check in payment. *WHEELER & M. MERCANTILE CO. v. KITCHEN*, ante, 160 (check was for less than the amount of the debt, but contained an indorsement that it was in full thereof); *Patten v. Lynett* (1909) 133 App. Div. 746, 118 N. Y. Supp. 185 (creditor re-

tained checks, one for a month and the other for six weeks, and then returned them); *Flynn v. Woolsey* (1890) 57 Hun, 590, 32 N. Y. S. R. 953, 10 N. Y. Supp. 875 (check was for less than the amount of debt and contained an indorsement that it was "in full;" check tendered back upon trial of action to recover the debt); *Washington Real Estate Co. v. Wachenheimer Bros.* (1909) — **R. I.** —, 71 Atl. 592 (check for less than amount of debt was tendered as in full thereof).

Where a bank upon which a check was drawn was at the time under assignment and hopelessly insolvent and hence the check was worthless, the retention thereof by the creditor did not indicate an intention to appropriate it as payment for the debt. *Herider v. Phoenix Loan Asso.* (1900) 82 Mo. App. 427.

Where the purchaser of property upon being pressed for payment gave checks upon a bank with the understanding with the seller that he then had no funds in the bank to meet the checks but would have money on deposit to do so in a few days, the seller agreeing to hold the checks for that period of time before presenting them for payment, the transaction did not constitute a payment where before the expiration of this time the purchaser went into bankruptcy and the checks were never paid. *Pfueger v. Lewis Foundry & Mach. Co.* (1904) 67 C. C. A. 102, 134 Fed. 28.

It has been held that it is not necessary that there should be an express agreement that a check should be received as payment; the circumstances and conduct of parties may show an express understanding that the check was taken in satisfaction of the debt, or estop the creditor from claiming the contrary; for example, where a check was sent for the express purpose of payment and was retained under circumstances implying that it was so accepted. *Conde v. Dreisam Gold Min. Co.* (1906) 3 Cal. App. 583, 86 Pac. 825. Even the retention of a check for an unreasonable length of time without returning or offering to return it has been held to constitute payment. *Day-Luellwitz Lumber Co. v. Serrell* (1913) 177 Ill. App. 30. And see *Bloomquist v. Johnson* (1903) 107 Ill. App. 154, holding that where a check sent in full for an account was returned to the debtor, but was subsequently taken back, then retained a few weeks by the creditor, and then again returned to the debtor, its retention unexplained tended to show an acceptance of the check, on the conditions upon which it was tendered. Compare with *Groh v. Great Eastern Casualty & Indemnity Co.* (1910) 155 Ill. App. 18, holding that the insured in an accident policy, by retaining a check containing a receipt in full for the amount due under the policy without indorsing the check, did not thereby accept it as an accord and satisfaction of his claim.

A postdated check received by a creditor and indorsed by him to a third person constitutes payment where it is retained by the latter. *Skolsky v. Harvitt* (1910) 121 N. Y. Supp. 592.

Where a seller took an agent's personal check in part payment for the goods sold to his principal for cash, and agreed to and did hold the check for a short time for the agent's accommodation, it constituted a payment as to the principal. *R.A.1918C.*

pal. Cleveland v. Pearl (1890) 63 Vt. 127, 25 Am. St. Rep. 748, 21 Atl. 261.

Where by a provision of the Code drawers or indorsers of bills of exchange are exonerated if the bill is not presented for payment within a designated time after it has been received, the check of a third person received by a creditor, and not presented for payment within the time designated, constitutes a payment of the debt. *Manitoba Mortg. & Invest. Co. v. Weiss* (1904) 18 S. D. 459, 112 Am. St. Rep. 799, 101 N. W. 37, 5 Ann. Cas. 858.

Retaining a check sent in full for rent up to the time the landlord commenced suit for the rent will estop him to assert that the check was not a tender of the rent due, the tender being kept good by a deposit in court by the tenant. *Donovan v. Maloney* (1912) 3 Boyce (Del.) 453, 84 Atl. 1032.

Of course if the debtor is injured by the negligence of the creditor in failing to present a check for payment, to the extent of the injury the check is generally held to operate as a payment. The cases involving this question, however, are not included herein. As illustrative of such cases see *Mankey v. Hoyt* (1911) 27 S. D. 561, 132 N. W. 230.

And see *Western Pacific Land Co. v. Wilson* (1912) 19 Cal. App. 338, 125 Pac. 1076, holding that where a check sent in full for the balance due on account was retained by the creditor for about a month without expressly refusing it and until after the bank upon which it was drawn closed its doors as insolvent, it was a question for the jury whether or not the giving and retention of the check had the effect of payment.

As to the effect on the drawer's liability of delay in presenting a check, where the drawee remains solvent, see note appended to 38 L.R.A.(N.S.) 255.

A. G. S.

WISCONSIN SUPREME COURT.

HENRY CASSON, Special Admr., etc., of
Max Brickman, Deceased, Respt.,

v.

W. F. SCHOENFELD et al., Appts.

(— Wis. —, 166 N. W. 23.)

Broker — Liability for fraud in inducing purchase of real estate.

1. A broker who negotiates a sale of land

Note. — It is a general rule that contracts of persons mentally incompetent may be avoided by them and the consideration

by false representations to the purchaser as to its quality and value is liable to him in damages for the loss caused by reliance upon such representations.

For other cases, see Brokers, II. a, in Dig. 1-52 N. S.

Principal and agent — liability of agent for fraud of broker.

2. One assisting a broker in effecting a sale of real estate is not liable for the false representations made by the broker to effect the sale if he has no knowledge of them. *For other cases, see Principal and Agent, III. in Dig. 1-52 N. S.*

Broker — effecting sale to person mentally deranged — liability.

3. A broker who effects a sale of land to one who he knows or ought to know is so mentally deranged as to be incompetent to transact such business is liable in damages for the loss suffered by him through the transaction.

For other cases, see Brokers, II. a, in Dig. 1-52 N. S.

Evidence — mental incompetency.

4. Upon the question of the mental capacity of one to whom brokers sell real estate, members of his family may testify as to what they saw in his condition and appearance at and prior to the time of the transaction indicating mental incompetency and derangement.

For other cases, see Evidence, VII. c, in Dig. 1-52 N. S.

Same — testimony of attending physician as to insanity.

5. The physician in charge of the section of the hospital to which an insane person was committed cannot testify, in a proceeding by the heirs of such person against one who sold him real estate to his loss while he was insane, as to the mental condition of the patient, where the statute provides that no person authorized to practise physic or surgery shall be permitted to disclose any information which he may have acquired in attending any patient in a professional character if such information was necessary to enable him to prescribe for such patient as his physician.

For other cases, see Evidence, X. b, in Dig. 1-52 N. S.

Appeal — error — admission of incompetent testimony.

6. The admission of the testimony of the physician in charge of the section of the hospital to which an alleged insane person was committed, in an action to hold one liable in damages for selling real estate to

him to his loss, as to his mental condition, is reversible error where such testimony is practically all that tends to show insanity at the time of the transaction.

For other cases, see Appeal and Error, VII. m, 3, a, (1), in Dig. 1-52 N. S.

Evidence — opinion as to knowledge of insanity.

7. A witness cannot be permitted to testify that in his opinion persons dealing with a person alleged to have been insane should have known that he was insane.

For other cases, see Evidence, VII. m, in Dig. 1-52 N. S.

(January 5, 1918.)

SEPARATE APPEALS by defendants from a judgment of the Circuit Court for Iowa County in favor of plaintiff in an action brought to recover damages alleged to have been sustained by plaintiff's decedent through fraudulent representations of defendants in an exchange of certain properties. Reversed.

Statement by Eschweiler, J.:

One Max Brickman, now deceased, and for whose estate the plaintiff was appointed special administrator after the commencement of the action, conducted a general store at Linden, Wisconsin. The defendant Schoenfeld was a minister at Dodgeville, Wisconsin, dealing to some extent in real estate also, particularly lands in North Dakota, and at the time in question had an option or right to sell a farm of 480 acres in Mercer county in that state, owned by one Stewart. The defendant Elliott was a merchant at Richland Center, Wisconsin, and engaged in selling real estate, and owned another 480 acres in Billings county, North Dakota, about 70 miles from the tract in Mercer county. Elliott met Brickman through one Sullivan, a real estate agent living at Lone Rock, Wisconsin, and a meeting was had between Elliott and Brickman at Linden to discuss a trade of the North Dakota land for Brickman's store. Elliott knew that defendant Schoenfeld had this option on the Mercer county lands at the time. An arrangement was made between Elliott and Brickman whereby Sullivan was to accompany Brickman to inspect lands in Dakota proposed to be traded, and on September 20th, while on the

they have parted with thereunder may be recovered. It is also a general rule that an agent or broker is personally liable in damages to third persons for any actual fraud he commits upon them in acting for his principal. No other case has been found, however, which decides the question passed upon by *CASSON v. SCHOENFELD*, as to whether an agent or broker is liable in damages to a mentally incompetent person for dealing with him in behalf of his principal, if he knew, or ought to have known, of the mental disability of such person.

The authorities which the court cites in support of its decision did not consider the right to damages nor the liability of an agent or broker, but the right to avoid the contract or transaction in question and recover what the incompetent person had parted with.

way, and at Madison, they met defendant Schoenfeld, who was then intending to visit other lands in North Dakota than either of these two tracts. It was then arranged that Schoenfeld should accompany Brickman instead of Sullivan. It was understood as between the two defendants that in case Brickman was not satisfied with the Billings county land belonging to Elliott that the tract in Mercer county might be used for the purpose of an exchange. Schoenfeld and Brickman went to Hebron, North Dakota, and at that place Schoenfeld had one Barker take Brickman to see the land in Mercer county, at a distance from Hebron of about 40 miles, and on this trip Brickman did not see the Billings county land owned by Elliott. Schoenfeld and Brickman were on the train together on their return trip, which was about September 25th.

On the return a written contract was made, which was not produced by either party on the trial, and dated September 26th, purporting to be between Elliott and Brickman for the exchange of the store property at Linden for the farm in Mercer county. There is a dispute between the parties as to whether this contract was written out by Schoenfeld at Madison on the way back, or at the Brickman store in Linden one or two days after such return.

On October 8th the parties again met, and it is uncontradicted that a further written agreement was made out by Schoenfeld and signed by the two, arranging for the taking of an invoice of the stock of goods at the Linden store, and such invoice was taken, and there is no dispute as to the amount thereof, and such amount was the basis for the judgment for damages entered by the court upon the special verdict.

The material parts of the special verdict of thirteen questions were: That, before the transfer was made, Elliott told Brickman that the 480 acres of land Elliott owned in North Dakota were worth at least \$25 an acre, were black loam soil, and free from stone; that such representations induced Brickman to go to North Dakota with defendant Schoenfeld to look at said 480 acres with a view of entering into the trade; that such representations were relied upon and were the inducement to Brickman to exchange his stock of goods for the 480 acres of land and to assume the payment of a \$3,000 mortgage thereon; that defendant Schoenfeld did not make statements concerning the character of the land similar to those the jury found that Elliott made; that Schoenfeld in what he did to promote the trade of the 480 acres of land for Brickman's store was acting as an agent of Elliott and in his own interest. L.R.A.1918C.

By the tenth question of the special verdict the jury found that at the time Brickman entered into the contract of exchange he was mentally deranged; by the eleventh, that when Brickman transferred his stock of goods he was not of sufficient mental ability to know what he was doing and the nature of the act done, and did not have ability to exercise reasonable judgment in regard to such act. (To this finding defendants filed no exception or any motion to set aside the same.) By the twelfth and thirteenth questions they found, respectively, that Elliott and Schoenfeld at the time of the trade knew, or as men of ordinary intelligence, observation, and prudence should have known, that at the time the trade was negotiated and carried out Brickman was mentally deranged, and not of sufficient mental ability to exercise reasonable judgment in regard to such trade.

The jury also found that the representations as to the kind of soil and the value of the land were not true, and that the land was worth but \$15 an acre, and that the market value of the stock of goods was the invoice price.

After motions by both parties the court ordered judgment in favor of the plaintiff for \$5,691 and costs against the two defendants, from which judgment each of the defendants appeals to this court.

Messrs. Jeffris, Mouat, Oestreich, & Avery, for appellants:

On the findings of the jury and the undisputed facts, defendant Schoenfeld is entitled to judgment in his favor.

Brannock v. Bouldin, 26 N. C. (4 Ired. L.) 61; Todd v. Bourke, 27 La. Ann. 385; Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050; Worthington v. Cowles, 112 Mass. 30; Huston v. Tyler, 140 Mo. 252, 36 S. W. 654, 41 S. W. 795; Leuthold v. Fairchild, 35 Minn. 99, 27 N. W. 503, 28 N. W. 218; McLennan v. Minneapolis & N. Elevator Co. 57 Minn. 317, 59 N. W. 628; Larson v. E. A. Straut Co. 23 Pa. Dist. R. 310; Riley v. Bell, 120 Iowa, 618, 95 N. W. 170; Hussey v. Michael, 91 Kan. 542, 138 Pac. 596; White v. Rutherford, — Tex. Civ. App. —, 148 S. W. 598; Hillis Logging Co. v. Mescher, 69 Wash. 454, 125 Pac. 768; McLennan v. Investment Exch. Co. 170 Mo. App. 389, 156 S. W. 730.

The court erred in admitting the testimony of Harry Brickman, son of deceased, because he was incompetent to testify to a transaction with deceased.

Holcomb v. Holcomb, 95 N. Y. 316; Re Eysaman, 113 N. Y. 62, 3 L.R.A. 599, 20 N. E. 613; Re McArthur, 36 N. Y. S. R. 292, 12 N. Y. Supp. 822; Re Goldthorp, 94

Iowa, 336, 58 Am. St. Rep. 400, 62 N. W. 845; *Re Evana*, 114 Iowa, 240, 86 N. W. 283; *Anderson v. Cranmer*, 11 W. Va. 562; *Re Valentine*, 93 Wis. 45, 67 N. W. 12; *Brader v. Brader*, 110 Wis. 423, 85 N. W. 681; *Jackman v. Inman*, 134 Wis. 297, 114 N. W. 489, 137 Wis. 30, 22 L.R.A.(N.S.) 559, 118 N. W. 189; *Holway v. Sanborn*, 145 Wis. 151, 130 N. W. 95; *Schultz v. Culbertson*, 125 Wis. 169, 103 N. W. 234; *Burnham v. Mitchell*, 34 Wis. 117.

The court erred in permitting Dr. W. F. Lorenz to testify to the results of his professional examination of Max Brickman for the reason that the witness was incompetent under § 4075 of the statutes.

Re Hunt, 122 Wis. 460, 100 N. W. 874; *Westover v. Aetna L. Ins. Co.* 99 N. Y. 56, 52 Am. Rep. 1, 1 N. E. 104; *Massachusetts Mut. L. Ins. Co. v. Michigan Asylum*, 178 Mich. 193, 51 L.R.A.(N.S.) 22, 144 N. W. 538, Ann. Cas. 1915D, 146; *Meyer v. Supreme Lodge, K. P.* 178 N. Y. 63, 64 L.R.A. 839, 70 N. E. 111; *Green v. Nebagamain*, 113 Wis. 508, 89 N. W. 520.

The admission of the hypothetical testimony of Drs. Lorenz and Green that the defendants, as men of ordinary intelligence and prudence, should have known that Max Brickman was incompetent to transact business, was error.

Koblenschlag v. State, 23 Tex. App. 264, 4 S. W. 888; 2 Jones, Ev. § 372.

Messrs. Hill & Spohn, for respondent:

The judgment against the defendant Schoenfeld in this action is sustained by the testimony and by the special verdict of the jury.

Burnham v. Mitchell, 34 Wis. 117; *Enck v. Simmons*, 28 Wis. 272; *Helbreg v. Schumann*, 150 Ill. 12, 41 Am. St. Rep. 339, 37 N. E. 99; *Sims v. McLure*, 8 Rich. Eq. 286, 70 Am. Dec. 196; *Crawford v. Scovell*, 94 Pa. 48, 39 Am. Rep. 766; 1 Story, Eq. Jur. § 227.

There was no error in admitting the testimony of Harry Brickman.

Burnham v. Mitchell, 34 Wis. 117; *Page v. Danaher*, 43 Wis. 221; *Wollman v. Ruehle*, 104 Wis. 603, 80 N. W. 919; *Brader v. Brader*, 110 Wis. 423, 85 N. W. 681; *Morgan v. Henry*, 115 Wis. 27, 90 N. W. 1012; *Schultz v. Culbertson*, 125 Wis. 169, 103 N. W. 234; *Boyd v. Gore*, 143 Wis. 531, 128 N. W. 68, 21 Ann. Cas. 1263; *Lawrence v. Vilas*, 20 Wis. 382; *Hanf v. Northwestern Masonic Aid Asso.* 76 Wis. 450, 45 N. W. 315; *Re Valentine*, 93 Wis. 45, 67 N. W. 12; *Anderson v. Laugen*, 122 Wis. 57, 99 N. W. 437; *Klehr's Will*, 147 Wis. 653, 133 N. W. 1105; *Weissman v. Weissman*, 156 Wis. 26, 145 N. W. 230.

Defendants have not shown that the relation of physician and patient existed and

that the doctor was incompetent to testify.

Re Bruendl, 102 Wis. 45, 78 N. W. 169; *People v. Schuyler*, 106 N. Y. 298, 12 N. E. 783.

Even assuming that the relation of physician and patient existed in this case, we submit that the proper construction of the statute is that the personal representatives of the deceased may waive the provision of the statute and put on testimony.

Olson v. Court of Honor, 100 Minn. 117, 8 L.R.A.(N.S.) 521, 117 Am. St. Rep. 676, 110 N. W. 374, 10 Ann. Cas. 622; Jones, Ev. § 761, p. 572.

Even assuming that Dr. Lorenz was incompetent to give testimony, the defendants are not the proper persons to object.

Pierson v. People, 79 N. Y. 424, 35 Am. Rep. 524; *Massachusetts Mut. L. Ins. Co. v. Michigan Asylum*, 178 Mich. 193, 51 L.R.A.(N.S.) 22, 144 N. W. 538, Ann. Cas. 1915D, 146; *Hempton v. State*, 111 Wis. 127, 86 N. W. 596, 12 Am. Crim. Rep. 657.

No error was committed in allowing Dr. Lorenz and Dr. Green to testify, in answer to hypothetical questions, that a person of ordinary intelligence and prudence should have known that the deceased was insane.

Maitland v. Gilbert Paper Co. 97 Wis. 476, 65 Am. St. Rep. 137, 72 N. W. 1124; *Daly v. Milwaukee*, 103 Wis. 588, 79 N. W. 752; Jones, Ev. § 377, p. 926; *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458.

Eschwoller, J., delivered the opinion of the court:

The appellant Schoenfeld contends that there was no evidence to support a judgment against him. The two defendants contend that the court erred in admitting evidence and in assessing the measure of damages, or erred in refusing to grant a new trial.

There is no way of determining from the record herein, including the decision of the trial court in passing upon the motions made after verdict, whether the judgment is entered against the defendants on the theory that the plaintiff was entitled to recover on the ground of false representations, which may be considered as one cause of action, or because the stock of goods was obtained from Brickman by the defendants at a time when Brickman was mentally incompetent to transact the business, and when such condition was known or ought to have been known by the defendants and they took advantage of such condition, which may be considered as a second cause of action. It would appear from the respondent's brief on appeal that he appar-

ently relies in support of this judgment on the theory of such second cause of action.

Upon the face of the verdict as it stands a judgment could be properly entered against the defendant Elliott on the ground that by reason of his false representations as to the character and the value of the land conveyed to Brickman the latter was induced, and to his damage, to transfer his stock of goods to Elliott. The jury, however, have expressly acquitted the defendant Schoenfeld of making representations similar to those which they find the defendant Elliott made concerning the land. This would necessarily prevent entering a judgment against the defendant Schoenfeld on the ground of any false representations inducing the contract, unless such a judgment could be supported by the finding that what Schoenfeld did in inducing the trade by Brickman was done in his own interest and as agent for Elliott. There is no finding, however, and no expression by the trial court to the effect, that he found that Schoenfeld knew that Elliott had made any representations to Brickman concerning this land, and manifestly, unless he did know that fraud had been practised by Elliott in representing this land to Brickman, the mere fact that he acted as agent in such transfer would not be sufficient to make him liable with Elliott on the ground of false representations. There is testimony to the effect—by members of Brickman's family—that Schoenfeld was present at one or more interviews between Brickman and Elliott before the day on which the contract to make an inventory of the goods was made on October 8th, and that on one or more of such prior visits Schoenfeld also made similar representations as to the value and nature of the 480-acre tract. But both Schoenfeld and Elliott deny that Schoenfeld was present prior to October 8th at any interview between Elliott and Brickman at Linden, where the members of the family claim such representations were made by Schoenfeld. The jury have expressly found in their answer to the fourth question that the testimony of the defendants was true as to there being no representations made by Schoenfeld. This, therefore, fairly construed, should be held a determination in defendant Schoenfeld's favor of the question as to whether Schoenfeld was present at those prior meetings and therefore chargeable with knowing of Elliott's representations, because such actual presence there before October 8th is necessarily involved, as the testimony stands herein, in the determination of that fourth question of the verdict. There is no other view of the evidence in the record which would support a finding, or warrant this court in assum-

ing under § 2858m a finding, that Schoenfeld knew, or ought to have known, that Brickman was induced to make this trade by virtue of any false representations made by Elliott concerning the land, and consequently there is no support for upholding the judgment against Schoenfeld on the basis that he is liable as for false representations.

If, however, defendants knew, or ought to have known, that at the time of the exchange by which Elliott got the stock of goods, in October, 1910, from Max Brickman, that Brickman was so mentally deranged as to be incompetent to transact such business, they could nevertheless be held to have participated in a fraud upon him by taking advantage of that condition, and for that they could be required to respond in damages. *Encking v. Simmons*, 28 Wis. 272; *Halley v. Troester*, 72 Mo. 73; *Creekmore v. Baxter*, 121 N. C. 81, 27 S. E. 994; *Crawford v. Scovell*, 94 Pa. 48, 39 Am. Rep. 766; 12 R. C. L. p. 685; 22 Cyc. 1205.

If there was no material error committed on the trial amounting to substantial prejudice to the rights of the defendants in the admission or rejection of testimony, it would be our duty to sustain this judgment on what might be considered this second cause of action for such fraud perpetrated by defendants in so taking advantage of Brickman's incompetency to their benefit or his harm. The defendants, however, now insist on three grounds, each claimed to be a substantial prejudicial error occurring on the trial: First, the admission by the court of the testimony of the widow and children of Max Brickman as to his conduct and appearance, indicating mental incompetency and derangement at and prior to the time of the exchange of property; and second, the admission, over objection, of the testimony of Dr. Lorenz of the State Hospital for the Insane at Mendota, to which institution Brickman was committed November 17th following the exchange of property; and thirdly, as to a hypothetical question propounded to and permitted to be answered by Dr. Lorenz and Dr. Green as medical experts as to whether, under the facts stated in such question, purporting to relate to the condition of Brickman, a person of average intelligence and prudence situated towards him as were Elliott and Schoenfeld should have known that Brickman was not in a mental condition to understand business or business dealings.

On the first question thus raised, we are satisfied that the ruling of the trial court in admitting the evidence of the members of the family of the deceased was proper and cannot be disturbed. They were per-

mitted to testify as to what they saw in the conduct of Brickman prior to this exchange, and from such conduct the inference might well have been drawn that he was deranged. Such testimony did not either call for transactions between such witnesses and the deceased which could be excluded under § 4069, nor did they call for testimony that violated the provisions of § 4072, which prevents either husband or wife disclosing confidential communications.

The matters of observation thus called for were substantially all of such a nature as were wholly unparticipated in and uninfluenced by them, and were not, as to the wife, anything in the nature of a confidential communication, and such evidence was properly admitted under the rule in *Schultz v. Culbertson*, 125 Wis. 169, 172, 103 N. W. 234; *Burnham v. Mitchell*, 94 Wis. 117, 133.

It should be noted, however, that such testimony, although admissible as to the question of Max Brickman's mental competency, would not necessarily be admissible on the question whether defendants knew or ought to have known of any incompetent condition that might be found to exist, without proof that the facts so testified to were either known to defendants or were of such a nature that they must have been known to them.

The second question, as to whether Dr. Lorenz, the examining physician of the male patients who were committed to the State Hospital for the Insane at Mendota, might properly be permitted to testify as to results of his personal examination of Max Brickman at the time of his commitment, involves the consideration of § 4075, Wis. Stat., which reads as follows: "No person duly authorized to practise physic or surgery shall be permitted to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician or to do any act for him as a surgeon; but as a witness in his own behalf, he may disclose such information in any civil action brought by such patient or his legal representatives to recover damages for malpractice in such professional attendance, and also in any criminal prosecution for such malpractice, whenever such patient or his legal representatives shall have first given evidence relating to such information."

The language is broad and absolute. Such a statute has been declared to be for the benefit of the patient, that matters learned in the confidential and sacred relationship that exists between patient and physician shall not be revealed to any third person except with the express consent or L.R.A.1918C.

waiver of the patient himself. It is to protect him, or his memory, from possible shame and disgrace. *Boyle v. Northwestern Mut. Relief Asso.* 95 Wis. 312, 322, 70 N. W. 351; *Re Hunt*, 122 Wis. 460-467, 100 N. W. 874; *Davis v. Supreme Lodge, K. H.* 165 N. Y. 159, 163, 58 N. E. 891.

It is essential, nevertheless, that the examination and information declared to be protected from disclosure shall be obtained in order that the physician may treat, cure, or alleviate the condition of the patient. And where the examination is solely for the purpose of determining the question of an individual's mental competency with a view to an application for her release from guardianship, and where it is beyond question not for the purpose of curing or helping her, the ban of the statute does not exist. *Re Bruendl*, 102 Wis. 48, 78 N. W. 169, so much relied upon in this case by plaintiff. Where the physician was permitted to testify as to the result of his examination when it was solely for the purpose of determining whether or not such person had a venereal disease, in order to permit testimony in respect to that to be given in a criminal case in which the person so examined was claimed to have been assaulted by the defendant, and where clearly the examination was not for the purpose of prescribing, it was properly received. *James v. State*, 124 Wis. 130, 102 N. W. 320.

Under the Code of the state of New York, § 834, which is substantially the same as our § 4075, except that the word "allowed" is used instead of the word "permitted," a physician who attended a person who had taken poison, although not called for by such person, and indeed ordered away by the patient, who refused his services, yet in fact did nevertheless attend and treat the patient, and learned of the fact of the taking of the poison, was not allowed to testify. *Meyer v. Supreme Lodge, K. P.* 178 N. Y. 63, 64 L.R.A. 839, 70 N. E. 111.

By § 561q, Wis. Stat., the duties of superintendent of such a hospital for the insane are specified, and among the duties prescribed it is provided that such superintendent shall be responsible for the care, health, and treatment of the inmates; shall cause to be kept a daily record of each inmate, and report monthly to the State Board of Control the name of each patient during the preceding month, with a brief statement of his or her mental and physical condition and form of insanity. Dr. Lorenz, the one examined, although not the superintendent, was in charge of the male patients of the institution, and all examinations of such patients were made by him, and a report was made by him, or under his direction, of such examination. Over ob-

jection he was permitted to disclose that from the physical examination and the test made of the spinal fluid of Brickman he ascertained that Brickman was suffering from a disease of the brain induced by a serious affliction, and that must have been of ten to twelve years' standing; that from the nature of such disease and the condition he then found him in Brickman must have been deranged and incompetent to transact business affairs for a year at least prior to the transaction in question.

We see no reason why § 4075 does not squarely meet this situation and exclude the testimony of one situated as was Dr. Lorenz and prohibit him from giving such information as he did, being the result of his examination, just as well as though he had been called in as a private physician to treat Brickman. It was, as he said on his examination, part of his duty to classify the inmates, study their insanity, the cause of it, and their condition, to determine whether they are treatable and recoverable and what kind of treatment they are to receive, if any. Even were there no such testimony here, it is manifest that the commitment of individuals to such institution is for the purpose of treatment and care, and the present high standard of such institutions could not be upheld and maintained if the sole purpose and object of them was to merely detain such patients, and not give them care and treatment tending to alleviate, if possible, their unfortunate condition. Almost this precise question has been passed upon by this court in the case of *Mehegan v. Faber*, 158 Wis. 645, 149 N. W. 397, where the records kept by the superintendent of the Wisconsin Tuberculosis Sanitarium were held to be properly excluded under this § 4075, Stat. The same rule is recognized in *Massachusetts Mut. L. Ins. Co. v. Michigan Asylum*, 178 Mich. 193, 51 L.R.A.(N.S.) 22, 144 N. W. 538, Ann. Cas. 1915D, 146; *Smart v. Kansas City*, 208 Mo. 162, 14 L.R.A.(N.S.) 565, 123 Am. St. Rep. 415, 105 S. W. 709, 13 Ann. Cas. 932; *Jones, Ev.* §§ 759, 760a.

We therefore hold that the public official who as a physician or surgeon learns in that capacity information concerning a patient committed to his care, or to him for examination in order that such physician or surgeon may be able to determine what treatment, if any, should be had, or whether any treatment is possible tending to cure, benefit, or alleviate that patient, shall not be permitted to give such information to anyone unless by consent of the patient.

That a public record is required to be kept by such physician or institution does not affect the rule. A legislative provision for the filing of certain documents as public L.R.A.1918C.

reports by physicians is not a legislative declaration that the secrecy of § 4075 as to physicians has been relaxed. *Cohodes v. Menominee & M. Light & Traction Co.* 149 Wis. 313, 135 N. W. 879.

We are urged that the rule in the case of *Olson v. Court of Honor*, 100 Minn. 117, 8 L.R.A.(N.S.) 521, 117 Am. St. Rep. 676, 110 N. W. 374, 10 Ann. Cas. 622, to the effect that the privilege of such a statute may be waived by the representatives of the deceased patient, as well as by the patient himself, should be now adopted instead of the one so long held by this court, viz., that such a provision can be waived by the patient only, and not by anybody after his death. *Re Hunt*, 122 Wis. 460-466, 100 N. W. 874; *Green v. Nebagamain*, 113 Wis. 508, 89 N. W. 520. But a rule so long established is more properly a subject of legislative, and not judicial, modification.

That such evidence so improperly received was vitally material and important in this case is very manifest. It necessarily must have had important weight and bearing with the jury in determining the questions herein, not only as to the nature and extent of Max Brickman's mental incompetency and whether or not, if such existed, it should have been detected by defendants, but also the question as to whether Brickman relied upon any representations that might be found to have been made, and so, therefore, it must be held to have been a prejudicial error as against both defendants as to either of the two theories upon which a cause of action may be predicated.

The great weight that was given to this testimony can also be seen from the statement made by the trial court in his rulings on the motions after verdict, to the effect that, even if the testimony of members of the family as to the condition of Max Brickman were disregarded, it was to the court beyond dispute, from the testimony of Dr. Lorenz, that Brickman was the victim of such brain disease, the result of the trouble with which he had been afflicted for several years, and was therefore not of sufficient mental capacity to make the trade.

The plaintiff offered in evidence,—and it was received by consent of counsel for defendants,—the proceedings at the commitment of Brickman to the hospital in the county court on November 17 following the exchange of October 11, 1910. Although this was the nature of the testimony of the condition existing at a period subsequent to the one material to the issues, yet it was before the jury, and it appeared that the information which the physicians in that examination received was obtained by them from Mrs. Brickman, and it appears therefrom that the symptoms of the disease were first

manifest within two or three weeks prior to November 17th, bringing it subsequent to the time of the transfer; that such was the first attack; that the cause of the attack was from his thinking he was defrauded in the sale of the store; that his physical condition was good; that he had not manifested anything peculiar in temper, habits, or disposition, or pursuits, before the accession of the disease, and, so far as the physicians can learn, had never had any sign of serious disease. It should be noticed also from the records that it appears that no suggestion of the condition of brain disease or serious affliction was made from any of the other witnesses until Dr. Lorenz's testimony had been admitted.

Furthermore, the recital of such facts so testified to by Dr. Lorenz was embodied in both of the hypothetical questions put to him and to Dr. Green as to whether or not in their judgment such person was incompetent, and so incompetent that third persons should have recognized that fact.

In view of the sharp conflict of evidence on the essential questions in the case, we are constrained to hold that the admission of the testimony of Dr. Lorenz as to the result of his examination of Max Brickman was such an error that it worked a substantial prejudice to the defendants, and that it must result in a reversal of the judgment.

On the third point urged; viz., error in allowing the other hypothetical question put to Dr. Lorenz and Dr. Green, asking, in effect, whether in their judgment persons of ordinary intelligence and prudence should have known, situated as the defendants were towards Brickman, that Brickman had not sufficient mental ability to know what he was doing and the nature and quality of the act and the consequences thereof, the answer in each instance being that the witness thought defendants should have known, —this is no more and no less than asking the witness whether any person should have known from the acts and conditions of Brickman as recited in the question that he was incompetent to transact business. This is not such a form of question as calls for expert testimony; for it is permitting the witness to do just what the jury is expected and required to do, and is not properly a question for what is generally called expert testimony.

If a person of ordinary intelligence and prudence could have detected from the condition of Brickman his mental incompetency, then it was not a situation that required expert knowledge to inform the jury; for what the average man can detect for himself is clearly within the province of the jury. As it was held in *Knoll v. State*, 55 Wis. 249, 42 Am. Rep. 704, 12 N. W. 369, L.R.A.1918C.

it was erroneous to admit the testimony of an expert testifying as to a comparison by him made, which he said any person could have made as well as himself. The same doctrine is recognized as correct in *Lomoe v. Superior Water, Light, & P. Co.* 147 Wis. 5, 11, 132 N. W. 623; and in *Mellor v. Utica*, 48 Wis. 457, 4 N. W. 655; *Koblenschlag v. State*, 23 Tex. App. 264, 4 S. W. 888.

It was from the very form of the question not a matter which partakes of the nature of a science, so as to require any course of previous habit or study in order to permit one to be better fitted to answer the question than the ordinary individual is. What impression a given state of facts would have upon the ordinary individual can be as well told by the jurors themselves as by any individual in the witness box, and such a question therefore was not the subject of expert testimony. *State v. Brooks*, — Iowa, —, 165 N. W. 194; *Dougherty v. Milliken*, 163 N. Y. 527, 79 Am. St. Rep. 608, 57 N. E. 757; *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63; *Wight Fireproofing Co. v. Poczekai*, 130 Ill. 139, 22 N. E. 543; 17 Cyc. 45.

The objection, therefore, to this form of question should have been sustained. If the other evidence before the jury had been properly received, we would not have felt inclined to reverse the case on this error alone.

The defendants also raise the question as to the measure of damages as found by the jury in the first question of the special verdict; but we are satisfied that there is evidence to support such finding, and it ought not be disturbed.

The judgment of the Circuit Court is reversed, and a new trial ordered.

LOUISIANA SUPREME COURT.

MAGLOIRE LOUVIERE

v.

SOUTHWESTERN TRACTION & POWER COMPANY, Appt.

(— La. —, 77 So. 293.)

Carrier — standing on platform.

It is contributory negligence for a passenger on a fast-moving suburban train, while being operated outside of a municipality, to stand on the platform, particularly after being warned not to do so; and he cannot recover damages for injuries result-

Headnote by SOMMERVILLE, J.

Note. — For riding on platform of railroad car as negligence, see notes to *Norvell v. Kanawha & M. R. Co.* 29 L.R.A. (N.S.)

ing to him from such negligence, although there is mutual negligence on the part of the employees of the car company.
For other cases, see *Carriers*, II. g, 2, b, in Dig. 1-52 N. S.

(O'Niell and Leche, JJ., dissent.)

(November 26, 1917.)

APPEAL by defendant from a judgment of the Judicial District Court for the Parish of Iberia in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Foster, Milling, Saal, & Milling, for appellant:

There was no negligence on the part of defendant.

6 Cyc. 628; 4 Elliott, Railroads, 2d ed. § 1585, p. 393; 2 Hutchinson, Carr. 3d ed. § 903, p. 1010; *Clerc v. Morgan's L. & T. R. & S. S. Co.* 107 La. 376, 90 Am. St. Rep. 319, 31 So. 886; *Black v. Carrollton R. Co.* 10 La. Ann. 33, 63 Am. Dec. 586; *Hanson v. Mansfield R. & Transp. Co.* 38 La. Ann. 111, 58 Am. Rep. 162; *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. ed. 115, 7 Am. Neg. Cas. 297; 3 Elliott, Railroads, § 1585; *Hanrahan v. Brooklyn Elev. R. Co.* 17 App. Div. 588, 45 N. Y. Supp. 474, 3 Am. Neg. Rep. 581.

If Louviere's negligence contributed to the injury, so that without his concurring fault it would not have happened, he cannot recover for the injury.

Sibley v. New Orleans City & L. R. Co. 49 La. Ann. 589, 21 So. 850, 2 Am. Neg. Rep. 558; *White v. Vicksburg, S. & P. R. Co.* 42 La. Ann. 990, 8 So. 475; *Woods v. Jones*, 34 La. Ann. 1086.

The fact that plaintiff stood on the rear platform when there was room inside of the car was negligence which bars recovery.

Sibley v. New Orleans City & L. R. Co. and *Woods v. Jones*, supra; *Bemiss v. New Orleans City & L. R. Co.* 47 La. Ann. 1671, 18 So. 711; *Oliver v. Louisville & N. R. Co.* 43 La. Ann. 804, 9 So. 431, 3 Am. Neg. Cas. 566; *Blackstone Mfg. Co. v. Blackstone*, 200 Mass. 82, 18 L.R.A.(N.S.) 755, 85 N. E. 880; *Worthington v. Central Vermont R. Co.* 64 Vt. 107, 15 L.R.A. 326, 23 Atl. 590, 10 Am. Neg. Cas. 331; *Fisher v. West Virginia & P. R. Co.* 42 W. Va. 183, 33 L.R.A. 69, 24 S. E. 570, 10 Am. Neg. Cas. 459; *Baltimore & P. R. Co. v. Jones*, 95 U. S.

443, 24 L. ed. 507; *Harbison v. Metropolitan R. Co.* 9 App. D. C. 60, 9 Am. Neg. Cas. 172.

One cannot excuse himself by saying that he did not think he was in danger, nor can he be excused because some act of defendant of which he was ignorant made the danger greater than he supposed it to be.

Erie R. Co. v. Kane, 55 C. C. A. 129, 118 Fed. 223; *Gilbert v. Burlington, C. R. & N. R. Co.* 63 C. C. A. 27, 128 Fed. 529.

Plaintiff's contributory negligence was the proximate cause of the injury.

Chattanooga Light & P. Co. v. Hodges, 109 Tenn. 331, 60 L.R.A. 459, 97 Am. St. Rep. 844, 70 S. W. 616.

Messrs. Louis P. Bryant and L. P. Bryant, Jr., for appellee:

In an action for damages by a passenger against a common carrier the burden of proof is upon the carrier to show why the contract of safe carriage was not fulfilled.

Le Blanc v. Sweet, 107 La. 355, 90 Am. St. Rep. 303, 31 So. 766; *Reems v. New Orleans G. N. R. Co.* 126 La. 511, 52 So. 681; *Spurlock v. Shreveport Traction Co.* 118 La. 4, 42 So. 575; *Patton v. Pickles*, 50 La. Ann. 865, 24 So. 290.

It avails the defendant company nothing to show that the collision was due to a slippery condition of its tracks, as it was its duty to know and guard against such a condition.

Indiana Union Traction Co. v. Ohme, 45 Ind. App. 632, 89 N. E. 507; *Chicago City R. Co. v. Casey*, 139 Ill. App. 655, affirmed in 237 Ill. 140, 86 N. E. 606; *Fuhry v. Chicago City R. Co.* 144 Ill. App. 521.

Louviere's presence upon the platform will not bar recovery, as this fact did not constitute the proximate cause of the collision as the result of which his injuries were sustained.

Jackson v. Natchez & W. R. Co. 114 La. 981, 108 Am. St. Rep. 366, 38 So. 701; *McMahon v. New Orleans R. & Light Co.* 127 La. 544, 32 L.R.A.(N.S.) 346, 53 So. 857; *Landix v. New Orleans R. & Light Co.* 140 La. 529, 73 So. 668.

In view of the defendant company conductor's knowledge of Louviere's presence on the platform, if this position was a dangerous one it was the said conductor's imperative duty to remove Louviere from such position.

Jackson v. Natchez & W. R. Co. supra.

325, and *Rose v. Northern P. R. Co.* L.R.A. 1915B, 166; and for riding on platform or running board of street car as negligence, see notes to *Harding v. Philadelphia Rapid Transit Co.* 10 L.R.A.(N.S.) 352; *Capital L.R.A.* 1918C.

Traction Co. v. Brown, 12 L.R.A.(N.S.) 831; *Lobner v. Metropolitan Street R. Co.* 21 L.R.A.(N.S.) 972; and *Capital Trust Co. v. Central Kentucky Traction Co.* 49 L.R.A.(N.S.) 135.

Sommerville, J., delivered the opinion of the court:

Plaintiff sued defendant for \$10,000 damages for and on behalf of his minor son, August Louviere, for personal injuries suffered by the latter while traveling as a passenger on one of defendant's electric cars, which was being operated over a suburban track running between New Iberia and Jeanerette.

Plaintiff also sued for \$5,000 damages on his own behalf, for the mental anguish suffered by him because of said accident; but he appears to have abandoned the claim.

There was a verdict for \$1,200 in favor of plaintiff and against defendant, and a judgment for that amount in favor of plaintiff for the use and benefit of his minor son.

Defendant appeals; and plaintiff asks for an amendment of the judgment by increasing it to \$10,000, for the benefit and use of his minor son.

Plaintiff alleges, and defendant admits, that August Louviere, the minor son of plaintiff, was a passenger standing on the rear platform of one of defendant's cars, and that another car following ran into the rear of the forward car in such manner that the forward platform of the rear car overlapped the platform on which Louviere was standing, and that a leg of Louviere was caught and crushed between the two platforms.

Plaintiff alleges negligence on the part of defendant company in not having properly manned and equipped the rear car which collided with the forward car, and in negligently operating it.

Defendant alleges that the accident was unavoidable, and that August Louviere was guilty of contributory negligence, and it denies liability.

If defendant was not negligent plaintiff cannot recover, for liability of a carrier of passengers for damages "is bottomed on negligence."

But the facts of the case, as disclosed by the record, render it unnecessary to consider the alleged negligence of the defendant, as they show that plaintiff's son, a young man about twenty years of age, was culpably negligent at the time of his injury and of the alleged negligence of defendant, and that the injury to him would not have happened except for negligence on his part.

Plaintiff's son, together with several young friends, boarded a trailer attached to a trolley car of defendant. They took positions and stood on the rear platform of the trailer, when there were many vacant seats in the cars. There was a printed warning on the car to go inside, and not to stand on the platform. The conductor several times

told plaintiff's son and others to "come into the car;" and when the car in the rear was getting close to the trailer the conductor halloosed to those on the rear platform to come into the car. The conductor saw the danger of a collision, and "got back in the car, because there was no chance of Morris [the motorman of the rear car] stopping his car." Regardless of these warnings, Louviere persisted in remaining in the dangerous position he had taken, laughing and flagging down, with his hat in his hand, the motorman of the fast-coming and uncontrolled car. His uncle, a passenger on the rear car, went to the front platform of that car, and halloosed and waved his hat to those on the rear platform of the forward car to get off the platform. His warnings were unheeded by Louviere. The other boys on the platform finally appreciated their dangerous position, and went into the car or jumped off the platform, as the forward car had made a stop, and was moving very slowly at the time. There was great confusion on and in the cars at the time, because all saw and knew that the rear car was not under control of the motorman, and that there would be a collision. Louviere retained his position, not realizing his danger, he says, until it was too late. When he turned to go into the car the collision took place; he fell down; and the platform of the rear car was forced over the platform of the forward car, and his leg was crushed between the two platforms. No one was injured except Louviere, and had he been inside of the car, where he should have been, and where he was told to go by the conductor and others, he would have escaped injury also. He undoubtedly contributed towards the injury which befell him; it would not have happened to him except because of his negligence; and he cannot recover damages from the defendant.

Louviere says in his testimony, had he known the collision "was going to happen, I would have gotten off," or "walked inside." Others knew the collision would happen, and he should have known it. Others got off the platform in time, and he should have done so. He admitted: "If I had not been on the platform, it wouldn't have hurt me. . . . I didn't think they would bump."

The law is that "a passenger must exercise ordinary care, and such care only, for his own safety; that is, such care as an ordinarily prudent man would exercise for his safety and security under the same circumstances." 10 C. J. p. 1096.

"One may be guilty of contributory negligence in failing to anticipate and act upon the contingency of another's negli-

gence." *Erie R. Co. v. Kane*, 55 C. C. A. 129, 118 Fed. 223.

"One who voluntarily and unnecessarily exposes himself to a known and great danger, and thereby directly contributes to his injury, cannot escape the fatal effect of his contributory negligence because the negligence of the defendant which concurred to produce the injury, and of which he was ignorant, [and which] made the danger greater than he supposed it to be." *Gilbert v. Burlington, C. R. & N. R. Co.* 63 C. C. A. 27, 128 Fed. 529.

"When an injury would not have happened, except for the culpable negligence of the party injured, concurring with that of the other party, no action can be maintained." *Woods v. Jones*, 34 La. Ann. 1086.

"If one's negligence proximately contributed to the injury, so that without his concurring fault it would not have happened, he cannot recover for the injury." *Sibley v. New Orleans City & L. R. Co.* 49 La. Ann. 589, 21 So. 850.

It is said in the above case that "the plaintiff seeks to support the position that he was ordinarily prudent in riding upon the steps by quoting from *Beach*, on Contributory Negligence, § 149: 'It is not negligence per se for a passenger to ride upon the platform or steps of a railway car.' In the section from which the quotation is made the text-writer says: 'But, if there is standing room within the car, it is negligence to occupy the platform.' It appears that the cars were crowded, and that there were no vacant seats. It was not made evident by preponderance of proof that there was no standing room. In *Chicago & N. W. R. Co. v. Carroll*, 5 Ill. App. 201, it was held: 'So long as there is standing room in the cars, he must ride there.' There is authority in support of the position that upon this point the burden of proof was with the plaintiff. 'He must prove that he was there from necessity, and not from choice.' *Camden & A. R. Co. v. Hoosey*, 99 Pa. 492, 44 Am. Rep. 123."

The concurring negligence of plaintiff, contributory negligence, is defined by the court in the case of *White v. Vicksburg, S. & P. R. Co.* 42 La. Ann. 990, 8 So. 475, as the "negligence but for which, notwithstanding defendant's negligence, the injury would have been avoided."

In *Woods v. Jones*, supra, the victim of the accident was riding on a train composed of an engine, an empty coal car, and a caboose in which seats had been placed for trainmen and passengers. He took a seat in the coal car instead of in the caboose. The train ran off the track, and he was thrown from the coal car and killed. No one in the caboose was injured. The court L.R.A.1018C.

says: "It is clear that, had *Woods* taken a seat in the caboose, as ordinary foresight prescribed, and the example of all others dictated, the deplorable occurrence would not have made him the victim of his audacity."

In the case of *Bemiss v. New Orleans City & L. R. Co.* 47 La. Ann. 1671, 18 So. 711, the court held: "It is negligence to go from one car to another while the train is in motion. If a passenger on a train in motion attempts to go from one car to another and is thrown from the platform by the sudden jerk of the train, the defendant corporation is not responsible."

In the case of *Oliver v. Louisville & N. R. Co.* 43 La. Ann. 804, 9 So. 431, 3 Am. Neg. Cas. 566, it was held: "A party voluntarily boarding a crowded train and taking his place on the platform of a car, without complaint, or effort to obtain a seat or other better accommodation, cannot assign the overcrowding of the train as negligence in the railroad company."

"A passenger who voluntarily and unnecessarily places himself in a position of danger cannot hold the railway responsible for injuries of which his position is the efficient cause; as, for instance, his riding on the platform of a moving car, contrary to the request of the conductor." *Fisher v. West Virginia & P. R. Co.* 42 W. Va. 183, 33 L.R.A. 69, 24 S. E. 570, 10 Am. Neg. Cas. 459.

The Supreme Court of the United States, in the case of *Baltimore & P. R. Co. v. Jones*, 95 U. S. 443, 24 L. ed. 507, 7 Am. Neg. Cas. 340, held, in a case where the plaintiff was riding upon the pilot of an engine when a caboose had been provided for passengers, that there was not liability, saying: "The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter, the former could not arise. He and another who rode beside him were the only persons hurt upon the train. All those in the box car, where he should have been, were uninjured. He would have escaped also if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit. The case is thus clearly brought within the second of the predicates of mutual negligence we have laid down. *Hickey v. Boston & L. R. Co.* 14 Allen, 429, 9 Am. Neg. Cas. 454; *Todd v. Old Colony & F. River R. Co.* 3 Allen, 18, 80 Am. Dec. 49; s. c. 7 Allen 207, 83 Am. Dec. 679, 9 Am. Neg. Cas. 449; *Gavett v. Manchester & L. R. Co.* 16 Gray, 501, 77 Am. Dec. 422, 3 Am. Neg. Cas. 742; *Lucas v. New Bedford & T. R. Co.* 6 Gray,

64, 66 Am. Dec. 406, 3 Am. Neg. Cas. 735; Ward v. Central Park, N. & E. River R. Co. 11 Abb. Pr. N. S. 411; Galena & C. Union R. Co. v. Yarwood, 15 Ill. 468, 9 Am. Neg. Cas. 208; Doggett v. Illinois C. R. Co. 34 Iowa, 284."

The accident to Louviere occurred on a fast-moving suburban car, and prudence required that he should have observed the ordinary rules concerning safety on fast-moving trains. He should not have stood on the platform, and thus have violated one of the rules of the defendant company, and have unnecessarily exposed himself to the injury which befell him.

There were many vacant seats in the cars at the time he boarded the trailer, and after the cars were filled there was standing room in them. He should have gone into one of the cars; and he should not have remained on the platform, particularly when he saw, or should have seen, the danger of

a collision with a fast-coming and uncontrolled car bearing down upon the car he was on.

In the state of Ohio a suburban railway is classed by statute as a street railway; but in that state it was held that the law of negligence governing the standing on a platform of a moving interurban car outside of a municipality is the same as in the case of steam cars. Cincinnati, L. & A. Electric Street R. Co. v. Lohe, 68 Ohio St. 101, 67 L.R.A. 637, 67 N. E. 161, 13 Am. Neg. Rep. 663.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that the plaintiff's suit be dismissed at his cost.

O'Neill and Leche, JJ., dissent.

Petition for rehearing denied January 3, 1918.

NEW HAMPSHIRE SUPREME COURT.

OVID F. WINSLOW et al.

v.

OLA ANDERSON.

(— N. H. —, 102 Atl. 310.)

Principal and surety — contractor's bond — construction.

1. A bond to insure delivery of paving blocks, obligating the surety to reimburse the purchaser for a loss occasioned by his purchasing the material elsewhere upon failure of the contractor to deliver, does not bind him to return payments mistakenly made for material not delivered.

For other cases, see Bonds, II. a, in Dig. 1-52 N. S.

Money received — overpayment to surety — use in principal's business.

2. The surety on the bond of one contracting to furnish paving stones is not liable to the purchaser for money had and received to the amount mistakenly paid to him on the contractor's order for blocks in excess of the number actually delivered, where he used the fund in the contractor's business.

For other cases, see Assumpsit, II. c, 1, in Dig. 1-52 N. S.

(November 6, 1917.)

EXCEPTIONS by plaintiffs to rulings of the Superior Court for Merrimack County, made during the trial of an action

Note. — The right to recover a payment made to a third person under a mistake as to the validity of the obligation of the payer to the party in whose behalf it was made is treated in the annotation following this case, post, 177.
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brought to recover money paid by plaintiffs to defendant under a mistake of fact, which resulted in a verdict for defendant. Overruled.

The facts are stated in the opinion.

Messrs. Allen Hollis and Joseph W. Worthen, for plaintiffs:

The bond is a valid and existing obligation.

Aaron v. Mendel, 78 Ky. 427, 39 Am. Rep. 248; Chapman v. Lothrop, 39 Me. 431; Gordon v. McCarty, 3 Whart. 407; McArthur v. McGilvray, 1 Ga. App. 643, 57 S. E. 1058; United States v. Williams, 1 Ware, 173, Fed. Cas. No. 16,724.

Plaintiffs have lost no right to assert the validity of the bond.

Pickard v. Sears, 6 Ad. & El. 469, 112 Eng. Reprint, 179, 2 Nev. & P. 486, 11 Eng. Rul. Cas. 78; Stevens v. Dennett, 51 N. H. 324; Sioux Valley State Bank v. Kellog, 81 Iowa, 124, 46 N. W. 859; Soule v. Michigan State Ins. Co. 51 Mich. 312, 16 N. W. 662; Brubaker v. Okeson, 36 Pa. 519; First Nat. Bank v. Williams, 126 Ind. 423, 26 N. E. 75; Deisch v. Wooten-Agee Co. 95 Ark. 279, 129 S. W. 819; Probate Judge v. Sulloway, 68 N. H. 511, 49 L.R.A. 347, 73 Am. St. Rep. 619, 44 Atl. 720; Peerless Casualty Co. v. Howard, 77 N. H. 355, 92 Atl. 165.

The contract secured by the bond in question was not performed.

Hutchinson v. Wright, 61 N. H. 108; Smith v. Molleson, 148 N. Y. 241, 42 N. E. 669; Cambridge Sav. Bank v. Hyde, 131 Mass. 77, 41 Am. Rep. 193.

Defendant having been unjustly enriched by money paid by plaintiffs to him under a mistake of fact, restitution by defendant would be just and equitable.

Wheat v. Norris, 13 N. H. 178; Mathewson v. Eureka Powder Works, 44 N. H. 289; Keener, Quasi Contr. p. 39; Lockwood v. Kelsea, 41 N. H. 185; Houghton v. Owen, 60 N. H. 125; Kingston Bank v. Eltinge, 40 N. Y. 391, 100 Am. Dec. 516; Corn Exch. Bank v. Nassau Bank, 91 N. Y. 74, 43 Am. Rep. 655; Koontz v. Booneville Cent. Nat. Bank, 51 Mo. 275; Phetteplace v. Bucklin, 18 R. I. 297, 27 Atl. 211; Houston & T. C. R. Co. v. Hughes, — Tex. Civ. App. —, 133 S. W. 731; Standish v. Ross, 3 Exch. 526, 154 Eng. Reprint, 954, 19 L. J. Exch. N. S. 185; Durrant v. Ecclesiastical Comrs. L. R. 6 Q. B. Div. 234, 50 L. J. Q. B. N. S. 30, 44 L. T. N. S. 348, 29 Week. Rep. 443, 45 J. P. 270; Woodward, Quasi Contr. § 29; Smith v. Kelly, 43 Mich. 390, 5 N. W. 437; Needles v. Fuson, 24 Ky. L. Rep. 369, 68 S. W. 644; Merchants Bank v. M'Intyre, 2 Sandf. 431; Canal Bank v. Bank of Albany, 1 Hill. 287; Holt v. Ross, 54 N. Y. 472, 13 Am. Rep. 615; United States v. Pinover, 3 Fed. 305; Newall v. Tomlinson, L. R. 6 C. P. 405, 25 L. T. N. S. 382; 1 Mechem, Agency, 2d ed. § 1439.

Even if it were conclusively shown on the evidence that defendant was not aware of the mistake at the time of payment, it would not avail him in this action.

First Nat. Bank v. Gattion, 71 Ill. App. 323, 172 Ill. 625, 50 N. E. 121; Gentle v. Stephens, 87 Ill. App. 190; Talbot v. National Bank, 129 Mass. 67, 37 Am. Rep. 302; National Park Bank v. Steele & J. Mfg. Co. 58 Hun, 81, 11 N. Y. Supp. 538; Buller v. Harrison, Cowp. pt. 2, p. 565, 98 Eng. Reprint. 1243; Newall v. Tomlinson, L. R. 6 C. P. 405, 25 L. T. N. S. 382; Payne v. Witherbee, S. & Co. 132 App. Div. 579, 117 N. Y. Supp. 15; Lawatsch v. Cooney, 20 App. Div. 470, 47 N. Y. Supp. 54; Evans v. Gale, 21 N. H. 240.

Messrs. Martin & Howe, for defendant:

A surety is not to be held beyond the precise terms of his contract, which is not to be extended by implication.

Ludlow v. Simond, 2 Cai. Cas. 1, 2 Am. Dec. 291; United States v. Boecker, 21 Wall. 652, 22 L. ed. 472; Warren v. Lyons, 152 Mass. 310, 9 L.R.A. 363, 25 N. E. 721; Rochester Sav. Bank v. Chick, 64 N. H. 410, 13 Atl. 872; Newbury Bank v. Sinclair, 60 N. H. 100, 49 Am. Rep. 307.

Plaintiffs cannot look beyond Otto Anderson for the money they paid him through mistake.

Sergeant v. Stryker, 16 N. J. L. 464, 32 Am. Dec. 404; Atwell v. Jenkins, 163 Mass. 362, 28 L.R.A. 694, 47 Am. St. Rep. 463, 40 N. E. 178; Stephens v. Board of Education, 79 N. Y. 183, 35 Am. Rep. 511; Rankin v. Chase Nat. Bank, 188 U. S. 557, 47 L. ed. 594, 23 Sup. Ct. Rep. 372; Justh v. National L.R.A.1915C.

Bank, 56 N. Y. 478; Southwick v. First Nat. Bank, 84 N. Y. 420; Goshen Nat. Bank v. State, 141 N. Y. 379, 36 N. E. 316; Hatch v. Fourth Nat. Bank, 147 N. Y. 184, 41 N. E. 403; Gammon v. Butler, 48 Me. 344; Fairbanks v. Snow, 145 Mass. 153, 1 Am. St. Rep. 446, 13 N. E. 596; Lime Rock Bank v. Plimpton, 17 Pick. 159, 28 Am. Dec. 286; Walker v. Conant, 69 Mich. 321, 13 Am. St. Rep. 391, 37 N. W. 292; Alken v. Short, 1 Hurlst. & N. 210, 156 Eng. Reprint, 1180, 25 L. J. Exch. N. S. 321, 4 Week. Rep. 645; Morrison v. Payton, 31 Ky. L. Rep. 992, 104 S. W. 685; Myers v. New York County Nat. Bank, 36 App. Div. 482, 55 N. Y. Supp. 504; Citizens' Bank v. Schwarzschild & S. Co. 23 L.R.A.(N.S.) 1092, and note, 109 Va. 539, 64 S. E. 954; Burnham v. Holt, 14 N. H. 367; Penacook Sav. Bank v. Hubbard, 58 N. H. 167.

Plummer, J., delivered the opinion of the court:

This action grew out of a contract for paving blocks made by the plaintiffs with Otto Anderson December 29, 1909. The defendant was surety on a bond given by Otto to the plaintiffs for the faithful performance or fulfilment of the contract. Otto Anderson agreed to deliver upon the cars or upon a plot of land leased by the plaintiffs prior to November 1, 1910, 700,000 paving blocks for \$30 per thousand; delivery to be upon the plaintiffs' written order, the plaintiffs to pay 75 per cent of the agreed price upon the acceptance of the blocks as delivered, and the balance after the blocks were laid; but in any event to pay the full price of all blocks accepted by them by December 1, 1910. The contract further provided that, in case of Otto's failure to deliver blocks as ordered, the plaintiffs should have the right to purchase such blocks elsewhere at Otto's expense. Otto shipped all the blocks ordered. He also delivered on the leased land other blocks. From time to time Otto furnished the plaintiffs memoranda made up from his cutters' returns of the blocks so delivered. These were accepted by the plaintiffs, and payment made in accordance with the contract. Before any payments were made Otto directed them to be made to the defendant, and all payments were made by check to the defendant, who used all the money in Otto's business, retaining none for his own use. Otto did not furnish 700,000 blocks before November 1st, and the plaintiffs did not order that number, as the contract required they should. Some time after December 1st, the parties adjusted the matters under the contract, and the bond was returned to the defendant, and destroyed. At the time of this settlement

it was understood that Otto had delivered on the leased land 138,100 blocks besides those which had been shipped. On these blocks, in accordance with the contract, the plaintiffs had paid 75 per cent of the purchase price, and were then obligated to pay the balance, but by agreement between them and Otto, they paid him \$5 more per thousand for the 138,100 blocks, and retained \$2.50 per thousand for expense of loading and shortage until the blocks should be shipped on the cars the following spring. Upon this basis the accounts between the parties were computed, and a balance of \$1,046.39 found to be due Otto, and a check for that sum was made out to the defendant, and delivered to him. This payment was made January 25, 1911. In loading the blocks upon the cars in the following September a shortage of 44,714 blocks was discovered. As the \$2.50 per thousand reserved for that purpose was insufficient to meet a deficit of this extent, the plaintiffs brought this suit against the defendant, and claimed to recover the overpayment: First, in an action of debt on the bond; and, second, in a count in assumpsit for money had and received.

Under the count in debt the plaintiffs state their claims as follows:

"(1) The bond is valid despite its destruction under a mistake in fact. . . .

"(2) The contract secured by the bond was broken. That contract was a severable contract to supply as many of 700,000 blocks as were ordered. . . . Under that contract, then, as secured by the bond, Otto Anderson owed the plaintiffs 604,000 blocks. To the extent of Otto's default the defendant is liable to plaintiffs on the bond."

Conceding these positions to be well taken, the case furnishes no evidence upon which to rest a judgment against the defendant upon the bond. Conceding that there was a failure to furnish 44,714 blocks, so as to constitute a breach of the bond, there is no evidence that such breach damaged the plaintiffs, or any claim that such shortage was an injury to them. The contract gave the plaintiffs the right, in case of such shortage, to purchase the blocks elsewhere at Otto's expense. The defendant's liability was to make up the excess between the price paid and the contract price. If the plaintiffs secured all they wanted at less than the contract, the breach was a benefit, not a damage, to them. In the absence of any evidence of damage recoverable under the bond, it is not useful to discuss the possibility of recovery if damage were shown.

The parties gave up the bond because the delivery of paving stones under the L.R.A.1918C.

contract secured by it was understood to be at an end. Absence of error in computation and settlement of their mutual accounts was not secured by the bond. If such had been understood to be the purpose of the bond, the exact phraseology of which does not appear, the plaintiffs would not have surrendered the document until the verity of their accounting had been demonstrated. The plaintiffs' obligation was to pay upon the acceptance of the blocks, the amount to be computed upon the count on the land, or aboard the cars. The bond was not, so far as appears, made to secure accuracy of count in either party. The plaintiffs could compute the number of blocks themselves before paying for them, or take Otto's account. They chose to take Otto's account, and settled on that basis. For this the defendant is not responsible.

The plaintiffs further contended that they are entitled to recover on their count for money had and received for the overpayment which they made, because such payment was caused by a mistake between the plaintiffs and Otto Anderson in settling their accounts. An action for money had and received "is an equitable action, and may, in general, be maintained whenever the defendant has money belonging to the plaintiff which in equity and good conscience he ought to refund to him." *McDonald v. Metropolitan L. Ins. Co.* 68 N. H. 4, 6, 73 Am. St. Rep. 548, 38 Atl. 500. Can it be said that the case at bar is of this character? The overpayment was occasioned by reason of the plaintiffs' paying Otto for paving blocks that he did not deliver to them. Otto made returns to the plaintiffs, showing that he had delivered 138,100 blocks to the plaintiffs that had not been shipped. Relying on these returns the plaintiffs settled with him, paying \$27.50 per thousand on the 138,100 blocks. Afterwards, when the plaintiffs counted the blocks, it was found that there was a shortage of 44,714.

The defendant had nothing to do with the settlement made between the plaintiffs and Otto. He was present when the final settlement was consummated between them, but he made no representations in reference to the number of blocks on hand, and knew nothing about it. The plaintiffs relied upon the returns and statements of Otto, which were honestly made, but turned out to be erroneous. The overpayment was made by checks which were payable to the defendant in accordance with the order given by Otto to plaintiffs when the contract was signed. The checks were made to the defendant, but the plaintiffs took a receipt for the checks from Otto. In legal effect the money was paid to Otto,

and by him to the defendant. *Atwell v. Jenkins*, 163 Mass. 362, 28 L.R.A. 694, 47 Am. St. Rep. 463, 40 N. E. 178; *Walker v. Conant*, 69 Mich. 321, 13 Am. St. Rep. 391, 37 N. W. 292; *Southwick v. First Nat. Bank*, 84 N. Y. 420, 436.

The checks for the overpayment were rightly received by the defendant, and applied to the payment of Otto's debts and obligations, for some of which the defendant was holden, but the application of some of the money received from the overpayment may have been to pay Otto's pay roll and the running expenses of his business, for which the defendant was not holden. For it was the custom of the defendant, when he received payments from the plaintiffs, to return to Otto enough to pay his help and other current business expenses, and to apply the balance to Otto's debts. About the time the contract was made the defendant sold to Otto one half and leased the other half of his quarry, tools, buildings, and appliances. Otto owed the defendant from the inception of the contract until they settled, February 4, 1911, \$1,500 directly, and he indorsed notes for Otto at the bank, upon which there was due on the above date some \$1,300. When they made a settlement the defendant suffered a loss. The defendant's settlement with Otto of all matters between them was made months before the plaintiffs demanded that he should return to them the overpayment which they had made on account of the mistake between themselves and Otto. Under these circumstances the defendant cannot be compelled to refund to the plaintiffs the amount of the overpayment.

"When . . . a bill is paid to one who holds it in good faith and for value, he should not be called upon afterward to account for the money paid, perhaps at a distant time or place after the accounts with the drawers have been settled and closed, upon proof that in transactions between the drawees and drawers, of which the holder has no knowledge or means of knowledge, there has been some fraud, or wrong, or mistake, to the injury of the drawees." *Southwick v. First Nat. Bank*, supra; *Justh v. National Bank*, 56 N. Y. 478, 484; *Goshen Nat. Bank v. State*, 141 N. Y. 379, 385, 36 N. E. 316; *Rankin v. Chase Nat. Bank*, 188 U. S. 557, 565, 47 L. ed. 594, 597, 23 Sup. Ct. Rep. 372.

"To permit in every case of the payment of a debt an inquiry as to the source from which the debtor derived the money, and a recovery if shown to have been dishonestly acquired, would disorganize all business operations and entail an amount of risk and uncertainty which no enterprise could bear. The rule is founded upon

a sound general policy as well as upon that principle of justice which determines as between innocent parties upon whom the loss should fall under existing circumstances." *Hatch v. Fourth Nat. Bank*, 147 N. Y. 184, 191, 192, 41 N. E. 403; *Gammon v. Butler*, 48 Me. 344; *Lime Rock Bank v. Plimpton*, 17 Pick. 159, 28 Am. Dec. 286; *Nassau Bank v. National Bank*, 159 N. Y. 456, 54 N. E. 66.

"As between the payor and the payee there is no mistake which affects the validity of the transaction. One receiving money or negotiable securities in payment of or as security for an existing debt is not bound to inquire where the money or securities were obtained. It is better that money or a negotiable security, passing from hand to hand to one who rightly receives it for a valuable consideration, should carry on its face its own credentials." *Spaulding v. Kendrick*, 172 Mass. 71, 72, 51 N. E. 453.

The case of *Merchants' Ins. Co. v. Abbott*, 131 Mass. 397, is very similar to the present action. In that case the plaintiffs had insured Abbott's mill. The mill was burned, and the loss was adjusted; whereupon Abbott assigned to Denny, Rice, & Company, who are the real defendants in this action, the amount due upon such adjustment, which amount was paid to Denny, Rice, & Company in payment of a debt due to them from Abbott. More than a year afterwards the plaintiffs learned that the mill was burned with the knowledge and at the instigation of Abbott, and that his proofs of loss were false and fraudulent. Denny, Rice, & Company had no knowledge of any fraud, and were wholly innocent parties. It was held that the payment made to Denny, Rice, & Company could not be recovered back by the plaintiffs. In his opinion Gray, Ch. J., said: "The only contract of the plaintiffs was with Abbott, and the only mistake was as between them and him. The money was voluntarily paid by the plaintiffs in discharge of Abbott's supposed claim upon them under their policy, and to these defendants as the persons designated by Abbott to receive it, and was in legal effect a payment by the plaintiffs to Abbott. These defendants received the money, not in satisfaction of any promise which the plaintiffs had made to them (for the plaintiffs had made no such promise), but under the agreement of Abbott with these defendants that they might receive it from the plaintiffs and apply it to the satisfaction of Abbott's debt to themselves. In other words, the money was paid by the plaintiffs to these defendants, not as a sum which the latter were entitled to re-

cover from the plaintiffs, but as a sum which the plaintiffs admitted to be due to Abbott, under their own contract with him, and which at his request and in his behalf they paid to these defendants, who, at the time of receiving it, knew no facts tending to show that it had not in truth become due from the plaintiffs to Abbott. This payment by the plaintiffs to these defendants at Abbott's request was a satisfaction of Abbott's debt to these defendants, and might have been so pleaded by him if sued by them upon that debt. . . . As between the plaintiffs and these defendants, there was no fraud, concealment, or mistake. These defendants had the right to receive from Abbott the sum which was paid to them. The assignment which they presented to the plaintiffs was genuine, and was all that it purported to be. They hold the money honestly, for value, with the right to retain it as their own, under a title derived from Abbott, and independent of the fraud practised by him upon the plaintiffs. The case stands just as if the money had been paid by the plaintiffs to Abbott, and by Abbott to these defendants, in which case there could be no doubt

that, while the plaintiffs could recover back the amount from Abbott, neither Abbott nor the plaintiffs could recover the amount from these defendants. The fact that the money, instead of being paid by the plaintiffs to Abbott, and by Abbott to these defendants, was paid directly by the plaintiffs to these defendants, does not make any difference in the rights of the parties. The two forms do not differ in substance. In either case, Abbott alone is liable to the plaintiffs, and these defendants hold no money which *ex æquo et bono* they are bound to return either to Abbott or to the plaintiffs."

The defendant was not a party to the settlement between the plaintiffs and Otto. He received the money paid him by plaintiffs in good faith, and applied it to debts of Otto. He obtained title to the money rightfully, and cannot be required to repay it to the plaintiffs.

Exceptions overruled; judgment for defendant.

All concur.

Petition for rehearing denied.

Annotation—Right to recover payment made to third person under a mistake as to the validity of the obligation of the payer to the party in whose behalf it was made.

The right of an agent to recover money erroneously paid to a third person is treated in a note in 4 L.R.A.(N.S.) 363.

And the right of a bank to recover money paid on a check or other instrument drawn upon it or payable at it, under a mistaken belief that there were sufficient funds of the drawer to meet it, is treated in notes in 23 L.R.A.(N.S.) 1092, and 33 L.R.A.(N.S.) 1023.

As to the drawee's right to recover money paid on a forged check or draft, see the following notes: 10 L.R.A.(N.S.) 49; 25 L.R.A.(N.S.) 1308, and L.R.A. 1915A, 77.

As to the right to recover overpayments made in ignorance or forgetfulness of previous payments, see note in 24 L.R.A.(N.S.) 517.

As to right of insurance company to recover back money paid in settlement of policy on life of one erroneously supposed to be dead, see note in 11 L.R.A.(N.S.) 234.

The present note is limited to cases where one person, under the direction of his supposed creditor, pays a third person, under a mistake either as to the

validity of his obligation or the amount thereof.

It is a general rule that where one person pays money to another by mistake as to the amount of the obligation or the validity thereof, and the circumstances of the payment do not constitute a waiver, he is entitled to recover the amount thus paid. Cases sustaining this general rule are not within the scope of this note. This rule, however, is limited to payments *inter partes*, and it does not apply where a debtor pays a third person the amount of his supposed indebtedness under a mistake as to the amount or validity thereof. As pointed out and held in *WINSLOW v. ANDERSON*, ante, 173, a payment to a third person in effect amounts to a payment by the debtor to his creditor, and a payment by the latter to the third person, or appointee; and the same rule applies as would apply had the money reached such third person in this manner. And of course it is clear that money cannot be followed in the hands of a third person on the ground that it was paid through fraud or mistake to another, who paid it to such third person. To this effect are:

—*Ferguson v. Hirsch* (1876) 54 Ind. 337, holding that where the surety on a bond pays money to a pledgee because of the latter's claim against the obligor, he cannot recover the same even though he was mistaken as to the validity of his obligation;

—*Bissell v. Edwards* (1811) 5 Day (Conn.) 94, holding that where an officer, in enforcing an execution, seized and sold the property of a third person for that of the execution debtor, and turned the proceeds of the sale over to the execution creditor, he could not recover from the latter the amount thus paid, although he was compelled to pay the true owner for the property he had seized and sold;

—*Whitehurst v. Mason* (1913) 140 Ga. 148, 78 S. E. 938, holding that where an insurance company paid instalments of insurance to a second assignee of the policy, and the first and second assignments were set aside on the ground of fraud in procuring the first assignment, and the insurance company was held liable to the original beneficiary for the entire amount of the policy, including instalments already paid to the second assignee, it could not recover from the latter such payment;

—*Morrison v. Payton* (1907) 31 Ky. L. Rep. 992, 104 S. W. 685, holding that where the owner of property paid a materialman the amount of his claim under the mistaken belief that he was owing that amount to the contractor, he cannot, upon subsequently ascertaining that he did not owe the amount, recover the payment. In this case, however, the owner had promised to pay for all material furnished for the property, and it was held that he was liable for the material even though he had paid the entire contract price for the construction of the buildings for which the material was furnished;

—*Leavitt v. Leighton* (1914) 219 Mass. 183, 106 N. E. 634, holding that where a person having control of the receipts of a business pays a claim contracted in the operation of the business under a mistaken belief that there were sufficient funds in his control to cover this claim, he cannot recover the payment even though the payee, before he cashed the check given in payment, knew that his debtor had ceased to have any interest in the account upon which the check was drawn;

—*Moors v. Bird* (1906) 190 Mass. 400, 77 N. E. 643, holding that where a bank was misled by the fraud of a depositor as to the amount due him, and paid at L.R.A.1918C.

his request a debt owing by him to another, upon subsequently learning of the fraud, it was not entitled to recover the amount thus paid from the person to whom the payment was made;

—*Merchants' Ins. Co. v. Abbott* (1881) 131 Mass. 397, holding that the payment by an insurance company of the amount of a policy to a creditor of the insured, under the latter's direction, amounted to a payment by the company to the insured and a payment by the latter to his creditor, and the company is not entitled to recover such payment, upon subsequently ascertaining that it did not owe the insured anything under the terms of the policy;

—*Walker v. Conant* (1888) 69 Mich. 321, 13 Am. St. Rep. 391, 37 N. W. 292, holding that the holder of a forged mortgage, who, by direction of the mortgagor, pays a portion of the proceeds of the loan to the holder of a prior forged mortgage,—neither mortgagee at the time knowing of the forgeries,—cannot recover such payment;

—*Ball v. Shepard* (1911) 202 N. Y. 247, 95 N. E. 719, holding that a bond broker who pays for bonds consigned to him c. o. d. for delivery to a purchaser cannot recover the amount paid on the ground that such payment was induced by the fraudulent representations of the purchaser, the seller not being a party thereto or having knowledge thereof;

—*Belloff v. Dime Sav. Bank* (1908) 118 App. Div. 20, 103 N. Y. Supp. 273, affirmed in (1908) 191 N. Y. 551, 85 N. E. 1106, holding that the purchaser of land, who pays a mortgage thereon, cannot recover the same upon ascertaining the lack of title in his grantor, although the mortgage he paid was void for the same reason;

—*Southwick v. First Nat. Bank* (1881) 84 N. Y. 420, holding that the fact that a drawee paid a draft to the payee under a mistake as to the purpose for which the proceeds of the draft were to be used by the drawer does not furnish ground for recovery from the payee of the amount paid;

—*Aiken v. Short* (1856) 1 Hurlst. & N. 210, 156 Eng. Reprint. 1180, 25 L. J. Exch. N. S. 321. 4 Week. Rep. 645, holding that where a subsequent mortgagee of the interest of the mortgagor in certain real estate under a will paid a prior mortgagee the amount of his lien, he was not entitled to recover such payment, although it subsequently turned out that, in consequence of a later will, the mortgagor had no interest therein, and hence neither mortgage was valid.

Compare with *Guild v. Baldrige* (1852) 2 Swan (Tenn.) 235, holding that where the creditor does not suffer prejudice by reason of the payment of a debt to him by a third person, it is wholly immaterial as respects the right to recover the same whether the payment by mistake was to the original creditor or to a third person claiming to be a creditor of the latter. The plaintiff's right is precisely the same in either case, and he is entitled to recover the amount thus paid.

And see also *Strauss v. Hensey* (1896) 9 App. D. C. 541, holding that where an innocent person was defrauded in making a loan on land by a person impersonating the owner, but was subsequently repaid the loan by another innocent person likewise defrauded, the latter was entitled to recover from the former the amount paid him. The court said that the case was fully within the principle that where money is paid by mistake, neither party being in fault, the party making the payment may recover it as money paid without consideration.

Where a draft drawn upon one person was mistakenly presented by a collector to another, who paid it as his own obligation, after subsequently ascertaining his mistake he is entitled to recover the amount paid. *Koontz v. Booneville Cent. Nat. Bank* (1873) 51 Mo. 275; *Munroe v. Bonanno* (1897) 16 App. Div. 421, 45 N. Y. Supp. 61.

So, where the purchaser of goods was directed by the seller to remit the purchase price to a certain bank, which had an equitable mortgage on the goods, and by mistake he remitted the amount to

another bank, which also had a claim against the seller, this constituted a mistake of fact entitling the purchaser to recover the amount thus remitted. *Continental Caoutchouc & Gutta Percha Co. v. Kleinwort Sons & Co.* (1904) 90 L. T. N. S. (Eng.) 474, 52 Week. Rep. 489, 20 Times L. R. 403, 9 Com. Cas. 240; *Kleinwort Sons & Co. v. Dunlop Rubber Co.* (1907) 97 L. T. N. S. (Eng.) 263, 23 Times L. R. 696.

If the person receiving the payment knows of the mistake and induces the payment, he is not entitled to retain the money.

For example, where the buyer paid the purchase price to the creditor of the seller upon condition that the creditor guarantee the delivery of the goods purchased, and the creditor knew of this condition before he received and appropriated the money, and further knew that the seller was insolvent and could not deliver the goods, he was liable to the buyer for the amount received. *Ketelson v. Groos* (1899) 21 Tex. Civ. App. 31, 50 S. W. 591.

So, where materialmen, at the request of the contractor, drew on the owner of the property upon which the buildings were being erected for more than the amount due for material furnished, but recited in the draft that the sum was to cover material furnished, and, upon receiving the proceeds of the draft, they paid the excess to the contractor, they were liable to the owner for the amount of the excess thus paid to them. *Caldwell v. Maxfield* (1895) 7 S. D. 361, 64 N. W. 166.

A. G. S.

NEW JERSEY COURT OF ERRORS AND APPEALS.

CHARLES FLECKENSTEIN, JR., by Next Friend, et al., Appts.,
v.

GREAT ATLANTIC & PACIFIC TEA COMPANY.

(— N. J. —, 102 Atl. 700.)

Negligence — unsafe premises — visitor to store.

1. Merchants invite the public to enter their stores to buy wares, but those who accompany them, without any intention of purchasing, are not invitees, but mere licensees.

For other cases, see *Negligence*, I. c. 2, a, in Dig. 1-52 N. S.

Headnotes by WALKER. Ch.
L.R.A.1918C.

Same — care necessary.

2. The duty of a landholder to one who enters his premises by mere license is not to keep the premises in a nonhazardous state, but only to abstain from acts wilfully injurious to the licensee.

For other cases, see *Landlord and Tenant*, III. c. 1, in Dig. 1-52 N. S.

(Garrison, Minturn, and Kalisch, JJ., dissent.)

(November 19, 1917.)

APPEAL by plaintiffs from a nonsuit granted by the Supreme Court in an action brought to recover damages for per-

Note. — The duty of a store or shopkeeper toward a customer as to the condition of his premises is treated in the notes to *McDermott v. Sallaway*, 21 L.R.A.(N.S.) 456, and *Smith v. Johnson*, L.R.A.1915F, 572; and

sonal injuries sustained by the minor plaintiff through the alleged negligence of defendant. Affirmed.

The facts are stated in the opinion.

Messrs. William Pennington, Charles C. Pilgrim, and Fredric C. Ritger for appellants.

Messrs. Edward T. Magoffin, Martin Conboy, and Edwin N. Moore for appellees.

Walker, Ch., delivered the opinion of the court:

This is an action by a son and his father for damages for injuries sustained by the son through the alleged negligence of the defendant.

The facts are these: On November 30, 1915, Charles Fleckenstein, Jr., aged about twelve years, accompanied his friend, Anthony Young, who was about fifteen years of age, into defendant's store. Young intended to make purchases, and did so, but Fleckenstein did not intend to buy anything, in fact bought nothing, and merely accompanied his friend on the latter's business. While Young was being waited on the store manager directed a boy to open a box of pork and beans. The opening of the box was in nowise connected with Young's purchases, and neither Young nor Fleckenstein had any interest whatever in the box. At this time Fleckenstein was standing beside Young, and the box was about 3 feet away from him. He was watching the boy who was stooping down to open the box on the side away from Fleckenstein. The boy proceeded to pry off the lid by inserting a hatchet under it and by striking the hatchet head with a hammer. While this was being done a fragment of metal flew into Fleckenstein's eye and destroyed the sight. At the close of the plaintiff's case the court granted a motion for nonsuit.

The question arises, Was the infant plaintiff lawfully upon defendant's premises, and, if so, was he an invitee or licensee? In our judgment he was lawfully in the store of the defendant, not as an invitee, however, but only as a licensee.

Merchants invite the public to enter their stores to buy wares. It cannot be said that they invite the entrance of those who accompany them, but who have no intention

of purchasing; such persons are mere licensees. While it may be that they invite those to enter, who, after inspecting their wares, may become purchasers, such an invitation did not extend to young Fleckenstein, when he accompanied his friend Young into the store, as he (Fleckenstein) admittedly had no intention of purchasing anything.

This court in *Saunders v. Smith Realty Co.* 84 N. J. L. 276, said, at page 279, 86 Atl. 405, that where the use of property is permissive, "the owner is under no obligation to them [the users] except to abstain from acts which are wilfully injurious." In *Fitzpatrick v. Cumberland Glass Mfg. Co.* 61 N. J. L. 378, 39 Atl. 675, 4 Am. Neg. Rep. 193, the supreme court held that the owner of lands is under no obligation to keep them in a safe condition for the use of a person who comes upon them not by the invitation of the owner, but merely by his permission. And this court in *Delaware, L. & W. R. Co. v. Reich*, 61 N. J. L. 635, at page 643, 41 L.R.A. 831, 68 Am. St. Rep. 727, 40 Atl. 685, held: "The general rule with regard to the duty which a landowner owes to persons coming upon his premises is that where the entry is made by his invitation, either express or implied, he is required to use reasonable care to have his premises in a safe condition; but that where the entry is made merely by his permission . . . the landowner is under no obligation to keep his premises in a nonhazardous state; his only duty to a licensee or a trespasser is to abstain from acts wilfully injurious. And this rule has been frequently enforced by the courts of this state. *Phillips v. Library Co.* 55 N. J. L. 307, 27 Atl. 478; *Mathews v. Bensel*, 51 N. J. L. 30, 16 Atl. 30; *Vanderbeck v. Hendry*, 34 N. J. L. 467; *Fitzpatrick v. Cumberland Glass Mfg. Co.* supra; *Turess v. New York S. & W. R. Co.* 61 N. J. L. 314, 40 Atl. 614, supra."

There is no pretense in the matter before us that the infant plaintiff was injured by a wilful act of any of the defendant company's employees, and that is entirely dispositive of the case. The judgment of nonsuit was right, and must be affirmed.

Garrison, Minturn, and Kalisch, JJ., dissent.

see later cases, *Elsey v. J. L. Hudson Co.* L.R.A.1916B, 1284; *Rumetsch v. Wana-maker*, L.R.A.1916C, 1245; and *Reese v. Abeles*, L.R.A.1917E, 747. L.R.A.1918C.

Generally as to the duty of the owner of premises toward licensees, see L.R.A. Indexes, under the title, "Negligence," and subtitle, "Liability to trespassers and licensees."

OKLAHOMA SUPREME COURT.

ANNA KNUDSON, Plff. in Err.,
v.

GEORGE O. FENIMORE et al.

(— Okla. —, 169 Pac. 478.)

Pleading — allegation of agency.

1. Under § 4759, Okla. Rev. Laws 1910, a general allegation of authorized agency will be presumed to be an agency with full powers legally conferred, and the failure to deny such allegation under oath is equivalent to an admission in the answer, and no further proof of the agent's authority is required.

For other cases, see Pleading, I. m, in Dig. 1-52 N. S.

Mortgage — tender — by whom.

2. A tender of a mortgage debt in order to extinguish the mortgage lien must be made by one having the right to make it, and cannot be made by a stranger.

For other cases, see Tender, in Dig. 1-52 N. S.

Same — notice of authority.

3. At the time the tender is made, if not made by the original mortgagor, it must clearly and unequivocally be made known to the tenderer that the tenderer is a person having the legal right to make the tender, and that all the rights of the mortgagor will be protected by an acceptance of the money and the discharge of the mortgage.

For other cases, see Tender, in Dig. 1-52 N. S.

(February 15, 1916.)

ERROR to the District Court for Oklahoma County to review a judgment in favor of defendants in an action brought to recover the amount due on a promissory note and to foreclose a mortgage given to secure it. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. Kroeger & King, Charles West, Joseph L. Hull, and Horace H. Hagan, for plaintiff in error:

The pleadings do not show that defendant Sweatt was authorized to make a tender so as to compel plaintiff to accept. He is a stranger to the mortgage and does not plead that he has assumed it.

Jones v. Moore, 1 Edw. Ch. 632; Mahler v. Newbaur, 32 Cal. 168, 91 Am. Dec. 571; Sinclair v. Learned, 51 Mich. 335, 16 N. W. 672; Watkins v. Ashwicke, Cro. Eliz. pt. 1, p. 132, 78 Eng. Reprint, 389; McDougald v.

Dougherty, 11 Ga. 570; Rowell v. Jewett, 73 Me. 365; Harris v. Jex, 66 Barb. 282.

The facts making the tender legal must be pleaded.

30 Cyc. 107; Enid Conservative Invest. Co. v. Porter, 45 Okla. 406, 145 Pac. 805; Ritchey v. Home Ins. Co. 98 Mo. App. 115, 72 S. W. 44; Strickland v. Clements, 83 Ark. 484, 104 S. W. 175; Himmelmarm v. Fitzpatrick, 50 Cal. 650; Murray v. O'Brien, 56 Wash. 361, 28 L.R.A.(N.S.) 998, 105 Pac. 840; Hayward v. Chase, 181 Mich. 614, 148 N. W. 214.

Authority to loan or collect interest does not show authority to collect principal, so that a tender could be made to him.

Calhoun v. Ainsworth, 118 Ark. 316, L.R.A.1915E, 395, 176 S. W. 316; Scarritt-Comstock Furniture Co. v. Hudspeth, 19 Okla. 429, 91 Pac. 843, 14 Ann. Cas. 857; Bautz v. Adams, 131 Wis. 152, 120 Am. St. Rep. 1030, 111 N. W. 69; Ortmeier v. Ivory, 208 Ill. 577, 70 N. E. 665; Burnham v. Wilson, 207 Mass. 378, 93 N. E. 704; Schenk v. Dexter, 71 Minn. 155, 79 N. W. 526; Wynn v. Grant, 166 N. C. 39, 81 S. E. 949; St. Louis & S. F. R. Co. v. Model Laundry, 42 Okla. 501, 141 Pac. 972.

If payment is made to an agent not then possessing the notes, the payee must prove his authority to accept payment.

Cornish v. Woolverton, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4; Bank of University v. Tuck, 101 Ga. 104, 28 S. E. 108.

Releasing the property where tender is not kept good is clearly inequitable.

Ferguson v. Popp, 41 Mich. 115, 3 N. W. 287.

Messrs. Welty & Orr, for defendants in error:

Defendant Sweatt was not a stranger, but had full authority to make a tender, and Brooks had full authority to accept the same.

Anderson v. Rose, — Okla. —, 152 Pac. 102; Davis v. First State Bank, — Okla. —, 152 Pac. 122; Newcomer v. Sheppard, — Okla. —, 152 Pac. 66; Mott v. Hull, — Okla. —, L.R.A.1916B, 1184, 152 Pac. 92.

It was not necessary for the defendants to do further than plead tender in court.

Puls v. Casey, 18 Okla. 142, 92 Pac. 388; Smith-Wogan Hardware & Implement Co. v. Rice, 34 Okla. 294, 125 Pac. 456; Tompkins v. Batie, 11 Neb. 147, 38 Am. Rep. 361, 7 N. W. 747.

Robbarts, C., filed the following opinion:

On the 11th day of June, 1909, the defendants G. O. Fenimore and Pearl Fenimore, husband and wife, borrowed of the plaintiff, Anna Knudson, \$1,000, and executed and delivered to her their promissory note therefor, due two years after date, at

Headnotes by ROBERTS, C.

Note. — As to who may make a tender which will discharge the lien of a mortgage, see annotation following this case. post, 186.

L.R.A.1918C.

8 per cent interest per annum, and to secure the same they executed their mortgage on certain real estate in Oklahoma City, the mortgage providing, among other things, for payment of 10 per cent attorneys' fees if suit should be commenced thereon. At the maturity of the note, June 11, 1909, the interest was paid to date, and the time of payment extended six months at the same rate of interest. At the time the interest was paid, the note and mortgage were in the possession of the American National Bank of Oklahoma City, and the payment of interest and extension of time was made by and through the bank. At the second maturity of the note, which was December 11, 1911, or within a few days thereafter, defendant W. H. Sweatt tendered to C. W. Brooks the sum of \$1,040.87, as payment in full of said mortgage, which was refused by Brooks, as he then stated, for the reason that he demanded \$100 attorneys' fees, in addition to the amount due on the mortgage. It appears that the tender covered the full amount due at the time, and the trial court found as a fact that suit had not been commenced at the time the tender was made.

This action was commenced to recover judgment on the note and decree of foreclosure of the mortgage. The petition is the usual form, with exhibits attached, and alleges that the defendants Minetta Sweatt and W. H. Sweatt, husband and wife, claim to have some right or interest in the said premises covered by the mortgage of this plaintiff, but plaintiff states that, whatever said interest may be, the same is junior and inferior and subject to the rights of this plaintiff under said mortgage, and asks that said defendants be summoned to appear and set forth their interest in said property, if any they have, and that such interest, if any, be sold to satisfy the claims of this plaintiff under said mortgage.

Plaintiff prays judgment against all the defendants for \$1,050 and \$105 attorneys' fees, and for foreclosure of the mortgage. It appears that the petition was filed on the 14th day of December, 1911, and on the 29th day of April, 1913, the defendants Fenimore answered, admitting the execution of the note and mortgage, and that there is due on the note the sum of \$1,040.87, but deny that they are indebted to the plaintiff in the sum of \$1,050.

On the 19th day of May, 1913, the defendants filed their first amended answer as follows: (1) By a general denial, except as to such matters as are admitted; (2) they admit the execution of the note sued on; (3) deny that they are indebted to plaintiff in the sum of \$1,050 for principal and interest thereon; and (5) further allege L.R.A.1918C.

that the defendants were, on the 14th day of December, 1911, indebted upon said note for the principal thereof and interest to the date accrued in the aggregate sum of \$1,040.87, and no more; (6) that on the 14th day of December, 1911, defendant W. H. Sweatt tendered to C. W. Brooks, the authorized agent of Anna Knudson, the sum of \$1,040.87, which the plaintiff, through her agent, C. W. Brooks, refused to receive; (7) they tender said amount in open court, and ask that the plaintiff have judgment for said sum and no more; (8) they pray that they be not adjudged indebted upon said note and mortgage beyond the sum admitted, and that they have such other and further relief as they may be entitled to in equity. On the 20th day of December, 1913, defendants filed their second amended answer: (1) By general denial, except as to such matters as are admitted; (2) admit the execution of the note and mortgage; (3) deny that they are indebted to plaintiff, in the sum of \$1,050 for principal and interest thereon; (4) admit they were, on or about the 14th day of December, 1911, indebted upon said note for the principal thereof and interest to that time accrued, in the aggregate sum of \$1,040.87, and no more; (5) the defendants for their further answer allege that between the 11th and 14th day of December, 1911, the defendant W. H. Sweatt, tendered to C. W. Brooks, the authorized agent of Anna Knudson, the sum of \$1,040.87, which the plaintiff, through her agent, C. W. Brooks, refused to receive; that in making said tender these defendants did not require of C. W. Brooks, the agent of plaintiff, that he deliver to said defendants the note and mortgage sued on, that he give a receipt for same, or that he do anything except receive the money. Defendants pray that they be not adjudged indebted upon said note and mortgage beyond the sum admitted as herein set forth, and further pray that the plaintiff be denied the right to foreclose said mortgage, but that the said mortgage be ordered canceled and held for naught, and for such other and further relief as the court may deem just and proper.

For reply to defendants' answer, plaintiff admits the correct amount due on the note to be \$1,040.87, and prays for judgment and decree as alleged in the petition.

On these issues the case was tried to the court, and judgment rendered against all the defendants for the amount due on the note, foreclosure refused, and the mortgage canceled. From this judgment plaintiff appeals to this court.

The first contention of counsel for plaintiff is that C. W. Brooks was not the agent of the plaintiff at the time the tender was

made. From the evidence we would be inclined to favor that view of the case, but the answer alleges that he was the authorized agent of the plaintiff, and that allegation is not denied under oath, and therefore must be taken as admitted.

It is a well-settled rule in this state, under § 4759, Rev. Laws 1910, that a general allegation of authorized agency will be presumed to be an agency with full powers legally conferred, and the failure to deny such allegation under oath is equivalent to an admission in the answer, and no further proof of the agent's authority is required. *Mitchell v. Knudston Land Co.* 19 N. D. 736, 124 N. W. 946; *Thomas J. Baird Invest. Co. v. Harris*, 126 C. C. A. 217, 209 Fed. 297.

Several other grounds for reversal are presented and earnestly argued by counsel; but, as we look at the case, it will only be necessary to consider one of them, which is that neither the allegations nor the proof show that W. H. Sweatt was authorized to make such a tender as to effect or create a discharge of the mortgage. That instrument was executed by the Fenimores. In their separate answer they expressly admit the execution of the note and do not deny the execution of the mortgage, which is equivalent to an admission. They also admit the sum of \$1,040.87 was due thereon, on the 14th day of December, 1911, and pray that they be adjudged to pay that amount. The defendants Fenimore do not admit the authority of W. H. Sweatt to make a tender for them. So far as their separate answer goes, they are the only persons interested in the matter, and all other persons would seem to be interlopers. It is true, the plaintiff's petition alleges that the defendants Sweatt claim to have some interest in the premises covered by the mortgage, and plaintiff prays that they be summoned to appear and make known their interest in said property, if they have any, but in their several answers they fail, neglect, or refuse to state what interest they have in said property, and in fact do not claim that they have any interest therein, either personal, or as the agents of the mortgagors. Even if we admit, as a matter of fact, that Brooks was the agent of the plaintiff, and had perfect right to collect the money, there is no allegation, and no evidence whatever tending to show, that he knew, or had any reason to believe, that Sweatt had any interest in the transaction at the time the tender was made, either as principal or agent. Counsel for defendants may claim that the answers allege, and therefore show, that the defendants Sweatt admit their liability on the note, or rather for the debt secured by the mortgage, but it must not be

overlooked that the first answer was filed by the Fenimores only, fifteen months after the petition was filed, and no such confession or statement is found therein. The first admission of the Sweatts as to their liability for the debt is found in the answer of all the defendants on the 19th day of May, 1913, eighteen months after tender was made. This is the first intimation or notice that the plaintiff, or her alleged agent, Brooks, had of the fact that the Sweatts made any pretensions of liability for the debt, and the answer in that particular is indefinite, uncertain, and amounts simply to a conclusion, if anything, but certainly nothing more. They admit the defendants are indebted to plaintiff in the sum of \$1,040.80, but do not say which defendants,—a sort of hit it if it's a deer, and miss it if it's a calf, admission. There is no reason or equity in the contention that the defendants brought themselves, or the plaintiff, within the harsh rule that a refusal by a creditor of a tender of the amount due on a debt secured by mortgage or other lien operates to relinquish and discharge the lien, when made by the proper person, to the creditor or his agent duly authorized to receive the same.

Leaving out the question of the agency of Brooks, there is nothing in this case that even tends to show that Wm. H. Sweatt brought himself within the rule authorizing him to make this binding tender. The most that can possibly be said is that there is some intimation in the evidence that his wife was sometime, for some purpose unknown, the grantee of the Fenimores, but there is nothing to show that the plaintiff, Brooks, knew of that claim at the time the tender was made, nor until it came out in the evidence at the trial more than two years after the tender. The rule as laid down in *2 Jones on Mortgages*, §§ 895 et seq., is that a tender of a mortgage debt, in order to extinguish the mortgage lien, must be made by one having the right to make it, and cannot be made by a stranger, and that "a mere stranger has no right to tender money to discharge an encumbrance on the property, or redeem it." One of the earliest cases in this country, holding that a tender of the money due on a mortgage discharges the lien, is *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145. In a later case the supreme court of New York (*Harris v. Jex*, 66 Barb. 237) says:

"In the case of *Kortright v. Cady*, supra, it was held that a tender of the money due on a mortgage discharged the lien, although the tender was not subsequently kept good. It is plain that this is a somewhat harsh principle, and it should not be pressed beyond its strict limits. It rests upon the

familiar doctrine that the bond is the principal, and the mortgage is the collateral. Now while this is the legal principle, yet in modern times and in the common understanding of men, a contrary view prevails. It is the security on the land, and not the responsibility of the debtor, to which men look in taking mortgages. The facility of transferring real estate and mortgages results frequently in ignoring the original mortgagor and treating the lien on the land as the only thing of real value. To hold, then, that a mere tender, without actual payment, is a discharge of the lien, may sometimes operate very unjustly. It is important, then, to inquire who has the right to make a tender which shall have this very serious effect. To ascertain this, it may be well to examine the authorities cited in *Kortright v. Cady*. The first is that of *Jackson ex dem. Bowers v. Crafts*, 18 Johns. 110. In that case the party who made the tender, on its refusal, deposited the money tendered with another person, to be delivered to the mortgagee, so that there was more than a mere tender. In *Merritt v. Lambert*, 7 Paige, 344, the tender was made by the mortgagor; but the chancellor held that the lien was not discharged. In *Edwards v. Farmers' F. Ins. & Loan Co.* 21 Wend. 467, and *id.*, 26 Wend. 541, the tender was by the mortgagor. The case of *Arnot v. Post*, 6 Hill, 65, in which the tender was made by a purchaser under a sheriff's deed, was reversed in 2 Denio, 344. In the case of *Kortright v. Cady* the tender was made by the holder of the equity of redemption. Whether or not he had assumed a personal liability to pay the debt does not appear. But the reasoning in that case is throughout based on the right of the mortgagor to pay his debt. And the court constantly speak of the right to make a tender as belonging to the debtor. Thus, at page 366 of 21 N. Y., 78 Am. Dec. 145: 'The mortgagor has the same right after as before a default to pay his debt and so clear his estate from encumbrances.' 'Tender is equivalent to payment as to all things which are incidental and accessorial to the debt.'

"Now certainly it would not be claimed that a mere stranger to the contract could make a tender of the debt to the creditor which would have any validity. And such a tender,—that is, a tender made by a mere stranger,—if refused, could not have the effect of 'payment as to all things which are incidental and accessorial to the debt.' It is important to keep this in view; that is, that a tender cannot be made by a mere stranger to the contract, so as to oblige the creditor to accept it.

"What right, then, has the owner of the L.R.A.1018C.

equity of redemption who has not assumed the debt personally? He has just what the name which designates him implies: the equity of redemption. That is, he has the right to redeem the land from the lien. But how is the land to be redeemed from the lien of the mortgage? Not, I suppose, by a mere tender which is not kept good, but by actual payment, or by bringing the money into court for the purpose of payment. The mere owner of the equity of redemption owes no debt. It cannot be said in respect to him, as it is said in *Kortright v. Cady*, supra: 'The creditor, by refusing to accept, does not forfeit his right to the very thing tendered, but he does lose all collateral benefits and securities.' For the creditor, if he refuses to take the money from the owner of the equity of redemption, cannot recover it from him. It is the redemption of a lien, not the payment of a debt, which his tender is to accomplish. There is no debt, at least from him, and therefore, as it seems to me, his mere tender does not discharge the mortgage lien. He has the right to redeem; but he must redeem by actual payment.

"But there is a further consideration. The equity of redemption was, in this case, conveyed subject to the payment of the mortgages. The land was thereby made the primary fund for payment. The original debtor has become a quasi surety, having a right to insist on the enforcement of the debt out of the land. The holder of the equity of redemption cannot even dispute the validity of the mortgage. *Freeman v. Auld*, 44 N. Y. 50. The land, or so much as is necessary, is (as it were) appropriated to the payment of the mortgages. If, therefore, under such circumstances, the owner of the equity of redemption were permitted to discharge the lien by a mere tender without payment, great injury would be done. For instance, in the present case *Jex* took the land subject to the mortgages. It is reasonable to suppose that in so doing he deducted their amount from the value of the land agreed upon. The land, then, is primarily liable for the debt. That is, *Poillon* has a right to insist upon the collection of the debt first out of the land. Now if by a mere tender *Jex* has discharged the lien, then all the rights of the mortgagee seem to have gone. He cannot sue *Jex*, for *Jex* never assumed the debt. He cannot enforce the lien, for that, by the supposition, is discharged. He cannot sue *Poillon*, for by the discharge of the primary fund *Poillon*, who has become a quasi surety, must be released. The result is that *Jex* retains the whole of the mortgage for which he has paid nothing, and the mortgagee loses his debt. Unless the clearest principles of law

require it, we ought not to work out such injustice."

We quote this case fully for the purpose of fixing the fact that under this harsh rule the tender must be made by the proper party, and it necessarily follows that if made by an actually authorized party, the tenderer is entitled to know that fact at the time the tender is made; otherwise, how could he possibly, in justice, be bound by the tender? We therefore lay this down as a positive rule that at the time the tender is made, if not made by the original mortgagor, it must clearly and unequivocally be made known to the tenderer that the tenderer is a person having the legal right to make the tender, and that all the rights of the mortgagor will be protected by an acceptance of the money and the discharge of the mortgage. In *Sinclair v. Learned*, 51 Mich. 339, 16 N. W. 674, the supreme court of Iowa says: "The tender proposed to be proved appears to have been made by the plaintiff. The objection to it was that the plaintiff was not in position to make it. He was not mortgagor or the grantee of the mortgagor, or in any manner, at that time, interested in the equity of redemption.

There was no offer to show that the tender was made for, or in the interest or at the request of, the mortgagor. It was therefore made by one who, as between the mortgagor and mortgagee, was a stranger to their dealings, and an intermeddler. Nothing is plainer than that such a person has no right of redemption. If the mortgagee had accepted the money, he could not afterwards have claimed rights under the mortgage; but it is assumed that he refused it, and this he clearly had a right to do."

In the sixth syllabus of *McDougald v. Dougherty*, 11 Ga. 570, it is said: "A tender, to be a bar, should be made by the debtor or his legal representative, and not by a stranger." The opinion of the court fully sustains the doctrine.

In *Mahler v. Newbaur*, 32 Cal. 168, 91 Am. Dec. 571, the headnotes are as follows:

"A party having no interest in the mortgaged premises or in the tender made has no right to make a tender on his own behalf of the amount due on the mortgage.

"When a tender of the amount due on a mortgage is made by a stranger, and not the party in interest, the creditor must be informed on whose behalf it is made; and, if not so informed, the tender is invalid."

In the body of the opinion they fully and completely sustain the rule herein laid down.

In a very recent case, *Brunswick Realty Co. v. University Invest. Co.* 43 Utah, 75, 143 Pac. 608, the court says: "In no event can the appellant insist that, as the pur-

chaser of the equity of redemption, without assuming payment of the debt, it could, by its tender, discharge the premises from the mortgage lien. The appellant was a stranger to the contract between the trust company and the Carpenters, its grantors, and hence the only effect the tender would have would be to stop interest on the debt and to prevent the recovery of costs and attorneys' fees."

Hunt on Tender, in § 373, uses the following language: "A tender by a mere stranger will not discharge the lien of a mortgage. Where mortgaged premises are conveyed to a purchaser subject to a mortgage, but without any assumption of the debt by him, a tender by such owner of the equity of redemption will not discharge the lien. As between the mortgagor and the purchaser of the legal estate, the mortgage debt is part of the consideration, and the land is the primary fund for the payment of the mortgage debt. Hence a purchaser cannot be permitted to discharge the lien of the mortgage by a mere tender without payment. If he desires to pay the mortgage debt so as to free his land, and the mortgagee refuses the money, he has his remedy in equity to compel a discharge of the mortgage, and, by keeping the tender good and bringing the money into court for the purpose of the payment, he stops the running of the interest, and subjects the mortgagee to the costs of the suit. Or in a suit to foreclose he may plead the tender as a defense and bring the money into court with like effect."

In *Graffin v. State*, 103 Md. 171, 63 Atl. 373, 7 Ann. Cas. 1061, one of the headnotes is as follows: "In order to extinguish the lien of a mortgage by a tender of the amount due at maturity and its refusal by the mortgagee, the tender must be made by a person who has a right to pay the debt; such as the debtor himself, or the holder of the title to the property mortgaged, or the holder of some subsequent lien having an equity of redemption. The tender of the debt by a stranger does not extinguish the lien of the mortgage."

In the body of the case the court states its reasons for so holding in the following language: "In the first place, the plea does not aver that the guaranty company was the owner of the equity of redemption in the mortgaged property, or that the company occupied any other relation to the property or the liens upon it that would entitle it to tender to the holder of the first mortgage the amount due thereon. The plea sets up simply the fact that the guaranty company, a mere stranger, tendered to the holder of the first mortgage the amount

due thereon, whereby, upon the holder's refusal to accept payment, the lien of the first mortgage was extinguished and the second mortgage thereupon became the first mortgage. It may be conceded that if there is a tender of the mortgage money at the time and in the manner prescribed in the condition of the mortgage, and the mortgagee refuses to receive it, the condition is complied with and the mortgagee must lose his security upon the land, which was merely collateral to the debt, although the mortgagor may be still liable for the money. *Merritt v. Lambert*, 7 Paige, 344; 28 Am. & Eng. Enc. Law, 13. But to produce such a result the money really due must be tendered by a person having a right to make the tender, because a valid tender can only be made by the person, or the agent of the person, who has a right to pay the debt; as the debtor himself or his representatives, or the holder of the title to the estate or property on which the debt is a lien, or the holder of some subsequent lien having an equity of redemption; a tender by a stranger is not good. 28 Am. & Eng. Enc. Law, 34."

From the foregoing it must be apparent that no such tender was made as would effect a discharge of the mortgage lien.

By their answer the defendants confessed

the amount of \$1,040.87 to be due on the note on the 14th day of December, 1911. That admission should be accepted by the court as the true amount due at that time, and was the amount for which judgment and decree of foreclosure should have been rendered, and the court committed error in not so doing. The judgment of the trial court should therefore be reversed and remanded to the District Court of Oklahoma County, with directions to that court to set aside its judgment therein and enter judgment against the defendants for the sum of \$1,040.87, with interest thereon at 8 per cent from the 19th day of May, 1913, and further decreeing said mortgage to be a prior lien on the property involved, and that the same be foreclosed and the property ordered sold, as provided by law, for the payment of said indebtedness, and that said court, in the exercise of its equitable jurisdiction, disallow the claims of plaintiff for attorneys' fees.

Per Curiam:

Adopted in whole.

Petition for rehearing denied March 7, 1916. Second petition for rehearing denied January 8, 1918.

Annotation—Who may make a tender which will discharge the lien of a mortgage.

It is a rule that the tender of the amount due on a mortgage discharges the lien thereof. This rule has been discussed in detail in this series of reports.¹ By reference to the above note it will be seen that the mortgage is discharged by such a tender, if made at maturity, whether or not the tender has been kept good. Where the tender is made after maturity there is some difference of opinion as to the necessity of keeping it good. The tender under this rule is not, therefore, the ordinary tender made to stop the running of interest or the accrual of costs, which it is necessary to keep good. The present note is concerned with one of the phases of the general rule first herein referred to, viz., the person by whom such tender must be made to effect a discharge of the lien of the mortgage. A tender for the purpose of discharging the lien of a mortgage must be distinguished from a tender for the purpose of acquiring some rights in the mortgage

itself, or for the purpose of redemption. It has been stated that "an offer of money by a subsequent encumbrancer for the purpose of acquiring a prior encumbrance, or as a step preparatory to a bill to redeem, is quite different in its spirit and equitable bearing" from a tender of the money in the sense of an offer made and understood as one to cancel the lien of the former mortgage.² Where the party making the tender fails to make it clear that he intends to pay the mortgage and cancel the lien, he cannot insist that the lien is discharged by a refusal of the tender, especially where the mortgagee has reason to believe that his purpose is to secure a transfer of the securities to himself and hold them against the mortgaged premises.³ This, however, goes to the sufficiency of the tender rather than to the person who may make it, and is therefore not within the scope of this discussion.

Other questions of interest in connec-

¹ See note to *Parker v. Beasley*, 33 L.R.A. 231.

² *Proctor v. Robinson* (1877) 35 Mich. 284; and see *Frost v. Yonkers Sav. Bank* L.R.A.1918C.

(1877) 70 N. Y. 553, 26 Am. Rep. 627, *infra*, note 24.

³ *Proctor v. Robinson* (Mich.) and *Frost v. Yonkers Sav. Bank* (N. Y.) *supra*.

tion with the present question have been discussed in this series of reports.⁴

It seems clear that the mortgagor may make the tender so long as he remains the owner of the property. It has been stated that a tender "must be made by the owner of the mortgaged property, or someone acting by his authority or in his interest; for, as it has often been said, the right to redeem is inseparable from the ownership of the property."⁵ As will appear in subsequent parts of this note, however, parties other than the owner are held, at least in some jurisdictions, to have the right to make a tender which will discharge the lien of the mortgage. As hereafter pointed out, in some jurisdictions, even the owner of the mortgaged property is not entitled to make such tender if he be a purchaser of the property after the mortgage was given, without having assumed payment of the mortgage. The real question is as to who, other than the mortgagor, may make the tender.

It has been stated generally that any party who has an interest in the mortgaged property may make the tender.⁶ But the interest which entitles the holder to make a tender must, it seems, be one subject to the mortgage. Accordingly, the holder of a tax title which is not subject to the mortgage has been held not entitled to make a tender.⁷ The court states that the holder of the tax title "was not mortgagor, or the grantee

of the mortgagor, or in any manner at that time interested in the equity of redemption. He had tax titles, it is true, but these were not subject to the mortgage. There was no offer to show that the tender was made for or in the interest or at the request of the mortgagor. It was therefore made by one who, as between the mortgagor and mortgagee, was a stranger to their dealings and an intermeddler. Nothing is plainer than that such a person has no right of redemption."

It is recognized in all the cases that a stranger cannot make the tender which will discharge the lien of the mortgage.⁸ If the stranger makes the tender on behalf of a party, it is not good where the mortgagee is not informed of the party in whose behalf it is made.⁹ But if the mortgagee does understand the relation of a stranger to the mortgaged property, a tender need not necessarily be made by the mortgagor.¹⁰ The fact that the mortgagee supposed the tender to be made on behalf of a party who was entitled to make it does not aid the tender when it was in fact made on behalf of a party other than the one supposed.¹¹

According to the better considered cases, a purchaser of land subject to a mortgage who has not assumed payment of the mortgage debt is not entitled to make a tender which will discharge the lien of the mortgage.¹² The reasoning upon which this conclusion is reached is

⁴ The effect of tender before maturity of debt to discharge lien of mortgage is discussed in *Pyross v. Frazer*, 23 L.R.A.(N.S.) 403.

See note to *Thomas v. Seattle Brewing & Malting Co.* 15 L.R.A.(N.S.) 1164, as to the effect of tender after default, of amount due under chattel mortgage.

See note to *Murray v. O'Brien*, 28 L.R.A.(N.S.) 998, as to the effect of tender after maturity, but before foreclosure, to discharge lien of mortgage.

⁵ *Josephson v. Ginsburg Realty Co.* (1915) 160 App. Div. 189, 154 N. Y. Supp. 533, denying the right to make a tender to one who agreed to furnish money to the mortgagor with which to pay the mortgage.

⁶ *Loftis v. Alexander* (1913) 139 Ga. 346, 77 S. E. 169, Ann. Cas. 1914B, 718.

In denying the right of a stranger to make a tender, the court in *Graffin v. State* (1906) 103 Md. 171, 63 Atl. 373, 7 Ann. Cas. 1061, says that to discharge the lien of the mortgage the money must be tendered by a person having the right to make the tender, because "a valid tender can only be made by the person, or the agent of the person, who has a right to pay the debt, as the debtor himself or his representatives, or the holder of the title to the estate or property on which the debt is a lien, or the holder of L.R.A.1918C.

some subsequent lien having an equity of redemption."

⁷ *Sinclair v. Learned* (1883) 51 Mich. 335, 16 N. W. 672.

⁸ *Loftis v. Alexander* (Ga.) and *Graffin v. State* (Md.) supra; *Harris v. Jex* (1873) 66 Barb. (N. Y.) 232, affirmed in (1873) 55 N. Y. 421, 14 Am. Rep. 285; *Josephson v. Ginsburg Realty Co.* (1915) 169 App. Div. 189, 154 N. Y. Supp. 533 (see note 5, supra); *Knudson v. Fenimore*, ante, 181; *Brunswick Realty Co. v. University Invest. Co.* (1913) 43 Utah, 75, 134 Pac. 608. See *Sinclair v. Learned* (Mich.) supra.

⁹ *Mahler v. Newbaur* (1867) 32 Cal. 168, 91 Am. Dec. 571, holding a tender by an attorney for a purchaser of the mortgaged property ineffectual where the mortgagee did not know and was not informed for whom the tender was made.

See *Whittaker v. Belvidere Roller Mill Co.* (1897) 55 N. J. Eq. 674, 38 Atl. 289, infra. See *Knudson v. Fenimore*.

¹⁰ *Davies v. Dow* (1900) 80 Minn. 223, 83 N. W. 50, sustaining a tender by an assignee in insolvency of a chattel mortgagor.

See *Eslow v. Mitchell* (1873) 26 Mich. 500, infra.

¹¹ *Mahler v. Newbaur* (Cal.) supra.

¹² *Harris v. Jex* (1873) 66 Barb. (N. Y.) 232. This case was affirmed by the court of

very clearly set forth in the opinion in *KNUDSON v. FENIMORE*, ante, 181, and extracts from the opinions of other courts and text-writers contained therein, and amounts in brief to this: viz., that the purchaser who has not assumed payment of the mortgage owes no debt to the mortgagee; hence the mortgagee, if he refuse the tender, cannot recover the debt from such purchaser; the right which such purchaser has is to discharge the lien of the mortgage, either by actual payment or by bringing the money into court for the purpose of payment. In the case of a chattel mortgage securing a debt that is payable on demand, the right of one who has purchased the mortgaged property subject to the existing lien, but who has not assumed the payment thereof, to make a tender, has been denied. The court states: "Nor am I able to see, under the evidence and findings of the referee, that the plaintiff had the right to make a legal and valid tender of the debt for which the chattel mortgage was security. Clearly a tender of the debt before it was due would be ineffectual to destroy the security. The debt was payable on demand and would be due either on the demand of the defendant or on the tender of the debtor. The plaintiff did not assume payment of the debt in purchasing the property, and

took upon himself no duty or obligation in reference thereto. So far as the contract between Fitzgerald and defendant is concerned, he is an entire stranger." ¹³ The court again refers to the fact that the debt was not due at the time of the tender, and continues by saying that, in view of all the facts, "we think the plaintiff was not in a position to perform the condition of the mortgage by a tender of the debt, and nothing short of absolute payment by him and acceptance by the creditor could vest him with the title to the property." Such a purchaser has been held to be a stranger to the transaction. ¹⁴

But where such purchaser has, as part of the contract of purchase, assumed payment of the mortgage, he may make the tender; such a purchaser is not a stranger. ¹⁵

It has been assumed in a number of cases that a purchaser of the mortgaged property may make a tender which will discharge the lien of the mortgage. The court in these cases has not considered whether the purchaser assumed payment of the mortgage. The facts are such that the cases cannot be regarded as direct authority upon the question, but as they have a bearing upon it they have been included herein. ¹⁶ It has been held that a purchaser of the mortgagor's title and

appeals in (1874) 55 N. Y. 421, 14 Am. Rep. 285, but the tender was held insufficient upon other grounds, and the court expressly states it to be unnecessary to decide whether the purchaser might make the tender.

Harris v. Jex (1873) 66 Barb. (N. Y.) 232, was followed in *Frost v. Yonkers Sav. Bank* (1876) 8 Hun (N. Y.) 26, affirmed without deciding this point in (1877) 70 N. Y. 553, 26 Am. Rep. 627, in case of a tender by a junior mortgagee.

Although the court of appeals in affirming *Harris v. Jex* did not decide the right of a purchaser of the mortgaged property to make the tender, see opinion in *Noyes v. Wyckoff* (N. Y.) infra.

Brunswick Realty Co. v. University Invest. Co. (1913) 43 Utah, 75, 134 Pac. 608. Such a purchaser is a stranger to the contract.

See discussion in *KNUDSON v. FENIMORE*, ante, 181.

A tender by a purchaser of mortgaged premises of the amount of the mortgage was held insufficient for other reasons in *Smith v. Mould* (1914) 87 Misc. 199, 149 N. Y. Supp. 552, and the right of the purchaser to make the tender was not considered.

¹³ *Noyes v. Wyckoff* (1889) 114 N. Y. 204, 21 N. E. 158.

¹⁴ *Harris v. Jex* (1873) 66 Barb. (N. Y.) 232, affirmed in (1873) 55 N. Y. 421 (see supra note 12), followed in *Frost v. Yonkers Sav. Bank* (1876) 8 Hun (N. Y.) 26, affirmed, L.R.A.1918C.

in (1877) 70 N. Y. 553, 26 Am. Rep. 627, without reference to this point, holding a tender by a junior mortgagee insufficient.

¹⁵ *Loftis v. Alexander* (1913) 139 Ga. 346, 77 S. E. 169, Ann. Cas. 1914B, 718, holding the purchaser of land subject to "a loan deed," which such purchaser assumed, entitled to make a tender to the holder of the loan deed. The court states that "in this state a deed to secure a debt is not the same as a mortgage. Such a deed conveys title. A mortgage is only a lien. But a deed of that character is in several particulars similar to a common-law mortgage; and one of them is as to the right of one who buys the property from the maker of the deed, and obtains an equitable interest therein, to protect his purchase by paying off the secured loan; especially where, as part of the contract of purchase, he agrees to make such payment."

¹⁶ In *Johnston v. Gray* (1827) 16 Serg. & R. (Pa.) 361, 16 Am. Dec. 577, in holding a tender by a purchaser of mortgaged premises good, the court states that "as a purchaser, whose title was on record, he had a right to tender and redeem." The exact bearing of the tender in this case is not altogether clear.

A tender by a purchaser from the mortgagor was treated as valid in *Jackson ex dem. Bowers v. Crafts* (1820) 18 Johns. (N. Y.) 110, but the dispute in that case was as to whether the tender was made to the right

interest at an execution sale of that interest may tender the amount of a prior mortgage to the mortgagee, and, the tender being kept good, the lien of the mortgage is devoted, and the purchaser entitled to possession.¹⁷

It has usually been held that a second mortgagee may make a tender which will discharge the lien of a mortgage.¹⁸ "No distinction is perceived as to the effect of a tender," says the court in one case, "between that of a mortgagor to a mortgagee, and of a subsequent encumbrancer to the same party to redeem. In each

case the effect is to discharge the lien of the mortgage on the mortgaged premises, and if tender discharges the lien in one case, it ought to have the same effect in another."¹⁹ It has been stated that an assignee of a second mortgagee is entitled to make the tender.²⁰ But a surety on the official bond of the second mortgagee is not entitled to make the tender;²¹ nor can a purchaser at a foreclosure of a junior mortgage make the tender when his relation to the property does not appear to the mortgagee.²² One court, in discussing this case, states

person, no question being raised as to the person by whom it was made. See *New York cases*, supra.

A tender by a purchaser of chattels to the mortgagee was held to discharge the mortgage in *Thomas v. Seattle Brewing & Malting Co.* (1908) 48 Wash. 560, 15 L.R.A. (N. S.) 1164, 125 Am. St. Rep. 945, 94 Pac. 116, 15 Ann. Cas. 494, but there was no question as to the proper person to make the tender.

The court in *Murray v. O'Brien* (1909) 56 Wash. 361, 28 L.R.A. (N.S.) 998, 105 Pac. 840, regards the purchaser of an undivided interest in the mortgaged property as entitled to make the tender, but the tender in this case was held ineffectual to discharge the lien of the mortgage for other reasons.

In *Rice v. Kahn* (1887) 70 Wis. 323, 35 N. W. 465, a tender by an agent of a purchaser of chattels was treated as good without any discussion.

A tender by a purchaser of part of the mortgaged premises was held to stop interest in *Brown v. Simons* (1864) 45 N. H. 211.

A purchaser of one of two lots upon which deeds of trust had been given to secure two notes has no right to demand, as a condition of his tender of the amount due on one of the notes, that a release should be executed discharging the lot purchased by him from liability for the remainder due upon the other note. *Flake v. Nuse* (1879) 51 Tex. 98. See references to note in 33 L.R.A. 231, contained in note 18, infra.

A purchaser of a partnership interest in a stock of goods was held to have the right to make a tender of the amount due on a pledge of the goods in *Summers v. Heard* (1909) 66 Ark. 550, 50 S. W. 78, 51 S. W. 1057.

¹⁷ *Gould v. Armagost* (1896) 46 Neb. 897, 65 N. W. 1064 (chattel mortgage).

¹⁸ *Hull v. Godfrey* (1891) 31 Neb. 204, 47 N. W. 850 (chattel mortgage). But see contra, *Frost v. Yonkers Sav. Bank* (1876) 8 Hun (N. Y.) 26, affirmed in (1877) 70 N. Y. 553, 26 Am. Rep. 627, supra.

It is stated obiter in *Sager v. Tupper* (1876) 35 Mich. 134, that if a second mortgagee had made an absolute tender to the first mortgagee, who had foreclosed his mortgage, before the period for redemption had expired, the first mortgage would have been discharged by such tender.
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The right of a second mortgagee of chattels to make a tender was not raised in *Bank of Benson v. Hove* (1890) 45 Minn. 40, 47 N. W. 449, the sufficiency of the tender being denied on other grounds.

But a tender by a second mortgagee of chattels, accompanied by and conditioned upon a demand which he was not legally entitled to make, that certain securities held by the first mortgagee be assigned to him, is an ineffectual tender. *Schmittiel v. Moore* (1894) 101 Mich. 590, 60 N. W. 279, affirmed on second appeal in (1899) 120 Mich. 199, 79 N. W. 195. This raises a question not within the scope of the note. See sufficiency of tender made on condition, II. d. 2, of the note to *Parker v. Beasley*, 33 L.R.A. 231, and also I. e, 2, relating to real estate mortgages.

In holding that a junior mortgagee of chattels who had tendered the amount due on a prior mortgage to the sheriff, who held the property for the purpose of foreclosing the senior mortgage, was entitled to recover possession of the chattels, the court in *DeLuce v. Root* (1899) 12 S. D. 141, 80 N. W. 181, says that the rights of the junior mortgagee were the same as the mortgagor's. "She was required to pay, or offer to pay, the same amount that the mortgagor would have been required to pay to satisfy the claim of the senior mortgagee." And the court concludes that as the junior mortgagee offered to pay a sum in excess of the amount due on the senior mortgage, she was entitled to be subrogated to all the benefits of the superior lien.

¹⁹ *Dings v. Parshall* (1876) 7 Hun (N. Y.) 522.

²⁰ *Mahler v. Newbaur* (1867) 32 Cal. 168, 91 Am. Dec. 671.

²¹ *Graffin v. State* (1906) 103 Md. 171, 68 Atl. 373, 7 Ann. Cas. 1061, holding a surety on the committee of a lunatic, who had taken a second mortgage on premises, not entitled to make a tender of the amount due on the first mortgage to the mortgagee therein. The court states that the surety did not owe the mortgage debt on the property, that he did not own the property, and had no interest of any kind in it, but was a total stranger, and could not, therefore, as a volunteer, make a valid tender of the money due on the first mortgage.

²² *Whittaker v. Belvidere Roller Mill Co.*

that "to make an effectual tender, it must appear that at the time when it was made the party making it had the right to tender payment of the debt, as in the case of the debtor himself or his representatives, or the holder of the title to the estate on which the debt was a lien; or that he had the right to require a transfer of it, as in the case of subrogation of a surety, or redemption sought by the holder of some subsequent lien having that equity. The demand should clearly disclose the right of the party making the offer, so that the creditor may be notified of his duty to accept."²³

A distinction must be observed between a tender for the purpose of discharging the lien of a mortgage and one for the purpose of acquiring rights therein.²⁴

(1897) 55 N. J. Eq. 674, 38 Atl. 289, holding that a purchaser at a foreclosure sale held under a junior mortgage, whose relation to the property was not disclosed, is not entitled to make the tender. The tender was also held insufficient in this case on the ground that it was coupled with a demand that the bond secured by the prior mortgage be assigned.

²³ Whittaker v. Belvidere Roller Mill Co. (N. J.) *supra*.

²⁴ Procter v. Robinson (1877) 35 Mich. 284, holding that a second mortgagee who intends to make an offer of money by way of tender in payment, and with the purpose of insisting that the lien of the earlier mortgage be discharged in case of refusal to accept it, is bound to act in a straightforward way and distinctly and fairly make known his true purpose.

Practically the same idea is expressed in Frost v. Yonkers Sav. Bank (1877) 70 N. Y. 553, 26 Am. Rep. 627.

²⁵ A tender by the agent of a mortgagor of chattels was held sufficient in Schayer v. Commonwealth Loan Co. (1895) 163 Mass. 322, 39 Atl. 1110.

A tender by an attorney for a chattel mortgagor was treated as good in Daugherty v. Byles (1879) 41 Mich. 61, 1 N. W. 919, where the parties thereafter acted upon the assumption that an effectual tender had been made.

It is held in Porter v. Farmers & M. Sav. Bank (1900) 143 Iowa, 629, 120 N. W. 633, that a mortgagee to whom property has been conveyed by the mortgagor under an agreement that the mortgagor should have a stated time in which to redeem it cannot object to an offer to redeem made by the wife of the mortgagor, where it appeared that the mortgagor himself was away from home during most or all of the time covered by the transaction, and that the wife was in personal charge of the property, and to a great extent conducted the negotiations with the mortgagee, and the husband ratified and affirmed her action therein. L.R.A.1918C.

It is usually held that an agent of the mortgagor may make the tender.²⁵ In the cases thus holding the mortgagee apparently knew the party represented by the agent. In some cases it is expressly made a condition of the tender by another that the mortgagee understand for whom it is made.²⁶ It has been held that where the mortgagee does not understand this, the agent is in the position of a stranger and the tender is not good.²⁷

An assignee for the benefit of creditors may make the tender if the mortgagee understands his relation to the mortgaged property and recognizes his right to make it, or waives objection to a tender by the assignee by failing to make objection at the time of the tender.²⁸

See Rice v. Kahn (1887) 70 Wis. 323, 35 N. W. 465, *supra*.

²⁶ It was urged in one case by the mortgagees of a chattel that they could not be compelled to accept a tender from an agent unless they had an opportunity of knowing his authority. In answer to this contention, the court states that upon the facts there was some conflict in testimony. "but the charge of the court was very strong in requiring that they should have a reasonable opportunity to see the paper, and learn the extent of the authority;" and since there was evidence which tended to show that the mortgagees had this opportunity, it must be assumed that it was satisfactory to the jury. Eslow v. Mitchell (1873) 26 Mich. 500.

In an action of replevin by a mortgagor of chattels to recover the same, which had been taken by the mortgagee, the plaintiff relied upon a tender of the amount of the mortgage debt by a subsequent mortgagee. It is assumed that to entitle the plaintiff to rely upon this tender it must have been made on his behalf. Whether it was made on his behalf was left to the jury under instructions that if the subsequent mortgagee was acting on behalf of the plaintiff and made the tender for him, and what was said and done and the information imparted were sufficient to appraise the mortgagee that the tender was being made for the mortgagor, it was sufficient. This instruction was held sufficiently favorable to the mortgagee in the replevin action. Shattuck v. Cole (1892) 91 Mich. 580, 52 N. W. 69.

²⁷ Mahler v. Newbaur (1867) 32 Cal. 168, 91 Am. Dec. 571, *supra*.

²⁸ Davies v. Dow (1900) 80 Minn. 233, 83 N. W. 50 (chattel mortgage).

In Juckett v. Fargo Mercantile Co. (1905) 19 S. D. 150, 102 N. W. 604, a receiver of the mortgagor was held not entitled to make a tender that would discharge a mortgage according to an agreement entered into subsequently to the mortgage, between the

The holder of a tax title which is not subject to the mortgage is not entitled to make the tender; such a holder is a stranger.²⁹

mortgagor and mortgagee, by the terms of which the mortgage was to be discharged upon certain terms therein stated. The mortgagor was in default at the time of the tender by the receiver, and the court relies upon this fact also in denying the receiver's right to make the tender.

²⁹ Sinclair v. Learned (1883) 51 Mich. 335, 16 N. W. 672. W. A. E.

TENNESSEE SUPREME COURT.

MINNIE V. McIRVIN, By Next Friend,
Plff. in Certiorari,

v.

LINCOLN MEMORIAL UNIVERSITY
et al.

(— Tenn. —, 197 S. W. 862.)

Limitation of actions — married women
— statutory removal of disability —
effect.

A statute fully emancipating women from all disability on account of coverture, giving them the same right to sue and be sued as if unmarried, repeals the provision in the Statute of Limitations entitling married women to bring actions within a specified time after removal of their disability, so that an action for personal injury must be brought by a married woman within the time specified by statute after the injury occurs.

For other cases, see *Limitation of Actions*, II. m, in *Dig. 1-52 N. S.*

(October 13, 1917.)

CERTIORARI to the Court of Civil Appeals to review a judgment affirming a judgment of the Circuit Court for Knox County overruling a motion for new trial of an action brought to recover damages for personal injuries alleged to have been caused by the negligent treatment of plaintiff while in the defendant hospital. Affirmed.

The facts are stated in the opinion.

Messrs. J. Bailey Wray and John W. Green, for plaintiff in certiorari:

Plaintiff, a married woman, is not barred by the Statute of Limitations from bringing this suit, and the Act of 1913, chapter 26, removing the disability of coverture to a certain extent, has no bearing upon actions for personal injuries.

Thompson v. Cincinnati, N. O. & T. P. R. Co. 109 Tenn. 268, 70 S. W. 612; Sutherland, Damages, p. 1652; Wilson v. Wilson, 36 Cal. 447, 95 Am. Dec. 194; Norcross v. Stuart, 50 Me. 87; Trafford v. Adams Exp.

Note. — For statutory removal of disability of coverture as repealing exception in Statute of Limitations in favor of married women, see annotation following this case, post, 193.
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Co. 8 Lea, 97; Memphis Steam Laundry v. Johnson, 5 Tenn. C. C. A. 123; Chattanooga v. Carter, 132 Tenn. 609, 179 S. W. 127; Wood, Limitations, p. 1108; Solomon v. Garland, 2 Mackey, 121; Wolf v. Bauereis, 72 Md. 481, 8 L.R.A. 680, 19 Atl. 1045; Snashall v. Metropolitan R. Co. 8 Mackey, 399, 10 L.R.A. 746; Lillienkamp v. Rippetoe, 133 Tenn. 57, L.R.A.1916B, 881, 179 S. W. 628, Ann. Cas. 1917C, 901.

Messrs. Smith, Word, & Anderson, for the University, defendant in certiorari:

A married woman is barred by the Statute of Limitations of one year from bringing suit for alleged damages for personal injury.

Chavin v. Nashville, 1 Tenn. C. C. A. 317; 25 Cyc. 1254; Higgins v. Stokes, 116 Ky. 664, 76 S. W. 834, 3 Ann. Cas. 816; Sturgill v. Chesapeake & O. R. Co. 116 Ky. 659, 76 S. W. 826; Lindell Real Estate Co. v. Lindell, 142 Mo. 61, 43 S. W. 368;

Throckmorton v. Pence, 121 Mo. 50, 25 S. W. 843; Castner v. Walrod, 83 Ill. 171, 25 Am. Rep. 369; Hicks's Estate, 7 Pa. Super. Ct. 274; Ball v. Bullard, 52 Barb. 141; Murphy v. J. H. Evans City Steam Laundry Co. 52 Neb. 593, 72 N. W. 960; Brown v. Cousens, 51 Me. 301; Harrer v. Wallner, 80 Ill. 197; Cocke v. Garrett, 7 Baxt. 360; Knoxville R. & Light Co. v. Vangilder, 132 Tenn. 487, L.R.A.1916A, 1111, 178 S. W. 1117, 10 N. C. C. A. 820.

Messrs. Brown & Burrows also for defendants in certiorari.

Williams, J., delivered the opinion of the court:

When the Married Woman's Emancipation Act (1913, chap. 26) went into effect, was the exemption of married women from the operation of the general Statute of Limitations abrogated?

The action in favor of plaintiff, a married woman, was for personal injuries to herself, and was commenced after the lapse of the period of one year from the accrual of the cause of action allowed by the Statute of Limitations for the bringing of suit.

It is claimed by the plaintiff that the suit is saved from the bar of that statute by reason of the exemption clause in favor of married women.

Thompson's Shannon's Code, § 4448, is as follows: "If the person entitled to com-

mence the action is, at the time the cause of action accrued, . . . a married woman, such person . . . may commence the action, after the removal of such disability, within the time of limitation for the particular cause of action, unless it exceed three years, and in that case within three years from the removal of such disability."

The defendant contends that this saving clause is not applicable since the Married Woman's Act went into effect, January 1, 1914, and the injuries were sustained subsequent to that date.

That act was one "to remove disabilities of coverture from married women," and provides that married women are fully emancipated from all disability on account of coverture, and that every woman now married shall have the same capacity to sue and be sued, with all the rights and incidents thereof, as if she were not married. Act 1913, chap. 26, Thompson's Shannon's Code, § 4249a.

It was held in *Lillienkamp v. Rippetoe*, 133 Tenn. 57, L.R.A.1916B, 881, 179 S. W. 628, Ann. Cas. 1917C, 901, that the last-named act did not abrogate the common-law rule that one spouse cannot sue the other for assault; and the same ruling has been made quite general in other jurisdictions in respect of all civil actions sought to be brought by the wives against their husbands, notwithstanding emancipation acts which do not expressly confer that right. These decisions, however, are based upon the principle of public policy involved in the common-law rule denying the right of action.

We are to deal here with a claim of exemption based upon a statute, not upon the common law or upon any considerations of public policy.

In *Knoxville R. & Light Co. v. Vangilder*, 132 Tenn. 487, 499, L.R.A.1916A, 1111, 178 S. W. 1117, 10 N. C. C. A. 820, it was held that a married woman's right of action for her personal injuries was within the purview of the provision respecting her suing as if she were a feme covert.

The courts are in hopeless conflict on the far-reaching question that stands for solution, and the reasoning in favor of each of two views and rulings is as cogent as the conclusions reached are divergent.

The arguments advanced in the cases that hold that the exemption of married women from the general Statute of Limitations remains effective in such circumstances may be thus summarized:

(a) The wife is always largely under the influence and control of her husband, and the naked legal right to sue may be of lit-
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tle avail to her if his influence or command be that suit shall not be brought.

(b) A married woman is not exempted from the operation of the general statute merely because she is not allowed to sue alone, but on account of the marital relation itself, which may be supposed to disable or embarrass her in the assertion of her rights.

(c) Mere ability to sue does not create an obligation to do so.

(d) There is no logical impropriety in the legislature providing that a married woman may sue alone, and in providing also that she may be given time to sue after the disability of coverture is removed; therefore a repeal of the earlier statute by implication is not effected by reason of repugnancy in the two acts.

Adhering to this view are the courts of Kentucky, Missouri, New Jersey, Ohio, Oregon, and Wyoming. and Mr. Wood in 2 Wood, Limitations, 2d ed. § 240.

The reasoning in cases holding to the contrary is as follows:

(a) It is the disability as the result of marriage, and not the marriage itself, that is the reason for the exception or saving clause in the general statute. It is the disability that is removed; the marriage status is not in contemplation for removal as an impediment.

(b) The reason for the exception ceasing, the saving clause ceases also, and is no longer protective of the married woman.

Announcing this doctrine are the decisions in a majority of the jurisdictions that have pronounced,—England, Arkansas, California, Georgia, Illinois, Indiana, Maine, Michigan, Nebraska, New York, Pennsylvania; and more recently, and since the passage of acts of complete emancipation, as we understand their decisions, the courts of North Carolina (*Bond v. Beverly*, 152 N. C. 63, 67 S. E. 55, and *Graves v. Howard*, 159 N. C. 594, 75 S. E. 998, Ann. Cas. 1914C, 565) and Mississippi (*Wyatt v. Wyatt*, 81 Miss. 219, 32 So. 317).

We are of opinion that the direction to be given our ruling on the point was indicated by the opinion of this court in the recent case of *Gould v. Frost*, 138 Tenn. —, 196 S. W. 949. It was there held that a section (3532, Thompson's Shannon's Code) of the Mechanics' Lien Statute which contained a provision which tended to the protection of married women as a class was abrogated by the Married Women's Act, generally known as the Emancipation Act, since the effect of the later act was completely to emancipate so far as disability inhering in marriage was concerned.

The section of the Mechanics' Lien Act provided that the lien should have applica-

tion to lands of *femes covert* when the contract is evidenced by a writing signed by her. In the case referred to there was no written agreement. It was said that the legislature intended by this provision in favor of married women to obviate "the disability of coverture" and to prescribe the manner in which it could be done; that such disability was the reason for the exceptional and favorable treatment accorded when it was required that there be a signed written instrument in order to the binding of the realty of *femes covert*. It therefore followed that when the later act removed that disability the reason for the shielding clause in the earlier act ceased, and the lien of the mechanic was enforced.

The argument was that employed in the cases that announce the majority rule on the question under consideration in the pending case. It results that the removal of the disability of coverture and the grant to plaintiff of the right to sue and be sued, "with all the incidents thereof, as if she were not married," removed the exemption which otherwise would have excluded her from the operation of the Statute of Limitations. Plaintiff's cause of action arose after the Emancipation Act went into effect, and was barred, therefore, when she brought suit.

The Court of Civil Appeals and the trial judge reached the same conclusion, and an affirmance results.

Annotation—Statutory removal of disability of coverture as repealing exception in Statute of Limitations in favor of married women.

It is the aim of the note to discuss the question whether the so-called Married Women's Acts, conferring on married women certain rights of property and of action, have repealed by implication the exception commonly found in Statutes of Limitations in their favor. The note does not purport to cover cases involving express statutory repeal of the exception,¹ although some cases of this kind are incidentally referred to.

The statutory provisions either as regards the exception or the capacity to sue are not uniform, and as far as possible have been set out. But frequently the court refers to the statute without quoting it, or otherwise fully indicating its scope.

On the question presented the authorities are in conflict, due in part to differences in statutes, but chiefly, it appears, to differences as to the interpretation and purpose of the exception

in the Statutes of Limitations in favor of married women. It has been said that the trend of recent decisions is against the doctrine of implied repeal by the Married Women's Acts of the saving clause in favor of married women in the Statutes of Limitation.² But from the cases in the note it does not appear that there is a clear trend of authority either way on this question.

It is to be observed that the doctrine attributed to any particular jurisdiction merely represents the judicial precedents in that jurisdiction, and not necessarily the present state of the law on the point, since the situation may have been entirely changed by subsequent statutes.

Among the states in which it has been held that exceptions have been repealed by implication by the enactment of statutes conferring on married women rights of property and of action are Georgia,³

¹ For example, it appears that in 1895 the legislature amended the Texas statute limiting the time for beginning an action for recovery of real property by omitting married women from the excepted classes entitled to additional time after the removal of disability within which to bring the action, the amendment providing, however, that limitations should not begin to run against married women until they were twenty-one years of age, and that their disability should continue one year after the passage of the act. Among other cases construing this statute, see *Williams v. Bradley* (1902) — *Tex. Civ. App.* —, 67 S. W. 170; *Beale v. Johnson* (1907) 45 *Tex. Civ. App.* 119, 99 S. W. 1045; *Shook v. Lauser* L.R.A.1918C.

(1907) — *Tex. Civ. App.* —, 100 S. W. 1042; *Ryman v. Petruka* (1914) — *Tex. Civ. App.* —, 166 S. W. 711; and *Thompson v. McConnell* (1901) 46 C. C. A. 124, 107 Fed. 33.

² *Lindell Real Estate Co. v. Lindell* (1897) 142 Mo. 61, 43 S. W. 368.

³ *Ga.*—The cases of *Sparks v. Roberts* (1880) 65 Ga. 571, and *Perkins v. Crompton* (1882) 69 Ga. 736, hold that, since the passage of the Married Woman's Act of 1866 and subsequent statutes removing the disability of married women to sue, the Statute of Limitations runs against them the same as against other persons. But the statutory provisions involved are not set out.

Illinois,⁴ Maine,⁵ Michigan,⁶ Nebraska,⁷ Pennsylvania,⁸ and Tennessee.⁹ The

⁴ Ill.—The Illinois statute of 1861 provides: "All property, both real and personal, belonging to any married woman as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman, during coverture, acquires in good faith from any person other than her husband, by descent, devise, or otherwise, together with all the rents, issues, increase, and profits thereof, shall, notwithstanding her marriage, be and remain, during coverture, her sole and separate property, under her sole control, and be held and possessed and enjoyed by her the same as though she was sole and unmarried, and shall not be subject to the disposal, control, or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband." And it was held in *Castner v. Walrod* (1876) 83 Ill. 171, 25 Am. Rep. 369, that this statute repealed by implication the saving clause in the Statute of Limitations entitling married women to bring actions within the time limited after becoming *femes sole*. The court expressly overruled on this point *Morrison v. Norman* (1868) 47 Ill. 477, and *Noble v. McFarland* (1869) 51 Ill. 226.

To the same effect as *Castner v. Walrod*, supra, are *Hayward v. Gunn* (1876) 82 Ill. 385; *Enos v. Buckley* (1880) 94 Ill. 459; *Geisen v. Heiderich* (1882) 104 Ill. 537; *Safford v. Stubbs* (1886) 117 Ill. 389, 7 N. E. 653; *Miller v. Pence* (1890) 132 Ill. 149, 23 N. E. 1030; *Beattie v. Whipple* (1894) 154 Ill. 273, 40 N. E. 340; *Kibbe v. Ditto* (1877) 93 U. S. 674, 23 L. ed. 1005 (construing Illinois statutes).

In *Hayward v. Gunn* (1876) 82 Ill. 385, the court said that the necessary effect of the Act of 1861 investing married women with the sole control of their separate property was, as to such property, to place them in precisely the same position, as far as the Statute of Limitations was concerned, that they would occupy if *femes sole*; that the exception in favor of married women in the Statutes of Limitation was because of their disability to sue without consent of their husbands and the joining of their names, and that, this disability being removed by the Act of 1861, a married woman should be held to the same promptness in the assertion of her right as any other property owner.

In *Enos v. Buckley* (1880) 94 Ill. 459, the court said that since the enactment of the Married Woman's Act of 1861 the saving clause in favor of married women in the limitation law had no force, but applied against a married woman equally as against an unmarried woman, without regard to whether the property of a married woman be strictly in legal understanding, before the passage of the act, her separate property or not, and without regard to the time of its acquisition, whether since or before the enactment of the statute, or whether during or before coverture.

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The Illinois Statutes of 1861 and 1874, enlarging the rights and legal capacities of married women, by implication repealed all savings in their favor in existing limitation laws, including that relating to the prosecution of writs of error. *Geisen v. Heiderich* (1882) 104 Ill. 537.

But see note 32, infra.

⁵ Me.—*Brown v. Cousens* (1863) 51 Me. 301 (statute enabling a married woman to sue in her own name as if unmarried, and to make any bond or contract or perform any matter or thing necessary to the prosecution of such suits, held to repeal the provision in the Statute of Limitation entitling married women to bring actions within the time limited after the disability was removed).

⁶ Mich.—*King v. Merritt* (1887) 67 Mich. 194, 34 N. W. 689 (Statute of 1855, relieving married women from all disability to sue, held to repeal by implication a provision in a Statute of Limitation entitling married women to bring actions within a specified time after the disability was removed). To the same effect are *Curbay v. Bellemer* (1888) 70 Mich. 106, 37 N. W. 911, and *Douglass v. Douglass* (1888) 72 Mich. 86, 40 N. W. 177.

⁷ Neb.—*Murphy v. J. H. Evans City Steam Laundry Co.* (1897) 52 Neb. 593, 72 N. W. 960 (the Statute of 1871, providing that a woman may, while married, sue and be sued in the same manner as if she were unmarried, being held to repeal the provision in a Statute of Limitations entitling married women to bring actions within the time limited after the disability was removed). To the same effect is *Linton v. Heye* (1903) 60 Neb. 460, 111 Am. St. Rep. 556, 95 N. W. 1040, holding that the rule applied to nonresident married women.

In *Pope v. Hooper* (1877) 6 Neb. 178, it was held that as the common-law disability of a married woman had been removed by the Act of 1871, entitling a married woman to sue and be sued in the same manner as if unmarried, she no longer came within the protection of a statute authorizing the vacation or modification of judgments at a subsequent term in erroneous proceedings against certain classes, including married women.

And in *Smithson v. Smithson* (1893) 37 Neb. 535, 40 Am. St. Rep. 504, 56 N. W. 300, the court stated that the exception in favor of married women, in a statute providing that proceedings to vacate or modify a judgment on the ground of fraud must be begun within two years after the rendition thereof unless the party entitled thereto is a married woman, could have no force, in view of subsequent statutes removing the disability imposed by the common law on married women.

⁸ Pa.—*Hick's Estate* (1898) 7 Pa. Super. Ct. 274, holding that the Statute of 1887, conferring on a married woman the same rights of property, of contract, and of action as if she were a *feme sole*, except

same view was taken in a New York case,¹⁰ but the opposite conclusion was also reached in that state.¹⁰¹ In 1870 the legislature omitted married women from among the excepted classes.¹¹

Several English¹² and Canadian

cases¹³ also support the doctrine of repeal by implication.

The right to sue as if unmarried conferred on married women by statute not being limited to married women who are residents of the state, the rule that the

that she could not convey or mortgage her real estate unless her husband joined, and could not become accommodation indorser, guarantor, or surety, repealed the provision in a Statute of Limitation that if any person was a feme covert at the time the cause of action accrued she might maintain the action within the time limited after discovery.

To the same effect is *Nissley v. Brubaker* (1899) 192 Pa. 388, 43 Atl. 967. And see *Orr v. Orr* (1911) 22 Pa. Dist. R. 887, in which it is implied, apparently, that a married woman is not excepted from the operation of the Statute of Limitations.

⁹ *Tenn.*—*McLewin v. LINCOLN MEMORIAL UNIVERSITY*, ante, 191; *Chapin v. Nashville* (1910) 1 Tenn. C. C. A. 317, holding that a statute providing that where a husband has deserted his family the wife may prosecute or defend, in his name, any action which he might have prosecuted or defended, and may also sue and be sued in her own name for any cause of action accruing subsequent to the desertion, operated, as to cases within its scope, to repeal the provision in the Statute of Limitations entitling married women to bring actions within a specified time after removal of their disability.

¹⁰ *N. Y.*—In *Ball v. Bullard* (1868) 52 Barb. 141, it was held that the New York Statutes of 1860 and 1862, entitling married women to bring actions as though they were *femes sole*, repealed by implication the saving clause in a Statute of Limitations excepting married women therefrom, and providing that the time of such disability should not be a part of the time limited for the commencement of the action. The court said: "It was the disability by reason of marriage, and not marriage itself, that was the reason for the exception; and it was the disability, not the marriage, that was removed. As the law previously stood marriage created this impediment and the wife could not bring the action alone. She had no security that the damages would become hers when recovered. The statutes referred to wisely changed all this. In their effect, marriage was no longer a disability to the wife. The reason of the law ceasing, the law itself ceases also." This case was, however, disapproved in *Clark v. McCann* (1879) 18 Hun, 13, which was reversed on other grounds in (1880) 83 N. Y. 107.

¹⁰¹ It was held in *Clark v. McCann*, supra, that, although the Statute of 1860 had removed the disabilities of a married woman to bring an action to recover land, the provision in the twenty-year Statute of Limitation of 1849 excepting married women from the operation of the statute, and permitting them to bring the action within ten years after the disability ceased, was not thereby L.R.A.1918C.

repealed; and that the saving clause in favor of married women in the Statute of Limitations continued until the legislature in 1870 struck out the words "married women" from among the excepted classes.

And in *Acker v. Acker* (1880) 81 N. Y. 143, the court intimated that the fact of marriage created the disability within the meaning of the saving clause of the statute as it existed prior to 1870, stating that "by law certain persons are deemed disabled to bring such suit; and among them, once on a time, was a married woman. . . . The fact that she was a woman, and married, created the disability. Such, we think, is the plain meaning of the old Code. It is not that if she is under disability and is also a married woman; it is the fact of marriage, as it is the fact of insanity or of infancy, that is the disability. We say this, as a part of the appellant's argument was that there must exist a disability and also the state of marriage."

¹¹ The Statute of 1870 by striking out the words "married women" from among the excepted classes in the limitation statutes was held in *Acker v. Acker*, supra, and *Clarke v. Gibbons* (1880) 83 N. Y. 107, to leave the Statutes of Limitation operative as to married women the same as to other persons.

¹² *Eng.*—The view that after the passage of the Married Women's Property Act of 1882, giving married women the right to sue in all respects as *femes sole*, married women were discovert within the meaning of the English Statute of Limitations, entitling married women to bring actions within the time limited after becoming discovert, is supported by the cases of *Lowe v. Fox* (1885) L. R. 15 Q. B. Div. 667, 53 L. T. N. S. 886, 54 L. J. Q. B. N. S. 581, 34 Week. Rep. 144, 50 J. P. 244, and *Weldon v. Neal* (1884) 32 Week. Rep. 828. In the latter case it was said: "There is, however, an exception in that statute in favor of certain persons, and among others of married women, by which married women are at liberty to bring their actions within such times as are by the statute limited after being discovert. That is to say, a married woman has her rights reserved until she is in a position to sue in her own name. The Married Women's Property Act, 1882, gave to every married woman the right of suing, either in contract or in tort, in all respects as if she were a *feme sole*. The plaintiff therefore obtained her full rights on the 1st of January, 1883, and has brought her action within the statutable time from that date."

¹³ *Can.*—In *Re Laws* (1881) 28 Grant, Ch. (U. C.) 382, although the decision that there could be no recovery by a wife after her

statute repeals by implication the exception in favor of married women in Statutes of Limitation applies to non-residents as well as residents of the state.¹⁴

husband's death for money which she claimed to have loaned to him is based by two of the judges on other grounds. Proudfoot, V. C., concurred on the ground that the claim was barred by the Statute of Limitations, since, under the Married Woman's Act of 1869, she might have maintained an action against him therefor. And the opinion of another of the judges contains intimations to the same effect.

The Statute of Limitations was considered in *Cameron v. Walker* (1890) 19 Ont. Rep. 212, as running against a married woman after the enactment of the Statute of 1876, which it was said removed the disability of coverture. The statutes, however, are not set out.

But see note 23, *infra*.

¹⁴ Neb.—*Linton v. Heye* (1903) 69 Neb. 450, 111 Am. St. Rep. 556, 95 N. W. 1040.

¹⁵ Ky.—The fact that the property in question was the general property of the wife, and that by statute she was entitled in such cases to sue alone if her husband refused to join her in the action, was held in *Onions v. Covington & C. Elev. R. & Transfer & Bridge Co.* (1899) 107 Ky. 154, 53 S. W. 8, not to remove the plaintiff, during coverture, from the protection of a provision in a Statute of Limitations entitling married women to bring actions within a specified time after the removal of the disability.

The Kentucky Statute of 1894 provides: "A married woman may take, acquire, and hold property, real and personal, by gift, devise, or descent, or by purchase, and she may, in her own name, as if she were unmarried, sell and dispose of her personal property. She may make contracts and sue and be sued, as a single woman, except that she may not make any executory contract to sell or convey or mortgage her real estate unless her husband join in such contract, but she shall have the power and right to rent out her real estate, and collect, receive, and recover in her own name the rents thereof, and make contracts for the improvement thereof." And this statute has been held not to repeal by implication the saving clause in Statutes of Limitations entitling married women to bring actions within a specified time after removal of the disability. *Terrell v. Maupin* (1904) 26 Ky. L. Rep. 1203, 83 S. W. 591; *Sturgill v. Chesapeake & O. R. Co.* (1903) 116 Ky. 659, 78 S. W. 826; *Higgins v. Stokes* (1903) 116 Ky. 664, 76 S. W. 834, 3 Ann. Cas. 816; *Dukes v. Davis* (1907) 125 Ky. 313, 101 S. W. 390; *Smith v. Johns* (1913) 154 Ky. 274, 157 S. W. 21; *Henson v. Culp* (1914) 157 Ky. 442, 163 S. W. 455; *Big Sandy Co. v. Ramey* (1915) 162 Ky. 236, 172 S. W. 508.

The Kentucky decisions above cited are L.R.A.1918C.

On the other hand, statutes enlarging the rights of married women have been held not to repeal by implication exceptions in their favor in Statutes of Limitation in Kentucky,¹⁵ Missouri,¹⁶ New

based in part upon the fact that the Married Woman's Act did not remove all the disabilities of coverture. But other grounds also are stated for the conclusions reached. See, for example, quotation from *Terrell v. Maupin*, cited in note 49, *infra*.

A statute authorizing a wife who is abandoned by her husband to make contracts, sue, and be sued as a single woman, after being empowered to do so by judgment of a court of equity, was held in *McDanell v. Landrum* (1888) 87 Ky. 404, 12 Am. St. Rep. 500, 9 S. W. 223, not to operate, on the abandonment of the wife, to remove her disability, within the meaning of a provision in the Statute of Limitations entitling a married woman to bring action within a specified time after the removal of the disability; the disability being removed so as to set in motion the Statute of Limitation, only when the judgment is rendered authorizing her to sue.

¹⁶ Mo.—*Lindell Real Estate Co. v. Lindell* (1897) 142 Mo. 61, 43 S. W. 368, holding that a statute entitling married women to sue and be sued without joining their husbands with the same effect as if *femes sole* did not repeal by implication the exception in favor of married women in the general Statute of Limitation.

That a married woman after abandonment by her husband had the legal capacity to maintain the action in her own name, was held in *Throckmorton v. Pence* (1894) 121 Mo. 50, 25 S. W. 843, not to preclude her from the benefit of the saving clause in the Statute of Limitation, providing that if any person entitled to begin an action be, at the time the cause of action accrues, a married woman, the time during which such disability continues shall not be deemed a part of the time limited for the commencement of the action.

See also *Dubowsky v. Binggeli* (1914) 184 Mo. App. 361, 171 S. W. 12, in which the court cites *Throckmorton v. Pence* and *Lindell Real Estate Co. v. Lindell*, *supra*, in stating that the plaintiff was a married woman when the note in question was given, so that the Statute of Limitations would not run against her. But the question is not otherwise discussed.

It was held in *Babcock v. Adams* (1917) — Mo. —, 196 S. W. 1118, and *Graham v. Ketchum* (1905) 192 Mo. 15, 90 S. W. 350, among possibly other cases of the kind, that where a married woman prior to the Married Woman's Act of 1889 because the owner of the legal title to real estate, the right to the possession thereof and to a possessory action therefor immediately vested in the husband; that such right of possession in the husband was a vested right, which could not be taken away by the Married Woman's Act; so that under such conditions the

Jersey,¹⁷ North Carolina,¹⁸ Ohio,¹⁹ Oregon,²⁰ Wisconsin,²¹ and Wyoming.²²

Statute of Limitations did not, during coverture, begin to run against a married woman as regards recovery of such real estate.

In holding that coverture was not an excuse for a failure of the plaintiff to elect within a reasonable time to disaffirm a trustee's sale, the court in *Mueller v. Becker* (1914) 263 Mo. 165, 172 S. W. 322, said that the plaintiff, notwithstanding her coverture, was sui juris with respect to this transaction; and that, although the unlimited right to transact business on her own account, to contract and be contracted with, to sue and be sued, with which she was clothed by the Act of 1889, did not repeal her statutory exemption from the operation of the Statutes of Limitations, it carried with it all the incidents necessary to make those rights available; that with reference to both rights and duties she was placed on an equality with those with whom she dealt; and that one of the duties growing out of the trust relation she created was the duty to elect within a reasonable time to disaffirm the action of her trustee.

¹⁷N. J.—*Carey v. Paterson* (1885) 47 N. J. L. 365, 1 Atl. 473, holding that the exception, in a statute limiting the time for bringing an action to three months after the loss or injury, that if the party bringing the suit be under coverture the limitations should not apply, was not repealed by implication, by a statute permitting a married woman to sue in her own name without joining her husband.

¹⁸N. C.—*State ex rel. Lippard v. Troutman* (1875) 72 N. C. 551, holding that a statute entitling a married woman to sue alone with respect to her separate property did not repeal the saving clause in her favor in the Statute of Limitations. To the same effect are *State ex rel. Briggs v. Smith* (1880) 83 N. C. 306; *Campbell v. Crater* (1886) 95 N. C. 156; and *Wilkes v. Allen* (1902) 131 N. C. 279, 42 S. E. 616.

The fact that a married woman had registered as a free trader, as authorized by Statute, was held in *Wilkes v. Allen*, supra, not to remove her from the exemption excluding married women from the operation of the Statute of Limitations. The court stated that it would be presumed that the statute authorizing the registering of women as free traders was passed for the benefit of married women who wished to engage in business, in order to obtain credit, as was the right to sue alone, and neither right was intended for the benefit of their creditors.

The Statute of 1899, however, repealed coverture as a bar on the running of the Statute of Limitations. It named three classes against which limitations did not run, viz., persons under twenty-one years of age, insane, or imprisoned, and provided that in any action in which the defense of adverse possession was relied upon the time computed as constituting such adverse possession should not be included as against a feme covert during coverture prior to L.R.A.1918C.

February 13, 1899. As construing the statute to the above effect, see, for example, *State ex rel. Lafferty v. Young* (1899) 125 N. C. 296, 34 S. E. 444; *Norcum v. Savage* (1906) 140 N. C. 472, 53 S. E. 289; *Cherry v. Cape Fear Power Co.* (1906) 142 N. C. 404, 55 S. E. 287; *Re Beauchamp* (1907) 146 N. C. 254, 59 S. E. 687; *Bond v. Beverly* (1910) 152 N. C. 58, 67 S. E. 55; *Graves v. Howard* (1912) 159 N. C. 594, 75 S. E. 998, Ann. Cas. 1914C, 565; *Holmes v. Carr* (1916) 172 N. C. 213, 90 S. E. 162.

¹⁹Ohio—*Ashley v. Rockwell* (1885) 43 Ohio St. 386, 2 N. E. 437, holding that statutes making the property of a married woman her separate estate, and authorizing her to sue or be sued alone with respect thereto, did not by implication repeal the saving clause in a Statute of Limitations entitling married women to bring actions within the time limited after the disability was removed. To the same effect is *Hurlbut v. Wade* (1884) 40 Ohio St. 603, an action by the wife against her husband's executors for money loaned by her to him,—it being held error to sustain a plea of the Statute of Limitations on the ground that the Married Woman's Act had repealed the exception in the Statute of Limitations in favor of married women.

In view of the above Ohio decisions, *Ong v. Sumner* (1871) 1 Cin. Sup. Ct. Rep. 424, holding that the saving clause in the Statute of Limitations in favor of married women was repealed by implication by the Married Women's Act, seems now not an authority on the question.

In 1883, the saving clause in the Ohio Statute of Limitations in favor of married women was amended so as to provide that the disability of married women should not extend to rights of action of a married woman concerning her separate property, or growing out of or concerning business transacted in her own name. *Ham v. Kunzi* (1897) 56 Ohio St. 531, 47 N. E. 536 (holding that the amendment did not affect rights of action which had already accrued); see also *Yocum v. Allen* (1898) 58 Ohio St. 280, 50 N. E. 909, which approves and follows *Ham v. Kunzi*, supra.

²⁰Or.—*Morrison v. Holladay* (1895) 27 Or. 175, 39 Pac. 1100, the court stating that the exemption of a married woman from the operation of the ten-year Statute of Limitation, and allowing her five years additional time, was founded upon her marital relation, and not upon the idea that such relation prevented her from suing in her own name; and that if the Married Woman's Act removed all the legal disabilities of a married woman, as claimed by the defendant, they did not change her status or remove her marital disability, and so did not repeal or modify the Statute of Limitation; that the additional time was allowed because of her coverture, and not because she was disabled in fact from prosecuting the action; *Stubblefield v. Menzies* (1882) 8 Sawy. 41, 11 Fed. 268 (construing the Oregon statute).

The same view was taken in a Canadian case²³ in construing the English Statute of Limitations.

In earlier Mississippi cases the same conclusion was reached,²⁴ although it seems that a different rule prevails under later statutes.²⁵⁻²⁷

In Indiana the decisions that married women are not within the saving

clause in Statutes of Limitation are based chiefly, it seems, on the fact that they were omitted in the Statutes of 1881 from the definition of persons under disability, rather than on the fact that statutes have enlarged the rights of married women.²⁸

The California Statute of Limitations of 1850, providing that if the party en-

In *Wythe v. Smith* (1876) 4 Sawy. 17, Fed. Cas. No. 18,122, although apparently unnecessary to the decision, the court expressed an opinion to the effect that under the Oregon statute the saving clause in the Statute of Limitation in favor of married women applied to actions respecting her separate property, although she might as respects such property have sued alone. It was said that the exemption in the Statute of Limitations proceeded upon the theory that while the wife was under the disability of coverture she was not in fact at liberty to sue without her husband's consent, even if the law would permit it.

²¹ Wis.—*Wiesner v. Zaun* (1875) 39 Wis. 188, holding that statutes conferring on a married woman the absolute control of her separate estate as though she were unmarried, and permitting her to sue alone with respect to such estate, did not, as to actions relating to her separate estate, repeal by implication the provision in the Statute of Limitations entitling married women to bring actions within a specified time after the disability ceased. To the same effect is *Westcott v. Miller* (1877) 42 Wis. 454.

It appears that by statute in 1872 the provision in the Statute of Limitations in Wisconsin respecting actions for the recovery of real property was amended by omitting the exemption in favor of married women. *Wiesner v. Zaun*, supra.

²² Wyo.—*Bliler v. Boswell* (1899) 9 Wyo. 57, 59 Pac. 798, 61 Pac. 867, holding that a statute permitting a married woman to hold and convey property, sue, and be sued the same as though she was feme sole did not operate to repeal by implication the exception in her favor in a Statute of Limitation permitting married women to bring action within a certain time after removal of the disability.

²³ Can.—In *Carroll v. Fitzgerald* (1899) 5 Ont. App. Rep. 322, it was held that the provision in the English Statute of Limitations entitling married women to bring actions within a specified time after becoming discover was not repealed by implication by a statute entitling a married woman to maintain actions in her own name for her separate property and to avail herself of the same remedies against all persons for its protection as if it belonged to her as an unmarried woman.

See, however, notes 12 and 13, supra.

²⁴ Miss.—Without setting out the statutes involved, the court in *McLaughlin v. Spengler* (1880) 57 Miss. 818, an action by a married woman on a note, stated that, by the express provision of the statute, limitations L.R.A.1918C.

did not run against the plaintiff, and it was not authorized to disregard or explain away the statutory provision, however decided might be its conviction that, with the investiture of married women with all the rights of property and remedies possessed by persons sui juris, they should not have been included among those saved from the bar of the Statute of Limitations; and that it was bound by the unmistakable statutory declaration that persons under coverture should not be subject to the operation of the Statute of Limitations.

So, in *North v. James* (1884) 61 Miss. 761, the court stated that the mere ability to sue does not impose an obligation to do so; and that while the complainant might have sued either with or without her husband, after her marriage, she was not compelled to do so, and her failure to sue did not subject her to a plea of the Statute of Limitations.

²⁵⁻²⁷ It appears that since the adoption of the Code of 1880, the Constitution of 1890, and the Code of 1892, effecting the complete emancipation of married women, and authorizing suits between husband and wife, the Statute of Limitations runs against claims by a wife against her husband. *Wyatt v. Wyatt* (1902) 81 Miss. 219, 32 So. 317. The statutory provisions involved are not, however, set out.

²⁸ Ind.—In Indiana the phrase, "under legal disability," is defined by statute (Rev. Stat. 1881, § 1285) as including persons under twenty-one years of age, or of unsound mind, or imprisoned, or out of the United States. And in view of the fact that married women are not included in this definition, and the further fact that the disability of married women to sue, to enter into contracts, and to control their own property, has been removed by statute, the court, in *Rosa v. Prather* (1885) 103 Ind. 191, 2 N. E. 575, held that a married woman was not a person under disability within the meaning of a statute entitling any person under legal disabilities to file a complaint to review a judgment at any time within a year after the disability was removed.

Following *Rosa v. Prather*, supra, the court in *Indianapolis v. Patterson* (1897) 112 Ind. 344, 14 N. E. 561, held that since the enactment of the Code of 1881, omitting the term "married women" in the definition of the classes of persons under legal disabilities (the Code of 1852 having included married women in such definition), a married woman was not under disability within the meaning of a provision in the Statute of Limitations entitling any person under le-

titled to bring the action be a married woman the time of such disability shall not be a part of the time limited for the commencement of the action, was amended in 1863 so as to read that, if she be a married woman, "and her husband be a necessary party with her in commencing such action," the time of such disability shall not be a part of the time limited for beginning the action.²⁹ And since this amendment it has been held that the Statute of Limitations applies to bar an action by a married woman with respect to her separate property to which her husband was not a necessary party.³⁰

The Illinois Married Woman's Act of 1861, which is set out above,³¹ has been held not to operate to set in motion the Statute of Limitation against a married woman as regards an estate by the entirety.³²

Distinction between statutes permitting actions after "discoverture" and after "removal of disability."

In Arkansas a distinction is made as respects repeal by implication between cases whether the statute provides for the bringing of actions by married women within a specified time after discovery

and cases where it provides for bringing the action within a specified time after removal of disability. Thus, it was held³³ in that state that the Statute of 1873, empowering married women to sue alone, in their own names, in respect to their separate property, did not repeal by implication a provision in a Statute of Limitation permitting married women to bring actions within a certain time after discovery. But the court intimated that a different conclusion might have been reached if the language of the statute had been, "after removal of disability." And in accord with this intimation, it was held, in a later case³⁴, in that state, that the Statute of 1873, which the court said gave a married woman the sole and entire control over her property and authorized her to sue alone or be sued in respect to such property, repealed by implication a provision entitling married women to bring an action within the time limited after removal of disability. This distinction, however, while plausible, is not in accord with the result reached in cases which have construed the English statute,³⁵ and with decisions in some other states.³⁶

gal disability to bring actions within a specified time after the disability was removed. In other words, the court held that the Statute of 1881 operated to remove the disabilities of a married woman the same as they would have been removed by the death of her husband occurring at that time, and that the action must be begun within the time specified after the Statute of 1881 became effective.

And other cases in this state hold that a married woman is not a person under legal disability within the meaning of an exception in Statutes of Limitations in favor of such persons. *Royce v. Turnbaugh* (1887) 117 Ind. 539, 20 N. E. 485; *Sedwick v. Ritter* (1890) 128 Ind. 209, 27 N. E. 610; *Irey v. Markey* (1892) 132 Ind. 546, 32 N. E. 309; *Irey v. Mater* (1892) 134 Ind. 238, 33 N. E. 1018.

Under the Code prior to 1881, however, the rule was different. Thus, it was contended in *Bauman v. Grubbs* (1866) 26 Ind. 419, an action by a married woman to recover real property, that marriage was not a disability under the Code, and that the action was barred by the Statute of Limitations. This contention was overruled, the court stating that the fact that a person may sue is not the test, and citing the statute defining the phrase "under legal disabilities" as including married women.

²⁹ Cal.—*Wilson v. Wilson* (1868) 36 Cal. 447, 95 Am. Dec. 194.

³⁰ *Kapp v. Griffith* (1871) 42 Cal. 408, and *Cameron v. Smith* (1875) 50 Cal. 303.

See also *Moody v. Southern P. Co.* (1914) 167 Cal. 786, 141 Pac. 388, holding, in an action for personal injuries to a wife, that L.R.A.1918C.

prior to the amendment of 1913, authorizing the wife in such actions to sue alone, the husband was a necessary party, and that, therefore, the action was not barred by limitations.

³¹ Ill.—See note, 4, supra.

³² It was held in *Harrer v. Wallner* (1875) 80 Ill. 197, that the saving clause of a Statute of Limitations in favor of married women applied after the enactment of the Married Woman's Act of 1861, for the reason that, as the wife's estate was by the entirety, and had previously vested, the statute did not affect it, and after its enactment she could not have sued for any interest therein during coverture without joining her husband.

³³ Ark.—*Hershy v. Latham* (1883) 42 Ark. 305. Other cases to the same effect are *Batte v. McCaa* (1884) 44 Ark. 398; *McKneely v. Terry* (1896) 61 Ark. 527, 33 S. W. 953; *Fox v. Drewry* (1896) 62 Ark. 316, 35 S. W. 533, citing *Stull v. Harris* (1888) 51 Ark. 294, 2 L.R.A. 741, 11 S. W. 104; *Rowland v. McGuire* (1897) 64 Ark. 412, 42 S. W. 1068; *Rowland v. McGuire* (1900) 67 Ark. 320, 55 S. W. 16; *Memphis & L. R. R. Co. v. Organ* (1899) 67 Ark. 84, 55 S. W. 952; *Cooper v. Newton* (1900) 68 Ark. 150, 56 S. W. 867.

³⁴ *Garland County v. Gaines* (1886) 47 Ark. 558, 2 S. W. 460. The rule as declared in this case was followed as binding in *Percy v. Cockrill* (1893) 4 C. C. A. 73, 10 U. S. App. 574, 53 Fed. 872, in construing the Arkansas statute.

³⁵ See note 12, supra.

³⁶ See, for example, *Pennsylvania case* in note 8, supra.

Reasons for different rules.

It will be observed that the authorities are almost equally divided on the question whether the Married Women's Acts have repealed by implication the exception in favor of married women in Statutes of Limitation. It is therefore the more important to consider somewhat fully the reasons which have led to the different conclusions.

Attention is called in this connection to *McIRVIN v. LINCOLN MEMORIAL UNIVERSITY*, ante, 191, which states concisely the main reasons for and against the doctrine of implied repeal; and also to a summary of the reasons for and against the doctrine of repeal by implication, as stated in a Missouri case.³⁷

It is, of course, a well-established rule that implied repeal of statutes is not favored by the courts.³⁸ And the general doctrine, it seems, is supported by many cases, that the presumption is always

against the intention to repeal, where express terms are not used; that to justify the presumption of such an intention either the two statutes must be irreconcilable or the intent to effect a repeal must be otherwise clearly expressed; and that between the two acts there must be plain, unavoidable, and irreconcilable repugnancy.³⁹ This rule of statutory construction, applied to the statutes under consideration, has been the basis of the conclusion of many of the courts against the doctrine of repeal by implication.⁴⁰

In most of the states in which the question under consideration has arisen, the Statutes of Limitation entitle married women to bring actions within a specified time after the removal of the disability. And the question whether this provision is repealed by implication by a subsequent statute conferring on married women control of their own

³⁷ In holding that a provision in the Missouri Statute of Limitations exempting married women was not repealed by implication by the Statute of 1889, entitling married women to sue and be sued alone the same as *femes sole*, the court in *Lindell Real Estate Co. v. Lindell* (1897) 142 Mo. 61, 43 S. W. 368, said: "The question is an important one, involving matters of public policy as well as of private right, and has given rise to widely different views on the part of both courts and text-writers. The authorities which deny that the enabling acts relieving a married woman of the disability of coverture do not operate to repeal by implication, or modify, the exception as to coverture contained in the general Statute of Limitations before referred to, proceed upon the theory: (1) Mere ability to sue does not impose an obligation to do so; (2) where a married woman can sue, either with or without her husband, failure to do so will not subject her to a plea of the Statute of Limitations. The authorities maintaining the opposite view meet this argument in this wise, that when the disability is removed the cause for exemption disappears with it, and the exemption itself ceases to exist. On the whole, the former position would seem to be the more reasonable one. It has the support of Wood on Limitations, and the courts of North Carolina, Mississippi, Texas, Oregon, and Ohio. . . . But courts of great respectability, notably those of Illinois, Arkansas, and Maine, hold a contrary doctrine. . . . The whole tenor of our statutes relating to the Married Woman's Acts shows a tendency on the part of the legislature not to abrogate the exception contained in the general Statute of Limitations. While it is true that by the Married Woman's Acts, as revised in 1889, a married woman in this state has been emancipated, to some extent, from the common-law unity of husband and wife, and L.R.A.1918C.

now stands upon advanced ground, more in accordance with enlightened thought and justice, yet it must be borne in mind that the statutory enactments before alluded to do not undertake to confer upon a married woman all of the rights and powers of a *feme sole*. For this reason we are persuaded that the conclusion reached by division No. 2 in *Throckmorton v. Pence* (1884) 121 Mo. 50, 25 S. W. 843, is both sound and just. . . . And it may be added that the trend of recent decisions on the subject seems to be in that direction."

³⁸ 36 Cyc. 1071.

³⁹ 36 Cyc. 1071-1074.

⁴⁰ In *Carey v. Paterson* (1885) 47 N. J. L. 365, 1 Atl. 473, the court said: "It is very plain that the law excepting married women from the limitation in question is in no degree inconsistent with her statutory right to become a suitor. These two provisions do not clash or interfere with each other in the slightest degree; and the appropriate rule of law is that a statute is not repealed by subsequent legislation unless the acts are irreconcilably inconsistent."

In holding that a statute entitling a married woman to sue alone, in her own name, in respect to her separate property, did not repeal by implication a provision in a Statute of Limitation entitling married women to bring an action within a specified time after discovery, the court in *Hershy v. Latham* (1883) 42 Ark. 305, said that to declare that it was the intention of the legislature, or the necessary consequence of the Married Woman's Act, to shorten the period for bringing such action, was to assume that the only consideration which operated upon the lawmaking power in making an exception in favor of a married woman was her disability to sue at common law without joining her husband; that, although doubtless this was the principal reason, the court was not certain it was the only reason.

property and the right to sue in respect thereto as if unmarried (as most of the Married Women's Acts apparently do) depends, it seems, principally on the construction of the term "disability" as used in the Statute of Limitations, and the purpose of the exception therein in favor of married women. Some of the courts have given as a ground for their decision in favor of repeal by implication that, as the reason for the exception in the Statute of Limitations in favor of married women ceased on the enactment of the Married Women's Acts, the exception itself would be held to be repealed; in other words, they have applied the maxim, "*Cessante ratione legis cessat ipsa lex*."⁴¹ But, on the other hand, it has been well said that it is seldom that this maxim can be applied to statute law without some encroachment on the province of the legislature, and any attempt to apply it must be at the risk of misinterpreting the intention of the legislature, unless that has been distinctly expressed.⁴² And this reason assumes, of course, the purpose of the legislature in making the exception in the Statutes of Limitations in favor of married women, and the meaning of the term "disability" as there used.

The courts, in decisions holding against repeal by implication, have stated as grounds for this view that mere ability to sue does not impose an obligation to do so,⁴³ and that the right to sue alone is a privilege which may be used to the advantage of a feme covert, but a failure to exercise this privilege cannot operate to her prejudice;⁴⁴ that the right to sue alone was conferred on married women for their benefit, and not for that of their creditors;⁴⁵ and that the exception was allowed not merely because she was not allowed to sue alone, but on account of the marital relation itself, which may have been supposed to disable her from asserting her rights.⁴⁶ This latter case is strengthened by the

fact existing in some jurisdictions that among the excepted classes in the Statute of Limitations the legislature has included, with married women, persons who might, if so disposed, have brought an action notwithstanding the so-called disability, as persons absent from the country; so that, it is reasoned, the saving in their favor was not because they were of necessity disabled from suing.⁴⁷

And the fact that among the excepted classes entitled to bring actions within a specified time after the disability ceased were persons imprisoned on a criminal charge, whose rights of action and of contract were not affected thereby, has been considered as tending to show that the legislature by the term "disability" did not mean simply such disability as resulted from the total or partial suspension of civil rights, but also that disability resulting from duress.⁴⁸

This suggests the fundamental question as to which the courts are disagreed; viz., whether the term "disability" in the exception in Statutes of Limitation in favor of married women means legal common-law disabilities on the part of married women to contract, to maintain actions in their own names, etc. If so, it seems that statutes removing these disabilities should be construed as repealing the exception. In other words, if the limitation statute (as is generally the case) entitles married women to bring actions within a certain time after the "disability" is removed, under the above view of the term "disability" the Married Women's Acts as ordinarily enacted should be construed as removing the disability within the meaning of the saving clause in the Statute of Limitations. But if the term "disability" as used in the limitation statutes has a broader meaning and includes other so-called disabilities arising from the fact of marriage itself apart from the legal disabilities imposed by the common law, then the Married Women's

⁴¹ See, for example, *Castner v. Walrod* (1876) 83 Ill. 171, 25 Am. Rep. 369; *Hayward v. Gunn* (1876) 82 Ill. 385; *Ball v. Bullard* (1868) 52 Barb. (N. Y.) 141; *Hicks's Estate* (1898) 7 Pa. Super. Ct. 274.

The provision in the savings clause of the Statute of Limitations in favor of married women grew out of their disability, and with the removal of such disability no reason exists for the continuance of the provision in force, and it may properly be regarded as repealed by implication. *King v. Merritt* (1887) 67 Mich. 194, 34 N. W. 689.

⁴² *Carroll v. Fitzgerald* (1889) 5 Ont. App. Rep. 322.

⁴³ *North v. James* (1884) 61 Miss. 761; L.R.A.1918C.

Throckmorton v. Pence (1884) 121 Mo. 50, 25 S. W. 843; *Lindell Real Estate Co. v. Lindell* (1897) 142 Mo. 61, 43 S. W. 368; *Bliler v. Boswell* (1899) 9 Wyo. 57, 59 Pac. 798, 61 Pac. 867.

⁴⁴ *Campbell v. Crater* (1886) 95 N. C. 156; *State ex rel. Lippard v. Troutman* (1875) 72 N. C. 551.

⁴⁵ *Wilkes v. Allen* (1902) 131 N. C. 279, 42 S. E. 616.

⁴⁶ *Bliler v. Boswell* (1899) 9 Wyo. 57, 59 Pac. 798, 61 Pac. 867.

See also note 49, *infra*.

⁴⁷ *Carroll v. Fitzgerald* (1889) 5 Ont. App. Rep. 322.

⁴⁸ *Wiesner v. Zaun* (1875) 39 Wis. 188.

Acts would not have the effect of removing the disability. As stated above, the courts are disagreed on this question, and

some of the views, and the reasons therefor, in favor of,⁴⁹ and against,⁵⁰ the proposition that the term "disability,"

⁴⁹ It was contended in *Wiesner v. Zaun* (Wis.) *supra*, that the word "disability" was used in the statute in its technical, legal sense, meaning only an incapacity to sue or to perform a legal act. It was held, however, that the term had a broader meaning. The court said: "The grounds of the disability of a wife are thus stated by Chancellor Kent: 'The disability of the wife to contract so as to bind herself arises not from want of discretion, but because she has entered into an indissoluble connection, by which she is placed under the power and protection of her husband, and because she has not the administration of property, etc.' . . . The law giving her the control of her separate estate removes only one of the grounds of disability. She is still under the control and protection of her husband. He can lawfully control her domicile and her employment. In these particulars she is now, as she was at the common law, under a degree of duress. Although she may have an action in her own name relating to her separate estate, and may administer the same as if unmarried, yet such quasi duress, which is a recognized element of legal disability, still remains."

In *Ashley v. Rockwell* (1885) 43 Ohio St. 386, 2 N. E. 437, it was said: "There would seem to be no difficulty or logical impropriety in the legislature providing that a married woman may sue alone, and in also providing that she may have a given time to sue after the disability of coverture is removed. If the sole reason, object, and purpose of the saving clause in the Statute of Limitations was to protect her right of action until she had the legal right to maintain an action without joining her husband or prosecuting by next friend, then the argument of repeal by implication might be unanswerable. But was that the only object the legislature had in view? Can we say this is the only, or even the controlling, reason that influenced the legislature to put married women within the protection of the saving clause? The wife is always largely within the power of the husband. She may have the naked legal right to sue, and that be of little value or avail to her if he commands her to the contrary. She ought to have the right to sue after his influence, power, and command are no longer felt. We at least have not the right to say that this consideration may not have influenced the legislature in enacting and re-enacting this clause after the statute relating to the rights of married women was enacted, and the court is of opinion that no such repugnancy exists between these statutes as to work a repeal by implication."

And in construing the provision in the Kentucky Statute of Limitations, to the effect that if at the time the cause of action accrued the party entitled to bring the action was a married woman the action might

be brought within the like number of years after the removal of such disability, the court in *Terrell v. Maupin* (1904) 26 Ky. L. Rep. 1203, 83 S. W. 591, said: "The exception in favor of married women is unequivocal, and does not at all depend on whether they might or might not have sued notwithstanding the fact that they were married. Their ability to maintain the suit under the Code, or under the Act of 1894, is not a test of whether the statute runs against them. The sole test is whether or not they are married women. The legislature had the power to enact a general statute applicable to all of a class. Having done so, and providing for a suspension of the Statutes of Limitation during a designated condition of that certain class, there is nothing left for the courts to do but to apply the statute as enacted. It is to be noted that the statute does not read that the married woman must be under the disability of marriage from bringing a suit before she will have the benefit of the statute, but it says that if she be a married woman, or if such person be an infant or of unsound mind, the statute is suspended in their behalf. The words, 'disability of such person,' occurring later in the statute, do not mean disability to sue, but are merely descriptive of the condition of the person."

In *Morrison v. Holladay* (1895) 27 Or. 175, 39 Pac. 1100, the court, in holding that even if the Married Women's Acts removed all the legal disabilities of a married woman, as contended by the defendant, they did not repeal the provision in the Statute of Limitation allowing a married woman five years' additional time within which to maintain an action, stated that this additional time was allowed because of her coverture, and not because she was disabled in fact from prosecuting the action.

⁵⁰ In *Brown v. Cousens* (1863) 51 Me. 301, the court overruled the contention that the moral, social, and marital influence of the husband over the wife should be regarded as a disability within the meaning of the saving clause in favor of married women in the Statute of Limitations, saying that the latter provision was designed to relieve cases of disability, and not of disinclination, or of moral or social impediment; and that a restraining influence of the nuptial relation might as well be pleaded in behalf of the husband as of the wife, under the present statute.

In *Hicks's Estate* (1898) 7 Pa. Super. Ct. 274, the court stated that the exception in the Statute of Limitations in favor of married women was inserted because they might not sue without the consent and joinder of their husbands; that the disability was removed by the Married Persons' Property Act, and added: "Except where the contrary is expressed, we cannot think it was the purpose, when practically remov-

as used in the saving clause in Statutes of Limitation, should be construed as broad enough to include disability arising from the marriage itself, are indicated in the footnotes.

While the weight or trend of authority cannot be said to be clearly one way or the other on this question, the more plausible view seems to be that the disabilities referred to in Statutes of Limitation entitling married women to bring actions within a specified time after the disabilities are removed are not the moral influence or so-called "quasi dures" exercised by the husband, but the common-law legal disabilities arising from the marriage relation, and that when these are all, or substantially all, removed by statute, the "disability" is removed within the meaning of the exception.

The fact that the legislature, after the enactment of the Married Women's Act, retains the words "married women" in

ing all her disabilities, to put or leave her in a better situation than is occupied by members of the same class to which she now belongs. It would be a reproach to the law to have it said that of two neighboring merchants each sui juris, and having equal rights to make and enforce contracts, the remedy of the one should exist for only six years, while the other could bring suit, and recover, perhaps as late as the middle of the next century. Public policy and the duty to escape absurd results forbid any interpretation that would lead to such unjust and unequal consequences, if there is any reasonable way to avoid them."

In *Niasley v. Brubaker* (1890) 192 Pa. 388, 43 Atl. 967, the court stated that the statute conferring on married women the right to sue and be sued in the same manner as if they were single operated as a repeal of the proviso in the limitation act which prevented the Statute of Limitations from running against married women until they became discover, because a right to sue is fundamentally inconsistent with the disability to sue, and by consequence removed the disability.

⁵¹ In *Brown v. Cousens* (1863) 51 Me. 301, the court reached the conclusion that the statute entitling married women to sue in their own names as if unmarried repealed the provision in the Statute of Limitations entitling married women to sue within the time limited after the disability was removed, notwithstanding the fact that after the enactment of the former statute the saving clause in favor of married women in the Statute of Limitations was reincorporated into the revised statutes. The court regarded such retention as a mere inadvertence.

And the fact that in the amendment of 1863 the reference to married women among the excepted classes in the saving clause of L.R.A.1918C.

enumerating the excepted classes in the Statute of Limitations in a revision or amendment of the statutes, has been held not to show conclusively a legislative intention not to repeal by implication the exception in their favor.⁵¹ But in other cases this has been regarded as a circumstance tending to show that repeal by implication was not intended.⁵²

Claim by wife against husband.

Even though, as to claims against third persons, the Statute of Limitations may run against a married woman, who, under the Married Women's Acts, might have maintained the action in her own name and enjoyed the benefits of recovery free from the control of her husband, yet limitations may not run against her as to a claim against her husband, for the reason that the Married Women's Acts may not permit the maintenance of such an action. Reference is made in the note to cases so holding.⁵³

the Statute of Limitations was retained was held in *Curbay v. Bellemer* (1888) 70 Mich. 106, 87 N. W. 911, not to show necessarily an intention by the legislature to retain this clause in force as to married women notwithstanding they had been relieved from all disability to sue by a statute enacted in 1855. The amendment made a change in another respect in the saving clause, and the court stated that the legislature had no intention of changing the legal effect of the statute in any other respect; that this was prior to its decision declaring the repeal of the clause in favor of married women (see *King v. Merritt* (1887) 67 Mich. 194, 34 N. W. 689), and that there was no reason or necessity for the consideration of the subject by the legislature at that time; so that the retention and legal effect of the continuance of the repealed clause could only be regarded as if the amendment had not been made.

⁵² *Onions v. Covington & C. Elev. R. & Transfer & Bridge Co.* (1899) 107 Ky. 154, 53 S. W. 8; *Wiesner v. Zaun* (1875) 39 Wis. 188; *Ashley v. Rockwell* (1885) 43 Ohio St. 386, 2 N. E. 437.

⁵³ *Barnett v. Harshbarger* (1886) 105 Ind. 410, 5 N. E. 718; *Fourthman v. Fourthman* (1896) 15 Ind. App. 199, 43 N. E. 965; *Biggerstaff v. Biggerstaff* (1897) 19 Ky. L. Rep. 371, 40 S. W. 671; *Alpaugh v. Wilson* (1894) 52 N. J. Eq. 424, 28 Atl. 722, affirmed without opinion in (1894) 52 N. J. Eq. 589, 33 Atl. 50; *Kennedy v. Knight* (1896) 174 Pa. 408, 34 Atl. 585; *Re Wilkinson* (1899) 192 Pa. 117, 43 Atl. 466; *Gillan v. West* (1911) 232 Pa. 74, 81 Atl. 128.

For example the Maine statute authorizing a married woman to sue in her own name as if unmarried was held in *Morrison v. Brown* (1891) 84 Me. 82, 24 Atl. 672, to refer to actions by the wife against third persons, and not to actions by her against

It should be observed, however, that these decisions turn on a question not within the scope of the note, viz., whether the wife might have maintained an action against the husband during coverture, and that the note does not purport to cover this class of cases.⁵⁴

Where the wife during coverture might under statute have maintained an action against the husband the doctrine of implied repeal by the Married Women's Acts has been applied in actions on claims by the wife against the husband.⁵⁵ And in some cases the court has merely applied to a claim by a wife against her

husband's estate the general doctrine that a statute enlarging the rights of married women does not repeal by implication the exception in favor of married women in Statutes of Limitation.⁵⁶

Attention is called to the fact that the note excludes cases in which it does not appear that there was an exception in favor of married women in the Statute of Limitations, although the question arose whether under the statutes enlarging the rights of married women limitations ran on a claim by a wife against her husband.⁵⁷

her husband, so that as to the latter class of action she is still under disability, within the meaning of the saving clause in the Statute of Limitations. As illustrative of cases not within the scope of the note, to the effect that during the relation of coverture the wife cannot maintain an action against the husband notwithstanding the statute permitting her to prosecute and defend actions as if unmarried, see *Smith v. Gorman* (1856) 41 Me. 405; *Crowther v. Crowther* (1868) 55 Me. 358; *Small v. Small* (1889) 129 Pa. 366, 18 Atl. 497.

In *Barnett v. Harshbarger* (Ind.) supra, the court said: "The unity which a settled rule of law has recognized through so many years cannot be disregarded, and it prevents the operation of the general statute removing the disabilities of married women. The question cannot be disposed of by assuming that the disability of the wife alone prevents her from dealing with her husband, for, as we have seen, the husband who was free from disability, and at liberty to deal with all others except his wife, could not at law deal with her. The question is not whether disabilities have been removed, but whether the long prevailing rule of the law, declaring husband and wife to be one person, in legal contemplation, has been annulled. This question cannot be solved by affirming that a disability has been removed,

for there yet remains the positive rule that the husband and wife are one person."

⁵⁴ As to the right of wife to maintain action against husband, see L.R.A. Indexes under the title, "Husband and Wife," subtitle, "Actions."

⁵⁵ See *Re Laws* in note 13, supra; and *Wyatt v. Wyatt*, in note 25, supra.

Attention is called also to *Graves v. Howard* (1912) 159 N. C. 594, 75 S. E. 998, Ann. Cas. 1914C, 565, where, under a statute entitling the wife to maintain an action against her husband, and the act repealing coverture as a bar upon the running of the Statute of Limitations, the statute was held to run against a claim by a wife against her husband.

⁵⁶ See, for example, *Smith v. Johns* (1913) 154 Ky. 274, 157 S. W. 21, which was a claim by a wife for rent, the case being cited in note 15, supra; and *Hurlbut v. Wade* (1884) 40 Ohio St. 603, cited in note 19, supra.

⁵⁷ See, for instance, *Rice v. Crozier* (1908) 139 Iowa, 629, 130 Am. St. Rep. 340, 117 N. W. 984, holding that an action by a wife against the administrator of her husband on a note signed by him was barred by the Statute of Limitations, since the disability of a married woman to sue her husband in relation to her separate estate had been removed by statute. R. E. H.

KANSAS SUPREME COURT.

P. T. FOLEY

v.

T. B. HAM et al., Appts.

(102 Kan. 66, 169 Pac. 183.)

Criminal law — preliminary examination — county attorney.

1. While the county attorney is not re-

Headnotes by MASON, J.

Note. — As to right of public prosecutor to have preliminary examination before magistrate dismissed, see annotation following this case, post, 209.

As to injunction to restrain a prosecution of a criminal or quasi criminal nature, see notes to *Hall v. Dunn*, 25 L.R.A.(N.S.) L.R.A.1918C.

quired to take part in a preliminary examination in a felony case unless requested to do so by the magistrate, if he does appear, he is entitled to have full charge of the prosecution, and the case should be dismissed if he so directs.

For other cases, see Criminal Law, II. a, in Dig. 1-52 N. 8.

Prohibition — dismissal of prosecution.

2. Where a justice of the peace, sitting as an examining magistrate, refuses to dismiss a criminal prosecution on the motion

193; *Denton v. McDonald*, 34 L.R.A.(N.S.) 454; and *Alexander v. Elkins*, L.R.A.1916C, 263; and see later cases, *Truax v. Raich*, L.R.A.1918D, 545; *Rast v. Van Deman & L. Co.* L.R.A.1917A, 421; and *Adams v. Tanner*, L.R.A.1917F, 1163.

of the county attorney, the district court, by an order in the nature of a writ of prohibition, may compel such action.

For other cases, see *Prohibition*, IV. in *Dig.* 1-52 N. S.

Same — challenge of jurisdiction.

3. Where a county attorney asks the dismissal of a criminal case pending before a justice of the peace, and his request is denied, no further challenge of the right of the justice to proceed therein is necessary to give a basis for asking relief by prohibition.

For other cases, see *Prohibition*, V. in *Dig.* 1-52 N. S.

Appeal — sufficiency of record.

4. A transcript of the docket of a justice of the peace which recites that, after a preliminary examination, a defendant was required to give bail for his appearance in the district court to answer the charge against him, is sufficient (together with the recognition given by the defendant) to confer jurisdiction on the district court, although it omits a recital that it was found that an offense had been committed, and that there was probable cause to believe the defendant guilty.

For other cases, see *Courts*, II. a, 6, in *Dig.* 1-52 N. S.

Injunction — against prosecution.

5. Injunction against the maintenance of vexatious and unwarranted criminal prosecutions may be allowed against individuals even where no property rights are threatened.

For other cases, see *Injunction*, I. i, in *Dig.* 1-52 N. S.

(December 8, 1917.)

APPEAL by defendants from a judgment of the District Court for LaBette County in favor of plaintiff in an action brought to enjoin defendants from further prosecuting plaintiff for violation of the Corrupt Practices Act. **Affirmed.**

The facts are stated in the opinion.

Mr. Archie D. Neale, for appellants:

An application for a writ of prohibition will not be considered unless a plea to the jurisdiction has been first filed and overruled in the lower court.

Ex parte Hamilton, 51 Ala. 62; Ex parte Little Rock, 26 Ark. 52; Ex parte McMeechen, 12 Ark. 70; McAneny v. Superior Ct. 150 Cal. 6, 87 Pac. 1020; State ex rel. Romero v. Allen, 47 La. Ann. 1600, 18 So. 634; People ex rel. Hudson v. Judge of Superior Ct. 42 Mich. 239, 3 N. W. 850, 913; State ex rel. Jones v. Laughlin, 9 Mo. App. 486; State ex rel. Nookaack River Boom Co. v. Superior Ct. 2 Wash. 9, 25 Pac. 1007; Harris v. Brocker, 8 Wash. 138, 35 Pac. 599; State ex rel. First Nat. Bank v. District Ct. 12 Wyo. 547, 76 Pac. 680; 32 Cyc. 626; State ex rel. Terminal L.R.A.1918C.

R. Asso. v. Tracy, 237 Mo. 109, 37 L.R.A. (N.S.) 448, 140 S. W. 888.

Defendant not having raised the question of jurisdiction of the justice court, a writ of prohibition should not have issued, and therefore the court erred in not discharging the writ, upon the motion of the defendants herein.

32 Cyc. 611; Borello v. Superior Ct. 8 Cal. App. 215, 96 Pac. 404; Brobeck v. Superior Ct. 152 Cal. 289, 92 Pac. 646; Kitts v. Superior Ct. 5 Cal. App. 462, 90 Pac. 977; Owensboro v. Sparks, 99 Ky. 351, 36 S. W. 4; State ex rel. McNamee v. Stobie, 194 Mo. 14, 92 S. W. 191; State v. Price, 8 N. J. L. 358; People ex rel. Hummel v. Trial Term, 184 N. Y. 30, 76 N. E. 732; Powhattan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 9 L.R.A. (N.S.) 1225, 56 S. E. 257; Woods v. Cottrell, 55 W. Va. 476, 65 L.R.A. 616, 104 Am. St. Rep. 1904, 47 S. E. 275, 2 Ann. Cas. 933; State ex rel. De Puy v. Evans, 88 Wis. 255, 60 N. W. 433.

The writ will not issue where the party has an adequate remedy at law.

State ex rel. Mose v. District Ct. 46 Okla. 654, 149 Pac. 240; Browne v. Rowe, 10 Tex. 183; Mason v. Grubel, 64 Kan. 835, 68 Pac. 660; Hamilton v. Smart, 78 Kan. 218, 95 Pac. 836; State ex rel. Reed v. Jones, 2 Wash. 662, 26 Am. St. Rep. 997, 27 Pac. 452; Walcott v. Wells, 21 Nev. 47, 9 L.R.A. 59, 37 Am. St. Rep. 478, 24 Pac. 367; State ex rel. Lasher v. Municipal Ct. 26 Minn. 162, 2 N. W. 166.

Injunction will not lie to restrain criminal proceedings.

Suess v. Noble, 31 Fed. 855; Medical & Surgical Institute v. Hot Springs, 34 Ark. 559; Waters Pierce Oil Co. v. Little Rock, 39 Ark. 412; New Home Sewing Mach. Co. v. Fletcher, 44 Ark. 139; Phillips v. Stone Mountain, 61 Ga. 386; Chisholm v. Adams, 71 Tex. 678, 10 S. W. 336; Taylor v. Pine Bluff, 34 Ark. 603; Kansas City Cable R. Co. v. Kansas City, 29 Mo. App. 89; Yates v. Batavia, 79 Ill. 500.

Messrs. E. L. Burton, George F. Burton, and F. O. Martin for appellee.

Mason, J., delivered the opinion of the court:

P. T. Foley was arrested upon a charge of paying persons to work (and in some instances to vote) for the election of certain candidates for public office, such conduct constituting a felony under the Corrupt Practices Act. (Gen. Stat. 1915, §§ 4342, 4343). A preliminary examination was held before a justice of the peace, by whom he was required to give bond to answer the charge. In the district court the county attorney asked to be relieved

from filing information for the reason, among others, that there was not sufficient evidence in his possession to warrant a prosecution. The court made an order granting the request, and the case was dismissed. The complaining witness then applied to other justices of the peace to issue a warrant on a complaint charging the same offenses. Two of them refused to do so, but a third issued a warrant and held an examination, resulting in the discharge of the defendant for want of evidence. A similar complaint was then filed with another justice of the peace, Johnson Wade, who issued a warrant upon which Foley was again arrested. The county attorney filed a written motion asking, and undertaking to direct, that the case be dismissed. The justice of the peace overruled the motion. Foley then brought an action in the district court against the justice of the peace (Wade), the complaining witness, T. B. Ham, and his attorney, A. D. Neale, asking that further proceedings before the justice be forbidden. Issues were joined, evidence was taken, and judgment was rendered in accordance with the prayer of the petition. The defendants appeal.

1. So far as concerns the justice of the peace, the case amounts to an application for a writ of prohibition (or for a judgment or order in the nature of such a writ) forbidding further proceedings in the criminal case on the ground that the county attorney had full right to control the matter, and his direction for a dismissal should have been given effect. The first inquiry is as to the extent of the power of the county attorney in that respect. It is said that the public prosecutor, except as restrained by statute, has absolute control of criminal prosecutions, and has authority, in virtue of his office, to enter a nolle prosequi—a virtual dismissal—regardless of the attitude of the court. 32 Cyc. 713; 2 Bishop, New Crim. Proc. § 1388; *People ex rel. Atty. Gen. v. District Ct.* 23 Colo. 460, 48 Pac. 500. The practice in that respect, however, is not uniform in the different jurisdictions. Notes in 35 L.R.A. 701, and 45 L.R.A.(N.S.) 1123. Our statute recognizes the county attorney's right under ordinary circumstances to refuse to prosecute, by providing that in extreme cases the court may compel him to file an information. Gen. Stat. 1915, § 7981 (Code Crim. Proc. § 71). And his need to exercise discretion in determining whether prosecutions shall be brought is made the ground of exempting him from civil liability for wrongfully instituting them. *Smith v. Parman*, 101 Kan. 115, L.R.A.1917F, 698, 165 Pac. 663. He is made the representa-

tive of the state in litigation "in the several courts" of his county to which it is a party. Gen. Stat. 1915, § 2620. He is required to take charge of a preliminary examination in a felony case only when requested to do so by the magistrate. Gen. Stat. 1915, § 2624. The statute contemplates that criminal prosecutions may be instituted, not only without his participation, but without his knowledge; provision being made for the protection of the public against costs in such cases, except upon his statement that prior consultation with him was impracticable. Gen. Stat. 1915, § 4753.

Under statutes quite similar to ours, it has been held that a court may by mandamus compel a sheriff to serve a warrant in a felony case, notwithstanding the county attorney had instructed him not to do so. *Beecher v. Anderson*, 45 Mich. 543, 8 N. W. 539. This decision has been cited in support of the doctrine that the county attorney does not have absolute control of a criminal case. 32 Cyc. 714; 23 Am. & Eng. Enc. Law, 275. It is based, however, upon the conclusion that in the statute making it his duty to "appear for the state or county, and prosecute or defend in all the courts of the county, all prosecutions, suits, applications, and motions, whether civil or criminal, in which the state or county may be a party or interested," the phrase, "the courts of the county" is intended to refer only to courts of record. In a situation closely analogous to that presented in the Michigan case, this court held that the direction of the county attorney was controlling. A warrant charging a felony was placed in the hands of the sheriff. The county attorney directed him to return it, and he did so. More than two years later the defendant was arrested upon the same warrant and claimed the benefit of the Statute of Limitations. The question presented was whether the prosecution was to be regarded as pending between the return of the warrant already referred to and its reissuance, and this was treated as depending upon the power of the county attorney to control it. This court held that the bar of the statute had fallen, saying: "The county attorney is the representative of the state in criminal prosecutions, and, subject only to a limited direction by the court, controls such actions. . . . And when the sheriff, by the direction of the county attorney, returns a warrant which has been placed in his hands for service to the court that issued it, this ends the official connection of the sheriff with such warrant, renders the warrant functus officio, and effects an abandonment of the

prosecution by the state." *Re Broadhead*, 74 Kan. 401, 405, 86 Pac. 458.

Notwithstanding that the county attorney is not required to attend a preliminary examination unless asked to do so, we hold that he may appear if he sees fit, and when he does his authority is as complete as though his presence had been requested. The proceeding, while somewhat informal, is an adversary one. It is accusatory or litigious, rather than inquisitorial in character. It has something of the aspect of a voluntary investigation conducted by the magistrate, while exercising a function somewhat analogous to that of a grand jury, to determine whether or not there is ground for a prosecution. But under our practice it is quite different from that. It constitutes actual litigation between opposing parties. Testimony taken at such a hearing may be used at the trial in the district court, if the attendance of the witness cannot be had (*State v. Chadwell*, 94 Kan. 302, 146 Pac. 420; 8 R. C. L. 213, 214),—a course which could scarcely be justified if the proceeding were not essentially judicial,—a trial between opposing parties presided over by a judge.

The state is the plaintiff, and the state's attorney, rather than the complaining witness or any other unofficial person, is entitled to speak in its behalf, and decide upon the course to be pursued in its interest.

"Unquestionably, a private individual has no longer any right to prosecute another for crime,—no right to control any criminal prosecution when once instituted. A criminal prosecution is a state affair, and the control of it is in the public prosecutor. . . . The purpose of a public prosecution is to prevent the use of the criminal law to gratify private malice or accomplish personal gain. This purpose is fully subserved when the control of the case is with the county attorney." *State v. Wilson*, 24 Kan. 189, 192, 36 Am. Rep. 257.

"The law makes it the duty of the county attorney to conduct criminal prosecutions on behalf of the state, and all steps in the trial are alike under his supervision and control." *State v. Wells*, 54 Kan. 161, 165, 37 Pac. 1007.

"No one but the county attorney, or the attorney general on proper occasions, or persons deputized by them, may control prosecutions within a county." *State ex rel. Thomas v. Snelling*, 71 Kan. 499, 506, 80 Pac. 968.

It is true that this interpretation of the law places in the hands of the county attorney a very large power, which is susceptible of abuse. That, however, is a nec-

essary attribute of most governmental powers. In the case of a public officer some protection is afforded by statutes making official misconduct a crime (Gen. Stat. 1915, § 3588) and a basis for ouster (Gen. Stat. 1915, § 7603; Code Civ. Proc. § 686a). The other theory—that the control of a felony prosecution until it reaches the district court, so far as a plaintiff may exercise control, rests with the prosecuting witness, or with anyone who is under no official responsibility—would imply that the county attorney might be seriously embarrassed in the attempted enforcement of the criminal law by the interference of individuals, actuated by mistaken judgment or perverse purpose. For instance, a private prosecutor, if in charge of a preliminary examination upon a charge of gambling, might call the keeper of the gaming house and permit him to give such testimony as, under the statute (Gen. Stat. 1915, § 3652), would result in his own complete immunity. Clearly the selection of witnesses to be used in that manner should rest with the county attorney, and not with individuals or with the justice of the peace. The power effectively to control a prosecution involves the power to determine when and before what tribunal it shall be brought and maintained, and therefore whether it should be discontinued. We conclude that the justice of the peace should have acted upon the direction of the county attorney and dismissed the case.

Two Federal cases militate somewhat against this conclusion, but they are based upon statutes not entirely like those of Kansas. *United States v. Schumann*, 2 Abb. U. S. 523, 5 Sawy. 439, Fed. Cas. No. 16,235; *United States v. Scroggins*, 3 Woods, 529, Fed. Cas. No. 16,244.

2. It is contended that, even if the justice of the peace ought to have dismissed the case upon the direction of the county attorney, his refusal to do so was a mere error for which prohibition is not an available remedy. It is doubtless true that, upon the filing of the motion to dismiss, the justice did not lose jurisdiction in such sense as to render absolutely void everything that he thereafter did in the case. Prohibition is frequently spoken of as properly invoked only where it is sought to restrain a judicial officer from an act wholly beyond his jurisdiction. But expressions indicating some modification of this are not uncommon. Thus it is said that "the writ will lie in all cases either of abuse or usurpation of jurisdiction by an inferior tribunal." 32 Cyc. 604.

And that "three conditions are necessary to warrant the granting of the relief: First, that the court, officer, or person

against whom it is sought is about to exercise judicial or quasi judicial power; second, that the exercise of such power is unauthorized by law; third, that it will result in injury for which no other adequate remedy exists." High, Extr. Leg. Rem. § 764a.

In practice the writ is often used to prevent an act which, in a strict technical sense, is within the jurisdiction of the officer, but contrary to law,—one which he has the power to perform, but not the legal right. Thus in a recent textbook it is said: "The doctrine is universally held that a judge who has an interest in the subject-matter of the litigation is disqualified from hearing and adjudging the case, and, where he attempts to do so, prohibition will be granted to restrain him." 2 Bailey, Habeas Corpus, § 360.

See also *State ex rel. Jones v. Gay*, 65 Wash. 629, 118 Pac. 830.

Yet the disqualified judge is not wholly without jurisdiction, and if he acts the resulting judgment is not void, nor open to collateral attack. *Jones v. Williamsburg City F. Ins. Co.* 85 Kan. 235, 116 Pac. 484. Merely by way of illustration, it may be mentioned that the writ has been successfully invoked to correct an order requiring the production of records at an unreasonable place (*Equitable Life Assur. Soc. v. Hardin*, 166 Ky. 51, 178 S. W. 1155); to stay proceedings before a judge who had declared his intention to rule in a particular way (*Cullins v. Williams*, 156 Ky. 57, 160 S. W. 733); to enforce the rule of res judicata (*State ex rel. Burr v. Whitney*, 66 Fla. 24, 63 So. 299; *State ex rel. Missouri P. R. Co. v. Williams*, 221 Mo. 227, 120 S. W. 740); to restrain the hearing of a will contest because it was brought too late (*State ex rel. Wood v. Superior Ct.* 76 Wash. 27, 135 Pac. 494; *McVey v. Butcher*, 72 W. Va. 526, 78 S. E. 691); to prevent the taking of evidence on matters not pertinent to the issue (*Miller v. Superior Ct.* 25 Cal. App. 607, 144 Pac. 978); to prevent the splitting of a cause of action (*Bullard v. Thorpe*, 66 Vt. 599, 25 L.R.A. 605, 44 Am. St. Rep. 867, 30 Atl. 36); and even to prevent separate actions upon several notes of the defendant (*James v. Stokes*, 77 Va. 225).

The district court, besides having general original jurisdiction of all matters not otherwise provided for, and jurisdiction in cases of appeal and error from all inferior courts and tribunals, is specifically given by the statute "a general supervision and control of all such inferior courts and tribunals, to prevent and correct errors and abuses." Gen. Stat. 1915, § 2957. The clause quoted can hardly be regarded as

referring only to appellate jurisdiction, because that had already been provided for, and because the phrase "to prevent . . . errors and abuses" points to a preventive, and not a corrective, remedy. If it was the duty of the justice of the peace to dismiss the criminal case upon the motion of the county attorney (and we have determined that it was), he acted beyond his legal authority in going ahead with the hearing, and we think that prohibition was an appropriate method by which to require him to conform to the direction which we have decided the public prosecutor had a right to give.

It is true the plaintiff in this case might have submitted to the preliminary examination and given bond, if required to do so, for his appearance in the district court, and awaited his discharge upon the refusal of the county attorney to file an information; but that remedy manifestly might have been far from adequate.

3. A suggestion is made that the plaintiff had no right to resort to prohibition because he had not first invoked relief at the hands of the justice of the peace. When the justice had refused to dismiss the prosecution at the instance of the county attorney, a similar request by the accused would obviously have been a mere formality, the futility of which is demonstrated by the defense made in the district court on the ground that the county attorney did not have control of the case. *State ex rel. McEntee v. Bright*, 224 Mo. 514, 135 Am. St. Rep. 552, 123 S. W. 1057, 20 Ann. Cas. 955, 19 Ann. Cas. 1210.

4. In the first proceeding against Foley the docket of the justice did not recite findings that an offense had been committed and that there was probable cause to believe him guilty,—facts that the statute requires to be shown in order to warrant binding him over. This is referred to by the defendants in this action as casting a doubt upon the jurisdiction of the district court in that case. The transcript showed that Foley was required to give bond for his appearance in the district court for trial, and this, with the giving of the bond, was sufficient for jurisdictional purposes. *State v. Tennison*, 39 Kan. 726, 18 Pac. 948.

5. The decision that the order against the justice of the peace was properly granted renders of little practical consequence the question whether error was committed in rendering judgment against the individual defendants. As to them the action was one of injunction, and was maintainable for the same reasons that justified the prohibition against the officer, unless by reason of the rule which has sometimes been announced, that injunction against the pros-

execution of a criminal action will not lie except for the protection of property rights. 22 Cyc. 904; 14 R. C. L. 428. This rule seems to be founded on these considerations: The accused has usually a fairly adequate remedy by making his defense in the criminal action; a court of equity has no jurisdiction of criminal matters, that subject being committed to courts of law; as a matter of public policy the courts ought not to interfere with the representatives of the public seeking the enforcement of the law. In the case of numerous, repeated, and vexatious prosecutions, it is evident that the remedy of meeting the charges in the courts where they are brought may not be entirely adequate; where the same court has jurisdiction of legal and equitable matters distinctions founded on that difference are of little importance; and with respect to an injunction which runs not against the public prosecutor, but against individuals who seek to direct the machinery of the criminal law in

opposition to his judgment, the objection based on a reluctance to embarrass officers in discharging their duty to the government does not apply. A court of equity would seem to be as responsive to a call for the protection of personal rights, in an appropriate case, as to one for the protection of rights relating to property. In *Brown v. Nichols*, 93 Kan. 737, L.R.A. 1915D, 327, 145 Pac. 561, it is said: "The remedy of injunction may be employed to protect personal and property rights, although it may operate incidentally to restrain a prosecution under an invalid ordinance." Syllabus, ¶ 2.

The case on its merits was decided upon oral evidence, and any debatable inferences of fact must be resolved in favor of the plaintiff. So far as the decision turns upon the exercise of discretion, the action of the District Court must control. We conclude that no error is shown in any part of the court's order.

The judgment is affirmed.

Annotation—Right of public prosecutor to have preliminary examination before magistrate dismissed.

There seems to be little in the books on this subject and the courts are not agreed upon it. The power of a public prosecutor to dismiss a prosecution after indictment or information is discussed in the notes in 35 L.R.A. 701, and 45 L.R.A.(N.S.) 1123.

The United States district attorney has no power to have a criminal examination before a United States commissioner dismissed. *United States v. Schumann* (1866) 2 Abb. U. S. 523, 5 Sawy. 439, Fed. Cas. No. 16,235, where Field, J., said: "The district attorney may appear before the commissioner and attend to the presentation of the evidence, but in that position he is only counsel of the government; he cannot direct what finding the magistrate shall make, nor what course he shall pursue. The magistrate will, indeed, in any case, hesitate to continue an investigation after the prosecution has been abandoned by the legal officer of the government. Still, there may be cases where he will be justified, and more, bound to take such a course."

And the United States district attorney may not take away from the marshal a warrant issued by a United States commissioner, to determine whether it should be executed or not. *United States v. Seroggins* (1879) 3 Woods, 529, Fed. Cas. No. 16,244. L.R.A.1918C.

Similarly, it was held in *Beecher v. Anderson* (1881) 45 Mich. 543, 8 N. W. 539, (referred to in *FOLEY v. HAM*, ante, 205), that the sheriff must serve a warrant in a felony case, although the public prosecutor instructed him not to do so. In this case, where the statute did not require the prosecuting attorney to appear to prosecute complaints before a magistrate except where the magistrate requested it, the court said: "No doubt when he [the prosecuting attorney] appears the magistrate should govern his official action somewhat by his advice; he certainly ought very seldom to hold a party to bail or to convict him on trial when the prosecuting attorney in good faith advises him that no crime is made out. It would be proper, also, in many cases that he should seek the advice of the prosecuting attorney in advance of the issue of any warrant, and refuse a warrant even when the complainant is able to make prima facie showing of a technical offense, if the prosecuting attorney is of the opinion that the case would fail on full hearing, or that the criminal intent was so far wanting that the cause of justice would not be advanced by the prosecution."

In *Jamiset v. Monroe County* (1889) 77 Mich. 245, 43 N. W. 910, it was held that the county board may not refuse to allow the fees of a justice of the peace

in a criminal proceeding because he proceeded without the approval of the prosecuting attorney.

A magistrate may not refuse to issue a warrant upon the ground simply that the district attorney has refused to make a complaint, where the statute provides that "he shall examine on oath the complainant, and any witness provided by him, and shall reduce the complaint to writing, and shall cause the same to be subscribed by the complainant; and if it shall appear that any offense has been committed of which the superior court has exclusive jurisdiction, the magistrate shall issue a warrant reciting the substance of the accusation." *State ex rel. Romano v. Yahey* (1906) 43 *Wash.* 15, 85 *Pac.* 990, 9 *Ann. Cas.* 1071, where the court said: "It is the duty of every magistrate to see that false charges are not preferred against the innocent, and that criminal process is not resorted to, to subserve personal or private ends; but it is equally his duty to see that the guilty are brought to judgment. He may consult and advise with the prosecuting attorney, and it is proper that he should do so, especially where questions of law are involved, but, in the end, he must determine for himself whether an offense

has been committed of which the superior court has exclusive jurisdiction, and, if he so finds, he must issue his warrant, whether the prosecuting attorney assents or dissents."

On the other hand, *FOLEY v. HAM* is supported by the decision in *Re Broadhead* (1906) 74 *Kan.* 401, 86 *Pac.* 458, holding that "when a warrant which has been issued by a justice of the peace on a complaint charging the person whom the warrant commands the sheriff to arrest with a felony is delivered to a sheriff for service, and the sheriff thereafter, by direction of the county attorney, returns the warrant 'not found,' and files the same with the justice who issued it, such warrant thereupon becomes *functus officio*."

In *Ex parte Claunch* (1879) 71 *Mo.* 233, it was held that it was perfectly competent for the prosecuting attorney, as the representative of the state, to dismiss, against the will of a justice of the peace, a prosecution commenced before such justice for homicide, as the affidavit filed before him was, in the opinion of the prosecuting attorney, defective in failing to charge murder in the first degree.

B. B. B.

UNITED STATES SUPREME COURT.

CHARLES H. BUCHANAN, Plff. in Err.,
v.

WILLIAM WARLEY.

(245 U. S. 60, 62 L. ed. —, 38 Sup. Ct. Rep. 16.)

Statutes — who may question.

1. A white person who has sold land to a colored person under a contract providing that the purchaser shall not be required to accept a deed unless he shall have a right, under the laws of the city and state, to occupy the same as a residence, may, in an action by him to compel the specific performance of the contract, attack the constitutionality of a city ordinance which prohibits the purchase of such land by a colored person.

For other cases, see *Statutes*, I. c, 1, in *Dig.* 1-52 N. S.

Courts — interference with police power.

2. The exercise of the police power will

not be interfered with by the courts where it is within the scope of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose, but such power cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution.

For other cases, see *Courts*, I. c, 2, b, in *Dig.* 1-52 N. S.

Civil rights — colored person's right to purchase property.

3. A colored person has the right to acquire property without state legislation discriminating against him solely because of color, under U. S. Const. 14th Amend., providing that no state shall deprive any person of liberty or property without due process of law, nor deny to any person the equal protection of the laws, and the Act of Congress of April 9, 1866, providing that all "citizens of the United States" shall have the same right in every state and territory as is enjoyed by white citizens thereof to "purchase" real and personal property.

For other cases, see *Civil Rights*, in *Dig.* 1-52 N. S.

Note. — As to validity of segregation statute or ordinance prohibiting persons of different race or color from living in same locality, see annotation following this case, post, 220.

The question, who may raise the objection U. S. R. A. 1918C.

that a statute contains an unconstitutional discrimination, is considered in the note to *Pugh v. Pugh*, 32 L. R. A. (N. S.) 954; and see later case, *People v. Crane*, L. R. A. 1916D, 550.

Constitutional law — colored person's right to purchase property.

4. A city ordinance which prevents the occupancy of a lot by a colored person in a block where a majority of the residences are occupied by white persons, thereby preventing white persons in such block from selling property therein to negroes for residence purposes, is not a legitimate exercise of the police power of the state.

For other cases, see Constitutional Law, II, c, 3, in Dig. 1-52 N. S.

Same — prohibition against purchase of land by colored persons.

5. A city ordinance prohibiting colored persons from occupying as residences any house in any block in which the majority of residences are occupied by white people, thereby preventing white persons in such blocks from selling property to colored people for residence purposes, violates the constitutional prohibition against interference with property rights except by due process of law, and cannot be sustained on the ground that it will promote the public peace by preventing race conflicts, or that the acquisition of property in such blocks by colored persons for residence purposes will cause the depreciation in value of property in the neighborhood owned by white persons.

For other cases, see Constitutional Law, II, b, 5, in Dig. 1-52 N. S.

(November 5, 1917.)

ERROR to the Court of Appeals of the State of Kentucky to review a judgment affirming a judgment of the Chancery Branch of the Circuit Court for Jefferson County in favor of defendant in an action brought to compel specific performance of a contract for the sale of certain real estate. Reversed.

The facts are stated in the opinion.

Messrs. **Clayton B. Blakey and Moorfield Storey**, for plaintiff in error:

The presumption that the ordinance was enacted in good faith for the purposes declared fails when it is obvious that the real purposes were very different from those which are declared.

Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145.

Among the rights and privileges of the citizen which are fundamental is the right to acquire and possess property of every kind.

Cortfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3230; *Slaughter-House Cases*, 16 Wall. 36, 76, 21 L. ed. 394, 408.

The ordinance is an attempt to deprive the negro of the rights which belong to every citizen simply because white men consider him inferior by reason of his race and color. It was to protect him against precisely such consequences of race prejudice that the 14th Amendment was passed.

L.R.A.1918C

Slaughter-House Cases, supra; *Ex parte Virginia*, 100 U. S. 339, 344, 25 L. ed. 676, 678, 3 Am. Crim. Rep. 547; *Strauder v. West Virginia*, 100 U. S. 303, 306, 25 L. ed. 664, 665, 3 Am. Crim. Rep. 515; *Washington, A. & G. R. Co. v. Brown*, 17 Wall. 445, 21 L. ed. 675; *State v. Darnell*, 166 N. C. 300, 51 L.R.A.(N.S.) 332, 81 S. E. 338; *Re Lee Sing*, 48 Fed. 359.

The ordinance cannot be justified as an exercise of the police power.

Atchison, T. & S. F. R. Co. v. Vosburg, 238 U. S. 56, 59, 59 L. ed. 1199, 1200, L.R.A. 1915E, 953, 35 Sup. Ct. Rep. 675; *Geiger-Jones Co. v. Turner*, 230 Fed. 233; *Opinion of Justices*, 207 Mass. 601, 34 L.R.A.(N.S.) 604, 94 N. E. 558; *Ho Ah Kow v. Nunan*, 5 Sawy. 552, Fed. Cas. No. 6,546; *Truax v. Raich*, 239 U. S. 33, 41, 60 L. ed. 131, 135, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357.

In determining whether a legislative enactment of this character is or is not reasonable, courts will look to the purpose of the statute, and determine from the natural effect of such statutes when put into operation, and not from their proclaimed purpose.

Lochner v. New York, 198 U. S. 45, 64, 49 L. ed. 937, 944, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350, 362, 59 L. ed. 265, 271, 35 Sup. Ct. Rep. 99; *Coppage v. Kansas*, 236 U. S. 1, 15, 59 L. ed. 441, 446, L.R.A. 1915C, 960, 35 Sup. Ct. Rep. 240.

Police regulations in order to be enforceable must permit to all under like circumstances the enjoyment of the same rights and privileges.

Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Barbier v. Connolly*, 113 U. S. 30, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Mallinckrodt Chemical Works v. Missouri*, 238 U. S. 41-55, 59 L. ed. 1192-1198, 35 Sup. Ct. Rep. 671; *State v. Pennoyer*, 65 N. H. 113, 5 L.R.A. 711, 18 Atl. 878; *State v. Gurry*, 121 Md. 534, 47 L.R.A.(N.S.) 1087, 88 Atl. 546, Ann. Cas. 1915B, 957.

Mr. **Harold S. Davis** also for plaintiff in error.

Messrs. **Frederick W. Lehmann and Wells H. Blodgett**, amici curie:

Prejudice of race does not limit itself to protection of race integrity, but seeks race advantage always. It has no regard for constitutional limitations. It will under-

take to nullify political power plainly granted by the Constitution.

Guinn v. United States, 238 U. S. 347, 59 L. ed. 1340, L.R.A.1916A, 1124, 35 Sup. Ct. Rep. 926; *Myers v. Anderson*, 238 U. S. 368, 59 L. ed. 1349, 35 Sup. Ct. Rep. 932.

Deprivation of the use of property is equivalent to taking it, and to deprive an owner of property of one of its essential attributes is depriving him of his property within the constitutional provision.

Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; *State v. Julow*, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781.

The individual is entitled to the equal protection of the laws and may not be deprived of his property without due process of law.

McCabe v. Atchison, T. & S. F. R. Co. 235 U. S. 151, 59 L. ed. 169, 35 Sup. Ct. Rep. 69.

Mr. W. Ashbie Hawkins, amicus curiæ: The ordinance is invalid and unreasonable.

State v. Gurry, 121 Md. 551, 47 L.R.A. (N.S.) 1087, 88 Atl. 546, Ann. Cas. 1915B, 957; *State v. Darnell*, 166 N. C. 300, 51 L.R.A.(N.S.) 332, 81 S. E. 338; *Carey v. Atlanta*, 143 Ga. 192, L.R.A.1915D, 684, 84 S. E. 456, Ann. Cas. 1916E, 1151.

The limit of the police power was passed. *Baltimore & O. R. Co. v. Walters*, 105 Md. 421, 12 L.R.A.(N.S.) 326, 66 Atl. 685; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

The ordinance is unequal in its application.

6 Am. & Eng. Enc. Law, 2d ed. 79; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550; *Ex parte Virginia*, 100 U. S. 839, 25 L. ed. 676, 3 Am. Crim. Rep. 547; *Neal v. Delaware*, 103 U. S. 870, 26 L. ed. 567; *Ho Ah Kow v. Nunan*, 5 Sawy. 552, Fed. Cas. No. 6546; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730.

The right of residence, so long as it does not become a menace to the public health, L.R.A.1918C.

morals, or safety, is an inalienable right, incident to the ownership of real property.

State v. Redmon, 134 Wis. 89, 14 L.R.A. (N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408.

Mr. Alfred E. Cohen, amicus curiæ:

Due process of law within the meaning of the 14th Amendment to the Federal Constitution is not secure if the citizen is subjected to an arbitrary exercise of the powers of government.

Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 15 Sup. Ct. Rep. 721.

The vice of the ordinance lies in that what is permitted to one individual of the same race is denied to another.

State v. Gurry, 121 Md. 534, 47 L.R.A. (N.S.) 1087, 88 Atl. 546, Ann. Cas. 1915B, 957.

A class of citizens cannot be limited in their residences to a certain district.

Re Lee Sing, 43 Fed. 359; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

Where rights of property are admitted to exist the legislature cannot say they shall exist no longer.

Wynehamer v. People, 13 N. Y. 392.

The constitutional guaranty would be of little worth if the legislature could without compensation destroy property or its value, deprive the owner of its use, deny him the right to live in his own house, or to work at any trade therein.

Re Jacobs, 98 N. Y. 105, 50 Am. Rep. 636.

The word "liberty," as used in the Constitution of the United States and the several states, means not merely the right to go where one chooses, but is deemed to embrace the right of the citizen to live and work where he will.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Powell v. Pennsylvania*, 127 U. S. 678, 22 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257.

Messrs. Charles Nagel, James A. Seddon, Seldon P. Spencer, Sidney F. Andrews, W. L. Sturdevant, Percy Werner, Everett W. Pattison, and Joseph Wheless, amici curiæ:

Offensive occupations may be excluded from localities, but the Federal Constitution makes the right of exclusion depend on the occupation, and not on the nationality of the proprietor.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Strauder v. West Virginia*, 100 U. S. 303, 25 L. ed. 664, 3 Am. Crim. Rep. 515; *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667, 3 Am. Crim. Rep. 524; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676, 3 Am. Crim. Rep. 547.

Police regulations cannot impair constitutional rights.

Iruax v. Raich, 239 U. S. 33, 60 L. ed. 131, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 853, 19 Sup. Ct. Rep. 565; *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; *Re Neagle*, 5 L.R.A. 78, 14 Sawy. 232, 39 Fed. 844.

Messrs. Pendleton Beckley and Stuart Chevallier, for defendant in error:

The court will not declare invalid a police regulation, unless it clearly appears from the law itself or from facts of which the court may take judicial cognizance, that it violates the constitutional guaranties.

8 Cyc. 791; *Soon Hing v. Crowley*, 113 U. S. 710, 28 L. ed. 1147, 5 Sup. Ct. Rep. 730; *Cooley, Const. Lim.* 7th ed. 257; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 568, 569, 55 L. ed. 338, 339, 31 Sup. Ct. Rep. 259; *McLean v. Arkansas*, 211 U. S. 547, 548, 53 L. ed. 319, 320, 29 Sup. Ct. Rep. 206; *Noble State Bank v. Haskell*, 219 U. S. 575-580, 55 L. ed. 341-343, 32 L.R.A.(N.S.) 1065, 31 Sup. Ct. Rep. 299, Ann. Cas. 1912A, 489; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Tenement House Dept. v. Moeschén*, 179 N. Y. 325, 70 L.R.A. 704, 103 Am. St. Rep. 910, 72 N. E. 231, 1 Ann. Cas. 439, 203 U. S. 583, 51 L. ed. 328, 27 Sup. Ct. Rep. 781; *Hyman v. Boldrick*, 153 Ky. 77, 44 L.R.A.(N.S.) 1039, 154 S. W. 369; *Berea College v. Com.* 123 Ky 209, 124 Am. St. Rep. 344, 94 S. W. 623, 13 Ann. Cas. 337, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33.

Legislation segregating or separating the white and colored races is a constitutional exercise of the police power.

Roberts v. Boston, 5 Cush. 198; *People ex rel. King v. Gallagher*, 98 N. Y. 438, 45 Am. Rep. 232; *West Chester & P. R. Co. v. Miles*, 55 Pa. 209, 93 Am. Dec. 744; *Plessy v. Ferguson*, 163 U. S. 545, 41 L. ed. 258, 16 Sup. Ct. Rep. 1138; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Berea College v. Com.* supra; *Chiles v. Chesapeake & O. R. Co.* 218 U. S. 71, 54 L. ed. 936, 30 Sup. Ct. Rep. 667, 20 Ann. Cas. 980; *Chesapeake & O. R. Co. v. Kentucky*, 179 U. S. 388, 45 L. ed. 244, 21 Sup. Ct. Rep. 101.

The Federal Constitution does not prohibit a state from abridging under its police power privileges and immunities of citizens of the state; nor does the fact that privileges thereby regulated may not in fact be equal or identical amount to a denial of the equal protection of the laws; L.R.A.1918C.

nor does the Federal Constitution attempt to guarantee social or economic equality.

Berea College v. Com. supra; *McCabe v. Atchison, T. & S. F. R. Co.* 235 U. S. 151, 59 L. ed. 169, 35 Sup. Ct. Rep. 69; *Civil Rights Cases*, 109 U. S. 6, 27 L. ed. 838, 3 Sup. Ct. Rep. 18; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; *Twining v. New Jersey*, 211 U. S. 96, 53 L. ed. 104, 29 Sup. Ct. Rep. 14.

The use of property and the liberty of contract are always subject to reasonable police regulations, and their enforcement does not deprive a person of property without due process of law. The present ordinance, so far from destroying or impairing such rights, will have the effect of protecting property from the most serious and destructive results.

Tenement House Dept. v. Moeschén, 179 N. Y. 325, 70 L.R.A. 704, 103 Am. St. Rep. 910, 72 N. E. 231, 1 Ann. Cas. 439, 203 U. S. 583, 51 L. ed. 328, 27 Sup. Ct. Rep. 781; *O'Bryan v. Highland Apartment Co.* 128 Ky. 282, 15 L.R.A.(N.S.) 419, 108 S. W. 257; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 304; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1086; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *L'Hôte v. New Orleans*, 177 U. S. 587, 44 L. ed. 899, 20 Sup. Ct. Rep. 788; *Hyman v. Boldrick*, 153 Ky. 77, 44 L.R.A.(N.S.) 1039, 154 S. W. 369; *Hadacheck v. Sebastian*, 230 U. S. 394, 60 L. ed. 348, 36 Sup. Ct. Rep. 143, Ann. Cas. 1917B, 927; *Reinman v. Little Rock*, 237 U. S. 171, 59 L. ed. 900, 35 Sup. Ct. Rep. 511; *Fischer v. St. Louis*, 193 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673; *Scheffe v. St. Louis*, 194 U. S. 373, 48 L. ed. 1024, 24 Sup. Ct. Rep. 673; *Welch v. Swasey*, 214 U. S. 91-108, 53 L. ed. 923, 29 Sup. Ct. Rep. 567; *Ex parte Quong Wo*, 161 Cal. 220, 118 Pac. 714; *Re Montgomery*, 163 Cal. 457, 125 Pac. 1070; *Ann. Cas.* 1914A, 130; *People ex rel. Busching v. Ericsson*, 263 Ill. 368, L.R.A.1915D, 607, 105 N. E. 315, Ann. Cas. 1915C, 183; *Thomas Cusack Co. v. Chicago*, 267 Ill. 344, 108 N. E. 340, Ann. Cas. 1916C, 488; *Com. v. Alger*, 7 Cush. 53; *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Berea College v. Kentucky*, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33; *Schmidinger v. Chicago*, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284; *Northern P. R. Co. v. Minnesota*, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341.

The right to enact a law providing for reasonable residential segregation similar to that now under consideration has been

sanctioned by the state courts where the question has squarely arisen.

State v. Gurry, 121 Md. 534, 47 L.R.A. (N.S.) 1087, 88 Atl. 546, Ann. Cas. 1915B, 957; *Hopkins v. Richmond*, 117 Va. 692, 86 S. E. 139, Ann. Cas. 1917D, 1114; *State v. Darnell*, 166 N. C. 300, 51 L.R.A. (N.S.) 332, 81 S. E. 338; *Carey v. Atlanta*, 143 Ga. 192, L.R.A.1915D, 684, 84 S. E. 456, Ann. Cas. 1916E, 1151.

Mr. H. R. Pollard, amicus curiæ:

The ordinance in question is reasonable in its terms.

2 McQuillin, Mun. Ord. §§ 186, 432, 732; *Adams v. Milwaukee*, 228 U. S. 572-581, 57 L. ed. 971-976, 33 Sup. Ct. Rep. 610; *Schmidinger v. Chicago*, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284; *Plessy v. Ferguson*, 163 U. S. 537-550, 41 L. ed. 256-260, 16 Sup. Ct. Rep. 1138; *Chiles v. Chesapeake & O. R. Co.* 218 U. S. 71, 77, 54 L. ed. 936, 938, 30 Sup. Ct. Rep. 667, 20 Ann. Cas. 980; *Hopkins v. Richmond*, 117 Va. 692, 86 S. E. 139, Ann. Cas. 1917D, 1114.

The ordinance in question is constitutional and valid.

8 Cyc. 863; *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; *Chesapeake & O. R. Co. v. Kentucky*, 179 U. S. 388, 45 L. ed. 244, 21 Sup. Ct. Rep. 101; *Berea College v. Kentucky*, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33; *State v. Gurry*, 121 Md. 534, 47 L.R.A. (N.S.) 1087, 88 Atl. 546, Ann. Cas. 1915B, 957; *Ashland v. Coleman*, 19 Va. L. Reg. 427; *Hopkins v. Richmond*, 117 Va. 692, 86 S. E. 139, Ann. Cas. 1917D, 1114; *State v. Darnell*, 166 N. C. 300, 51 L.R.A. (N.S.) 332, 81 S. E. 338; *Civil Rights Cases*, 109 U. S. 6, 27 L. ed. 836, 3 Sup. Ct. Rep. 18; *Roberts v. Boston*, 5 Cush. 198; *Hall v. De Cuir*, 95 U. S. 485, 508, 24 L. ed. 511, 555; *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; *Chiles v. Chesapeake & O. R. Co.* 218 U. S. 71-77, 54 L. ed. 936-938, 30 Sup. Ct. Rep. 667, 20 Ann. Cas. 980; 27 Cyc. 799; *Pace v. Alabama*, 106 U. S. 583, 27 L. ed. 207, 1 Sup. Ct. Rep. 637; *Hudson County Water Co. v. McCarter*, 209 U. S. 340, 52 L. ed. 828, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560; *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 54 L. ed. 515, 30 Sup. Ct. Rep. 301; *Com. v. Alger*, 7 Cush. 53; *Health Dept. v. Rector*, 145 N. Y. 32, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; *Welch v. Swasey*, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 304; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Brown v. J. H. Bell Co.* L.R.A.1918C.

146 Iowa, 89, 27 L.R.A. (N.S.) 407, 123 N. W. 231, 124 N. W. 901, Ann. Cas. 1912B, 852; *Northern P. R. Co. v. Minnesota*, 208 U. S. 583, 595-597, 52 L. ed. 630, 633-636, 28 Sup. Ct. Rep. 341; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 856, 557, 38 L. ed. 269, 270, 14 Sup. Ct. Rep. 437; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22, 46 L. ed. 55, 61, 22 Sup. Ct. Rep. 1; *Bacon v. Walker*, 204 U. S. 311, 317, 51 L. ed. 499, 502, 27 Sup. Ct. Rep. 289; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561-592, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341; *Engel v. O'Malley*, 219 U. S. 128-136, 55 L. ed. 128-136, 34 Sup. Ct. Rep. 190; *Noble State Bank v. Haskell*, 219 U. S. 104, 111, 55 L. ed. 112, 116, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; *Mutual Loan Co. v. Martell*, 222 U. S. 225, 56 L. ed. 175, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529; *Crowley v. Christensen*, 137 U. S. 86-89, 34 L. ed. 620-622, 11 Sup. Ct. Rep. 13; *Lawton v. Steele*, 152 U. S. 133, 139-141, 38 L. ed. 385, 389, 390, 14 Sup. Ct. Rep. 499; *McLean v. Arkansas*, 211 U. S. 539, 545, 53 L. ed. 315, 318, 29 Sup. Ct. Rep. 206; *Missouri P. R. Co. v. Omaha*, 235 U. S. 121, 59 L. ed. 157, 35 Sup. Ct. Rep. 82.

Mr. S. S. Field, amicus curiæ:

The ordinance is a reasonable exercise of the police power, and therefore valid.

State v. Gurry, 121 Md. 534, 47 L.R.A. (N.S.) 1087, 88 Atl. 546, Ann. Cas. 1915B, 957; *Hopkins v. Richmond*, 117 Va. 692, 86 S. E. 139, Ann. Cas. 1917D, 1114; *Buchanan v. Warley*, 165 Ky. 559, 177 S. W. 472, Ann. Cas. 1917B, 149; *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; *Berea College v. Kentucky*, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33; *Chiles v. Chesapeake & O. R. Co.* 218 U. S. 71, 54 L. ed. 936, 30 Sup. Ct. Rep. 667, 20 Ann. Cas. 980; *Hart v. State*, 100 Md. 595, 60 Atl. 457; *Roberts v. Boston*, 5 Cush. 198; *West Chester & P. R. Co. v. Miles*, 55 Pa. 209, 93 Am. Dec. 744.

The ordinance has a real and substantial

relation to the public safety and morals, and to the general welfare.

Roberts v. Boston, 5 Cush. 198; *Plessy v. Ferguson*, 163 U. S. 537, 544, 41 L. ed. 256, 258, 16 Sup. Ct. Rep. 1138; *West Chester & P. R. Co. v. Miles*, 55 Pa. 213, 93 Am. Dec. 744; *Chiles v. Chesapeake & O. R. Co.* 218 U. S. 71, 54 L. ed. 936, 30 Sup. Ct. Rep. 667, 20 Ann. Cas. 980; *Hart v. State*, 100 Md. 601, 60 Atl. 457; *Berea College v. Kentucky*, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33.

The ordinance deprives no one of property without due process of law.

Harris v. Louisville, 165 Ky. 569, 177 S. W. 472, Ann. Cas. 1917B, 149; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 592, 50 L. ed. 609, 26 Sup. Ct. Rep. 341; *West Chicago Street R. Co. v. Illinois*, 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. Rep. 518; *Northern P. R. Co. v. Minnesota*, 208 U. S. 596, 52 L. ed. 636, 28 Sup. Ct. Rep. 341.

Mr. Chilton Atkinson, amicus curiæ:

The police power extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the states.

Munn v. Illinois, 94 U. S. 113, 125, 24 L. ed. 77, 83.

Conditions likely to give rise to disputes and bickerings prejudicial to the public order may be prevented by an act which, to a certain extent, involves the taking of property without compensation.

Camfield v. United States, 167 U. S. 518, 524, 42 L. ed. 260, 262, 17 Sup. Ct. Rep. 864.

Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate cannot be said to be reasonable.

Chiles v. Chesapeake & O. R. Co. 218 U. S. 71, 77, 54 L. ed. 936, 938, 30 Sup. Ct. Rep. 667, 20 Ann. Cas. 980.

Mr. Justice Day delivered the opinion of the court:

Buchanan, plaintiff in error, brought an action in the chancery branch of Jefferson circuit court of Kentucky for the specific performance of a contract for the sale of certain real estate situated in the city of Louisville at the corner of 37th street and Pflanz avenue. The offer in writing to purchase the property contained a proviso:

"It is understood that I am purchasing the above property for the purpose of having erected thereon a house which I propose to make my residence, and it is a distinct part of this agreement that I shall not be required to accept a deed to the above property or to pay for said property unless I have the right, under the L.R.A.1918C.

laws of the state of Kentucky and the city of Louisville, to occupy said property as a residence." This offer was accepted by the plaintiff.

To the action for specific performance the defendant, by way of answer, set up the condition above set forth, that he is a colored person, and that on the block of which the lot in controversy is a part, there are ten residences, eight of which, at the time of the making of the contract, were occupied by white people, and only two (those nearest the lot in question) were occupied by colored people, and that, under and by virtue of the ordinance of the city of Louisville, approved May 11, 1914, he would not be allowed to occupy the lot as a place of residence.

In reply to this answer the plaintiff set up, among other things, that the ordinance was in conflict with the 14th Amendment to the Constitution of the United States, and hence no defense to the action for specific performance of the contract.

In the court of original jurisdiction in Kentucky, and in the court of appeals of that state, the case was made to turn upon the constitutional validity of the ordinance. The court of appeals of Kentucky (165 Ky. 559, 177 S. W. 472, Ann. Cas. 1917B, 149) held the ordinance valid and of itself a complete defense to the action.

The title of the ordinance is: "An ordinance to prevent conflict and ill feeling between the white and colored races in the city of Louisville, and preserve the public peace and promote the general welfare by making reasonable provisions requiring as far as practicable, the use of separate blocks for residences, places of abode, and places of assembly by white and colored people respectively."

By the 1st section of the ordinance it is made unlawful for any colored person to move into and occupy as a residence, place of abode, or to establish and maintain as a place of public assembly, any house upon any block upon which a greater number of houses are occupied as residences, places of abode, or places of public assembly by white people than are occupied as residences, places of abode, or places of public assembly by colored people.

Section 2 provides that it shall be unlawful for any white person to move into and occupy as a residence, place of abode, or to establish and maintain as a place of public assembly, any house upon any block upon which a greater number of houses are occupied as residences, places of abode, or places of public assembly by colored people than are occupied as residences, places of abode, or places of public assembly by white people.

Section 4 provides that nothing in the ordinance shall affect the location of residences, places of abode, or places of assembly made previous to its approval; that nothing contained therein shall be construed so as to prevent the occupancy of residences, places of abode, or places of assembly by white or colored servants or employees of occupants of such residences, places of abode, or places of public assembly on the block on which they are so employed, and that nothing therein contained shall be construed to prevent any person who, at the date of the passage of the ordinance, shall have acquired or possessed the right to occupy any building as a residence, place of abode, or place of assembly from exercising such a right; that nothing contained in the ordinance shall prevent the owner of any building, who, when the ordinance became effective, leased, rented, or occupied it as a residence, place of abode, or place of public assembly for colored persons, from continuing to rent, lease, or occupy such residence, place of abode or place of assembly for such persons, if the owner shall so desire; but if such house should, after the passage of the ordinance, be at any time leased, rented, or occupied as a residence, place of abode, or place of assembly for white persons, it shall not thereafter be used for colored persons, if such occupation would then be a violation of § 1 of the ordinance; that nothing contained in the ordinance shall prevent the owner of any building, who, when the ordinance became effective, leased, rented, or occupied it as a residence, place of abode, or place of assembly for white persons, from continuing to rent, lease, or occupy such residence, place of abode, or place of assembly for such purpose, if the owner shall so desire, but if such household, after the passage of the ordinance, be at any time leased, rented, or occupied as a residence, place of abode, or place of assembly for colored persons, then it shall not thereafter be used for white persons, if such occupation would then be a violation of § 2 thereof.

The ordinance contains other sections and a violation of its provisions is made an offense.

The assignments of error in this court attack the ordinance upon the ground that it violates the 14th Amendment of the Constitution of the United States, in that it abridges the privileges and immunities of citizens of the United States to acquire and enjoy property, takes property without due process of law, and denies equal protection of the laws.

The objection is made that this writ of error should be dismissed because the L.R.A.1918C.

alleged denial of constitutional rights involves only the rights of colored persons, and the plaintiff in error is a white person. This court has frequently held that while an unconstitutional act is no law, attacks upon the validity of laws can only be entertained when made by those whose rights are directly affected by the law or ordinance in question. Only such persons, it has been settled, can be heard to attack the constitutionality of the law or ordinance. But this case does not run counter to that principle.

The property here involved was sold by the plaintiff in error, a white man, on the terms stated, to a colored man; the action for specific performance was entertained in the court below, and in both courts the plaintiff's right to have the contract enforced was denied solely because of the effect of the ordinance making it illegal for a colored person to occupy the lot sold. But for the ordinance the state courts would have enforced the contract, and the defendant would have been compelled to pay the purchase price and take a conveyance of the premises. The right of the plaintiff in error to sell his property was directly involved and necessarily impaired because it was held in effect that he could not sell the lot to a person of color who was willing and ready to acquire the property, and had obligated himself to take it. This case does not come within the class wherein this court has held that where one seeks to avoid the enforcement of a law or ordinance he must present a grievance of his own, and not rest the attack upon the alleged violation of another's rights. In this case the property rights of the plaintiff in error are directly and necessarily involved. See *Truax v. Raich*, 239 U. S. 33, 38, 60 L. ed. 131, 134, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283.

We pass, then, to a consideration of the case upon its merits. This ordinance prevents the occupancy of a lot in the city of Louisville by a person of color in a block where the greater number of residences are occupied by white persons; where such a majority exists, colored persons are excluded. This interdiction is based wholly upon color; simply that, and nothing more. In effect, premises situated as are those in question in the so-called white block are effectively debarred from sale to persons of color, because, if sold, they cannot be occupied by the purchaser nor by him sold to another of the same color.

This drastic measure is sought to be justified under the authority of the state in the exercise of the police power. It is

said such legislation tends to promote the public peace by preventing racial conflicts; that it tends to maintain racial purity; that it prevents the deterioration of property owned and occupied by white people, which deterioration, it is contended, is sure to follow the occupancy of adjacent premises by persons of color.

The authority of the state to pass laws in the exercise of the police power, having for their object the promotion of the public health, safety, and welfare, is very broad, as has been affirmed in numerous and recent decisions of this court. Furthermore, the exercise of this power, embracing nearly all legislation of a local character, is not to be interfered with by the courts where it is within the scope of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose. But it is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution; that principle has been so frequently affirmed in this court that we need not stop to cite the cases.

The Federal Constitution and laws passed within its authority are, by the express terms of that instrument, made the supreme law of the land. The 14th Amendment protects life, liberty, and property from invasion by the states without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. *Holden v. Hardy*, 169 U. S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land. 1 *Cooley's Bl. Com.* 127.

True it is that dominion over property springing from ownership is not absolute and unqualified. The disposition and use of property may be controlled, in the exercise of the police power, in the interest of the public health, convenience, or welfare. Harmful occupations may be controlled and regulated. Legitimate business may also be regulated in the interest of the public. Certain uses of property may be confined to portions of the municipality other than the residence district, such as livery stables, brickyards, and the like, because of the impairment of the health and comfort of the occupants of neighboring property. Many illustrations might be given from the decisions of this court and other courts, L.R.A.1918C.

of this principle, but these cases do not touch the one at bar.

The concrete question here is: May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the states, or by one of its municipalities, solely because of the color of the proposed occupant of the premises? That one may dispose of his property, subject only to the control of lawful enactments curtailing that right in the public interest, must be conceded. The question now presented makes it pertinent to inquire into the constitutional right of the white man to sell his property to a colored man, having in view the legal status of the purchaser and occupant.

Following the Civil War certain amendments to the Federal Constitution were adopted, which have become an integral part of that instrument, equally binding upon all the states and fixing certain fundamental rights which all are bound to respect. The 13th Amendment abolished slavery in the United States and in all places subject to their jurisdiction, and gave Congress power to enforce the Amendment by appropriate legislation. The 14th Amendment made all persons born or naturalized in the United States, citizens of the United States and of the states in which they reside, and provided that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person the equal protection of the laws.

The effect of these Amendments was first dealt with by this court in *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394. The reasons for the adoption of the Amendments were elaborately considered by a court familiar with the times in which the necessity for the Amendments arose and with the circumstances which impelled their adoption. In that case Mr. Justice Miller, who spoke for the majority, pointed out that the colored race, having been freed from slavery by the 13th Amendment, was raised to the dignity of citizenship and equality of civil rights by the 14th Amendment, and the states were prohibited from abridging the privileges and immunities of such citizens, or depriving any person of life, liberty, or property without due process of law. While a principal purpose of the latter Amendment was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminatory legislation by the states. This is now the settled law. In

many of the cases since arising the question of color has not been involved, and the cases have been decided upon alleged violations of civil or property rights, irrespective of the race or color of the complainant. In *Slaughter-House Cases* it was recognized that the chief inducement to the passage of the Amendment was the desire to extend Federal protection to the recently emancipated race from unfriendly and discriminating legislation by the states.

In *Strauder v. West Virginia*, 100 U. S. 303, 25 L. ed. 664, 3 Am. Crim. Rep. 515, this court held that a colored person charged with an offense was denied due process of law by a statute which prevented colored men from sitting on the jury which tried him. Mr. Justice Strong, speaking for the court, again reviewed the history of the Amendments, and, among other things, in speaking of the 14th Amendment, said:

"It [the 14th Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that, under the law, are enjoyed by white persons, and to give to that race the protection of the general government in that enjoyment, whenever it should be denied by the states. It not only gave citizenship and privileges of citizenship to persons of color, but it denied to any state the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation. . . . It ordains that no state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States. . . . It ordains that no state shall deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.

"What is this but declaring that the law in the states shall be the same for the black as for the white,—that all persons, whether colored or white, shall stand equal before the laws of the states, and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color? . . .

"The 14th Amendment makes no attempt to enumerate the rights it designs to protect. It speaks in general terms and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection either for life, liberty, or property. Any state action that denies this immunity to a L.R.A.1918C.

colored man is in conflict with the Constitution."

Again, this court in *Ex parte Virginia*, 100 U. S. 339, 347, 25 L. ed. 676, 679, 3 Am. Crim. Rep. 547, speaking of the 14th Amendment, said:

"Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state and is clothed with the state's power, his act is that of the state."

In giving legislative aid to these constitutional provisions Congress enacted in 1866 (chap. 31, § 1, 14 Stat. at L. 27, Comp. Stat. 1916, § 3931) that:

"All citizens of the United States shall have the same right in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

And in 1870, by chap. 114, § 16, 16 Stat. at L. 144, Comp. Stat. 1916, § 3925, that:

"All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and no other."

In the face of these constitutional and statutory provisions, can a white man be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color, intending to occupy the premises as a place of residence?

The statute of 1866, originally passed under sanction of the 13th Amendment (14 Stat. at L. 27, chap. 31), and practically re-enacted after the adoption of the 14th Amendment (16 Stat. at L. 144, chap. 114), expressly provided that all citizens of the United States in any state shall have the same right to purchase property as is enjoyed by white citizens. Colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color. *Hall v. De Cuir*, 95 U. S. 485, 508, 24 L. ed. 547, 555. These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every

race and color. Civil Rights Cases, 100 U. S. 3, 22, 27 L. ed. 835, 843, 3 Sup. Ct. Rep. 18. The 14th Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color.

The defendant in error insists that *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1198, is controlling in principle in favor of the judgment of the court below. In that case this court held that a provision of a statute of Louisiana requiring railway companies carrying passengers to provide in their coaches equal but separate accommodations for the white and colored races did not run counter to the provisions of the 14th Amendment. It is to be observed that in that case there was no attempt to deprive persons of color of transportation in the coaches of the public carrier, and the express requirements were for equal though separate accommodations for the white and colored races. In *Plessy v. Ferguson*, classification of accommodations was permitted upon the basis of equality for both races.

In the *Berea College Case*, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33, a state statute was sustained in the courts of Kentucky, which, while permitting the education of white persons and negroes in different localities by the same incorporated institution, prohibited their attendance at the same place, and in this court the judgment of the court of appeals of Kentucky was affirmed solely upon the reserved authority of the legislature of Kentucky to alter, amend, or repeal charters of its own corporations, and the question here involved was neither discussed nor decided.

In *Carey v. Atlanta*, 143 Ga. 192, L.R.A. 1915D, 684, 84 S. E. 456, Ann. Cas. 1910E, 1151, the supreme court of Georgia, holding an ordinance, similar in principle to the one herein involved, to be invalid, dealt with *Plessy v. Ferguson* and the *Berea College Case* in language so apposite that we quote a portion of it:

"In each instance the complaining person was afforded the opportunity to ride, or to attend institutions of learning, or afforded the thing of whatever nature to which in the particular case he was entitled. The most that was done was to require him, as a member of a class, to conform with reasonable rules in regard to the separation of the races. In none of them was he denied the right to use, control, or dispose of his property, as in this case. Property of a person, whether as a member of a class or as an individual, cannot be taken without due process of law. In the recent case

of *McCabe v. Atchison, T. & S. F. R. Co.* 235 U. S. 151, 59 L. ed. 169, 35 Sup. Ct. Rep. 69, where the court had under consideration a statute which allowed railroad companies to furnish dining cars for white people and to refuse to furnish dining cars altogether for colored persons, this language was used in reference to the contentions of the attorney general; 'This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one.'

"The effect of the ordinance under consideration was not merely to regulate a business or the like, but was to destroy the right of the individual to acquire, enjoy, and dispose of his property. Being of this character it was void as being opposed to the due-process clause of the Constitution."

That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges.

As we have seen, this court has held laws valid which separated the races on the basis of equal accommodations in public conveyances, and courts of high authority have held enactments lawful which provide for separation in the public schools of white and colored pupils where equal privileges are given. But, in view of the rights secured by the 14th Amendment to the Federal Constitution, such legislation must have its limitations, and cannot be sustained where the exercise of authority exceeds the restraints of the Constitution. We think these limitations are exceeded in laws and ordinances of the character now before us.

It is the purpose of such enactments, and it is frankly avowed it will be their ultimate effect, to require by law, at least in residential districts, the compulsory separation of the races on account of color. Such action is said to be essential to the maintenance of the purity of the races, although it is to be noted in the ordinance under consideration that the employment of colored servants in white families is permitted, and near-by residences of colored persons not coming within the blocks, as defined in the ordinance, are not prohibited.

The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he

saw fit to do so to a person of color, and of a colored person to make such disposition to a white person.

It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.

It is said that such acquisitions by colored persons depreciate property owned in the neighborhood by white persons. But property may be acquired by undesirable white neighbors, or put to disagreeable though lawful uses with like results.

We think this attempt to prevent the

alienation of the property in question to a person of color was not a legitimate exercise of the police power of the state, and is in direct violation of the fundamental law enacted in the 14th Amendment of the Constitution preventing state interference with property rights except by due process of law. That being the case, the ordinance cannot stand. *Booth v. Illinois*, 184 U. S. 425, 429, 46 L. ed. 623, 626, 22 Sup. Ct. Rep. 425; *Otis v. Parker*, 187 U. S. 606, 609, 47 L. ed. 323, 327, 23 Sup. Ct. Rep. 168.

Reaching this conclusion it follows that the judgment of the Kentucky Court of Appeals must be reversed, and the cause remanded to that court for further proceedings not inconsistent with this opinion.

Annotation—Validity of segregation statute or ordinance prohibiting persons of different race or color from living in same locality.

The earlier cases passing upon this question are presented in the notes to *State v. Gurry*, 47 L.R.A.(N.S.) 1087, and *Carey v. Atlanta*, L.R.A.1915D, 684.

The decision of the United States Supreme Court in *BUCHANAN v. WARLEY*, ante, 210, reversing Kentucky court of appeals (1915) 165 Ky. 559, 177 S. W. 472, Ann. Cas. 1917B, 149, establishes the invalidity of laws providing for the segregation of persons in residential districts solely on the ground of race or color under the United States Constitution and the Federal statutes, and prac-

tically overrules the decisions in *State v. Gurry* (1913) 121 Md. 534, 47 L.R.A.(N.S.) 1087, 88 Atl. 546, Ann. Cas. 1915B, 957; *Ashland v. Coleman* (1913) 19 Va. L. Reg. 427, which is set out at length in the note in 47 L.R.A.(N.S.) 1087; and the later case of *Harden v. Atlanta* (1917) — Ga. —, 93 S. E. 401, which involve the renting of a house in a "white district" by a negro. The ordinances involved in *Harden v. Atlanta* (Ga.) supra, and *BUCHANAN v. WARLEY* were identical. A. L. R.

WASHINGTON SUPREME COURT. (Department No. 1.)

NORTHWESTERN LUMBER COMPANY,
Appt.,
v.

D. I. CORNELL et al., Doing Business under the Firm Name of Cornell Brothers, Resp'ts.

(— Wash. —, 169 Pac. 590.)

Principal and agent — purchase without authority — ratification.

Contractors for a building who fail to repudiate a bill for materials ordered by one claiming without authority to be their agent until the time for filing a lien on the building has elapsed will be held to have ratified the purchase.

For other cases, see *Principal and Agent*, II. d, in *Dig.* 1-52 N. S.

(December 27, 1917.)

Note. — As to the ratification of an unauthorized act of an agent by silence, see annotation following this case, post, 222. L.R.A.1918C.

APPEAL by plaintiff from a judgment of the Superior Court for Pierce County dismissing an action brought to recover the balance alleged to be due for lumber sold and delivered by plaintiff to an alleged agent of defendants. Reversed.

The facts are stated in the opinion.

Messrs. Morgan & Brewer, for appellant:

Whether Steele was an agent for the defendants or not, when they discovered, as they did discover late in the fall and before the last of this lumber was furnished, that it was being charged to their account, it was their duty to immediately notify plaintiff.

31 Cyc. 1275, 1639; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640, 24 L. ed. 649, 1 Mor. Min. Rep. 432; *Southern L. Ins. Co. v. McCain*, 98 U. S. 84-86, 24 L. ed. 653, 654; *Heyn v. O'Hagen*, 60 Mich. 150, 26 N. W. 861; *Saveland v. Green*, 40 Wis. 438; *Roundy v. Erspamer*, 112 Wis. 181, 87 N. W. 1087; *Lynch v. Richter*, 10 Wash. 488, 30 Pac. 125.

Mr. C. M. Riddell for respondents.

Main, J., delivered the opinion of the court:

The purpose of this action was to recover the balance claimed to be due for lumber sold and delivered. The defendants denied liability, the cause was tried to the court without a jury, and resulted in a judgment dismissing the action. From this judgment the plaintiff appeals.

The facts are these: The appellant is engaged in the lumber business at Hoquiam. The respondents, under the firm name of Cornell Brothers, were engaged in the contracting business, with their principal office in the city of Tacoma. During the summer of the year 1914 the Northwestern Mausoleum Company or the Mausoleum Sales Company of Seattle was constructing a mausoleum in the city of Hoquiam. One W. K. Steele, an engineer, was superintendent of the construction. From time to time during the three or four years previous Steele had been employed as an engineer by the respondents, and in this capacity during the early part of the year 1913 superintended certain construction work in the city of Hoquiam which the respondents were doing for the appellants. When Steele went to Hoquiam for the purpose of superintending the construction of the mausoleum, he visited the office of appellant and desired to arrange to purchase lumber for that purpose. He stated that Cornell Brothers were about to construct a mausoleum in Hoquiam, and that he desired to purchase lumber upon their credit. This credit was extended, and, upon orders from Steele, lumber, from time to time, was delivered by the appellant.

The appellant's evidence, if true, shows that the original invoices, as the lumber was delivered, were mailed to Cornell Brothers at Tacoma, and the duplicates were mailed to Steele in Hoquiam. E. C. Cornell, a member of the firm of Cornell Brothers, testified that that firm did not receive the invoices. The mausoleum was to be constructed under the supervision of E. C. Cornell, representing the respondents, and for this the respondents were to receive 10 per cent of the money expended for labor and material in the construction thereof. From time to time, after the work was begun, Steele would mail to the respondents a statement of the amount due for labor and material, and the respondents in turn would mail these statements to the mausoleum company, that company would draw its check for the amount payable to the respondents, who thereupon would remit to Steele. In the construction work the respondents furnished a concrete mixer and some other equipment. During the time the work was being prosecuted E. C. Cornell visited Hoquiam and examined it three or four times. Before the mausoleum was completed the

company which was constructing it transferred Steele to Bellingham, where it was constructing another mausoleum. After Steele left Hoquiam, E. C. Cornell went there to superintend the completion of the mausoleum. This was during the late fall of the year 1913. The last lumber purchased was on December 4th of that year. While E. C. Cornell was at Hoquiam superintending the completion of the work, he learned that the lumber had been charged to Cornell Brothers. He did not at that time advise the appellant that his firm would not be responsible for the lumber and repudiate the account. After the work was completed and Cornell had returned to Tacoma, some correspondence took place between him and the appellant, and, as late as May 24, 1914, in the correspondence, Cornell did not repudiate the account, but stated that he was using every effort to have the mausoleum company take care of it. Six or eight months after E. C. Cornell learned that the lumber had been charged to his firm, the account was repudiated and the present action begun to recover \$311.69, the balance due on the account. Cornell denied that Steele was the agent of his firm in constructing the mausoleum, or in purchasing the lumber. It is unnecessary here to determine whether this denial would overcome the inference of agency from the other facts, because, assuming that Steele was not the agent of Cornell Brothers, it does not necessarily follow that the appellant is not entitled to recover from the respondents. When E. C. Cornell learned that the lumber had been charged to his firm, it became his duty within a reasonable time to notify the appellant that the account was charged without authority, and was therefore repudiated. Failing in this, the law is that the account is ratified where prejudice has resulted by failure to repudiate the account within a reasonable time. *Saveland v. Green*, 40 Wis. 431; *Heyn v. O'Hagen*, 60 Mich. 150, 26 N. W. 861.

In this case, had Cornell Brothers repudiated the account when they first learned that it was charged to them, the remedy by lien would have been then available to the appellant. When they repudiated the account the time in which a lien could be claimed had expired, and the appellant was thereby prejudiced by the delay. The account was not repudiated within a reasonable time.

The judgment will be reversed, and the cause remanded, with direction to enter a judgment in favor of the appellant.

Ellis, Ch. J., and Parker and Webster, JJ., concur. Fullerton, J., concurs in the result.

Annotation—Ratification of the unauthorized act of an agent by silence.

The present note is confined to an examination of the abstract principles underlying the ratification of the unauthorized act of an agent by the silence of the principal. So far as possible the note has been limited to cases which present no affirmative act of ratification on the part of the principal, the attempt being to determine how far the mere silence of the principal amounts to a ratification. Ratification as between the agent and the principal has been excluded.

In order to understand the principles underlying the subject of this discussion, it is necessary to distinguish at the outset between ratification and estoppel. "The substance of estoppel is the inducement to another to act to his prejudice. The substance of ratification is confirmation after conduct."¹ Ratification is a matter of intention; its existence is a question of fact; in order that there be a ratification there must be a voluntary assumption of the unauthorized act on full information;² a ratification of the unauthorized act of an agent, or of a stranger who claims to act as agent, must be found, if it exists, "in the intention of the principal, either express or implied."³ Estoppel, on the other hand, results from conduct which leads the party dealing with the agent to act to his prejudice.⁴ It has been stated that the distinction between being bound by reason of ratification and being bound by an estoppel "is very wide. In the former case the party is bound because he intended to be; in the latter he is bound notwithstanding there was no such intention, because the other party will be prejudiced and defrauded by his conduct unless the law treat him as legally bound."⁵

It is clear, therefore, that there cannot be an estoppel without some preju-

dice, and this is the view that has been taken.⁶ But ratification does not rest upon prejudice.

The courts, however, have not always kept the distinction between ratification and estoppel; some cases have held that silence does not amount to a ratification unless there is some prejudice. It has been stated that "where there is no element of estoppel the mere silence of the party does not amount to a ratification."⁷ Some cases state the rule as one of a possibility of misleading, as, for example: "When the ratification of an unauthorized act of an agent is sought to be inferred from the silence or conduct of his principal in favor of a third person, it must clearly appear that the latter might have been thereby misled, and induced to forego some advantage he would otherwise have enjoyed."⁸ It has been held that ratification of a deed executed by another without authority cannot result from mere silence; a ratification of this act can take place only by way of estoppel.⁹

It is clear, however, that to hold that there can be no ratification without prejudice is confusing ratification with estoppel. Prejudice is no necessary element of ratification. It has been stated that "it does not necessarily follow that one seeking to enforce a liability by ratification, arising from silence, or a failure to repudiate an unauthorized act after knowledge thereof, must also show that by such silence he has been misled to his prejudice, although it is proper to do so, as silence of the alleged principal under such circumstances may of itself be sufficient to establish a ratification of such act."¹⁰

Ratification being a question of intention, if the fact that the principal, with knowledge of the unauthorized act of

¹ *Steffens v. Nelson* (1905) 94 Minn. 365, 102 N. W. 871.

Approved in substance in *Depot Realty Syndicate v. Enterprise Brewing Co.* (1918) — Or. —, 171 Pac. 223.

² *Cannon v. Gibson* (1911) 162 Mo. App. 386, 142 S. W. 730.

³ *Merritt v. Bissell* (1898) 155 N. Y. 396, 50 N. E. 280; *Norden v. Duke* (1907) 120 App. Div. 1, 104 N. Y. Supp. 854; *Stiebel v. Haigney* (1909) 134 App. Div. 516, 119 N. Y. Supp. 455; *Mott v. Scholes* (1911) 147 App. Div. 82, 131 N. Y. Supp. 811.

⁴ *Cannon v. Gibson* (1911) 162 Mo. App. 386, 142 S. W. 730; *Norden v. Duke* (1907) 120 App. Div. 1, 104 N. Y. Supp. 854.

⁵ *Forsyth v. Day* (1858) 46 Me. 176. L.R.A.1918C.

⁶ *Union Gold Min. Co. v. Rocky Mountain Nat. Bank* (1907) 2 Colo. 248; *Ilfeld v. Ziegler* (1907) 40 Colo. 401, 91 Pac. 825; *Atlanta Nat. Bldg. & L. Assn. v. Bollinger* (1896) 63 Ark. 212, 37 S. W. 1049; *Heyn v. O'Hagen* (1886) 60 Mich. 150, 26 N. W. 861.

⁷ *California Bank v. Sayre* (1890) 85 Cal. 102, 24 Pac. 713 (person acting as agent was a stranger).

⁸ *Guimbilot v. Abat* (1843) 6 Rob. (La.) 284. But see *Raymond v. Palmer*, *infra*, note 28, and text thereto.

⁹ *McCalla v. American Freehold Land Mortg. Co.* (1892) 90 Ga. 113, 15 S. E. 687.

¹⁰ *Lynch v. Smyth* (1898) 25 Colo. 103, 34 Pac. 634.

his agent, remained silent, could be separated from the facts and circumstances under which such silence was maintained, there would be no evidence of an intent on the part of the principal to adopt the unauthorized act, consequently no evidence of ratification. It has been stated that "silence simply in itself is ordinarily no evidence of anything."¹¹ It has been held that the mere silence of the principal upon hearing of the unauthorized act is not ordinarily to be construed as a ratification in the absence of a showing of special circumstances making it the duty of the principal to speak.¹²

As a practical matter, however, the maintenance of the silence is almost inseparable from the circumstances under which it is maintained. "The conditions under which it [silence] occurs, and accompanying it," says one court, "may show it to be a ratification."¹³ These circumstances have been emphasized, and it has been stated that "mere silence, as a general rule, does not prove ratification, but it is merely a circumstance to be considered with others in arriving at a conclusion as to whether a transaction has been ratified or not."¹⁴ It is stated in one case that "where, with a knowledge of the facts, the principal acquiesces in the act of the agent, under such circumstances as would make it his duty to repudiate such acts if he would avoid them, such acquiescence is a confirmation of the acts of the agent."¹⁵ But in a majority of the cases no special stress is laid upon the circumstances; it is held generally that the unauthorized act of an agent may be ratified by mere silence.¹⁶ Whether it has been so ratified is a question for the trier of facts,—usually the jury; ratification may be found to exist where the principal has merely remained silent.¹⁷ "If the principal on being informed of the acts

fails to disavow them in a reasonable time," says one court, "his silence may be considered as an acquiescence and assent to the acts done."¹⁸ In such cases the silence is treated as mere evidence of ratification.

While, as above stated, the courts in these cases have not emphasized the circumstances under which the principal has maintained silence, it seems that this element was present, for it is practically impossible, at least it would be unusual, to show the silence of the principal without showing the circumstances under which it was maintained. The circumstances under which the silence is maintained, or the duration thereof, have an important bearing upon ratification. For example, the circumstance of a long-continued silence would be more convincing of an adoption of the unauthorized act than a silence of short duration. It is also true that silence under certain circumstances is more convincing of an acquiescence in the unauthorized act than it is in other circumstances.

It has been held that the jury may find a ratification from an unreasonable delay; that such delay is evidence to be considered by the jury on the question of ratification; but that the court should not instruct the jury to find a ratification in case of unreasonable delay after notice of the facts, but should leave the jury free to act, and to determine from all the facts whether a ratification should be inferred.¹⁹

Whether silence amounts to ratification has been held to depend upon whether the principal acquires knowledge of the unauthorized act at a time when his election might be attended with advantage to him. It has been stated that where an agent has gone beyond or beside his authority for the benefit, as he supposes, of his principal, and gives

¹¹ *Iron City Nat. Bank v. Fifth Nat. Bank* (1898) — *Tex. Civ. App.* —, 47 S. W. 533.

¹² *White v. Langdon* (1858) 30 Vt. 599.

¹³ *Iron City Nat. Bank v. Fifth Nat. Bank* (Tex.) *supra*.

¹⁴ *Lightfoot v. Horst* (1909) — *Tex. Civ. App.* —, 122 S. W. 606.

¹⁵ *Curry v. Hale* (1879) 15 W. Va. 867.

¹⁶ *Keim v. Lindley* (1895) — *N. J. Eq.* —, 30 Atl. 1063.

¹⁷ *Lee v. Fontaine* (1846) 10 Ala. 755, 44 Am. Dec. 505; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank* (1893) 2 Colo. 262, affirmed in (1878) 96 U. S. 640, 24 L. ed. 648, 1 Mor. Min. Rep. 432; *Hilfeld v. Ziegler* (1907) 40 Colo. 401, 91 Pac. 825; *Toledo, W. & W. R. Co. v. Prince* (1869) L.R.A.1918C.

50 Ill. 26; *St. Louis Gunning Adv. Co. v. Wanamaker & Brown* (1905) 115 Mo. App. 270, 90 S. W. 737; *Minneapolis Threshing Mach. Co. v. Humphrey* (1911) 27 Okla. 694, 117 Pac. 203; *Price v. Peeples* (1917) — *Okla.* —, 168 Pac. 191; *Thompson v. Laboringman's Mercantile & Mfg. Co.* (1906) 60 W. Va. 42, 6 L.R.A.(N.S.) 311, 53 S. E. 908; *Saveland v. Green* (1876) 40 Wis. 431; *Smith v. Collins* (1908) 91 C. C. A. 182, 165 Fed. 148.

¹⁸ *Union Gold Min. Co. v. Rocky Mountain Nat. Bank* (1878) 96 U. S. 640, 24 L. ed. 648, 1 Mor. Min. Rep. 432.

¹⁹ *Meyer v. Smith* (1893) 3 *Tex. Civ. App.* 37, 21 S. W. 995; *Iron City Nat. Bank v. Fifth Nat. Bank* (1898) — *Tex. Civ. App.* —, 47 S. W. 533.

him immediate notice, "silence is construed acquiescence and ratification. But a delay of intelligence until an election to approve or disapprove would be attended with no advantage to the principal defeats the right to construe silence into ratification."²⁰

Silence which proves ratification must be distinguished from silence as proof of original authority to do what the agent has done. For example, it is stated in some cases that it may be inferred from the silence of the principal that the agent had the power he assumed.²¹ This is not a question of ratification, but of original authority.

It is a rule sustained by a large number of cases that a ratification will be presumed from a failure of the principal for an unreasonable time to repudiate the unauthorized act of his agent.²² The rule of the cases can be best stated by giving extracts from the opinions. It is stated that "if, after knowledge of what the agent had done, the principal made no objection for an unreasonable time, a ratification would result by operation of law."²³ Again, "when the principal is informed of what has been done, he must dissent and give notice in a reasonable time, or otherwise his assent to what has been done will be presumed."²⁴ Another court states that "in all the varied business

transactions of men, wherever the relation of principal and agent exists, it is the duty of the principal to repudiate the unauthorized act of his agent as soon as he reasonably can after it has come to his knowledge, or he will be held to have ratified it."²⁵ A principal "must disavow the act of his agent within a reasonable time after the fact has come to his knowledge, or he will be deemed to have ratified it."²⁶ "The principal must, therefore, when informed, reject within a reasonable time, or be deemed to adopt by acquiescence."²⁷ "Acquiescence or long silence of the principal touching an unauthorized or illegal act of his agent" is "a ratification of the act or contract of the agent."²⁸ This rule is held especially applicable where the principal's silence might operate to the prejudice of innocent parties.²⁹

The presumption of ratification under this rule arises from the duty of the principal to repudiate the unauthorized act. It has been stated that if the principal remains silent when he should speak, he cannot thereafter deny the authority of the agent.³⁰

What is a delay for an unreasonable time from which a ratification will be presumed has been held to be a question for the jury, depending upon the peculiar circumstances of each case.³¹

²⁰ *Amory v. Hamilton* (1821) 17 Mass. 103.

²¹ *Farwell v. Howard* (1868) 26 Iowa, 381.

²² *Whitley v. James* (1904) 121 Ga. 521, 49 S. E. 600; *Brooke & Co. v. Cunningham Bros.* (1916) 19 Ga. App. 21, 90 S. E. 1037; *Eau Claire Canning Co. v. Western Brokerage Co.* (1905) 213 Ill. 561, 73 N. E. 430; *McGeoch v. Hooker* (1882) 11 Ill. App. 649; *Argus v. Ware* (1912) 155 Iowa, 583, 136 N. W. 774; *Halloway v. Arkansas City Mill Co.* (1908) 77 Kan. 76, 93 Pac. 577; *Hartwell v. Equitable Mfg. Co.* (1908) 78 Kan. 259, 97 Pac. 432; *Raymond v. Palmer* (1889) 41 La. Ann. 425, 17 Am. St. Rep. 398, 6 So. 692; *Burns v. Kelley* (1867) 41 Miss. 339; *Cairnes v. Bleecker* (1815) 12 Johns. (N. Y.) 300; *Russell v. Waterloo Threshing Mach. Co.* (1908) 17 N. D. 248, 116 N. W. 611; *Depot Realty Syndicate v. Enterprise Brewing Co.* (1918) — Or. —, 171 Pac. 223; *Bredin v. Dubarry* (1826) 14 Serg. & R. (Pa.) 27; *Wm. H. Baker v. Seattle & P. S. Packing Co.* (1917) 95 Wash. 45, 163 Pac. 17 (see *infra*, note 34); *Law v. Cross* (1861) 1 Black (U. S.) 533, 17 L. ed. 185.

In approving a verdict against the principal in favor of a third party who had dealt with the agent, the court, in *Ketchum v. Marsland* (1896) 18 Misc. 450, 42 N. Y. Supp. 7, states the rule as an absolute rule of law. There were other circumstances in this case besides mere silence, however. L.R.A.1918C.

²³ *Whitley v. James* (1904) 121 Ga. 521, 49 S. E. 600.

²⁴ *Cairnes v. Bleecker* (1815) 12 Johns. (N. Y.) 300.

Practically the same statement appears in *Brooke & Co. v. Cunningham Bros.* (1916) 19 Ga. App. 21, 90 S. E. 1037.

²⁵ *McGeoch v. Hooker* (1882) 11 Ill. App. 649, cited with approval in *Eau Claire Canning Co. v. Western Brokerage Co.* (1905) 213 Ill. 561, 73 N. E. 430.

²⁶ *Clews v. Jamieson* (1900) 182 U. S. 461, 45 L. ed. 1183, 21 Sup. Ct. Rep. 845, cited with approval in *Argus v. Ware* (1912) 155 Iowa, 583, 136 N. W. 774.

²⁷ *Law v. Cross* (1861) 1 Black (U. S.) 533, 17 L. ed. 185.

²⁸ *Raymond v. Palmer* (1889) 41 La. Ann. 425, 17 Am. St. Rep. 398, 6 So. 692.

²⁹ *Reid v. Alaska Packing Co.* (1905) 47 Or. 215, 83 Pac. 139, approved in *Depot Realty Syndicate v. Enterprise Brewing Co.* (1918) — Or. —, 171 Pac. 223.

³⁰ *Coffin v. Planters' Cotton Co.* (1916) 124 Ark. 360, 187 S. W. 309.

³¹ *Whitley v. James* (1904) 121 Ga. 521, 49 S. E. 600; *Hartwell v. Equitable Mfg. Co.* (1908) 78 Kan. 259, 97 Pac. 432; *Burns v. Kelley* (1867) 41 Miss. 339; *Bredin v. Dubarry* (1826) 14 Serg. & R. (Pa.) 27.

In at least one case stating the rule as above it is held simply that there was sufficient evidence to sustain a finding of ratification by the jury.³² But in other cases stating the rule as above, the method of determining what is a reasonable time has not been expressly considered, but, so far as appears, the entire question of the existence of a ratification was determined by the court.³³

Many courts have not gone farther, in defining the time within which a repudiation of the unauthorized act must take place, than to state that the principal must not wait an unreasonable time; other courts have been more specific. It has been held that the repudiation must be made promptly, in the sense that there must be no unnecessary delay.³⁴ An instruction that the repudiation should be "within a few days," it has been held, should have been changed by substituting "within a reasonable time," or "as soon thereafter as he can."³⁵ It has been held that a disavowal need not be made "immediately,"³⁶ or "instantly,"³⁷ upon acquiring the knowledge. Nor is the failure to do so a circumstance from which the jury could infer a ratification.³⁸ On the contrary, it has been stated that a principal whose agent has transcended his authority "is bound to disavow it the first moment the fact comes to his knowledge."³⁹

What is a reasonable time depends largely upon the facts of the individual case. It seems clear that where there has been an unauthorized purchase of grain, as in one case, and the principal was immediately notified thereof, his duty to repudiate the transaction called for prompter action than in a case in which changes in price or circumstances were not so apt to occur. It has been stated, in a case involving a sale of a carload of flour, that in "commercial transactions of this character a brief time is a reasonable time, in the absence of special circumstances extending it."⁴⁰

Whether mere silence amounts to ratification has been made to depend upon whether the unauthorized act is that of an agent, or of a volunteer or stranger.⁴¹ In the case of an agent an intention to ratify is stated to be presumed from the silence of the principal after being informed of what has been done on his account,⁴² especially if there is no repudiation within a reasonable time.⁴³ It is the duty of the principal to repudiate an unauthorized act of his agent as soon as he is informed thereof, or at least within a reasonable time thereafter. But in the case of a stranger there exists no obligation to repudiate the transaction and mere silence will not be construed into a ratification.⁴⁴ At least ratifica-

³² *Argus v. Ware* (1912) 155 Iowa, 583, 136 N. W. 774.

³³ *Brooke & Co. v. Cunningham Bros.* (1916) 19 Ga. App. 21, 90 S. E. 1037; *Eau Claire Canning Co. v. Western Brokerage Co.* (1906) 213 Ill. 561, 73 N. E. 430; *Raymond v. Palmer* (1880) 41 La. Ann. 425, 17 Am. St. Rep. 398, 6 So. 692; *Cairnes v. Bleeker* (1815) 12 Johns. (N. Y.) 300; *Russell v. Waterloo Threshing Mach. Co.* (1908) 17 N. D. 248, 116 N. W. 611; *Depot Realty Syndicate v. Enterprise Brewing Co.* (Or.) *supra*.

³⁴ *Clay v. Spratt* (1870) 7 Bush (Ky.) 334.

It has been stated that if after being informed of the unauthorized act the principal did not promptly reject it, but "acquiesced" therein, a ratification resulted. *Wm. H. Baker v. Seattle & P. S. Packing Co.* (1917) 95 Wash. 45, 163 Pac. 17.

³⁵ *Peck v. Ritchey* (1877) 66 Mo. 114.

³⁶ *Whitley v. James* (1904) 121 Ga. 521, 49 S. E. 600.

³⁷ *Miller v. Excelsior Stone Co.* (1878) 1 Ill. App. 273.

³⁸ *Burns v. Kelley* (1867) 41 Miss. 339.

³⁹ *Bredin v. Dubarry* (1825) 14 Serg. & R. (Pa.) 27, approved in *Smuckler v. Di Napoli* (1916) 62 Pa. Super. Ct. 570. L.R.A.1918C.

⁴⁰ *Halloway v. Arkansas City Mill Co.* (1908) 77 Kan. 76, 93 Pac. 577.

⁴¹ Cases cited in notes 42 et seq.

⁴² *Ralphs v. Henslar* (1893) 97 Cal. 296, 32 Pac. 243; *Ward v. Williams* (1861) 26 Ill. 447, 79 Am. Dec. 385; *Searing v. Butler* (1873) 69 Ill. 575.

In other cases announcing this rule all that is decided is that the jury may find that there was a ratification. *Dierks Lumber & Coal Co. v. Coffman* (1910) 96 Ark. 505, 132 S. W. 654; *Breed v. First Nat. Bank* (1878) 4 Colo. 481, 1 Mor. Min. Rep. 467.

⁴³ *Foster v. Rockwell* (1870) 104 Mass. 167.

⁴⁴ *Deane v. Gray Bros. Artificial Stone Paving Co.* (1895) 100 Cal. 433, 42 Pac. 443; *Robbins v. Blanding* (1902) 87 Minn. 246, 91 N. W. 844; *Doughaday v. Crowell* (1856) 11 N. J. Eq. 201; *Hatton v. Stewart* (1879) 2 Lea (Tenn.) 233.

In *Short v. Metz Co.* (1915) 165 Ky. 319, 176 S. W. 1144, it is stated that the rule that the act of an authorized agent in excess of his authority is ratified by silence of the principal which induces one to rely, to his prejudice, upon the ratification, does not apply "where the act relied upon is one performed by one who is not an agent, and

tion may not be presumed as a conclusion of law from the silence.⁴⁵ It has been stated that a failure to disavow the act of a stranger "will not amount to a ratification, unless under such circumstances as indicate an intention" to ratify.⁴⁶ Other cases go merely to the extent of holding the presumption of ratification arising from silence to be very much stronger where an agency exists than where a stranger assumes to act.⁴⁷

It is recognized, however, in some cases that silence may amount to ratification even of the act of a stranger. It has been stated in a case involving the act of a stranger that silence is a circumstance which with other circumstances is competent to go to the jury upon the question of ratification.⁴⁸ In other cases there is excepted from the operation of the rule, that ordinarily the failure to disavow the act of a stranger will not amount to a ratification, the case in which the circumstances indicate an intention to ratify.⁴⁹ Other cases have held that silence may amount to ratification of the act of one who without previous authority assumes to act for another, on the supposition that it may be the duty of the principal in certain circumstances to speak.⁵⁰

It has been stated that for acts to amount to ratification of the act of a stranger there must be prejudice;⁵¹ if by the silence of the purported principal

the party dealing with the purported agent is led to take a prejudicial course, that silence may amount to a ratification.⁵²

As has previously been stated, prejudice is no necessary element of ratification of the unauthorized act of an agent from mere silence, and this is true also of the act of a stranger. Where there is prejudice, however, there is stronger reason for holding the principal bound to the party dealing with the agent than in the absence of prejudice. And many courts have not carefully analyzed the principles under which the principal may be bound. It has been stated, as in the case of the act of a stranger in the last preceding paragraph, that silence by a principal whose agent has exceeded his authority to the knowledge of the principal amounts to ratification where the party dealing with the agent is misled or prejudiced;⁵³ a conclusive presumption of ratification is stated to arise where the party dealing with the agent is prejudiced by silence.⁵⁴ Other cases state that silent acquiescence may amount to ratification where it is continued for an unreasonable length of time and third persons have acted in reliance upon and been prejudiced by such acquiescence.⁵⁵ Other cases have more accurately stated that in such cases the principal is bound by virtue of equitable estoppel.⁵⁶ Thus it has been

the silence of the one in whose name the act is done does not induce anyone to do anything to his prejudice."

See *California Bank v. Sayre* (1890) 85 Cal. 102, 24 Pac. 713, *supra*, note 7, and text *thereto*.

⁴⁵ *Uniontown Grocery Co. v. Dawson* (1910) 68 W. Va. 332, 69 S. E. 845, Ann. Cas. 1912B, 148.

⁴⁶ *Merritt v. Bissell* (1898) 155 N. Y. 396, 50 N. E. 280; *Mott v. Scholes* (1911) 147 App. Div. 82, 131 N. Y. Supp. 811.

⁴⁷ *Union Gold Min. Co. v. Rocky Mountain Nat. Bank* (1873) 2 Colo. 248; *Foster v. Rockwell* (1870) 104 Mass. 167; *Harrod v. McDaniels* (1879) 126 Mass. 413.

⁴⁸ *Philadelphia, W. & B. R. Co. v. Cowell* (1857) 23 Pa. 329, 70 Am. Dec. 128 (the party assuming to act as agent was not a mere volunteer or intermeddler); *Uniontown Grocery Co. v. Dawson* (1910) 68 W. Va. 332, 69 S. E. 845, Ann. Cas. 1912B, 148.

⁴⁹ See text to *Merritt v. Bissell* (1898) 155 N. Y. 396, 50 N. E. 280, and *Mott v. Scholes* (1911) 147 App. Div. 82, 131 N. Y. Supp. 811, *supra*, note 46.

⁵⁰ *Lepman v. Woods* (1898) 79 Ill. App. 269.

⁵¹ *Doughaday v. Crowell* (1856) 11 N. J. Eq. 201; *Williams v. Moore* (1900) 24 Tex. Civ. App. 402, 58 S. W. 953. L.R.A.1918C.

⁵² *Heyn v. O'Hagen* (1886) 60 Mich. 150, 26 N. W. 861; *Robbins v. Blanding* (1902) 87 Minn. 246, 91 N. W. 844.

⁵³ *Mobile & M. R. Co. v. Jay* (1880) 65 Ala. 113, disapproving of the rule stated in *Powell v. Henry* (1855) 27 Ala. 612, to the effect that "if an agent exceeds his authority, although the principal may ratify the act, yet, to avoid it, he not obliged to give notice that he repudiates it,"—the court stating that this is too comprehensive in its statement of the law.

J. B. Owens Pottery Co. v. Turnbull Co. (1903) 75 Conn. 628, 54 Atl. 1122; *Alexander v. Jones* (1884) 64 Iowa, 207, 19 N. W. 913; *Short v. Metz Co.* (1915) 165 Ky. 319, 176 S. W. 1144.

See *NORTHWESTERN LUMBER Co. v. CORNELL*, *ante*, 220.

⁵⁴ *St. Louis Gunning Adv. Co. v. Wana-maker & Brown* (1905) 115 Mo. App. 270, 90 S. W. 737.

⁵⁵ *Cranston v. West Coast L. Ins. Co.* (1914) 72 Or. 116, 142 Pac. 762.

⁵⁶ *Reese v. Wallace* (1885) 113 Ill. 589; *Dewing v. Hutton* (1900) 48 W. Va. 576, 37 S. E. 670; *La Belle Iron Works v. Quarter Sav. Bank* (1914) 74 W. Va. 569, 82 S. E. 614.

stated that "ratification of the unauthorized acts of an agent by neglecting for an unreasonable length of time after knowledge of them to repudiate them, while the opposite party is acting on them, is an application of the doctrine of equitable estoppel."⁷⁷ Again, it has been stated that where the protection of third parties requires it, it will be presumed that a principal who after knowledge of an unauthorized act remains silent has satisfied the act; that such implied ratification "has its foundation in the doctrine of equitable estoppel."⁷⁸

To briefly restate the principles applicable to ratification of the unauthorized act of an agent by silence of the principal, it appears that ratification according to one theory is a question of

fact, and may be found to exist from the mere silence of the principal in connection with the circumstances under which it is maintained. According to a considerable number of authorities ratification will be presumed from the failure of the principal to repudiate the unauthorized act within a reasonable time.

Prejudice has been stated to be necessary to a ratification by mere silence. Such a theory, however, rests upon a misconception of the nature of ratification. Prejudice is no necessary element of ratification. But where prejudice to the party dealing with the agent exists, there is more reason for holding the principal bound; the principal is bound, however, in such cases by virtue of an equitable estoppel.

⁷⁷ Turner v. Kennedy (1894) 57 Minn. 104, 58 N. W. 823.

⁷⁸ Smith v. Fletcher (1899) 75 Minn. 189, 77 N. W. 800. W. A. E.

KANSAS SUPREME COURT.

S. F. HELMS

v.

EASTERN KANSAS OIL COMPANY, Limited, Appt.

(102 Kan. 164, 169 Pac. 208.)

Nuisance — refuse from refinery.

1. If the owner of a refinery permits oil, refuse, and poisonous substances in large quantities to escape from the refinery and flow over and upon the land of his neighbor, causing material injury to the neighbor, the use of the refinery will be deemed to be unreasonable and to constitute a "nuisance."

For other cases, see *Nuisances, I. in Dig.* 1-52 N. S.

Same — lawful business.

2. The fact that the business of the refinery is in itself a lawful one, and that the owner of it operates it carefully, will not exempt him from liability for casting oil, refuse, and poisonous substances on the land of the plaintiff in such quantities as to cause him substantial injury.

For other cases, see *Nuisances, II. d, in Dig.* 1-52 N. S.

Same — rules governing liability.

3. The liability of the defendant in such a case is measured by the rules in relation to a nuisance, instead of those governing cases of negligence.

For other cases, see *Nuisances, II. a, in Dig.* 1-52 N. S.

(December 8, 1917.)

Headnotes by JOHNSTON, Ch. J.

Note. — For oil refinery as a nuisance, see annotation following this case, post, 230. L.R.A.1918C.

APPEAL by defendant from a judgment of the District Court for Allen County in favor of plaintiff in an action brought to recover damages for injuries alleged to have been caused through the operation of defendant's oil refinery. Affirmed.

The facts are stated in the opinion.

Messrs. Charles H. Apt and Frederick G. Apt, for appellant:

There is no allegation of any negligence or omission on the part of defendant, either in the construction of the refinery or in its operation. Without such averments there is no cause for action stated.

Malchow v. Leoti, 95 Kan. 787, L.R.A. 1915F, 568, 149 Pac. 687; Bailey v. Kelly, 93 Kan. 723, L.R.A.1916D, 1220, 145 Pac. 556; Atchison, T. & S. F. R. Co. v. Armstrong, 71 Kan. 366, 1 L.R.A.(N.S.) 113, 114 Am. St. Rep. 474, 90 Pac. 978; Fogarty v. Junction City Pressed Brick Co. 50 Kan. 478, 18 L.R.A. 756, 31 Pac. 1052; Phillips v. Lawrence Vitrified Brick & Tile Co. 72 Kan. 643, 2 L.R.A.(N.S.) 92, 82 Pac. 787; Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; Livingston v. Adams, 8 Cow. 175; Cosulich v. Standard Oil Co. 122 N. Y. 118, 19 Am. St. Rep. 475, 25 N. E. 259.

There must be an unnecessary and unwarranted act in the conduct of a lawful business, amounting to negligence, before the owners can be held in damages from carrying on the business.

Fogarty v. Junction City Pressed Brick Co. 50 Kan. 478, 18 L.R.A. 756. 31 Pac. 1052; Phillips v. Lawrence Vitrified Brick & Tile Co. 72 Kan. 643, 2 L.R.A.(N.S.) 92, 82 Pac. 787.

Mr. Christopher S. Ritter for appellee.

Johnston, Ch. J., delivered the opinion of the court:

This action was brought by S. F. Helms against the Eastern Kansas Oil Company, Limited, to recover damages alleged to have been caused through the operation of defendant's oil refinery, which is situated near the corner of plaintiff's farm, which he has occupied as a homestead for many years. A small natural water course flows through the refinery grounds and across the north half of plaintiff's farm. On May 1, 1914, the plaintiff brought an action against the defendant, claiming damages because of the oil, poisonous substances, and fumes which the defendant had allowed to escape from the refinery and pass over his farm, causing injury to the land and also to some of his cows. The trial of that case resulted in a judgment in defendant's favor as to the injury to the land, but in favor of the plaintiff as to the injury to the cows. That judgment stands as a finality, and the award made against the defendant has been paid and satisfied. On October 1, 1915, the present action was begun, in which the plaintiff averred that during the last two years, and especially since May 1, 1914, the defendant had permitted large quantities of oil, refuse, and poisonous substances to escape from its premises and run upon and over his land, and also that it had contaminated the air with foul and ill-smelling gases and vapors which were carried upon his farm and into his residence. There was an allegation that the defendant had enlarged its plant since May 1, 1914, and that the flow and passage of oil, fumes, and poisons had been correspondingly increased, with the result that his land had been injured to the extent of \$1,000, and that, in addition to the damage to the land, his orchard and trees had been injured and the health and comfort of the family impaired, for which he asked \$2,000. A motion of defendant to require the plaintiff to separately state and number his causes of action was overruled, the court holding that only a single cause of action had been pleaded. The defendant answered that it was carrying on the refinery business in a lawful and proper way; that the stream that flows through the premises of both is a natural water course; that the use it made of the stream was lawful and proper; and that if any substances had flowed upon plaintiff's land, it was due to excessive rainfall (an act of God); and, further, that the claims made by the plaintiff had either been adjudicated, or were barred by the Statute of Limitations. At a trial on these issues a jury returned a verdict awarding plaintiff \$300, and also L.R.A.1918C.

special findings that plaintiff's land was as valuable on October 1, 1915, as it had been on May 1, 1914, and that the trees for the destruction of which plaintiff asked damages had died from improper care and from neglect. On the motion of the defendant the court set aside the special findings and verdict and granted a new trial. The plaintiff then amended his petition, setting forth the creation and maintenance of a nuisance on plaintiff's land by permitting the escape of and the throwing of poisonous substances and vapors over it, for which he asked \$3,000. He also alleged special injury to the live stock, which decreased the quantity of milk given by his cows, amounting to \$665, and for the destruction of crops and pasture he asked \$300. In this petition he alleged that since May 1, 1914, the defendant had increased the equipment of its plant, which increased the injury to his land and other property. The answer which the defendant made to the first petition was refiled as the answer to this petition. The court ruled that this petition stated a single cause of action, and it instructed the jury that the former adjudication constituted a bar to a recovery of any depreciation in or damage to the land which had occurred prior to May 1, 1914, and that only such damages could be recovered as had been caused since that time through the enlargement of the defendant's refinery and increased flow of refuse matter upon the land. The jury was further instructed that the former judgment would not bar a recovery for the alleged loss of crops and pasture and injury to live stock. The second trial of this case resulted in findings that the defendant had not increased the output of its plant since May 1, 1914, and that the land had not decreased in value since that time. There was a finding by the jury that the plaintiff had sustained no loss through the wrongful acts of the defendant, except for injury to the grass on 25 acres of pasture land.

In its appeal defendant complains of the ruling refusing to require the plaintiff to separately state and number his causes of action, insisting that the claim for general damages to the land constituted a distinct cause of action, and that the claim for special damages to other property constituted a different cause of action. Since the jury has specifically found that the land was not injured, and has only awarded damages upon the single item of the loss of the grass, the question is no longer material. Nor is there any good ground for the complaint of a variance between the original and amended petitions.

It is contended that the averments in the

plaintiff's amended petition did not warrant a recovery, and therefore defendant's demurrer should have been sustained. This contention is based mainly on the ground that in the petition there was no allegation of any unnecessary act of the defendant in the construction or operation of the refinery, nor any averment that in its operation it was guilty of any negligent act or omission. Defendant insists that the business is a lawful one and that there can be no liability to the plaintiff as a result of the operation of the refinery, in the absence of negligence of the defendant. Plaintiff's action as pleaded must be regarded as one for nuisance rather than negligence. An owner of property, although conducting a lawful business thereon, is subject to reasonable limitations. He must use his property so as not to unreasonably interfere with the health or comfort of his neighbors, or with their right to the enjoyment of their property.

"If he makes an unreasonable or unlawful use of it, so as to produce material injury or great annoyance to his neighbor, he will be guilty of a nuisance to his neighbor, and the law will hold him responsible for the consequent damage." *Fogarty v. Junction City Pressed Brick Co.* 50 Kan. 478, 487, 18 L.R.A. 756, 31 Pac. 1054.

In *Stotler v. Rochelle*, 83 Kan. 86, 29 L.R.A. (N.S.) 49, 109 Pac. 788, the court in defining a "nuisance" said: "It is, of course, not necessary that the use to which property is put shall be unlawful in itself in order to constitute it a nuisance in the eye of the law." 83 Kan. page 88.

Nor will the fact that the business is carried on carefully and in accordance with the ordinary methods employed in such a business relieve one from liability to a neighbor, if the use is unreasonable and such as constitutes a nuisance. In *Hauck v. Tidewater Pipe Line Co.* 153 Pa. 366, 20 L.R.A. 642, 34 Am. St. Rep. 710, 26 Atl. 644, it was said: "If the mere fact that the business is a lawful business, and has been conducted with care, would be a defense where a neighbor's land had been injured in consequence of the business carried on there, the escape of gas, for instance, or the escape of oil, the result would be that a man might lose his farm; might be compelled to leave it, and have no compensation, simply because the business which brought about this loss was a lawful business and was carried on carefully. That is not the law. No man's property can be taken, directly or indirectly, without compensation, under the law of this state. Hence there are cases, and a great many of them, where a defendant is held liable in damages, although his business is lawful L.R.A.1918C.

and he has exercised care in carrying it on." 153 Pa. page 375.

Whether or not a use which in itself is lawful is a nuisance depends upon a number of circumstances,—locality and surroundings, the number of people living there, the prior use, whether it is continual or occasional, and the extent of the nuisance and injury caused to the neighbor from the use. If the injury is slight and trivial, and occurs in the development of the natural resources of the land, it is not deemed to be unreasonable. *Phillips v. Lawrence Vitrified Brick & Tile Co.* 72 Kan. 643, 2 L.R.A. (N.S.) 92, 82 Pac. 787. The oil that was treated by the defendant at the refinery was obtained elsewhere, and its operations had no connection with the products of the land or the development of its natural resources. Taking the averments of the plaintiff, it is clear that the quantity of oil, refuse, fumes, and gases that were thrown upon plaintiff's land constituted an unreasonable use and a nuisance. However useful and lawful the business in itself is, the defendant cannot be permitted to carry it on in such a way as to cause material injury to the plaintiff. When the injurious substances were thrown upon plaintiff's land in the excessive quantities and in the manner set forth in plaintiff's petition, the defendant's use of its property became both unreasonable and unlawful. In the leading case of *Fletcher v. Rylands*, L. R. 1 Exch. 265, it was said: "The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stench." Page 280.

See also *Gilmore v. Royal Salt Co.* 84 Kan. 729, 34 L.R.A. (N.S.) 48, 115 Pac.

541; *Kansas City v. Hog Cholera Serum Co.* 87 Kan. 786, 125 Pac. 70; *McCarty v. Natural Carbonic Gas Co.* 189 N. Y. 40, 13 L.R.A.(N.S.) 465, 81 N. E. 549, 12 Ann. Cas. 840; *Hauck v. Tidewater Pipe Line Co.* 153 Pa. 366, 20 L.R.A. 642, 34 Am. St. Rep. 710, 26 Atl. 644; note in 15 L.R.A.(N.S.) 535.

Error assigned in the overruling of the demurrer to plaintiff's evidence is not

available, as the evidence is not preserved in the record. The objections to the instructions have been answered in part in what has been said on the contention that a cause of action was not stated in the amended petition, and we find nothing substantial in the other objections to the rulings on the instructions.

The judgment of the District Court is affirmed.

Annotation—Oil refinery as a nuisance.

As pertinent to the question under discussion, reference is made to the following notes:

Storage of explosives as a nuisance. *Henderson v. Sullivan*, 16 L.R.A.(N.S.) 691; *State ex rel. Hopkins v. Excelsior Powder Mfg. Co.* L.R.A.1915A, 615.

Storage of oil, gasoline, or gas as nuisance because of explosive or combustible qualities. *Whittemore v. Baxter Laundry Co.* 52 L.R.A.(N.S.) 930.

Liability of one for injury caused by escape of dangerous substance stored on his premises, including escape of oil. *Brennan Constr. Co. v. Cumberland*, 15 L.R.A.(N.S.) 535.

The validity of regulations for fire protection other than building regulations. *State v. Wittles*, 41 L.R.A.(N.S.) 456.

But few cases in addition to *HELMS v. EASTERN KANSAS OIL CO.* ante, 227, have been found on the question indicated in the title.

In *Com. v. Kidder* (1871) 107 *Mass.* 188, it was conceded that evidence of the carrying on of the business of refining petroleum and other oils so as to emit noisome, offensive, and unwholesome substances, smokes, smells, and stenches which impregnated and rendered the earth and air corrupt, offensive, uncomfortable, and unwholesome, to the great damage and common nuisance of citizens having occasion to use the highways in the vicinity, showed a nuisance at common law. The question presented was whether defendants were protected in their business by two statutes licensing and regulating the keeping, storing, and refining of petroleum and its products. In holding that the defendants were not protected by the statutes against the indictment, the court said: "These enactments are manifestly intended to protect the public against the dangers arising from the explosive and inflammable nature of petroleum; and having regulated the whole subject in that aspect, they might well be deemed to protect any establishment,

guarded as they direct, from indictment as a nuisance on account of such dangers only. But they contain no provisions for preventing the spread of unwholesome and offensive odors in the course of the manufacture; and if the defendants' position were sustained the result would be that no limit would be put to such manufacture in the most crowded and populous portions of any town or city. The reasonable, if not the necessary, inference is that it was not the intention of the legislature to establish a new rule in this regard, but to leave the question whether the manufacture is carried on at such places and in such a manner as to be unwholesome and offensive to the public, and on that account indictable as a nuisance, to be determined by the rules of the common law."

So, in *Green v. Sun Co.* (1907) 32 *Pa. Super. Ct.* 521, trespass to recover damage for injuries to real estate resulting from fumes from an oil refinery, nuisance was charged and proved. The court observed that "the injury complained of was peculiar and special to the plaintiff. It consisted in the destructive effects and depreciation in value consequent upon the fumes thrown off by the defendant's works. It was something more than the general inconvenience to which the whole community was subjected by reason of the character of the business carried on in the vicinity. So far as appears from the evidence, the defendant's refinery was the only one there which was engaged in refining Texas oil, and we may conclude from the evidence that it was the peculiar quality of this oil which caused the trouble. . . . It is not an answer to the plaintiff's charge to say that the defendant has erected extensive works at large cost and is engaged in the prosecution of a business useful to the public, and that the plaintiff's rights are subordinate to the larger interests of the

defendant and the public. The defendant chose to locate its works in proximity to the plaintiff's property and to engage in a business which the jury has declared to be harmful to him. Neither the magnitude nor the importance of its business permits an invasion of the rights of another. . . . If in the advancement of its own interests the defendant has trespassed upon the right of the plaintiff, it cannot justify such conduct by showing that it gives employment to a large number of men and is an important factor in the commerce of the state."

Under an indictment charging that the defendant's refinery constituted a public and common nuisance, because of the emission therefrom of certain noxious and offensive smell and vapors, and because the oils and gases stored and used therein were inflammable, explosive, and dangerous, a verdict of guilty having been rendered, the court in *Com. v. Miller* (1891) 139 Pa. 77, 23 Am. St. Rep. 170, 27 W. N. C. 257, 21 Atl. 138, 8 Am. Crim. Rep. 619, reversed judgment, on the ground, among others, that the jury was left without an adequate presentation of the defense by an instruction that the character of the location when the refinery was established, the nature and importance of the business, the length of time it had been

in operation, the capital invested, and the influence of the business upon the growth and prosperity of the community, were no defense to an indictment for a nuisance. "The right to pure air," observed the court, "is in one sense an absolute one, for all persons have the right to life and health, and such a contamination of the air as is injurious to health cannot be justified; but in another sense it is relative, and depends upon one's surroundings. People who live in great cities that are sustained by manufacturing enterprises must necessarily be subject to many annoyances and positive discomforts by reason of noise, dust, smoke, and odors, more or less disagreeable, produced by and resulting from the business that supports the city. They can only be relieved from them by going into the open country. The defendants had a right to have the character of their business determined in the light of all the surrounding circumstances, including the character of Allegheny as a manufacturing city and the manner of the use of the river front for manufacturing purposes. If, looked at in this way, it is a common nuisance, it should be removed; if not, it may be conducted without subjecting the proprietors to the pecuniary loss which its removal would involve."

J. D. C.

KANSAS SUPREME COURT.

REBECCA HARVEY

v.

CITY OF BONNER SPRINGS, KANSAS,
Appt.

(102 Kan. 9, 169 Pac. 563.)

Pleading — petition for damages.

1. In an action against a city under § 3822 of the Gen. Stat. of 1915, to recover damages in consequence of the action of a mob, the petition is held sufficient to state a cause of action, and the plaintiff's evidence is held sufficient as against a demurrer.

For other cases, see *Pleading*, II. 1; *Trial*, II. d, 4, in *Dig.* 1-52 N. S.

Appeal — refusal to direct verdict.

2. Upon the facts stated in the opinion, it is held that the court committed no error

in refusing to direct a verdict for the defendant.

For other cases, see *Trial*, II. d, 3, in *Dig.* 1-52 N. S.

Same — instructions.

3. In an action against a city to recover damages for the acts of an alleged mob in causing the death of plaintiff's husband, the answer alleged that he had committed a felony by shooting at the city marshal with a revolver; that the city marshal, who was also a deputy sheriff, summoned a posse to aid in arresting him; that he resisted arrest, and was killed while in the act of drawing his revolver; and that the killing was justified. Held that the instructions given correctly stated the law upon the issue raised by the answer.

For other cases, see *Municipal Corporations*, II. g, 1, in *Dig.* 1-52 N. S.

Trial — question for jury — act of mob.

4. In such a case it is held that it was a question of fact for the jury to determine whether the plaintiff's husband had committed a felony, and also whether the crowd of men around plaintiff's house were acting in good faith in attempting to arrest her husband, and shot him in the honest belief that it was necessary to do so, or whether.

Headnotes by PORTER, J.

Note. — As to what is a mob or riot for the act of which a municipality is liable, see annotation following this case, post, 239.
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as plaintiff claimed, they formed during the time they were assembled a purpose and intent to take his life, and that in carrying out that unlawful purpose he was killed.

For other cases, see Trial, II. c, in Dig. 1-52 N. S.

Mob — sheriff's posse — liability for acts.

5. On the facts stated in the opinion, it is held that the court cannot declare as a matter of law that the persons summoned by the officer in the present case did not constitute a "mob" within the meaning of the statute, since the motive which actuated them, not only when they assembled, but also at the time the death of plaintiff's husband was brought about, became questions of fact; and if on these vital issues reasonable minds might draw different conclusions from the evidence, the verdict in plaintiff's favor cannot be disturbed.

For other cases, see Trial, II. c, in Dig. 1-52 N. S.

(Johnston, Ch. J., and Marshall and Dawson, JJ., dissent.)

(December 8, 1917.)

APPEAL by defendant from a judgment of the Circuit Court for Wyandotte County in favor of plaintiff in an action brought to recover damages for the alleged wrongful death of her husband. Affirmed.

The facts are stated in the opinion.

Mr. James F. Getty, for appellant:

The allegations of the amended petition and the plaintiff's evidence fail to state facts sufficient to constitute a cause of action under the statute.

Cherryvale v. Hawman, 80 Kan. 170, 23 L.R.A.(N.S.) 645, 133 Am. St. Rep. 195, 101 Pac. 994, 18 Ann. Cas. 149, 21 Am. Neg. Rep. 99; *Atchison v. Twine*, 9 Kan. 350; *Adams v. Salina*, 58 Kan. 246, 48 Pac. 918; *Blakeman v. Wichita*, 93 Kan. 444, L.R.A. 1915C, 578, 144 Pac. 816, Ann. Cas. 1916D, 188; *Lawson*, Presumptive Ev. 93, 101.

If Easling was a trespasser in attempting to arrest Harvey, that would not render the assembling of the citizens unlawful, nor their intent to apprehend Harvey an unlawful intent or purpose.

McMahan v. Green, 34 Vt. 69, 80 Am. Dec. 665; *Firestone v. Rice*, 71 Mich. 377, 15 Am. St. Rep. 266, 38 N. W. 885; *Reed v. Rice*, 2 J. J. Marsh. 44, 19 Am. Dec. 122; *North Carolina v. Gosnell*, 74 Fed. 734.

The defendant city is not liable for the acts of an officer representing the state in the performance of a duty imposed on him by the state, or in the exercise of an authority conferred upon him by the state.

20 Am. & Eng. Enc. Law, 1202, 1203; *Peters v. Lindsborg*, 40 Kan. 654, 20 Pac. 490; *Pfefferle v. Lyon County*, 39 Kan. 432, L.R.A.1918C.

18 Pac. 506; *New Kiowa v. Craven*, 46 Kan. 114, 26 Pac. 426; *Caldwell v. Prunelle*, 57 Kan. 511, 46 Pac. 949; *Edson v. Olathe*, 81 Kan. 328, 36 L.R.A.(N.S.) 861, 105 Pac. 521, 82 Kan. 4, 36 L.R.A.(N.S.) 865, 107 Pac. 539; *State ex rel. Atwood v. Hunter*, 38 Kan. 578, 17 Pac. 177.

The evidence fails to show an unlawful assault was made on Harvey by a mob; but does show that the acts of the deputy sheriff and those called to his assistance were justified.

Starr v. United States, 153 U. S. 614, 38 L. ed. 841, 14 Sup. Ct. Rep. 919; *North Carolina v. Gosnell*, 74 Fed. 734; *Robertson v. Arizona*, 110 C. C. A. 489, 188 Fed. 783; *Cockrill v. Com.* 95 Ky. 22, 28 S. W. 659; *Lindle v. Com.* 111 Ky. 866, 64 S. W. 986; *Doherty v. State*, 84 Wis. 152, 53 N. W. 1120; *Com. v. West*, — Ky. —, 113 S. W. 76; *People v. Brooks*, 131 Cal. 311, 63 Pac. 464; *Hammond v. State*, 147 Ala. 79, 41 So. 761; *Holland v. State*, 162 Ala. 5, 50 So. 215; *State v. Montgomery*, 230 Mo. 660, 132 S. W. 232; *State v. McNally*, 87 Mo. 644; *State v. Dierberger*, 96 Mo. 666, 9 Am. St. Rep. 380, 10 S. W. 168; *State v. Rose*, 142 Mo. 418, 44 S. W. 329; *Smith v. State*, 59 Ark. 132, 43 Am. St. Rep. 20, 26 S. W. 712.

When the special findings of fact made by the jury are inconsistent with the general verdict the former must prevail, and judgment should be rendered accordingly.

Hazard Powder Co. v. Viergutz, 6 Kan. 471; *Nichols v. Weaver*, 7 Kan. 373; *Tobie v. Brown County*, 20 Kan. 14; *Atchison, T. & S. F. R. Co. v. Morgan*, 43 Kan. 1, 22 Pac. 995, 11 Am. Neg. Cas. 538; *Leavenworth, N. & S. R. Co. v. Wilkins*, 45 Kan. 674, 26 Pac. 16; *Stanley v. Atchison, T. & S. F. R. Co.* 78 Kan. 87, 96 Pac. 34; *Beech v. Missouri, K. & T. R. Co.* 85 Kan. 90, 116 Pac. 213.

Messrs. J. E. McFadden and H. E. Dean for appellee.

Porter, J., delivered the opinion of the court:

Rebecca Harvey brought this action against the city of Bonner Springs, a city of the third class, to recover damages for the death of her husband. The jury returned a verdict in her favor for \$8,500, and judgment was rendered thereon, from which the city appeals.

The action is sought to be maintained under the provisions of § 3822 of the Gen. Stat. of 1915, which provides: "All incorporated cities and towns shall be liable for all damages that may accrue in consequence of the action of mobs within their corporate limits, whether such damages

shall be loss of property or injury to life or limb."

The petition alleged: "That on said 18th day of December, 1913, a large number of persons, residents and citizens of the town of Bonner Springs, Kansas, congregated and assembled at and around the home of this plaintiff and her husband, Rolla Harvey, within the corporate limits of said Bonner Springs, and while so assembled, and while the said Rolla Harvey was coming out of his home at their direction and request, said assemblage of persons unlawfully assaulted the said Rolla Harvey with shotguns and revolvers and inflicted upon him mortal wounds which caused his death."

The answer alleged that Rolla Harvey had committed a felony on the night before his death by shooting at the city marshal with a revolver; that Easling, the city marshal, who was also a deputy sheriff, summoned a posse to his aid in attempting to arrest Harvey the next morning; that Harvey resisted the officer and the posse, shot at them, and, on being asked to surrender, refused; that, while he was in the act of drawing his revolver, one of the posse shot him in self-defense; and that the killing was justified.

Rolla Harvey, the plaintiff's husband, at the time of his death was thirty-nine years old. He was a structural steel mechanic in the employ of a bridge company, for which he had been working for six or eight years and held a position as foreman, earning from \$4.50 to \$6 a day. The family consisted of himself, his wife, and two children, the eldest a boy of less than five years, and a girl less than a year old. For eighteen months Harvey had been a tenant of the city, living in one of two upstairs apartments in the city hall.

The city hall at Bonner Springs is a two-story brick building at the corner of Second and Cedar streets. It is 53 feet long north and south, and 42 feet wide east and west. It fronts south on Second, and its west side abuts on Cedar street, which runs north and uphill. The yard in the rear of the building is above the street, and about on a level with the second story. Extending across the rear of the second story is a porch 5 feet wide, and from the west end of it steps extend down to Cedar street. On the elevated ground in the rear of the building, and facing west, is what is termed in the evidence the "Crow house," the porch of which is about 7 feet wide and 23 feet long, and runs at right angles to the porch on the rear of the upstairs of the city building. The south end of the Crow porch is only 3½ feet from the city hall porch, and practically on a line with the door leading from the hallway out upon the city hall

porch. This hallway divides the two apartments upstairs in the city building, on the west side of which lived Rolla Harvey and his family; the east side being occupied by Easling, the city marshal, and his wife. The premises occupied by Rolla Harvey and his family consisted of three rooms. The first room from the north was the kitchen. The next to the south was the living room, and the third was the bedroom. Each of these rooms was connected by a door leading out into the center hall. Each room had a window opening west on Cedar street, and the kitchen had two windows opening north on the porch.

By the special findings the jury found that Harvey had committed no felony as claimed by the city.

The evidence introduced by the plaintiff in reference to what occurred the night before was that about half past 11 o'clock Harvey and a man by the name of Rhodes came down from the Harvey home to the street. Easling, the city marshal, who lived across the hall from Harvey in the same building, followed them downstairs and spoke to them on the street and said, "Ain't you out kind of late to-night?" One of the men replied, "I don't know as it's any of your damn business." To which Easling replied, "I will make it some of my business." The testimony of the witness Adair as to what transpired then was as follows: "And just then somebody busted him, hit him, knocked him out in the street, knocked him 15 or 20 feet, and he raised up and shot the first time through the air, sitting down, and shot up that way. The next time he shot up that way, north, Easling did. I don't know which one busted Easling; the way he rolled, they must have both hit him. Harvey went in the house; Rhodes ran up the hill; Easling ran toward the depot after he fired those two shots. There were no other shots fired then at that time than the ones I mentioned."

The evidence of the plaintiff went to show that when the Harvey family awoke from their sleep the next morning they found their home surrounded by men with pistols and shotguns. Some time after Harvey got up he dressed, went to the kitchen, and washed. He then stepped out on the porch to empty the washbasin. There is a conflict in the evidence as to what then occurred. The plaintiff's evidence tended to show that Harvey was at once met with a volley of shots from revolvers and shotguns fired by men, some of whom were standing under the roof of the porch of the Crow house, others around the corners of buildings, and behind a tree. As a result of this fusillade, one of the posse, Webber, was shot in the fleshy part of the leg, un-

doubtedly by a shot from Harvey's revolver; Harvey was shot in the left breast by a shotgun fired by one of the posse. Harvey went back into his house, told his wife he had been wounded, and called to his little boy to go for a doctor. Mrs. Harvey was afraid to let the child go, and said that she would summon aid. She went to the window on the west side of the bedroom, for the purpose of calling to outsiders, and as she raised the blind she was confronted with a shotgun in the hands of another of the posse, O'Donnell, who had been stationed across the street. She screamed and got back from the window, and started to cross the hall for the purpose of using the telephone in the Easling apartments. When she reached the hall, she was ordered back by Milstead, who pointed a shotgun towards her, and she retreated into one of the rooms. Milstead was standing at this time only a few yards from her on the porch of the Crow house, directly in line with the hallway.

An interval of about fifteen minutes occurred between the first and the second shooting. During this lull in the hostilities, and while the Harvey family were in their rooms, Easling, the city marshal, who had summoned the posse, said, "Well, I will just shoot in the window once and see if I can raise him." He then fired with a shotgun through the screen in the west window. When this shot was fired Mrs. Harvey came out into the hall again, and Milstead asked, "Will he come out? Will he surrender?" She said, "Well, I will see." She went in and told her husband that they wanted to know if he would surrender, and Harvey said, "Yes, tell them to come on in." She then went out in the hall and told Milstead what her husband had said, and Milstead replied, "We will never come in there; tell him to come out." Mrs. Harvey then went back to her husband and told him they said for him to come out, they would not come in, and he got up and went out. She went with him. She testified that when Harvey went out she went out the kitchen door with him. She had the children with her, the baby in her arms, and the little boy by her side. Harvey was a little in advance of her on the porch. She stood in the doorway of the hall, when someone said, "Go back in there; put them children back in there." "Get the children out the way." "Get in there." That they all had their guns in their hands, and she put the little boy back and stepped back herself; and just as she stepped back, and as her husband started to raise his arms, they fired, and he staggered up against the door casing, turned, walked back into the kitchen, and fell over on his face, dead. "He did not

have any gun in his hands or weapon in his clothes at that time."

Timmons, a farmer living near Bonner Springs, a friend of Harvey in his lifetime, was a witness for plaintiff. He was on the street near the city hall just before the second shooting occurred. He observed the parties had guns, and he talked with O'Donnell, who was standing across the street from the city hall, armed with a shotgun. When Timmons learned who it was they were trying to arrest, or wanted, he said to O'Donnell, "I will get Rolla for you," but O'Donnell replied, "No, Timmons, we are going to get him." The witness said, "All right, if you want to get into trouble, go ahead," and turned around and went away and left him.

Mr. Longfellow, who was mayor of the city, and who had been sheriff of the county for two terms, was a witness for the defense. His testimony is that the night before, when Marshal Easling consulted with him with reference to the trouble with Harvey, he advised him to get some guards to guard the house until after daylight. "And I told him that I believed, when the whisky died out on him, he would surrender without any trouble. They left my house and went away." He further testified that, a little after 7 o'clock the next morning, he was present at the first exchange of shots between the besiegers and Harvey. There were five persons in the crowd besides himself at that time. He described the position of the men surrounding the house. Easling, O'Donnell, and Lawrence were at the corner of the house, and Webber stood opposite the center of the porch. Milstead, it appears, was behind a tree in the yard. During the shooting, the witness heard Webber say, "I am shot," and Webber then took his shotgun, aimed in the direction where Harvey stood, and fired. After the first shooting, the mayor left and went back to his work.

O'Donnell was a witness for the defense. About 1 o'clock the night before the shooting, he heard Easling direct Weber to stay at the back of the building and guard it. Easling directed the witness to go and get a revolver. Webber made some reference to having a shotgun, and Easling told him to get it. Easling gave orders that they were all to be at the city hall at daylight. The witness arrived at the scene with Mayor Longfellow and Milstead. When he arrived there were present, besides himself, Milstead, and the mayor, Easling, Webber, and Norvall Lawrence. "Harvey was just in the act of coming out of the door, pushing the screen open, when I first saw him. The porch is 5 feet wide, according to the plat. . . . I should say he took at least two

steps from the door, a little left of what would be straight forward. I observed him with a wash pan in his hand. . . . My impression was, and is yet, that at first he had both hands on the pan or near the pan. Then Marshal Easling commanded him to surrender. He told him to consider himself under arrest, that he was under arrest, and to throw up his hands; and began immediately to advance over the end of the Crow porch toward Mr. Harvey. . . . When he said that, Harvey began to back into the door; he went back quickly. . . . Easling fired. I saw Harvey in the act of shooting. I heard two reports and saw the flashes from both Easling and Mr. Harvey. My impression is that Mr. Easling's gun was fired first; always has been my testimony all the way through, and is yet. . . . After those two shots, the other persons out there were firing. I saw old man Webber fire. He had a shotgun. I heard Webber say he was hit. Then I saw him fire. . . . Quite soon after he (Easling) fired twice out of his revolver, he asked me for this revolver. He said, 'Give it to me.' After I gave him the revolver, he shot Mr. Harvey with it, or shot in that direction. I couldn't tell how many times. . . . There was a good deal of shooting there in the instant, or minute, or a short time. Those that I saw were all pointed at Rolla Harvey as he stood there in the hallway; they were all pointed in that direction. That is the reason I said in my direct examination, 'I expected to see him fall dead in his tracks at any time.' You could not understand why he wasn't killed. They were all shooting at him; that is, in that direction."

After Harvey went into the house the witness went and got a shotgun, and, at the direction of Easling, took a position in the street, to prevent Harvey from escaping from that side of the house.

This witness also testified: "I heard Easling say, immediately after Milstead fired that last shot, 'Give him the other barrel.'"

In regard to what occurred at the second shooting, Mr. Milstead, the man who fired the fatal shot, testified: "After Harvey went back into the house, I went from there to my rooms and got a shotgun. I went to go and get a shotgun because Easling told me to go and get a gun, if I ain't mistaken. . . . When I pulled up my gun and shot at him, he stood right there in the hallway. I aimed right at him. . . . When I shot he staggered back and turned into the room out of my sight. My shot was the only shot that was fired at that time. When I fired that shot, Easling was standing right near me. . . . I don't remem-

ber whether Easling said, 'Give him the other barrel,' or not. I wouldn't say positive whether he told me to shoot again or not. I don't recall it if I said, 'No, that got him.' I don't recall it if I said it; I would not say that I did not say it. During the lull, I heard Mr. Easling say, 'Well, I will just shoot in the window once and see if I can raise him.' He did shoot; I couldn't say whether he shot into the window or not. I seen the shot up in the kitchen window after that. Q. Was there anybody there, either Mr. Harvey or his wife, or those two little babies, in sight of you at the time that shot was fired by Easling into the window? A. They were not."

Referring to what occurred at the time Harvey was killed, he testified: "I couldn't say how long it was after Easling fired that shot before Mrs. Harvey appeared in the hall. . . . I told her to take those children back and go back into the house, or some words to that effect. She did that immediately. She was right at her kitchen door and stepped right back into the kitchen. I did not shoot right at that moment. Harvey was standing right there where I could see him. The next thing that occurred was that I asked him to come out and surrender, once or twice. I don't know whether he heard me or not. He made no reply. I think I said, 'Throw up your hands.' I didn't see him if he started to throw up his hands. I never seen his hand, if it was up there so as to protect his body from shot. I think his hands were down at his side. I would not swear positively that they were hanging clear down. I am not positive sure where they were; I don't think they were on his breast, either of them."

On his direct examination the witness Milstead testified that when he asked Harvey to come out and surrender, "he kind of stepped back this way, dropped his hand like he was going into his pocket. I fired the shotgun. I shot at him at that time because I thought my life was in danger. He had been shooting there, and I didn't know but what he would shoot again."

On cross-examination he was asked whether or not he had testified at the coroner's inquest that his instructions were to take Harvey dead or alive, and whether he had not answered, "The marshal told me that if he can't,—if he didn't surrender, to shoot him." His answer was: "Easling told me that, I believe, yes; yes, I will say yes, 'if he didn't surrender.' I couldn't say that he also told me to shoot him regardless of whether he resisted or not; I couldn't say that he did. I wouldn't say that he didn't. It has been so long ago." He had known Harvey probably twenty years. "During that twenty years I had not personally any

knowledge of his ever having shot anybody, or committed any felony, or stolen anybody's property, or been a violent, turbulent man."

Webber, who testified for the defense, said that Easling deputized him to guard the house at the rear, and told him what had happened. From 1 o'clock in the night until daylight he stood guard alone, except for a short time when O'Donnell and the marshal were there. In reference to his instructions, he said, "I kind of think he (Easling) told me to shoot if he (Harvey) didn't surrender."

Easling was dead when the trial took place, more than two years after these occurrences. The city offered evidence to show that Harvey bore a reputation of being a turbulent, violent, and dangerous man; that in 1901 he had been convicted of larceny in Wyoming and served a term of two years in the penitentiary there.

The plaintiff introduced witnesses in rebuttal as to the character and reputation of Harvey in the neighborhood where he had resided.

There was a justice of the peace in Bonner Springs, but no warrant had been issued for the arrest of Harvey.

The jury made the following special findings:

"1. What persons were about the outside of the city hall in Bonner Springs on the night of December 17, 1913, or in the morning of December 18, 1913, before the death of Harvey? Webber, Easling, Lawrence, Milstead, O'Donnell.

"2. Did such persons leave their homes and assemble at the city hall upon the call, order, or direction of anyone? Yes.

"3. If you answer the last question in the affirmative, upon whose call or order did they assemble there? Easling.

"4. At the time in question, was William G. Easling an appointed, qualified, and acting deputy sheriff of Wyandotte county, Kansas? Yes.

"5. For what purpose were said persons called or ordered to assemble at said city hall? To arrest Rolla Harvey.

"6. Did said Harvey on the night of December 17, 1913, while in the company of one Rhodes, on Cedar street, in the city of Bonner Springs, assault William G. Easling by shooting at him? No.

"7. Was said Harvey armed with a revolver when he first came out upon the porch of the city hall on the morning of December 18, 1913? We think he was.

"8. Did said Harvey on the morning of December 18, 1913, when informed that he was under arrest, or was called upon by the marshal to surrender and throw up his I.R.A.1918C.

hands, comply with such request? The first time he did not, but the last time he did.

"9. Did said Harvey, upon being informed that he was under arrest or throw up his hands by said William G. Easling, hold in his hand or produce a revolver and shoot with the same at said W. G. Easling or the persons with him at the time? The first time we think he did, but the last time he did not.

"10. Did said Harvey shoot at or inflict a wound upon one Webber at said time? We think the bullet that struck Mr. Webber possibly was fired by Harvey."

The contention of defendant that it was error to overrule a demurrer to the evidence is argued upon two grounds. First, that the petition fails to state a cause of action under the statute which imposes upon cities and towns a liability for injuries occasioned by the acts of a mob. There was no demurrer to the petition; besides, it stated a cause of action under the statute when it alleged that a large number of persons congregated and assembled at and around the house of the plaintiff and her husband within the limits of the city; that, while her husband was coming out of his house at their direction and request, the assemblage of persons unlawfully assaulted him with shotguns and revolvers and caused his death. The second ground upon which it is urged the demurrer was well taken is that there was no evidence to sustain such a cause of action when plaintiff rested her case. If the petition stated a cause of action under the statute, the evidence was sufficient as against a demurrer, because it tended to prove just what the plaintiff alleged in her petition.

The main contention is that the court erred in not directing a verdict for the defendant. The defendant invokes the well-known rule that where an officer has legal authority to make an arrest, and is using proper means, he may repel force with force, and if the person resisting is necessarily killed in the struggle the homicide is justified, and a corollary to the same rule, to the effect that "duly summoned assistants of an officer are under the same protection of the law that is afforded to the officer who has process in his hands." Many authorities are cited in the brief, holding that where an officer making an arrest for a felony is forcibly resisted he is not limited to such force as is necessary to protect himself from death or great bodily harm, but may stand his ground and use such force as is necessary, or apparently necessary, to overcome the resistance offered, even to the extent of taking life.

Other authorities relied upon state the rule as to the power and the rights of an

officer in arresting a person who is committing a public offense in his presence, or where a felony has been committed and the officer has in his possession a warrant for the arrest. The officer in the present case had no warrant, and the jury has found that no felony was committed. There was some conflict in the evidence; but in our opinion there was abundant evidence,—perhaps a preponderance—to sustain the finding in favor of the plaintiff that all that Harvey was guilty of the night before his death was assaulting the city marshal and knocking him down, and that the only revolver shots on that occasion were fired by the officer himself.

We think it was a question of fact for the jury to determine whether the crowd of men around Harvey's house that morning were acting in good faith in attempting to make his arrest, and killed him in the honest belief that it was necessary to kill or disable him; or, on the other hand, as the plaintiff claimed, they formed, during the time of the assemblage, the purpose and intent to take his life, and that in carrying out that purpose he was killed. The court stated the law fairly on these propositions and gave admirable instructions. The jury were told that the burden of proof rested upon the plaintiff to establish that her husband met his death at the hands of a mob; and unless the jury believed from the preponderance of the evidence that her husband was so killed, no recovery could be had against the defendant; and that if the jury believed from a preponderance of all the evidence that the assemblage about his home was without authority of law, but for the purpose and with the intent on their part of doing violence to or injuring plaintiff's husband, or that, after having assembled for the purpose, whether lawful or otherwise, they thereafter formed the unlawful purpose of injuring the said Rolla Harvey, and, while so assembled, they did, or any of them did, inflict injury upon him from which his death resulted, they should find for the plaintiff.

The court charged that the fact that a member or members of a lawfully assembled posse in attempting to effect an arrest might act too hastily, or unnecessarily kill a person sought to be arrested within the limits of the city, would not render the city liable for the death; in order that a liability may arise, the posse, after having lawfully assembled, must have abandoned and lost its character as such, and must have become a mob. They were charged that if they found from the evidence that Easling was a deputy sheriff, or city mar-

shal, and that Harvey attempted to shoot him without other provocation than being accosted in the nighttime with an inquiry as to his presence on the street at that time of night, or words to that effect, Harvey was guilty of a felony, and that Easling had the right to arrest him without a warrant, and to call on any citizen or citizens of the county to assist him in making such arrest; and that it was the duty of any citizen or citizens to obey the call and to act under the orders and directions of Easling; and that while so acting they were clothed with the same duties, responsibilities, and protection as Easling, and the defendant would not be liable for their acts. The court also charged that in the face of a resistance an officer attempting to arrest one who has committed a felony is not required to fall back, but, on the contrary, is justified and encouraged to press forward and vindicate the law by effecting the arrest or apprehension of the person. In another instruction the jury were told that if they believed from the evidence that the persons present at the time Harvey was killed were there in pursuance of the call of a deputy sheriff for assistance, the presence of citizens so assembled would not constitute a "mob" as defined by the statute, and that the defendant would not be liable for the acts of such citizens in attempting to arrest or apprehend Harvey, "even though you should find that the acts of said citizens or any of them were not excusable on the ground of self-defense, or apparent necessity, as hereinbefore explained, and your verdict should be for the defendant, unless you find that, after having lawfully assembled, an unlawful intent and purpose was formed, and a mob constituted as hereinbefore defined."

These instructions state the law contended for by the defendant with respect to the rights of an officer making an arrest without process where a felony has been committed, and the protection afforded by the law to those whom such officer has called to his assistance. As already observed, the jury find that no felony had been committed by Rolla Harvey. They may have believed that he was guilty of a misdemeanor or the violation of a city ordinance. Under the instructions of the court, and facts which the jury believe were shown by a preponderance of the evidence, they may have found that the assemblage was lawful at first, and that afterwards those assembled united in an unlawful purpose to injure or take the life of Harvey unless he surrendered. If these facts were true, no

member of the assemblage could invoke the rule that he was protected by reason of the lawful purpose for which the assemblage was first formed; nor could the city rely for a defense upon the fact that the assemblage in its original purpose was lawful.

The statute defines a "mob" as "any collection of individuals assembled for an unlawful purpose, intending to injure any person by violence and without authority of law" (Gen. Stat. 1915, § 3727); and the statute which provides for the punishment of persons participating in unlawful assemblages (Gen. Stat. 1915, § 3674) defines an "unlawful assemblage" as "three or more persons" who "assemble together with intent to do any unlawful act with force and violence against the person or property of another, or to do any unlawful act against the peace."

In the quite recent case of *Blakeman v. Wichita*, 93 Kan. 444, L.R.A.1915C, 578, 144 Pac. 816, Ann. Cas. 1916D, 188, it was held that under these statutes it is immaterial what the primary purpose was for which the persons assembled "if they in fact formed and executed the unlawful purpose after they were together." Syl. 2. In that case the city was held liable for the acts of a mob, comprised wholly of persons confined in the city prison, who unlawfully assembled and acted together in assaulting a fellow prisoner in the jail. The opinion quotes from *Madisonville v. Bishop*, 113 Ky. 106, 57 L.R.A. 130, 67 S. W. 269, the following language: "The purpose of the assembly, or the aim that it had primarily in view, is not material, if it was in fact riotous or tumultuous, and the city authorities had notice of it and ability to prevent the damage it did." 93 Kan. 448.

The courts have always been jealous, and rightly so, of any attempt to limit unduly the exercise in good faith of the power and rights the law has conferred upon an officer of the peace in the discharge of his duties; but peace officers, like all other officers, are subject to human frailties and passions; so long as they act with proper motives in seeking to arrest a person charged with an offense the law protects them and those summoned to assist, even though, acting hastily, or upon mistaken judgment, they unnecessarily take the life of the person charged. The fact, however, that the assemblage acts under the color of authority as a posse summoned by an officer will not necessarily and of itself furnish a defense to the city in an action under the statute.

This court cannot declare as a matter L.R.A.1918C.

of law that the assemblage in the present case was not a mob within the meaning of the statute, because the motive which actuated the assemblage, not only at the time it was assembled, but also until the death of plaintiff's husband was brought about, was a question of fact; and if on this vital issue reasonable minds might draw different conclusions from the evidence, we are bound by the verdict of the jury. It certainly cannot be said that the statute affords no redress in a situation which conceivably might happen, where a deputy sheriff or city marshal, or an assistant city marshal called together a posse to assist him in making an arrest for a misdemeanor, intending under the guise of such a call to take, and did take, the life of the person charged, on the pretense that he was resisting arrest, or that they or some of them were in danger of being assaulted by him. In some of the large cities of our own country men have been known to conspire with officers to bring about the death of a person whom they desire to get rid of, and, in carrying out such unlawful purpose, to employ the pretense that the person was killed while resisting an arrest. In the bandit wars in Mexico,—and if some of the stories which are told of the present world war are true, it sometimes happens in other countries,—prisoners of war have been shot under the specious pretense that they were attempting to escape.

There is some complaint in reference to the rejection of testimony. The court properly limited the cross-examination of plaintiff to matters connected with her testimony in chief. Some of the testimony rejected was hearsay. Besides, none of the evidence concerning which complaint is made was brought to the court's attention on the hearing of the motion for a new trial. The instructions given, as already observed, presented fairly the issues raised by the defense.

Because of plaintiff's neglect to present a verified claim against the city, it is conceded that she was not entitled to judgment for costs. She should have offered in the lower court to release the judgment for costs before the appeal was taken, and we think it is proper that one half the costs in this court should be taxed to plaintiff.

The judgment, except as to costs in the court below, is affirmed.

Johnston, Ch. J., and Marshall and Dawson, JJ., dissent.

Petition for rehearing denied January 18, 1918.

Annotation—What is a mob or riot for the act of which a municipality is liable.

This question has been previously discussed in notes to *Adamson v. New York*, 10 L.R.A.(N.S.) 925, and *Pittsburg, C. C. & St. L. R. Co. v. Chicago*, 44 L.R.A.(N.S.) 359. The cases in the present note are supplementary thereto.

Generally, as to liability of municipal corporations for failure to prevent improper conduct in or use of streets, see notes to *Van Cleef v. Chicago*, 23 L.R.A.(N.S.) 636, especially cases under heading, "Riots and unlawful assemblages;" and *Goodwin v. Reidsville*, 42 L.R.A.(N.S.) 862.

A large number of persons confined together in a city jail, who joined together to whip another prisoner, and who did severely whip and injure him, were, in *Blakeman v. Wichita* (1914) 93 Kan. 444, L.R.A.1915C, 578, 144 Pac. 816, Ann. Cas. 1916D, 188, held to be a "mob" or "riotous assemblage" within the meaning of the statute making cities liable for damages resulting from mob violence. And the fact that these persons did not voluntarily come into the jail does not prevent their action from being that of a mob, nor is it the primary purpose for which they assembled material, if they in fact formed and executed the unlawful purpose after they were brought together. See also *HARVEY v. BONNER SPRINGS*, ante, 231.

In *Cherryvale v. Hawman* (1909) 80 Kan. 170, 23 L.R.A.(N.S.) 645, 133 Am. St. Rep. 195, 101 Pac. 994, 18 Ann. Cas. 149, 21 Am. Neg. Rep. 99, an action upon a statute making cities liable for injuries done by mob, an instruction that "a mob is an unorganized assemblage of many persons intent on unlawful violence, either to persons or property," is held not erroneous because it makes no reference to a determination on the part of those composing the assemblage to resist opposition. So in this case it is held that where the members of a charivari party forcibly place a bride and groom in a wagon against their will, and draw them up and down the streets, they are engaged in an act of unlawful violence within the meaning of such definition. The fact that they are good-natured and intend no serious harm to anyone does not absolve the corporation from liability.

In *Stevens v. Sheriff* (1905) 71 Kan. 434, 80 Pac. 936, an action for damages on account of injuries to the person and property of the plaintiff, alleged in the L.R.A.1918C.

petition to have been unlawfully inflicted by several persons while "acting in concert and as a mob, and in pursuance and furtherance of a common design," it is held error to instruct that a recovery can be had only upon proof that the defendants constituted a mob; that, assuming it to be necessary in such a case for the plaintiff to prove that the defendants constituted a mob, it is error to instruct that "a mob is the assemblage of a number of people acting in a tumultuous and riotous manner, calculated to put good citizens to fear, and to endanger their persons and property."

In a case somewhat similar to *HARVEY v. BONNER SPRINGS*, a collection of persons, some of whom had been deputized to capture a negro who, having violated the law, had taken refuge in a house, was, in *Arnold v. Centralia* (1915) 197 Ill. App. 73, an action against a city for damages to property by shooting, held to be a mob, under a statute defining a mob to be "any collection of individuals, five or more in number, assembled for the unlawful purpose of offering violence to the person or property of anyone supposed to have been guilty of a violation of the law, or for the purpose of exercising correctional powers over any person or persons by violence, and without lawful authority."

In *People v. Most* (1891) 128 N. Y. 108, 26 Am. St. Rep. 458, 27 N. E. 970, an anarchist was indicted under statute requiring that, in order to constitute the offense of unlawful assembly, three or more persons, being assembled, should attempt or threaten any act "tending towards a breach of the peace, or an injury to person or property, or any unlawful act." "The offense," observes the court, "can only be committed when there is a concert or combination of three or more persons who unite in the attempt or in the threat to do one or more of the things specified in the statute. A threat made by one or by two persons only, in which no others participated, would not be indictable under this statute, although made in an assembly of many persons. It was also the rule of the common law that three or more persons should be assembled and participate in the unlawful purpose in order to constitute the offense of unlawful assembly, or the cognate offenses of rout and riot. 4 Bl. Com. 146; 1 Russell, Crimes, 288. Unless, therefore, the jury

were authorized to find that the threat charged in the indictment was made not only by the defendant, Most, but also by at least two other persons on the occasion in question, the offense was not made out."

It is stated in *Mitchell v. Champaign County* (1899) 10 Ohio C. D. 801, 9 Ohio

S. & C. P. Dec. 821, involving a lynching, that an essential element to change a collection of individuals into a "mob" is the intent to do damage or injury to someone, or the pretense to exercise correctional power over other persons by violence, and without authority of law.

J. D. C.

KENTUCKY COURT OF APPEALS.

E. B. MILLER et al., Appts.,
v.
CENTRAL CITY.

(— Ky. —, 199 S. W. 611.)

Intoxicating liquor — adoption of prohibition — refund of license fee.

A city is not compelled to refund the unearned portion of the fee exacted for a license to sell liquor, because, upon its being voted dry, the county officials force the holder of the license to close his business, if the city authorities make no attempt to interfere with the business.

For other cases, see *Assumpsit*, II. c, 2, in Dig. 1-52 N. S.

(January 11, 1918.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Muhlenberg County in favor of defendant in an action brought to recover the unearned portion of the fee exacted for a liquor license. Affirmed.

The facts are stated in the opinion.

Messrs. Freeman & Straud for appellants.

Mr. Walker Wilkins for appellee.

Sampson, J., delivered the opinion of the court:

Miller and May for many years were engaged in the saloon business in Central City. On September 28, 1912, a local option election was held whereby that territory became dry. Their licenses, however, for that year, did not expire until December, at which time they applied for and took out a new license for another twelve months; and again, on the expiration of the second license, they applied for and took out, in December, 1913, a license good until December 5, 1914. In the meantime the local option election had been contested by the wets, and tried out before the board of election commissioners, who upheld the election.

Note. — As to right to recover liquor license fee or unearned portion thereof upon adoption of legislation or regulation inimical to the sale of intoxicating liquor, see annotation following this case, post, 241.

—R.A.1918C.

It was then appealed to the circuit court, which affirmed the finding of the election commissioners, and from the circuit court it was appealed to this court; a supersedeas having been executed staying the proceedings of the county court upon the election. The local option election was held valid by this court, and mandate issued April 25, 1914. On April 27th a certificate of election was issued by the canvassing board, and this certificate, with proper orders adjudging valid said election, was spread of record on the order books of the Muhlenberg county court. The county attorney and judge of the quarterly court were endeavoring by prosecutions to stop the sale of intoxicating liquors in Central City, and had issued a number of warrants against appellants and other saloon keepers charging them with the unlawful sale of whisky in that city. Some trials were had on these warrants, and a conviction resulted in each case, but neither of the appellants had been tried. On May 1, 1914, appellants, along with other saloon keepers, agreed with the county attorney to and did close up their saloons and ceased to operate the same. At that time appellants held a saloon license granted them by the city authorities, authorizing them to operate a saloon for the year ending December 5, 1914. The city authorities did not interfere with appellants in the operation of their saloons, nor did they ask or require them to close their business. It was only the county authorities who attempted this. However, on July 7, 1914, the city council of Central City passed an ordinance prohibiting the sale of intoxicants by persons without a license within the municipal corporation, but the saloons had all been closed long before that by agreement with the county attorney.

This action was instituted by Miller and May, holders of a saloon license, to recover of the city pro tanto for the 202 days which they allege they were prohibited from operating their saloon before the expiration of said license on December 5, 1914.

Can a keeper of a saloon who has obtained from a municipality, in consideration of \$1,000 per year, a license to carry on his business, have of the city a pro tanto recovery of the \$1,000 license tax, if he,

to avoid a multiplicity of criminal prosecutions, agree with officials other than those of the city to and does close his saloon 202 days before the expiration of the life of the license? This is the real question in this case, and the one this action was intended to determine. We must answer it in the negative.

The city and its officials did not attempt to close appellants' saloon, or to prevent them from selling liquor under the license which appellants held. The county authorities, however, did issue warrants against appellants and caused their arrest, but these officials acted upon their own initiative and entirely without encouragement or authority from the municipal officials. The saloon men had the undoubted right to continue the sale of liquor until the expiration of their license, and this question had been well settled by this court, and appellants should not have voluntarily relinquished their right to conduct a saloon, especially when the courts had determined the question in their favor. Whether appellants would be entitled to a recovery had the city officials themselves prevented the operation of the saloon it is unnecessary here to decide.

Appellants contend that they involuntarily relinquished their right to carry on the saloon business, and that an analogy between an involuntary relinquishment, such as this, and an involuntary payment of a license tax wrongfully assessed, exists. It is well settled that, where a licensee, under protest, pays a tax to prevent the immediate seizure of his person or property, or to obtain his release after his arrest, such payment will be considered involuntary, and its recovery will be permitted. But there is no analogy between the case at bar and those cited by appellants supporting the principle just stated. In this case the saloon keepers were being prosecuted by county officers, and to avoid these criminal prosecutions appellants, by agreement with the county attorney, relinquished their right

to continue in the saloon business. With this Central City and its officials had nothing to do and were in no manner responsible. The law upon the subject of sales by licensees after the territory is voted dry and before the expiration of the license was well settled by this court, and the legal profession in this commonwealth was fully acquainted therewith. While it is alleged by plaintiffs below that they could not get attorneys to definitely advise them as to their right to sell liquor after the entry of the certificate of election, it cannot be doubted that many lawyers in Muhlenberg county and elsewhere in Kentucky were well acquainted with the law as announced in the cases of *Watts v. Com.* 78 Ky. 329, and *Shehan v. Louisville & N. R. Co.* 125 Ky. 478, 101 S. W. 380. Moreover, in the case of *May v. Com.* 160 Ky. 785, 170 S. W. 493, to which one of the appellants was a party, the doctrine of the case of *Watts v. Com.* supra, was reaffirmed, and it was made quite plain that the licensee had the right to continue the sale of intoxicants during the period for which he had a license. This opinion was rendered and published subsequent to the filing and entry of the election certificate, but previous to the expiration of the license held by appellants.

Appellants' petition contains almost three pages of irrelevant and redundant matter which the lower court upon motion properly struck out. Leave was then given to amend the petition, but the petitioners declined to plead further. Thereupon the circuit court sustained a demurrer to the petition and dismissed the action. There can be no serious controversy as to the correctness of the ruling of the circuit court in sustaining the motion to strike, nor can it be urged that the allegations which remained in the petition were sufficient to constitute a cause of action. This being true, the Circuit Court properly sustained the demurrer and dismissed the action.

Judgment affirmed.

Annotation—Right to recover liquor license fee or unearned portion thereof upon adoption of legislation or regulation inimical to the sale of intoxicating liquor.

The recovery of an unearned liquor license fee where the business has not been entered upon, or has been abandoned voluntarily, or where the license turns out to have been improperly issued, is discussed in the note to *Allsman v. Oklahoma City* (1908) 16 L.R.A. (N.S.) 512. And see the subsequent case of *Scott v. New Castle* (1909) 132 Ky. 616, 21 L.R.A. (N.S.) 112, 116 S. W. 788, L.R.A.1918C.

holding that one who secures and pays for a license to sell intoxicating liquor under an interpretation of the law by a nisi prius court may, upon reversal of the decision by a ruling that there was no authority to issue the license, recover an amount of the money so paid in proportion to the remainder of the term.

The right or duty of municipal corporations to refund liquor license fees

on adoption of state prohibition is discussed in the note to *Fitzgerald v. Witchard*, 16 L.R.A.(N.S.) 519.

The recovery of an unearned liquor license fee upon revocation of the license for misconduct of the licensee is discussed in the note to *Roberts v. Boise City*, 45 L.R.A.(N.S.) 593.

As to the right of the legal representative of a deceased licensee to recover a portion of the fee paid for a liquor license, because of the licensee's death before the expiration of the term of the license, see the note to *Wood v. School Dist.* 15 L.R.A.(N.S.) 478.

As to the liability for damages for wrongful revocation of liquor license, see *Claussen v. Luverne*, 15 L.R.A.(N.S.) 698, and note.

As to the constitutionality of a statute by which conviction of violation of the liquor law entailed revocation of the license and prohibition of the sale of liquor, see the note to *State v. Woodward*, 30 L.R.A.(N.S.) 1004.

It has been stated that the legislature has power to enact a local option statute under which a license to sell liquors may be annulled, without making any provision for the refunding of license money paid. *Brooks, J., in Ex parte Vaccarezza* (1907) 52 *Tex. Crim. Rep.* 105, 105 S. W. 1119. In discussing the validity of a statute which made provision for the refunding of the unearned portion of license money, the court, in *Gillesby v. Canyon County* (1910) 17 *Idaho*, 586, 107 *Pac.* 71, states that a "license for the sale of intoxicating liquor is not a contract between the state and the licensee, but is merely a permission, and is subject at all times to the control of the state, and in exercising the police power the legislature may pass an act which in effect revokes and annuls a license issued prior to the passage of such act, and the legislature possesses such power without making any provision whatever for the refunding of license money paid." Accordingly, the act was held constitutional in an action brought to test the constitutionality thereof. *Ibid.*

Some statutes in providing for local option make provision for the refunding of the unearned portion of license fees. This is true of the statute involved in *People v. McBride* (1908) 234 *Ill.* 146, 123 *Am. St. Rep.* 82, 84 *N. E.* 865, 14 *Ann. Cas.* 994; *State ex rel. Bucy v. Troy* (1912) 177 *Ind.* 413, 98 *N. E.* 290 (holding that the license must be valid, however, to entitle the holder to a refund under such a statute); *Hall v. Smith-McKenney Co.* (1915) 162 *Ky. L.R.A.* 1918C.

159, 172 S. W. 125. See *Louisville v. Cain* (1909) 134 *Ky.* 76, 119 S. W. 763, *infra*; *Re Johnson* (1896) 18 *Misc.* 498, 42 *N. Y. Supp.* 1074; and *H. Koehler & Co. v. Clement* (1908) 125 *App. Div.* 886, 111 *N. Y. Supp.* 151 (holding that the license must be valid to entitle the holder to a rebate); *State v. Rouch* (1890) 47 *Ohio St.* 478, 25 *N. E.* 59. Such statutes providing for a refund have been upheld. *Calderwood v. Jos. Schlitz Brewing Co.* (1909) 107 *Minn.* 465, 121 *N. W.* 221, sustaining the validity of a curative act enacted to validate the refunding of unearned license fees by a municipality. It is by some statutes expressly made a condition of the rebate that no arrest or indictment for violation of the liquor law be pending against the holder upon the surrender; a holder who is under arrest at the time of such surrender is not entitled to the rebate, nor can an assignee of such holder recover. *People ex rel. Frank Brewery v. Cullinan* (1901) 168 *N. Y.* 258, 61 *N. E.* 243; *People ex rel. Seitz v. Lyman* (1901) 59 *App. Div.* 172, 69 *N. Y. Supp.* 111. Cases passing upon statutes which expressly regulate the refunding of the unearned fee have not in general been considered in this note.

It is a view maintained by some courts where the sale is prohibited by virtue of action taken under a local option statute, that one who takes out a license while a law authorizing such action is in effect cannot recover the unearned portion thereof. Thus, it has been held that one who took out a license for the sale of intoxicating liquor within a certain distance of a church, when there was in existence a law authorizing the county court upon proper petitions to prohibit such sale, could not, after such sale had been prohibited under the law, recover the unearned portion of his license tax. *Peyton v. Hot Springs Co.* (1890) 53 *Ark.* 236, 13 *S. W.* 764. This is held irrespectively of whether the judgment of the court prohibiting the sale of liquor annulled and revoked the license. The court states that the payment of the license was legal when made by the appellant, and was voluntary on his part; that if the effect of the judgment of the court prohibiting the sale within a stated distance of the church did not annul and revoke his license, he was not injured, and could not recover the amount paid therefor; and that if his license was annulled and revoked by said judgment, there was no authority in the statute for apportioning the amount of the license tax according to the time that ap-

pellant sold under the license. Upon the petition for prohibition being granted, the holder of the license abandoned the sale of liquor under it, made application by petition to the county court to recover the sum paid by him for his license. A statutory provision that licenses may be obtained to sell liquors for a period less than a year, but the licensee must pay the license tax for a full year, lends some support to the theory adopted by the court.

It was held in the subsequent case of *Alexander v. State* (1905) 77 Ark. 294, 91 S. W. 181, where an order prohibiting the sale of liquor within a stated distance of a schoolhouse was revoked by the county court, but the revoking order was reversed upon appeal to another court, that one who had in the meantime obtained a license to sell liquor could not recover the unearned portion thereof; but it is expressly held that the judgment of the appellate court operated as a revocation of the license issued to the appellant. Where the issuing of a license is subject to an appeal, and an appeal is taken and the order issuing it reversed, that the holder is not entitled to recover the unearned portion is held also in *Monroe County v. Kreuger* (1882) 88 Ind. 231.

It is held in *Bender v. Fergus Falls* (1911) 115 Minn. 66, 131 N. W. 849, that, without statutory authority, no refund of the unearned portion of the liquor license can properly be made where the sale has been rendered unlawful by virtue of a local option election. Under statutory authority providing that a liquor license shall be annulled by the sale of liquor becoming unlawful in the place for which such license is granted, and providing that in such case such part of the license fee as corresponds to the time such license has yet to run "may be returned," it is held that a municipality which has voted to prohibit the sale of liquor under a local option statute may return the unearned portion of the license fee, but that it is not compelled to do so, as the statute is discretionary only, and not mandatory. Accordingly, a licensee whose rights have been annulled is held not entitled to recover a balance on an unearned portion above that which the municipality has voluntarily returned to him.

In *Fitzgerald v. Witchard* (1908) 130 Ga. 552, 16 L.R.A.(N.S.) 519, 61 S. E. 227, municipal authorities were enjoined from refunding the unearned portion of a license fee to the holder of a license granted by the city, who voluntarily dis-

continued business before the expiration thereof because of a state law exacting a higher license fee, where the attempt to refund was made by city officials who succeeded others who had failed to act upon a petition for a refund filed with them, and the term of the license had expired without any attempt on the part of the city authorities to refund.

The right of a holder of a liquor license granted by a city, to recover the unearned portion thereof from the city upon the adoption of state prohibition, is affirmed in *Allsman v. Oklahoma City* (1908) 21 Okla. 142, 16 L.R.A.(N.S.) 511, 95 Pac. 468, 17 Ann. Cas. 184.

Where both a city and a county license are required by a dealer in intoxicating liquors selling within a city, the holder of a city license who was denied a county license for the reason that, before he applied for the county license, the city had held a local option election by which the sale of intoxicating liquor was prohibited, has been held, in *Sharp v. Carthage* (1892) 48 Mo. App. 26, entitled to recover from the city the unearned portion of his license, although the Local Option Law provided that the adoption of prohibition in any county or city should not be so construed as to interfere with any license issued before the day of election under the law, but that such license might run until the day of its expiration. The court argued, in support of its decision, that when the city, immediately after issuing its license, "voted against the sale of intoxicating liquors within its boundaries, it thereby effectually prohibited the county court from granting a license to plaintiff, and rendered its own license worthless." The fact that the license was issued a short time before the holding of the local option election at which the sale of intoxicating liquors was prohibited is held entitled to no weight, as the holder had the right to assume that the city would not at once revoke the license which it had granted to him. In this case the license was taken out on the day preceding the election.

It is held in *Bart v. Pierce County* (1911) 60 Wash. 507, 31 L.R.A.(N.S.) 1151, 111 Pac. 582, that a county which has for a fee granted a license to sell intoxicating liquor within its limits for a certain period is, so far as the funds remain within its control, bound to return the unearned portion thereof, if, before the expiration of the prescribed period, the territory where the business is conducted becomes incorporated as a municipal corporation, which assumes

the regulation of the traffic within its limits and requires the payment to it of a fee for the privilege of conducting the business. It was conceded in this case that the county license became inoperative upon the incorporation of the territory into the town.

As stated above, some courts take the view that the holder of a license who has taken it out while a statute is in effect permitting local prohibition cannot recover the unearned portion thereof after the sale is prohibited by virtue of such statute, and this is held true whether or not the license is revoked. *Peyton v. Hot Springs Co.* (1890) 53 Ark. 236, 13 S. W. 764; *Alexander v. State* (1905) 77 Ark. 294, 91 S. W. 181, see *supra*. The court in *MILLER v. CENTRAL CITY*, ante, 240, being committed to the doctrine that the local option election in favor of prohibiting the sale does not interfere with existing licenses, holds that one who has voluntarily surrendered his license cannot recover the unearned license fee. It has been held under the peculiar facts set out in *Sharp v. Carthage (Mo.) supra*, that, even though the

local option election does not interfere with the license issued previously thereto, the licensee is entitled to recover the unearned portion thereof.

In *Nurnberger v. Barnwell* (1894) 42 S. C. 158, 20 S. E. 14, a state law had been enacted limiting the time for which municipal authorities could grant licenses for the sale of intoxicating liquor subsequently to the enactment of this statute. The municipal authorities granted the plaintiff in this case a license to sell intoxicating liquor extending beyond the period set by the statute, the plaintiff being induced to pay the excess beyond this period by the promise of the town authorities that, if the license was illegal and void after the period fixed by statute and the plaintiff was not allowed by law to carry on his business as a retail liquor dealer, the town would repay to the plaintiff the excess. Upon these facts the holder of the license was held entitled to recover the unearned portion thereof, the license being held illegal beyond the period fixed in the statute.

W. A. E.

KENTUCKY COURT OF APPEALS.

H. V. JOHNSON, Appt.,
v.

LUCY JOHNSON McMILLON et al.

(— Ky. —, 199 S. W. 1070.)

Bills and notes — note for money advanced to remove witness.

1. A note given for money advanced to remove from the jurisdiction a witness necessary for the prosecution of a criminal cause cannot be enforced by the payee, who advanced the money with knowledge of the purpose for which it was to be used.

For other cases, see Bills and Notes, VI. c, in Dig. 1-52 N. S.

Same — consideration illegal in part.

2. A note, a part of the consideration of which is money lent to remove a witness from the jurisdiction, cannot be enforced by the payee, although a portion of the consideration was legal.

For other cases, see Bills and Notes, VI. c, in Dig. 1-52 N. S.

Mortgage — securing void note — enforceability.

3. A mortgage given to secure an illegal note is not enforceable.

For other cases, see Mortgage, V. in Dig. 1-52 N. S.

(January 18, 1918.)

Note. — The right to recover back money loaned for the purpose of being used in an illegal transaction, or with knowledge of

APPPEAL by plaintiff from a judgment of the Circuit Court for Elliott County in favor of defendants in an action brought to enforce payment of a note. Affirmed.

The facts are stated in the opinion.

Mr. John A. Gray for appellant.

Messrs. Theobald & Theobald, for appellees.

Plaintiff has no standing in a court of equity nor in law, nor can he enforce his proposed contract in law or equity.

1 Pom. Eq. Jur. 2d ed. §§ 397-399; American Asso. v. Innis, 109 Ky. 595, 60 S. W. 388; 9 Cyc. 505, 546, 562; *Averbeck v. Hall*, 14 Bush, 505; *Kimbrough v. Lane*, 11 Bush, 556.

Mr. J. J. C. Johnson also for appellees.

Hurt, J., delivered the opinion of the court:

This action was instituted in the Elliott circuit court by the appellant, H. V. Johnson, against the appellee Lucy Johnson McMILLON, to recover against her a personal judgment for the sum of a promissory note and its accrued interest, which the appellee, while a married woman, and her former husband, Ell Johnson, had executed to appellant on the 30th day of July, 1909, and also to enforce a mortgage lien upon

borrower's intention so to use it, is treated in the annotation following this case, post, 247.

the appellee's lands, and to secure an order of sale of the lands to satisfy the debt represented by the note. The mortgage, as alleged, had been executed to appellant by the appellee and her husband at the time of the execution of the note, to secure its payment. The lands embraced in the mortgage were owned by the appellee, and not her husband. The husband of appellee, with whom she joined in the execution of the note and mortgage, was killed a few weeks after the note and mortgage were executed. As defenses to a recovery by the appellant, the appellee pleaded that the note was without a valuable consideration as to her; that the consideration of the note was illegal and vicious; that she was compelled, by duress exerted upon her by her husband, with the knowledge and contrivance of the appellant, to execute the note and mortgage, against her will and consent; that appellant and her husband conspired together and fraudulently procured her to execute the note and mortgage, when same were without any consideration as to her; and that the acknowledgment of the mortgage by her was before an unauthorized person, who had no authority to take acknowledgments of mortgages or deeds executed by a feme covert, and that his certificate thereon of such acknowledgment was a mistake. A considerable quantity of evidence was taken upon the various issues made, and upon a submission of the action the circuit court adjudged that the appellant was not entitled to any recovery, and that his petition be dismissed, and from the judgment this appeal is prosecuted.

Because of the conclusion which has been reached, it is found to be unnecessary to advert to more than one of the grounds presented in resistance of the recovery upon the note and mortgage. Passing over the controversy as to whether the note was executed as a promise to pay the debt of the appellee or the debt of her husband, or whether she executed it under fear of violence at the hands of her husband, the facts about which there seems to be controversy are that Ell Johnson, in the early part of the year 1908, killed his brother-in-law, who was a brother of appellee, and thereafter was indicted for the crime of wilful murder, and was incarcerated in jail, awaiting trial, in September of that year. His father and the appellant, his brother, and two or more brothers-in-law and the appellee, gathered at Sandy Hook for the purpose of assisting him in procuring counsel for his defense, and otherwise rendering him assistance in the defense of the prosecution. Attorneys

were secured for him and four notes were executed to them for their fees, and the appellant became an obligor upon the notes, as well as his father, and a brother-in-law subscribed at least two of the notes. The appellee was an obligor upon one or more of the notes, and Ell Johnson seems to have subscribed to one of them and possibly all of them. The evidence as to who were the obligors upon these notes is very contradictory and far from satisfactory. Ell Johnson underwent a trial and was convicted in the early part of the year 1909, but upon appeal by him the judgment was reversed and a new trial granted, and he was admitted to bail in the month of June, 1909.

Regardless of who were the obligors upon the notes, they were regarded by the parties as representing the debts of Ell Johnson, and by an arrangement between him and appellant, the appellant discharged two of the notes and portions of two others, and Ell Johnson paid to him the amount of one of the notes, and also some other small payments. The appellant also paid for and furnished to Ell Johnson other sums of money for purposes connected with his defense to the indictment for murder, as well as for some other purposes, and in July, 1908, the appellant rendered to Ell Johnson and the appellee a statement of the matters between them. The statement was in the shape of an account against Ell Johnson, showing the amounts of money which appellant had paid for and furnished to him, and also a statement of the amounts which he had received from Ell Johnson. The balance was the consideration for the note sued upon, and for which the mortgage sued upon was executed to secure. Of the consideration for the note, three of the items, which amounted together to \$162.50, were sums of money which had been furnished by the appellant to Ell Johnson for the purpose of procuring a witness for the commonwealth of Kentucky in the prosecution against Ell Johnson to leave the state of Kentucky, and to keep her out of the jurisdiction of the court, for the purpose of preventing her from giving testimony against Ell Johnson in the prosecution against him for murder. These sums of money were furnished by appellant with the full knowledge of the purpose for which they were to be used, and for the purpose of being so used, and were used for that purpose, as appears from the testimony of the appellant. It seems that the witness thus corrupted and carried out of the jurisdiction of the court, so as to be prevented from testifying for the commonwealth in

the prosecution, was the only witness whose testimony was deemed to be dangerous to the safety from conviction of Ell Johnson. It scarcely seems necessary to say that a promise, the consideration of which is illegal, will not be enforced. An enforceable contract must be based upon a valid consideration, and if the consideration is illegal, the contract is void.

At the common law, the obstruction of justice in the courts was a misdemeanor and an indictable offense, and the spiriting away of a witness to prevent the witness from testifying was always held to be one method of obstructing justice in the courts, and in order to constitute this offense, it was not necessary that the witness should have been under subpoena or recognizance. *Com. v. Berry*, 141 Ky. 477, 33 L.R.A. (N.S.) 976, 133 S. W. 212, Ann. Cas. 1912C, 516. A promise, the consideration for which is an agreement to defeat or hinder the administration of the criminal laws, is always void, as against public policy, and is not enforceable. *Averbeck v. Hall*, 14 Bush, 505; *Swan v. Chandler*, 8 B. Mon. 97; 9 Cyc. 500. There is some divergence of opinion as to whether or not a promise to repay money loaned for an illegal purpose is void, but the rule is thus stated in 6 R. C. L. p. 696, as follows: The "mere knowledge of the borrower's unlawful intention . . . does not ordinarily render the contract illegal, although it is otherwise where money is loaned for the express purpose of being used in an illegal transaction."

And further: "It undoubtedly is a correct principle, it has been said, that one who furnishes funds to another, who he knows or has every reason to believe intends to devote them to the perpetration of crime, and seeks to procure them for that purpose, will not be allowed to maintain an action on his contract." 6 R. C. L. p. 697.

Hence any promise which Ell Johnson might have made to repay to appellant the money thus illegally furnished for such illegal and vicious purpose would not be enforceable, as the appellant was a participant with Ell Johnson in violating the law and assisting him in the obstruction of public justice by furnishing the money necessary to accomplish the purpose of spiriting away the witness beyond the jurisdiction of the court, and keeping her away by means of money furnished, to prevent her from testifying. The money, it seems, was furnished for that express purpose. This money so furnished constitutes a part of the consideration for the note sued on. A L.R.A.1918C.

portion of the consideration for the note was, however, sums of money which were furnished to Ell Johnson for legitimate purposes, and the question is thus presented: If a part of the consideration for a promise is legal and valid, and a part is illegal, can the promise be enforced to the extent of the legal consideration, and held invalid to the extent that the consideration is illegal? Can you thus split up a single promise and divide its effects? This question is answered in 9 Cyc. 566, as follows: "If any part of a single consideration for one or more promises be illegal, or if there are several consideration for one promise, some of which are legal and others illegal, the promise is wholly void, as it is impossible to say which part or which one of the considerations induced the promise."

In *Kimbrough v. Lane*, 11 Bush, 556, it is said: A "part of the entire consideration . . . be vicious, the whole contract is void."

The rule is different where the consideration or all of the considerations, if there be more than one, are legal, and they are relied upon to support several promises made because of these considerations, some of which are legal and others illegal. In such states of case, if the legal promises can be separated from the illegal ones, the legal ones may be enforced, while the illegal are held void. It will be observed, in the instant case, that the note is a single promise, and a part of the consideration for it being illegal, it vitiates the entire promise, in accordance with the rule first stated, as was held in *Brown v. Langford*, 3 Bibb, 500, where it was said: "There is no question but that a promise founded upon several considerations, one of which is vicious, is void; and the same principle requires that a covenant should be held to be so, if the consideration be in part affected with turpitude."

In addition to the above-cited authorities, the principles above stated have been upheld by this court in *Collins v. Merrell*, 2 Met. (Ky.) 163; *Bugg v. Holt*, 29 Ky. L. Rep. 1208, 97 S. W. 29; *McLane v. Dixon*, 30 Ky. L. Rep. 683, 99 S. W. 601; *Smith v. Corbin*, 135 Ky. 729, 123 S. W. 277; *Newport Rolling Mills Co. v. Hall*, 147 Ky. 598, 144 S. W. 760; *Gardner v. Maxey*, 9 B. Mon. 90; *Donallen v. Lennox*, 6 Dana, 80; *Stratton v. Wilson*, 170 Ky. 61, 185 S. W. 522. The note which the mortgage was executed to secure being void and uncollectable, the mortgage is also void.

The judgment is therefore affirmed.

Annotation—Right to recover back money loaned for the purpose of being used in an illegal transaction, or with knowledge of borrower's intention so to use it.

I. Introductory, 247.

II. Money loaned before the illegal transaction, 247.

1. Introductory.

It will be seen that the cases on this subject are in a good deal of confusion. It is a logical rather than a practical distinction which separates the lender who has mere knowledge of the borrower's illegal purpose from one who lends for the illegal purpose without participating in it or making it a condition. Further, the subject is peculiarly one of those in which rules are likely to bend to the individual case; or, in other words, that leave too much to the judge or jury. In the absence of statute the lender's mere knowledge of the possibility that the money lent may be used for an illegal purpose seems, in general, not sufficient to prevent its recovery, and yet there are some purposes so nefarious that the citizen should be scrupulous to see that he gives them no aid. If, for example, the borrower requires the money for bribery, or to enable him to kill someone, or to use it in facilitating the escape of an enemy spy, the lender will not find much sympathy from his fellow citizens in or out of court.

This note excludes loans by agents, loans by one jointly interested, and paper in the hands of bona fide holders.

For right of broker to recover commissions on advances made in furthering wagering contract, see the note in 11 L.R.A.(N.S.) 575. For effect of transfer of negotiable instrument to secure money for gambling purposes, see the note in 22 L.R.A.(N.S.) 627. For right to refuse payment of draft the proceeds of which are to be used in an illegal transaction, see the note in 39 L.R.A.(N.S.) 1005. For validity of contracts in business which it is a misdemeanor to transact, see the note in 12 L.R.A.(N.S.) 575. For loan to pay usurious debt, see the note to *King v. Lane*, post, 351.

II. Money loaned before the illegal transaction.

There are a number of cases laying down the rule of distinction between the lender who merely knows of the borrower's intent to put the money to an illegal use and one who lends for the L.R.A.1918C.

III. Money loaned to pay an illegal debt, 252.

IV. Miscellaneous, 254.

express purpose that the money be put to such use.

"The mere knowledge of the lender of money, of the illegal use that the borrower intends to make of the money, is not enough, of itself, to fix the stain of illegality upon the lender. In order to do so, it must appear that the lender made the loan for the purpose to enable the borrower to do the illegal act." *McGavock v. Puryear* (1868) 6 Coldw. (Tenn.) 34 (note given to raise money to equip Confederate cavalry); *Bond v. Perkins* (1871) 4 Heisk. (Tenn.) 364; *Jones v. Planters' Bank* (1872) 9 Heisk. (Tenn.) 455; *Puryear v. McGavock* (1871) 9 Heisk. (Tenn.) 461.

A loan to a company with knowledge that the same was obtained to enable it to make iron for the Confederate government cannot be recovered, but if the loan was made to be used as the company pleased, "but without any understanding that it was to be used in building works for the manufacture of iron for the Confederate States, or any other illegal purpose, his mere knowledge that it was engaged in such illegal business, and might possibly or probably use the funds so obtained from him in advancing such work, would not affect his contract injuriously." *Oxford Iron Co. v. Spradley* (1874) 51 Ala. 171.

While mere knowledge of the lender that the borrower intends to use the money in illegal speculation will not prevent a recovery of the money loaned, if the borrower is active in furthering the illegal speculation, he cannot recover such money. *Singleton v. Bank of Monticello* (1901) 113 Ga. 527, 38 S. E. 947.

The mere knowledge that the borrower intends to use the money in a wagering transaction in oil is not sufficient to defeat recovery; the loan must be for the express purpose of enabling him to commit an unlawful act. *Waugh v. Beck* (1886) 114 Pa. 422, 60 Am. Rep. 354, 6 Atl. 923, where there was no prohibiting statute.

If a person who advances money to another knows that he proposes to use it to gamble on the bourse, that will

not take away his right to repayment if he has not participated in the gambling, and has not advanced the money to aid it. *Venne v. Christin* (1899) *Rap. Jud. Quebec* 16 C. S. 164.

In *Tyler v. Carlisle* (1887) 79 *Mo.* 210, 1 *Am. St. Rep.* 301, 9 *Atl.* 356, the court, in affirming a verdict for the defendant, held that if the plaintiff lent the money with an express understanding, intention, and purpose that it was to be used to gamble with, and it was so used, the debt so created could not be recovered; but otherwise if the plaintiff had merely knowledge that the money was to be so used.

It has been held that a recovery of money loaned will not be defeated by mere knowledge that the money might be used in an illegal enterprise (*Lewis v. Alexander* (1879) 51 *Tex.* 578; *Cleveland v. Taylor* (1908) 49 *Tex. Civ. App.* 496, 108 *S. W.* 1037, gambling); nor by mere knowledge that the borrower is to use the money to suppress a threatened criminal prosecution of her husband (*Hines v. Union Sav. Bank & T. Co.* (1904) 120 *Ga.* 711, 48 *S. E.* 120, loan by a bank); nor by knowledge that the borrower is to use the money to pay off existing encumbrances on property used for lewd purposes and which is thereafter so to be used (*Mechanics' Realty & Improv. Co. v. Leva* (1915) 16 *Ga. App.* 7, 84 *S. E.* 222); nor by mere knowledge that the borrower intends to use the money by engaging in the purchase of options on grain in the market of another state, or investing it in wagering or gambling contracts (*Jackson v. City Nat. Bank* (1890) 125 *Ind.* 347, 9 *L.R.A.* 657, 25 *N. E.* 430); nor by simple knowledge that the borrower intended to use money advanced on a note or bond for arming or equipping a military company to engage in the Rebellion (*Walker v. Jeffries* (1871) 45 *Miss.* 160).

Where a creditor lends his debtor more money bona fide in order to obtain security for the whole, which he does in the form of a bill of sale, such bill will be good although the creditor knew that the debtor had committed forgery and might use some of the money advanced by the creditor to leave the country. *Bagot v. Arnott* (1867) *Ir. Rep.* 2 C. L. 1.

Mere knowledge of the lender that the borrower intended to use the money in illegal speculation will not bar recovery of the money. *Plank v. Jackson* (1891) 128 *Ind.* 424, 26 *N. E.* 568, where the court said: "The statute, doubtless, was L.R.A.1918C.

enacted to prevent the borrowing of money to be at the time wagered; it provides that notes given 'for repaying any money lent at the time of such wager for the purpose of being wagered shall be void,' and by its language covers cases of loaning money at the time of the wager for the purpose of being wagered, and does not include cases where money is borrowed with an intention on the part of the borrower to invest it in some speculative transaction at some time in the future, or to pay losses theretofore sustained."

In *Corbin v. Waehhorst* (1887) 73 *Cal.* 411, 15 *Pac.* 22, it was held that the plaintiff might recover on a promissory note given for money lent by him to the defendant during play at dice, in which the plaintiff was engaged part of the time, the plaintiff not being a winner at the game, which was not forbidden by statute.

So, also, it has been held that a conveyance of property to a broker knowing that it could or would be used to assist him in his illegal business of dealing in cotton futures might be set aside (*Futch v. Sanger* (1914) — *Tex. Civ. App.* —, 163 *S. W.* 597); that money lent in New Jersey to bet on an election could be recovered in Pennsylvania, there being no evidence of any prohibiting statute in New Jersey (*Scott v. Duffy* (1849) 14 *Pa.* 18); and that money lent in a foreign country for the purpose of being used by the borrower for gaming, the game not being illegal by the law of that country, could be recovered in the English courts (*Saxby v. Fulton* [1909] 2 *K. B. (Eng.)* 208, 4 *B. R. C.* 381, 78 *L. J. K. B. N. S.* 781, 101 *L. T. N. S.* 179, 25 *Times L. R.* 446, 53 *Sol. Jo.* 379, 17 *Ann. Cas.* 39).

On the other hand, it has been held that there could be no recovery for money lent to be used to suppress a criminal prosecution (*Plumer v. Smith* (1832) 5 *N. H.* 553, 22 *Am. Dec.* 478); for money lent a Confederate county (on its bonds) to buy salt with to counteract the effect of the United States blockade (*Leak v. Richmond County* (1870) 64 *N. C.* 133; *Setzer v. Catawba County* (1878) 64 *N. C.* 516; *Brickell v. Halifax* (1879) 81 *N. C.* 240); for money knowingly lent on a note to hire a substitute to put into the Confederate army (*Kingsbury v. Flemming* (1872) 66 *N. C.* 524); so of money lent on a bond to hire such a substitute (*Critchler v. Holloway* (1870) 64 *N. C.* 526; *Kingsbury v. Gooch* (1870) 64 *N. C.* 528); so of money knowingly lent on a bond

for equipping a volunteer Confederate company (*Smitherman v. Sanders* (1870) 64 N. C. 522); so of money knowingly lent on bonds to buy a forge to make iron for the Confederate government (*Logan v. Plummer* (1874) 70 N. C. 388); and so of money lent for the express purpose of prohibited gambling in futures (*Catton v. Catton* (1912) 69 Wash. 130, 124 Pac. 387).

In a case where the jury found that the plaintiff bank, in cashing a check, had no knowledge as to the purpose for which the money was to be used, it was stated that if it had cashed the check knowing the money was to be used in gambling, it could not recover, gambling being unlawful by the laws of the state. *Camas Prairie State Bank v. Newman* (1909) 15 Idaho, 719, 21 L.R.A.(N.S.) 703, 128 Am. St. Rep. 81, 99 Pac. 833.

In *Schirm v. Wieman* (1906) 103 Md. 541, 7 L.R.A.(N.S.) 175, 115 Am. St. Rep. 373, 63 Atl. 1056, 7 Ann. Cas. 1008, in holding that there was no illegal act or intent on the part of anyone, the court said: "It undoubtedly is a correct principle that one who furnishes funds to another who he knows or has every reason to believe intends to devote them to the perpetration of crime, and that they were procured for that purpose, will not be allowed to maintain an action on his contract. He cannot do so for the reason that, as was said (*Hanauer v. Doane* (1871) 12 Wall. (U. S.) 347, 20 L. ed. 441) by Judge Story in his *Conflict of Laws*, § 253: 'No one can hesitate to say that such a man voluntarily aids in the perpetration of the fraud, and, morally speaking, is almost, if not quite, as guilty as the principal offender.'"

Statutes.

Apart from advances by brokers in prohibited speculations, most of the cases expressly decided upon statutes relate to gambling transactions. These statutes are more or less framed on the lines of the Statute of 9 Anne, chap. 14, providing that "all notes," etc., "securities," etc., "for the reimbursing or repaying any Money knowingly lent, or advanced for such gaming or betting as aforesaid, or lent or advanced at the Time and Place of such Play, to any Person or Persons so gaming or betting as aforesaid, or that shall, during such Play, so play or bett, shall be utterly void, frustrate, and of none Effect, to all intents and purposes whatsoever."

At first it was the disposition of the courts to hold under this statute that L.R.A.1918C.

while securities for loans for gambling could not be enforced, the money lent could be recovered, as it was not a "security" within the statute. *Barjeau v. Walmsley* (1746) 2 Strange, 1249, 93 Eng. Reprint, 1161; *Wettenhall v. Wood* (1793) 1 Esp. (Eng.) 18.

So in *Robinson v. Bland* (1760) 1 W. Bl. 234, 96 Eng. Reprint, 129, where the plaintiff sued on the common counts and on a bill of exchange given him by the defendant in France, partly for money lent at the time and place of play and partly for money won at play, it was held that while the bill was void, the plaintiff might recover on the common counts for the money lent, but not for that won.

But in *M'Kinnell v. Robinson* (1838) 3 Mees & W. 434, 150 Eng. Reprint, 1215, 7 L. J. Exch. N. S. 149, where it was held that money lent for the purpose of illegally playing and gaming therewith at hazard, a prohibited game, could not be recovered, the court doubted the cases of *Barjeau v. Walmsley* (Eng.) supra, and *Alcinbrook v. Hall* (1766) 2 Wils. 309, 95 Eng. Reprint, 828, infra.

There seems still, however, to have been some uncertainty about the matter, as appears from the decision in *Quarrier v. Colston* (1842) 6 Jur. 959, 1 Phill. Ch. 147, 41 Eng. Reprint, 587, 12 L. J. Ch. N. S. 57, where it was held that equity will not enjoin an action on an I. O. U. for money lent at Baden Baden, to be employed there for gambling, it not appearing that the game was illegal there or in England, the court saying: "Until the late case of *M'Kinnell v. Robinson*, in the court of exchequer, it had been supposed that in all cases, although securities given for money won at play were void by the Statute of Anne, yet that the money might be recovered."

(See further as to the conflict of laws on this subject the notes in 64 L.R.A. 160, and 46 L.R.A.(N.S.) 650).

In the American courts no distinction is made in general between securities and money, and some of the statutes are explicit on the subject.

A note given in part for money loaned while the parties were playing poker, to be used in the game, is void under the Statute of Anne in force in Maryland, and a judgment upon such note will be enjoined as void. *Emerson v. Townsend* (1890) 73 Md. 224, 20 Atl. 984.

In *Mordecai v. Dawkins* (1856) 9 Rich. L. (S. C.) 262, it was held that a note given for money knowingly lent to gam-

ble with at the time and place of play was void by the Statute of Anne and the South Carolina statute, and that a verbal promise to repay the money was void; this apparently overrules *Carsan v. Rambert* (1804) 2 Bay (S. C.) 562, where it was held that the value of a horse lent to stake on a game of cards might be recovered, as the statutes merely declare void gambling contracts and securities for their performance.

In *Ruckman v. Bryan* (1846) 3 Denio (N. Y.) 340, the court considered that the Statute of Anne, as lately construed by the English courts, prevented the recovery of money lent for gaming or betting, and held that where two parties made a bet with a third party on a horse race, and one of them advanced to the stakeholder the share of his betting partner, and the bet was lost, that the advancer could not recover the money of such partner.

In *Peck v. Briggs* (1846) 3 Denio (N. Y.) 107, where the court stated that he did not see how money knowingly lent for the purpose of betting or gaming could be recovered from the borrower under the New York statute, which went further than the Statute of Anne, A and B, wishing to bet with each other on an election, borrowed the money from C and made him stakeholder; A winning the bet, C paid him the money on his promise to repay B's stake if B failed to pay the loan. B failing to pay the loan, A desired C to sue, agreeing that if the suit failed A would pay the loan and costs and expenses. It was held on the failure of the suit that A was liable to C for the loan and costs and expenses.

Money lent while the parties and others were gaming and playing at cards, for the purpose of enabling the borrower to continue such gaming and playing, cannot be recovered where the statute declares that all notes, bills, bonds, mortgages, and other securities, given for money won, or for repaying any money knowingly lent for any gaming or betting, shall be void and of no effect, as between the parties to the same. *White v. Buss* (1849) 3 Cush. (Mass.) 448.

A promise to pay for a thing lent to a person then engaged in a game, to be bet therein, was held to be void by the statute of Virginia in force in Kentucky, providing that every promise, etc., to repay or secure money or other thing lent or advanced for the purpose of gaming, etc., shall be void. *Levy v. Perkins* (1817) 4 Bibb. (Ky.) 505. It was similarly held as to a note given for

lottery tickets advanced for the purpose of being staked, etc. *Colyer v. Ransom* (1817) 4 Bibb (Ky.) 552.

A note given for money loaned to the maker at the time and place of making an election bet is void under the statute providing that a security "for the reimbursing or repaying any money knowingly lent or advanced, . . . to any person or persons . . . wagering. . . . or that shall at such time and place so 'wager,'" is "utterly void, frustrate, and of none effect, to all intents and purposes whatsoever." *Machir v. Moore* (1845) 2 Gratt. (Va.) 258.

Money loaned in the state for the purpose of gaming in or out of the state cannot be recovered where the statute provides that every contract "for the consideration of money, property, or other thing lent or advanced for the purpose of gaming, or lent or advanced at the time of any betting, gaming, or wagering, to a person then actually engaged in betting, gaming, or wagering, shall be void." *Collins v. Merrell* (1859) 2 Met. (Ky.) 163. So where the money was advanced by pool sellers on horse races to enable the defendant to buy a pool on a horse race. *Alfriend v. Hughes* (1868) 4 Bush (Ky.) 40. So where the money was advanced by placing bets on horse races for the defendant at his request. *McDevitt v. Thomas* (1908) 130 Ky. 805, 114 S. W. 273.

Money advanced to pay losses at poker to third parties in games in some of which the lender participated, the lender having promised to pay such losses before the end of the first game, cannot be recovered where the statute provides that all promises "where the whole or any part of the consideration of such promise, agreement, . . . or other security shall be for money or other valuable thing whatsoever won or lost, laid or staked, or betted at or upon any game of any kind or under any name whatsoever, or by any means, . . . or for the repayment of money or other thing of value, lent or advanced at the time and for the purpose, of any game, play, bet or wager, or of being laid, staked, betted or wagered thereon shall be absolutely void." *Schoenberg v. Adler* (1900) 105 Wis. 645, 81 N. W. 1055.

A check given for money borrowed to gamble with and later lost to the lender cannot support a recovery by one who acquired it when aware of the circumstances, the statute providing that "all notes, bills, bonds, mortgages, or other securities, or other conveyances, the consideration for which shall be money or

other things of value, won by playing at any unlawful game, shall be void and of no effect as between the parties to the same and all other persons, except holders in good faith without notice of the illegality of such contract or conveyance." *Ash v. Clark* (1903) 32 Wash. 390, 73 Pac. 351.

The statute of New York is clearly broad enough to cover the decision in *Johnson v. Clark* (1898) 23 Misc. 346, 51 N. Y. Supp. 238, holding that jewelry given to secure poker chips advanced by the defendant to be used in a game in which both parties participated might be recovered by the plaintiff, a minor; and that in *Ransom v. Vermilyea* (1887) 11 N. Y. S. R. 683, holding that chips lent to be played with in a poker game in which the parties participated cannot be the subject of recovery.

In *Scott v. Baker* (1908) 143 Ill. App. 151, it was held that money lent knowing that it was to be used in prohibited speculation could not be recovered, the statutes providing that option contracts should be considered gambling contracts and should be void, and that "all promises . . . the whole or any part of the consideration whereof, shall be for money . . . won by gaming . . . or for the reimbursing or paying any money or property knowingly lent or advanced at the time and place of such play or bet to any person or persons so gaming or betting, or that shall, during such play or betting, so play or bet, shall be void and of no effect."

On the other hand, money lent to be gambled with in the lender's house may be recovered where the statute merely prohibits the recovery of money won at gambling. *Vasquez v. Florence* (1905) 5 Philippine, 183.

In *Ensley v. Patterson* (1862) 19 Ind. 95, it was held that to defeat a note given for money lent for the purpose of wagering and betting on an election, it must be alleged that the money was lent at the time of such wager, when the statute declared void all notes, etc., "for repaying any money lent at the time of such wager, for the purpose of being wagered."

And in *Longnecker v. Shields* (1891) 1 Colo. App. 264, 28 Pac. 659, it was held that there is nothing illegal in advancing money to enable the borrower to start a "faro bank" within the statute providing that all contracts, etc., and notes for the reimbursing or paying any money or property knowingly lent or advanced at the time or place of

such play, to any person or persons so gaming or betting, shall be utterly void and of no effect.

Lender an active participant.

It would seem clear that the lender ought not to recover where he is an active participant in the illegal use of the money, as was clearly the case in *JOHNSON v. McMILLON*, ante, 244.

Thus, where the plaintiff and the defendant, who was the master of a vessel, and also the vessel, were taken by the enemy, and the plaintiff advanced money to ransom the vessel, for which the defendant gave him a bill of exchange, it was held that both parties were equally to be benefited by the transaction, and that the plaintiff could not recover on the bill, the ransoming being forbidden by the statute and securities given for ransom being void. *Webb v. Brooke* (1910) 3 Taunt. 6, 128 Eng. Reprint, 3.

So, if the lender of money to a wife to enable her to compromise a criminal prosecution actually participates in such employment of the money, he cannot recover it. *Pierson v. Green* (1904) 69 S. C. 559, 48 S. E. 624.

"Where the party advancing, or even loaning, the money, participates and shares in the gambling transaction thus promoted by his act, he thereby becomes a particeps criminis, and cannot recover for money loaned or advanced under such circumstances." *Appleton v. Maxwell* (1901) 10 N. M. 748, 55 L.R.A. 93, 65 Pac. 158.

The following three cases seem to belong to the same class, although the court did not expressly comment on the feature of the participation of the lender. Thus, in *Bates v. Watson* (1853) 1 Sneed (Tenn.) 376, it was held that money lent for the express purpose of being staked on an election bet could not be recovered (where there was evidence that the lender was interested in the bet). And in *Cutler v. Welsh* (1862) 43 N. H. 497, it was held that money knowingly lent to be used for the purpose of gambling could not be recovered nor could there be a recovery on a note given for such money (where, however, most of the money was lost to the plaintiff). And in *Viser v. Bertrand* (1853) 14 Ark. 287, it was held that money advanced to a husband at the wife's request, by her counsel, the consideration being that the husband would make no opposition to a pending divorce suit, could not be recovered, although she, after the divorce, expressly promised to pay it.

III. Money loaned to pay an illegal debt.

It will be observed that when the illegal transaction has been completed, and all that remains is the payment of a debt incurred therein, the lending of money to pay such debt seems, generally speaking, to be looked upon by the courts with greater favor than the lending of money to engage upon an illegal enterprise.

In *Armstrong v. Toler* (1826) 11 Wheat. (U. S.) 258, 6 L. ed. 468, Marshall, Ch. J. said: "The general proposition stated by Lord Mansfield in *Faikney v. Reynous* (1767) 4 Burr. 2069, 98 Eng. Reprint, 79, that if one person pay the debt of another at his request, an action may be sustained to recover the money, although the original contract was unlawful, goes far in deciding the question now before the court. That the person who paid the money knew it was paid in discharge of a debt not recoverable at law has never been held to alter the case. A subsequent express promise is, undoubtedly, equivalent to a previous request."

In *Leavitt v. Blatchford* (1848) 5 Barb. (N. Y.) 9, it is said that where the statute does not make the payment of an illegal debt illegal, a promise to pay a loan made to pay the illegal debt is not illegal.

Where losses have been incurred in an illegal transaction a person who lends money to the loser with which to pay the debt can recover the loan, notwithstanding his knowledge of the fact that the money was to be so used. *Armstrong v. American Exch. Nat. Bank* (1889) 133 U. S. 433, 33 L. ed. 747, 10 Sup. Ct. Rep. 450 (possibly not necessary to decision); *Sampson v. Camperdown Cotton Mills* (1897) 82 Fed. 833 (possibly not necessary to decision).

So it has been held that there may be a recovery for money advanced as loans to pay the borrower's losses in illegal speculations (*Ballard v. Green* (1896) 118 N. C. 390, 24 S. E. 777); on a note for money knowingly lent to pay accrued margins on a prohibited option contract (*Charleston State Bank v. Edman* (1900) 99 Ill. App. 235); on a note for goods delivered at the maker's request to pay his election bet (*White v. Yarbrough* (1849) 16 Ala. 109); for the value of goods furnished on store orders to pay the drawer's gambling debt (*English v. Young* (1849) 10 B. Mon. (Ky.) 141). So it has been said that one might recover money lent to pay a

gambling debt (*McKinney v. Pope* (1842) 3 B. Mon. (Ky.) 93); and the same was held where it seems that the lender did not know of the purpose (*Cooley v. Allen* (1906) 28 Ky. L. Rep. 982, 90 S. W. 1048).

Money loaned to pay gaming debts may be recovered. It is not within the prohibition in the statute against contracts "to repay or secure money or other thing lent or advanced for that purpose, or lent or advanced at the time of such gaming," although lent at a gaming place. *Smith v. Harris* (1856) 3 Sneed (Tenn.) 553.

It was said obiter in *Jacoby v. Heidelberg* (1900) 33 Misc. 111, 67 N. Y. Supp. 146, that the principle is now well settled with respect to gambling contracts that where a loss is already incurred, any person other than the winner who advances money or other property to the loser to enable him to pay the loss may recover such advance in the absence of a special statute.

In *Greathouse v. Throckmorton* (1831) 7 J. J. Marsh. (Ky.) 16, A, losing \$150 at cards to B, requested C to pay it, and C did so by crediting B the amount which B owed him, of which part was for a gambling debt; it was held that C might recover the \$150 from A notwithstanding the statute made void all promises "to any person or for his use" in consideration of money or property "by him won, or whereof money or other thing so won, lent, or advanced, shall be a part or all of the consideration money."

It may be noted, while beyond the scope of this note, that where A and B jointly bet and lost on an election, and A paid more than his share of the loss, it was held that he might recover on a note B gave him for the excess (*Brooks v. Brady* (1893) 53 Ill. App. 155), although the statute made void all promises, notes, etc., made, etc., or "for the reimbursing or paying any money or property knowingly lent or advanced at the time and place of such play or bet."

Money advanced to pay losses in option deals in another state is not unrecoverable where the statute of such other state merely provides that "a contract for the purchase or sale of a commodity of any kind, to be delivered at a future day, the parties not intending that the commodity is to be actually delivered in kind and the price paid, shall not be enforced by any court: nor shall any contract of the kind commonly called 'futures' be enforced, nor shall a

contract in this section mentioned be a valid consideration, in whole or in part, for any promises or undertaking." *Searles v. Lum* (1901) 89 Mo. App. 235.

Where a note with a surety was given for money borrowed to hire a substitute to put into the Confederate army, and the surety paid it at the request of the principal, who gave him a new note, it was held that the surety might recover on the new note. *Powell v. Smith* (1872) 66 N. C. 401.

It may be noted that it was held in *Stewart v. Miller* (1887) 3 Tex. App. Civ. Cas. (Willson) 356, that if the loser at play gives to a third person, not a player, a draft, and asks him to cash it and pay the debt and he does so, such third person may recover of the drawer.

But one lending money to pay card debts cannot recover it if he has any percentage or commission on the money staked in the play. *White v. Wilson* (1897) 100 Ky. 367, 37 L.R.A. 197, 38 S. W. 495.

In *St. Croix v. Morris* (1885) 1 Cal. & El. (Eng.) 485, it was held that the secretary of a club where *baccarat* was played could not recover on a check given him by the defendant for counters with which to pay his losses at the game, as the plaintiff was really a party to the gambling transaction.

In *Aleinbrook v. Hall* (1766) 2 Wils. 309, 95 Eng. Reprint, 828, it was held under the Statute of Anne that *assumpsit* would lie for money paid by the plaintiff for the defendant, lost on a horse race, as the statute did not contain the word "contract." And in *Hussey v. Crickitt* (1811) 3 Camp. 168, it was held that where the winner of a dinner paid for it, he might recover the amount from the loser.

In *Hill v. Fox* (1859) 4 Hurlst & N. 359, 157 Eng. Reprint, 879, where the defendant, desiring to pay the plaintiff and others money lost in betting on horse races, borrowed money of the plaintiff, giving him an agreement to give certain security, and paid him what he had lost to him, it was held that the court properly instructed the jury to the effect that "if you believe that this deed, which upon the face of it purports to be a security for a sum of £2,000, money lent, is merely a colorable transaction for the purpose of passing the money and carrying into effect an illegal agreement, then the deed is void; but if you are of opinion that there was no such stipulation, and that the plaintiff advanced the £2,000 as a loan, and put it into the hands of the defendant as the L.R.A.1918C.

lawful owner, to do with it as he pleased, the deed is perfectly valid although the plaintiff expected to be paid his bets out of the money so lent."

On the other hand, there are numerous cases, most of them decided under statutes, which hold that the money loaned to pay the illegal debt could not be recovered.

In *Hanauer v. Doane* (1870) 12 Wall. (U. S.) 342, 20 L. ed. 439, it was held that one who, at the defendant's request, took up his duebills issued to pay for stores supplied by the defendant to the Confederate government, could not recover on promissory notes given in place of the bills. But the court stated that if the plaintiff had knowingly lent money to take up the duebills, the loan would have been legal as one degree further removed from the illegal transaction.

In *Scollans v. Flynn* (1876) 120 Mass. 271, it was held that money paid to satisfy a third person's betting debt could not be recovered from him where the statute provided that the loser might recover back from the winner money lost.

In *Ayer v. Younker* (1897) 10 Colo. App. 27, 50 Pac. 218, it was held that a note given in part for the payment of gambling losses and in part for money borrowed to gamble with, and lost to the lender, was void under the Colorado statute referred to under *Longnecker v. Shields* (1891) 1 Colo. App. 264, 28 Pac. 659, *supra*, under "Statutes."

In *Cannan v. Bryce* (1819) 3 Barn. & Ald. 179, 106 Eng. Reprint, 628, 6 Eng. Rul. Cas. 326, it was held that a bond given to secure one who lent the obligor money to pay his losses in an illegal stock-jobbing transaction was void, and that property transferred in payment of the bond might be recovered by the assignees of the bankrupt obligor, the statute (of 7 Geo. II. chap. 8) providing: "That no money or other consideration shall be voluntarily given, paid, had, or received for the compounding, satisfying, or making up any difference for not transferring any public stock, or not performing any contract or agreement stipulated to be performed." The court overruled *Faikney v. Reynous* (1767) 4 Burr. 2069, 98 Eng. Reprint, 79, where the plaintiff recovered in an action on a bond given to secure the plaintiff for illegal stock-jobbing debts paid by him for the defendant.

Where the plaintiff, to enable the defendant to pay a bet on a horse race which the defendant had lost to a third

person, drew a bill of exchange on the defendant which he accepted, it was held that the plaintiff could not recover, as the Statute 5 and 6 Wm. IV. chap. 41, § 1, enacted that such a security should be deemed to have been made for an illegal consideration. *Hay v. Ayling* (1851) 16 Q. B. (Eng.) 423, 20 L. J. Q. B. N. S. 171, 15 Jur. 605.

In *Tatam v. Reeve* (1893) 1 Q. B. (Eng.) 44, 62 L. J. Q. B. N. S. 30, 5 Reports, 83, 67 L. T. N. S. 683, 41 Week. Rep. 174, 57 J. P. 118, it was held that one paying the defendant's debts for betting on horse races could not recover the money, as the Statute of 55 and 56 Vict. chap. 9, made null and void any promise, express or implied, to pay any person any sum paid by him under or in respect to a contract or agreement rendered null and void by the prior Act of 8 and 9 Vict. chap. 109.

And it was held under the same statute that one advancing a stake for the defendant for a boxing match could not recover the money from the defendant though he had won the match and received the stake. *Carney v. Plimmer* [1897] 1 Q. B. (Eng.) 634, 66 L. J. Q. B. N. S. 415, 76 L. T. N. S. 374, 45 Week. Rep. 385, 61 J. P. 324.

So an action will not lie to recover on a check drawn on an English bank by the defendant, given to the plaintiff in Algiers, partly to pay losses at baccarat in Algiers and partly for money advanced for the purpose of playing baccarat there. *Moulis v. Owen* [1907] 1 K. B. (Eng.) 746, 4 B. R. C. 352, 76 L. J. K. B. N. S. 396, 96 L. T. N. S. 596, 23 Times L. R. 348. (Compare *Saxby v.*

Fulton [1909] 2 K. B. (Eng.) 208, 4 B. R. C. 381, 78 L. J. K. B. N. S. 781, 101 L. T. N. S. 179, 25 Times L. R. 446, 53 Sol. Jo. 397, 17 Ann. Cas. 39.)

But in *Re O'Shea* [1911] 2 K. B. (Eng.) 981, 81 L. J. K. B. N. S. 70, 105 L. T. N. S. 486, it was held that one giving a guaranty to a bank in order that its customer might be enabled to pay betting debts had a sufficient debt to support a bankruptcy petition.

IV. Miscellaneous.

In *Lyon v. Respass* (1822) 1 Litt. (Ky.) 133, it was held that equity would not enjoin a judgment at law for the recovery of money loaned to gamble with, as if the loan were paid such payment could not be recovered; the borrower should have defended at law.

It may be noted that in *Howell v. Stewart* (1873) 54 Mo. 400, it was held that where the money loaned had not been used for the illegal purpose it might be recovered; and the court expressed a similar opinion in *Williamson v. Baley* (1883) 78 Mo. 636. And in *Osgood v. Westphelling* (1897) 72 Mo. App. 45, it was held that to bar a recovery it must appear that the money was so used; but the contrary was held in *Kingsbury v. Flemming* (1872) 66 N. C. 524.

The headnote of *Fellows v. Van Hyring* (1857) 29 How. Pr. (N. Y.) 230, indicates that one actively participating in compounding a felony, who advances the means therefor, cannot recover the advance; but the report is not satisfactory on the question. B. B. B.

LOUISIANA SUPREME COURT.

JEFF W. FRISTOE, Appt.,
v.

CITY OF CROWLEY et al.

(— La. —, 76 So. 812.)

Constitutional law — compulsory sewer connection.

1. Act No. 249 of 1912, authorizing municipalities having a sewerage system to compel the owners of property within a distance of 300 feet from a public sewer to connect their premises with the sewerage system, and an ordinance enacted in pursuance thereof, do not violate or invade any

Headnotes by O'NIELL, J.

Note. — As to power to compel connection of property with sewer, see annotation following this case, post, 258.
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constitutional guaranty, but are legitimate exercises of the police power.

For other cases, see Constitutional Law, II. c. 4, in Dig. 1-52 N. S.

Same — option to do work.

2. A municipal ordinance that allows the property owners ample opportunity to furnish their own material and have their premises connected with the public sewerage system, and, in default thereof within the time specified, authorizes the municipality to contract for the work to be done at the expense of the property owners, does not deprive the latter of their liberty or freedom of contract.

For other cases, see Constitutional Law, II. b. 4, b, in Dig. 1-52 N. S.

Statute — invalid in part.

3. If the legislature has failed, either intentionally or by inadvertence, to provide, in a statute creating a lien, a special remedy for the enforcement of the lien, it does

not follow that the entire statute is therefore null or without effect. The provisions for the special remedy for enforcing the lien might be unconstitutional without affecting the validity of the provisions creating the lien. A liability created by statute without a special remedy may be enforced by an ordinary action.

For other cases, see *Statutes, I. c. 2, in Dig. 1-52 N. S.*

(Provosty, J., dissents.)

(October 29, 1917.)

A PPEAL by plaintiff from a judgment of the Judicial District Court for the Parish of Acadia dismissing a suit filed to enjoin defendants from connecting plaintiff's premises with a sewerage system in compliance with an alleged void statute and ordinance. Affirmed in part.

The facts are stated in the opinion.

Mr. Philip S. Pugh, for appellant:

An ordinance which provides that the city shall do the work and furnish the materials for making sewerage connections up to within 3 feet of the building to be connected is void as an unreasonable invasion of the rights of property owners.

Slaughter v. O'Berry, 126 N. C. 181, 48 L.R.A. 442, 35 S. E. 241.

Although the title of a statute need not contain all of its details, it shall be such an index as to put those who are to be affected by the act upon inquiry into its contents.

Sullivan v. Minden Lumber Co. 135 La. 331, 65 So. 479; *State v. Dalcourt*, 112 La. 420, 36 So. 479; *State v. Ferguson*, 104 La. 249, 81 Am. St. Rep. 123, 28 So. 917; *Beary v. Narrau*, 113 La. 1034, 37 So. 961.

If all of the provisions of an act are so interwoven as to be incapable of distinct separation, or are of such character that it cannot be said that the legislature intended that the valid part should be enforced if the other parts fall, the entire law will be held to be invalid.

1 Lewis, *Stat. Constr.* 2d ed. ¶ 297; *Second Municipality v. Morgan*, 1 La. Ann. 111.

Messrs. Harry W. Gueno and Denis T. Canan, Jr., for appellees.

O'Neill, J., delivered the opinion of the court:

The mayor and board of aldermen of the city of Crowley adopted an ordinance requiring the owners of all improved property situated within 300 feet from the public sewer to connect their premises with the sewerage system. The ordinance, being Ordinance No. 440, conforms precisely with the statute on the subject (Act No. 249 of L.R.A. 1918C.

1912), granting to municipalities having a public sewerage system the authority exercised in this instance.

The plaintiff, owning improved property within the distance of 300 feet from a public sewer line, but refusing to comply with the ordinance, brought this suit to have the ordinance and the statute decreed unconstitutional, null, and void. He obtained a temporary writ of injunction, preventing the mayor and board of aldermen from entering into a contract with H. S. Sealy, contractor, for the connection of the plaintiff's premises with the sewerage system. He appeals from the judgment rendered, maintaining the ordinance and statute as constitutional and valid, dissolving the writ of injunction, and dismissing his suit.

The grounds on which the plaintiff attacks the constitutionality of the ordinance and the statute, as set forth in his brief, are as follows:

First. That an enforcement of the ordinance would amount to the taking and damaging of private property for public purposes without just or adequate compensation being first paid, and would therefore violate article 167 of the state Constitution.

Second. That the ordinance and the statute are so harsh, unreasonable, arbitrary, and unfair that their enforcement would abridge the privileges and immunities of the plaintiff and deprive him of his liberty and property without due process of law, in violation of article 2 of the state Constitution and the 14th Amendment of the Constitution of the United States.

Third. That the state Constitution does not confer any authority upon the legislature, nor upon any municipality, to tax private property for the cost of connecting it with a public sewerage system.

Fourth. That to compel the plaintiff to purchase and pay for materials furnished by a contractor under contract with the municipality would deprive the plaintiff of the liberty and freedom of action guaranteed to him by the Constitution of the state and of the United States.

Fifth. That the state Constitution does not authorize the legislature or a municipality to impose a tax lien upon property for the purpose for which it is attempted in this instance, or to enforce such tax lien by summary process; but, on the contrary, by enumerating the purposes for which property may be assessed and sold summarily for taxes, the framers of the Constitution have impliedly forbidden the assessment and summary sale of property for taxes for any other purpose than those enumerated.

Sixth. That §§ 7 and 8 of the statute, purporting to authorize a sale by summary

proceedings for the collection of the cost of sewerage connections, are beyond the objects expressed in the title of the statute, contain provisions not mentioned in the title, and are therefore violative of article 31 of the state Constitution; that the legislature has therefore failed to provide a method of proceeding for the enforcement of the statute, and that the entire act is therefore null and void and of no effect.

It does not appear that an enforcement of the ordinance in contest would amount to a taking or damaging of the plaintiff's property in any sense. The constitutional guaranty that private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid has no application to this case.

This ordinance, in our opinion, is not an arbitrary or unreasonable act on the part of the municipal government, but is a legitimate exercise of the police power. See *Hutchinson v. Valdosta*, 227 U. S. 303, 57 L. ed. 520, 33 Sup. Ct. Rep. 290. It is argued by the learned counsel for the plaintiff that there is this difference between an ordinance requiring property owners to connect their premises with a public sewer and an ordinance requiring them to pave the sidewalks adjoining their premises; that the one ordinance does, and the other does not, authorize an invasion of private property. But it might as well be contended that municipal ordinances, requiring property owners to keep their premises clean, sanitary, and safe, and providing for an inspection for that purpose, authorize an invasion of private property, and are therefore unconstitutional.

Our attention is called to the fact that the city of Crowley is governed not by a special statute or charter, but by the general law of municipal corporations, Act No. 136 of 1898. It is contended that, as paragraph 31 of § 15 of that statute (re-enacted in the Act No. 114 of 1916) confers upon municipal corporations the power "to pass all ordinances and to enforce the same by fine not to exceed \$100 or imprisonment not exceeding thirty days, or both," the ordinance in question could only be enforced by fine or imprisonment, or both fine and imprisonment. The contention of the learned counsel for the plaintiff is that, inasmuch as the municipal government has not provided for the enforcement of this ordinance by fine or imprisonment, it cannot be enforced at all. But it does not follow that, because municipal corporations are given the power to enforce their penal ordinances by a limited fine or term of imprisonment, therefore all municipal ordinances must be enacted in the form of penal laws or ordinances.

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There is no force in the contention that it required express constitutional authority for the legislature to enact a law empowering municipal corporations to require property owners to connect their premises with the public sewerage system at the expense of each property owner. It suffices that the Constitution does not prohibit such legislation.

The ordinance in question does not deprive the property owner of his liberty or freedom of action by requiring him to pay for material furnished by a contractor under contract with the municipality. On the contrary, the ordinance allows the property owners ample opportunity to select and purchase material and have the work done.

In that respect, the ordinance differs from that which was declared invalid by the supreme court of North Carolina, in *Slaughter v. O'Berry*, 126 N. C. 181, 48 L.R.A. 442, 35 S. E. 241.

There being no constitutional inhibition, the legislature and the municipality had the right to impose upon the property owner the cost of connecting his premises with the public sewerage, and to impose a lien upon the property to secure the payment of the debt. The legislature also had authority to provide a special remedy or summary process for the enforcement of the lien and the collection of the debt. Sections 7 and 8 of Act No. 249 of 1912 make provision for that special remedy or summary process. If those provisions of the statute are not constitutional, because their object is not expressed in the title of the act, the legislature has inadvertently failed in its purpose to provide a special remedy for the enforcement of the lien and the collection of the debt. In that event the lien might be enforced and the debt collected by the ordinary process, by an action at law for the collection of the debt. If the legislature has failed, either intentionally or by inadvertence, to provide a special remedy for the enforcement of a lien which it has created, it does not follow that the statute creating the lien is without effect. As was said in *Pollard v. Bailey*, 20 Wall. 520, 22 L. ed. 376, a liability created by statute without a special remedy may be enforced by an appropriate common-law action, although, where the provision for the liability is coupled with a provision for a special remedy, that remedy—and that alone—must be employed. We see no reason for deciding now whether the municipality must eventually resort to the ordinary process or may employ the special remedy which the legislature has attempted to grant for the enforcement of the lien imposed upon the plaintiff's property. It is sufficient to say that the provisions of the

statute that authorized the municipality to create the lien are valid, whether the remedy provided for enforcing the lien is or is not valid legislation. The only question with which the plaintiff is now concerned is whether the municipality had a right to impose the debt and lien upon his property. Our opinion is that the municipality had the right. *Ubi jus ibi remedium*. What the remedy is will be determined when the question arises.

We will amend the judgment appealed from in so far as it holds that §§ 7 and 8 of Act No. 249 of 1912 are constitutional, by making it a judgment of nonsuit against the plaintiff on that issue. In other respects the judgment is correct.

The judgment appealed from is affirmed, except in so far as it holds that §§ 7 and 8 of Act No. 249 of 1912 are constitutional, and on that issue the judgment is made one of nonsuit against the plaintiff. The plaintiff is to pay the costs of the District Court and the defendants the costs of appeal.

Provosty, J., dissents and hands down reasons. Leche, J., takes no part.

Provosty, J., dissenting:

Act 249, p. 553, of 1912, is designed to authorize municipalities to compel property owners to install sanitary closets connected with the municipal sewerage and water system. In this case, an ordinance of the city of Crowley under this act is enjoined, on the ground that the act is unconstitutional, in that it authorizes the city to invade the premises of the property owner for installing the closets, and compels him to buy the furnishings from the city, and in that §§ 7 and 8 of the act, which prescribe the mode of enforcing payment of the cost of said work, are void because not covered by the title of the act, and that thereby the entire act is made void, since it is thereby bereft of all means of enforcement.

The act empowers the municipality to have the work done only after the owner himself has failed to do it after due notification. We think the right of the public through the legislature and the local government to compel the instalment of sanitary closets connected with the municipal sewerage and water systems can hardly be doubted in this day of awakened public sentiment on the subject of sanitation. 28 Cyc. 919; *Com. v. Roberts*, 155 Mass. 281, 16 L.R.A. 400, 29 N. E. 522. And if the owner will not do it himself after due notification, there is nothing left but for the municipality to have it done at his expense. And necessarily it can be done only by providing the furnishings and going on the premises to install them.

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That such installation and connection may be compelled under the police power, the learned counsel for plaintiff concedes; but he holds that the compulsion can only be by fine and imprisonment, not by having the work done and charging the cost. We have no doubt observance of such an ordinance might well be enforced by fine and imprisonment, under proper legislative authority; but, suppose the recalcitrant householder will pay fines and go to jail rather than make the installation, is the municipality in the meantime to remain subject to contagion from his unsanitary closet? To do the work for him if he will not do it is evidently the more certain, direct, sensible, and practical way.

However, if a special mode of proceeding is desired to be provided for enforcing payment of the cost of the work, that purpose must be expressed in the title of the statute that seeks to so provide; for otherwise the constitutional requirement that every act express its object in its title is not complied with. Now, the title of said Act 249 expresses the intention of empowering the municipalities "to levy costs thereof under special assessment carrying with it a lien and privilege upon property improved," but it says absolutely nothing on the point of how, or by what means, this special assessment shall be enforced. The said §§ 7 and 8 provide that the mode of enforcement shall be the same as for ordinary taxes. The intention to provide this special mode of proceeding is not expressed in the title of the act, and that therefore these §§ 7 and 8 are void.

The invalidity of part of a statute does not necessarily entail the invalidity of the whole, but it does, if the valid part is "ineffective and unenforceable" without the invalid part. 36 Cyc. 978. The learned counsel for the city say that, failing this special mode of proceeding sought to be provided for by §§ 7 and 8, the municipality may resort to an ordinary suit.

It is true that the special statutory remedy is not in all cases exclusive; that sometimes when it turns out to be unavailable, either because of unconstitutionality or otherwise, the ordinary remedy may be resorted to. 1 C. J. 991. But "where a statute creates a new right and also provides a remedy for its enforcement, it is ordinarily held that such remedy is exclusive." 1 C. J. 989. In this case the right in question is a new right created by the statute. This rule is said to be "based merely upon a presumed prohibition of other remedies." *Id.* In this case such prohibition appears to me to result from the nature of the right in question; for the recourse in this case against the property of the householder

seems to have been intended to be restricted to the property upon which the installation is made, and not to extend to his other property as it would in the case of an ordinary suit. And the restricting of the recourse in this manner to the property improved, and not extending it to the property of the owner generally, is in accordance with the principles which come into play in such cases. "The levy of an assessment to pay the costs of public improvements imposes no personal liability upon the owner of land assessed, unless such liability is created by express statutory provision, and there are cases holding that the legislature is without power to make a special assessment a personal liability." 28 Cyc. 1253. The work in question in this case is not a public improvement, within the meaning of the passage here quoted, but said Act 249

provides that the cost shall "be assessed" and be "borne by each property" and be a lien upon the property, and that "the amounts assessed shall be placed upon the tax roll . . . and be due and collectable like other taxes." The manifest intention is that the cost of the work upon each piece of property shall be borne by the property, and be enforced in rem against it, and not in personam against the owner. "As a general rule, a statute providing a specific method for the enforcement of assessments is held" to be exclusive. 28 Cyc. 1209.

The necessary conclusion is that the act as a whole is inoperative, and that consequently the ordinance passed under it has no foundation to stand on, and therefore has been properly enjoined. I, therefore, respectfully dissent.

Annotation—Power to compel connection of property with public sewer.

The general question of the right and duty to connect property with a drain or sewer is treated in a note to *Fergus Falls v. Edison*, 70 L.R.A. 238.

The rule is well established that the enactment of statutes and ordinances compelling owners to connect their property with public sewers is within the police power, and that the validity of such legislation will be sustained; at least unless under the particular circumstances it is plainly unreasonable or arbitrary. And the fact that the existing sanitary arrangements may have been made under legislative authority or compulsion does not apparently affect the application of the rule. The following cases support the doctrine that, under the police power, legislatures, or municipalities if properly authorized, may compel the making by property owners of sewer connections not plainly unreasonable or arbitrary: *Hutchinson v. Valdosta* (1913) 227 U. S. 303, 57 L. ed. 521, 33 Sup. Ct. Rep. 290 (set out *infra*); *Distriet of Columbia v. Brooke* (1908) 214 U. S. 138, 53 L. ed. 941, 29 Sup. Ct. Rep. 560 (same); *Allman v. Mobile* (1909) 162 Ala. 226, 50 So. 238 (city ordinance enacted under statutory authority requiring owners of property abutting on a street on which a sewer is laid to connect all closets, etc., therewith); *Spear v. Ward* (1917) — Ala. —, 74 So. 27; *State, Van Wagoner, Prosecutor, v. Paterson* (1902) 67 N. J. L. 455, 51 Atl. 922; *Com. v. Roberts* (1892) 155 Mass. 281, 16 L.R.A. 400, 29 N. E. 522 (sustaining the constitutionality of a statute providing that every building used as a dwell-

ing and situated on a street in which there was a public sewer should have sufficient water-closets connected with the sewer); *Com. v. Abbott* (1894) 160 Mass. 282, 35 N. E. 782 (where the constitutionality of the statute considered in the last case was conceded, the question being whether the sewer was a public one, and it being held that if it was a public sewer below the premises in question, connection therewith might be required even if the laying out of that part above such premises was wrongful); *Hill v. St. Louis* (1900) 159 Mo. 159, 60 S. W. 116 (holding that the city may by ordinance require every water-closet or privy in use in any dwelling house within the city to be connected with an adjacent sewer); *Mead v. Turner* (1909) 134 App. Div. 691, 119 N. Y. Supp. 526 (statute authorizing village to require property owners to make connections with sewer); *Lower Merron Twp. v. Becker* (1910) 42 Pa. Super. Ct. 203 (upholding the validity of an ordinance, enacted under legislative authority, giving township commissioners power to establish a system of sewers and to require adjoining property owners to connect therewith when necessary for the public health and imposing a fine of \$50 on any property owner abutting on a street in which a township sewer was laid who failed, after notice, to connect his property therewith, in the absence of a showing of abuse of discretion on the part of the commissioners); *Harrington v. Providence* (1897) 20 R. I. 233, 38 L.R.A. 305, 38 Atl. 1 (holding that notice and opportunity to be heard need not be given to

a property owner before the passage of an ordinance under statutory authority requiring him to connect his drainage with the sewer and destroy any cesspool on the property); *Case v. Board of Health* (1913) 24 *Philippine*, 250 (upholding the validity of an ordinance requiring buildings or premises in the city to be connected with a new sewer system upon notice that the sewer into which such building or premises could drain was ready for service); *Re McCutcheon* (1863) 22 *U. C. Q. B.* 613.

In holding that the legislature might confer power on a municipality to compel owners of property abutting on a street in which a sewer was laid to make connections therewith, the court, in *Allman v. Mobile* (Ala.) *supra*, said: "No police power is more important than that to adopt such sanitary regulations as may be necessary to insure the safety and preserve the health of the inhabitants of a city. Nor do we doubt that the maintenance of an efficient sanitary sewerage system is of prime importance in encompassing the ends sought by the delegation of such power; and surely no sewerage system could be regarded as efficient without the incident of power in the municipal corporation to compel connections of property by its owners with the system. So, on principle and authority, we hold it to be within legislative competency to confer on municipal corporations the power to compel such connections."

And, it was held in *Allman v. Mobile* (1909) 162 *Ala.* 226, 50 *So.* 238, *supra*, that an ordinance providing that it should be the duty of the plumbing inspector, or of an authorized inspector acting under him, to order all persons owning property abutting on a street in which a sewer was laid to connect all closets, etc., therewith, and making it a misdemeanor for any person to refuse to make such connections after receiving notice to do so, was not invalid as an improper delegation of legislative power to an administrative officer, on the theory that the ordinance did not fix a duty on the property owner to make the connections, but only required those property owners to make the connection who were notified to do so. This contention, the court said, could not prevail for the reason that the ordinance left nothing to the discretion of the inspector, but imposed on him the imperative duty of ordering all persons of the class mentioned in the ordinance, namely, those owning property any part of which abutted on a street

in which a sewer was laid, to connect all closets, etc., with the sewer.

And the doctrine of presumption of the validity of statutes and ordinances enacted to compel sewer connections, as well as the reasons for sustaining the right to compel such connections, are well stated in the recent case of *Spear v. Ward* (1917) — *Ala.* —, 74 *So.* 27, as follows: "The preservation of the public health by the installation and maintenance of sanitary systems of sewers and closets is well recognized as one of the most important duties of municipal governments, and falls clearly within the police powers of government, subject to which the inhabitant and citizen of the municipality holds his individual rights to property and to liberty. Consequently, statutes and ordinances dealing with and relating to such subjects, together with provisions for the enforcement thereof, will be indulged by the courts, with the presumptions in their favor, as to their necessity, propriety, and validity, in the absence of a showing to the effect that they are unreasonable, arbitrary, unduly oppressive, or inconsistent with the legislative policy of the state. . . . As before stated one of the most important objects of municipal government is the preservation of the public health; and science has demonstrated that nothing contributes more to secure the end than a sanitary system of sewerage and water-closets connected therewith; and the benefits of such a system are largely lost unless the inhabitants of the city can be compelled to connect their premises with the system, and to abandon dry closets and install water-closets. To this end the legislature has clothed municipalities with the power and authority to pass ordinances, by-laws, etc. The municipal authorities to this extent exercise the police power of the state; and they not only have the power, but the law enjoins the duty and obligation on them, to promptly abate or remove all nuisances by which the public health may be affected, and to thus provide for the safety, comfort, and convenience of the inhabitants. All the inhabitants, therefore, have an interest in seeing that proper ordinances are passed, as well as that, when passed, such ordinances are enforced against all, as the failure to conform thereto by a few may inflict injury and ill health upon the many. There are times when the public health is the object of paramount concern, and the law wisely lodges in municipal bodies discre-

tion and power adequate to such emergencies."

In *Branch v. Gerlach* (1910) 94 Ark. 378, 127 S. W. 451, it was held that a city could by ordinance require a separate sewer connection for each lot, and that an owner of several houses on different lots in the same block could not compel the issuance of a permit for a single sewer connection for all the houses.

And under the Arkansas statute providing that property owners near or adjacent to a city sewer shall connect their premises therewith when required to do so by the board of health, it was held in *Martin v. Hilb* (1890) 53 Ark. 300, 14 S. W. 94, that one whose property was not within a sewer district might connect with the sewer when ordered to do so by the board of health, and was not required to pay any part of the cost of construction of the sewer before so doing.

An apparently extreme case supporting the right of a municipality to require property owners to make connections with a public sewer is that of *Hutchinson v. Valdosta* (1913) 227 U. S. 303, 57 L. ed. 520, 33 Sup. Ct. Rep. 290, in which it was held that an ordinance, adopted under legislative authority by an inland town of less than 6,000 inhabitants, by which the owners of property abutting on a street along which sewers had been laid were required to install water-closets in their houses, and connect the same with the sewer within thirty days from the passage of the ordinance, under penalty of fine and imprisonment for noncompliance, was a valid exercise of the police power, and did not, although affording no notice or opportunity to be heard, deny either due process of law or the equal protection of the laws. The court said: "According to the bill, the city is given the power, through its mayor and council, 'to enact such rules and regulations for the transaction of its business and for the welfare and proper government thereof,' as the mayor and council may deem best; and the bill shows that the courts of the state decided that the ordinance was within this delegation of power. It is the commonest exercise of the police power of a state or city to provide for a system of sewers, and to compel property owners to connect therewith. And this duty may be enforced by criminal penalties. *District of Columbia v. Brooke* (1908) 214 U. S. 138, 53 L. ed. 941, 29 Sup. Ct. Rep. 560. It may be *L.R.A.1918C*.

that an arbitrary exercise of the power could be restrained, but it would have to be palpably so to justify a court in interfering with so salutary a power and one so necessary to the public health. There is certainly nothing in the facts alleged in the bill to justify the conclusion that the city was induced by anything in the enactment of the ordinance other than the public good, or that such was not its effect."

In *District of Columbia v. Brooke* (U. S.) supra, which is cited in the quotation in the last case, the court sustained the validity of the Act of Congress of 1896, providing for the drainage of lots in the District of Columbia, and requiring connections with public sewers. The statute provided for the making of the connections, in case of nonresident owners, by the commissioners, and the assessment of the cost thereof as a tax against the property. And it was held that the owner could not urge against the validity of an assessment for connecting her property with the sewer that no showing was made that any nuisance existed on the property, or that the means of drainage already there were unsanitary or insufficient, or that any necessity existed for making the connections; neither could she, as an owner of property on which the buildings had been erected, challenge the validity of a provision in the statute which affected only owners of unimproved property. And it was held also that, assuming that Congress was forbidden to enact discriminating legislation, the statute was not rendered invalid for discrimination by the distinction between resident and nonresident owners of abutting property, in that the coercion of the law as to making connections with the sewer was by criminal punishment in the case of residents, whereas, against nonresidents, the district did the work in case of their neglect, and assessed the cost against the property as a tax.

The power to compel the making of connections with a new sewer system was held in *Case v. Board of Health* (1913) 24 Philippine, 250, to be conferred on the municipal authorities by charter provisions authorizing them to enact ordinances for the installation and maintenance of proper drainage of buildings and premises, to establish and maintain drains and sewers, to declare, prevent, and abate nuisances, and to provide for the "peace, order, safety, and

general welfare of the city and its inhabitants."

However, in *Philadelphia v. Provident Life & T. Co.* (1890) 132 Pa. 224, 18 Atl. 1114, it was held that while the board of health of the city of Philadelphia had power to declare and abate nuisances, under which it could require privies to be cleaned and purified, it had exceeded its powers, so far as shown, in requiring also that the owner construct water-closets with proper sewer connections, although a statute authorized it to "remove the cause of all nuisances that now exist, or may hereafter be created."

And it was held in *Gault v. Ft. Collins* (1914) 57 Colo. 324, 142 Pac. 171, Ann. Cas. 1916B, 718, that the power to compel outside vaults or privies in a sewer district to be connected with the sewer, regardless of whether they were on vacant lots or were in use, was not conferred on a municipality by a statute giving city authorities the power to establish a sewerage system, and, for that purpose, to divide the city into sewer districts and compel the owners of buildings located in the districts and the owner of any building located on blocks abutting on any established sewer to connect with the sewer; and to prohibit the keeping or maintaining of any vault or privy within the sewer district or within a certain distance of any established sewer. It was held also that such power was not conferred by statutes giving boards of health in cities the power to make such rules and regulations in relation to the care and cleaning of privies as might be deemed desirable for the preservation of health, or to declare a privy a nuisance and abate the same, or to compel the owner to cleanse or remove it.

In *State, Van Wagoner, Prosecutor, v. Paterson* (1902) 67 N. J. L. 455, 51 Atl. 922, it was held that a city might be authorized by statute, when building a sewer, to construct necessary house connections from the sewer to the curb line of the lots, and charge the costs and expenses thereof to the lot owners, on the ground that a requirement for a sewer connection with a dwelling on premises abutting on a sewer is within the power of the local authorities under the sanitation and health laws, and that this requirement may be anticipated for municipal convenience, and as a necessary police regulation, at the time the sewer is constructed.

See also *Boyce v. Tuhey* (1904) 163 Ind. 202, 70 N. E. 531, holding that the L.R.A. 1918C.

fact that a sewer was constructed with house connections extending from the sewer to a point 12 inches beyond the curb line did not render it a private instead of a public improvement, and that the cost of the improvement, including the house connections, could be assessed on the property benefited. But in *Corde-man v. Cincinnati* (1872) 23 Ohio St. 499, it was held, on grounds beyond the scope of the note, that a contract by a city for the making of "house connections" at the time the sewer was built was without authority of law and unenforceable. The note does not purport to cover this class of cases.

The power to compel connections with public sewers seems to be assumed in *Toney v. Macon* (1903) 119 Ga. 83, 46 S. E. 80, in which it was held that a statute extending the limits of a certain city could not be declared void as a whole because the penalty for not making sewer connections in the new territory was by fine and imprisonment, while under existing ordinances in the old limits the punishment was by fine only. A writ of error in this case was dismissed for want of jurisdiction in (1904) 195 U. S. 625, 49 L. ed. 350, 25 Sup. Ct. Rep. 791.

The opinion in *Tenement House Dept. of New York v. Moeschen* (1904) 179 N. Y. 325, 70 L.R.A. 704, 103 Am. St. Rep. 910, 72 N. E. 231, 1 Ann. Cas. 439, affirmed without opinion in (1906) 203 U. S. 583, 51 L. ed. 328, 27 Sup. Ct. Rep. 781, will be found helpful in this connection, although the case goes beyond the scope of the present note, and unholds the validity of a statute requiring the substitution of water-closets for school sinks.

The English cases on the question of compelling connections with drains and sewers seem to be of little general value as precedents, because of the controlling effect of the local statutes, and no attempt is here made to collect these cases. It may be worth while to observe, however, that the power to compel such connections seems in that country to be well established. It is said in 25 Halsbury's Law of England, pp. 750 et seq., that "where any house within the district of a local authority is without a drain sufficient for effectual drainage, the local authority must by written notice require the owner or occupier of such house within a reasonable time therein specified, to make a covered drain or drains emptying into any sewer which the authority is entitled to use, and which is not more than 100 feet

from the site of such house, or if no such means of drainage are within that distance, then emptying into such covered cesspool or other place not being under any house as the local authority directs. . . . If such notice is not complied with within the specified time, the local authority may do the work by agreement with the owner, or may do the work required, and recover the expenses incurred by it in so doing from the owner summarily, or may by order declare them to be private improvement expenses. . . . The provisions in the Metropolis as to draining houses into sewers are of a similar nature to, but different in form from, those in the rest of the country."

Cases such as *Ginter v. St. Mark's Church* (1905) 95 Minn. 14, 69 L.R.A. 621, 111 Am. St. Rep. 438, 103 N. W.

738, on the question of the duty generally of a property owner, apart from express statute or ordinance, to connect water gutters on his buildings with a sewer on an adjoining street, so as to prevent the collection of rain water and its discharge upon adjoining property, are not covered in the note.

And the note does not, of course, purport to include such cases as *Slaughter v. O'Berry* (1900) 126 N. C. 181, 48 L.R.A. 442, 35 S. E. 241, where no affirmative duty to make the connection was imposed, but a statute or ordinance provided for connection only on certain conditions, among which were in this case that the city should do the work and furnish the materials for making the sewer connections up to within 3 feet of the building to be connected.

R. E. H.

LOUISIANA SUPREME COURT.

STATE OF LOUISIANA, Appt.,
v.
LOUIS McCORMICK.

(— La. —, 77 So. 288.)

Constitutional law — police power — control.

1. The legitimate exercise of the police power is not subject to restraint by constitutional provisions for the general protection of individual rights of life, liberty, and property; nor does the 14th Amendment to the Constitution of the United States interfere with such exercise of that power.

For other cases, see Constitutional Law, II, c, in Dig. 1-52 N. S.

Same — penalizing association with prostitutes.

2. A statute penalizing as vagrants "male persons who habitually associate with prostitutes and who habitually loiter in or around houses of prostitution" is a competent exercise of the police power.

For other cases, see Constitutional Law, II, c, 5, in Dig. 1-52 N. S.

(November 26, 1917.)

APPEAL by the State from a judgment of the Judicial District Court for the Parish of Ouachita sustaining defendant's mo-

Headnotes by MONROE, Ch. J.

Note. — The constitutionality of a statute or ordinance making it an offense to associate with disreputable persons is discussed in the annotation following *Watertown v. Christnacht*, L.R.A.1917F, 904; and see references therein to annotations on related questions.
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tion to quash an indictment charging him with vagrancy. Judgment set aside.

The facts are stated in the opinion.

Messrs. A. V. Coco, Attorney General, Fred M. Odom, and Vernon A. Coco, for appellant:

The state, in the exercise of its police power, has the right to legislate against vagrancy.

Ex parte Strittmatter, 58 Tex. Crim. Rep. 156, 137 Am. St. Rep. 937, 124 S. W. 906, 21 Ann. Cas. 477; *Ex parte McCarthy*, 72 Cal. 384, 14 Pac. 96; *People v. Craig*, 152 Cal. 42, 91 Pac. 997; *State v. Preston*, 4 Idaho, 215, 38 Pac. 694, 9 Am. Crim. Rep. 735; *Ex parte Hayden*, 12 Cal. App. 145, 106 Pac. 893.

Mr. Harry H. Russell, for appellee:

An act forbidding association with prostitutes or loitering around a house of prostitution is an unconstitutional invasion of personal liberty.

Ex parte Smith, 135 Mo. 223, 33 L.R.A. 606, 58 Am. St. Rep. 576, 36 S. W. 628; *St. Louis v. Roche*, 125 Mo. 541, 31 S. W. 915.

To bring such association or such loitering within the proper control of the state, under the guise of police regulation, there must be committed some act, or there must enter some element, in itself such an act or such an element as to vest the state with control under its police power.

8 Cyc. 864-871, 886, 1087; *St. Louis v. Fitz*, 53 Mo. 582.

Monroe Ch. J., delivered the opinion of the court:

Defendant was prosecuted under an indictment which reads in part: "That Louis McCormick . . . from January 1 . . .

to March 23, 1917, . . . in the parish and state aforesaid, being . . . a male person, did, . . . wilfully and feloniously, habitually associate with prostitutes and habitually loiter in or around a house of prostitution, in violation of Act 226 of . . . 1912," etc.

The statute thus mentioned is entitled, "An Act to Define and Punish Vagrancy and to Provide Penalties for The Violation Hereof," and it declares: "Section 1. . . . That any male person who habitually associates with prostitutes, or who habitually loiters in or around houses of prostitution, or who, being without visible means of support, lives with a prostitute, shall be deemed guilty of vagrancy."

Defendant moved to quash the indictment on the ground that the statute quoted, in so far as here applicable, is unconstitutional, in that it attempts to abridge, deny, or impair the rights, privileges, and immunities of the citizen, and invade those rights of personal liberty which are guaranteed to him by articles 1, 2, and 15 of the Constitution of the state, and the 14th Amendment to the Constitution of the United States. The trial judge sustained that view and quashed the indictment, and the state has appealed.

The articles of the state Constitution which are relied on declare that government originates with the people, is founded on their will alone, and is instituted solely for the good of the whole; that its only legitimate end is to secure justice to all, preserve peace, and promote the interest and happiness of the people; that no person shall be deprived of life, liberty, or property except by due process of law; and the 14th Amendment to the Constitution of the United States declares that all persons born or naturalized in the United States are citizens thereof and of the state in which they reside; that no state shall abridge the privileges and immunities of citizens of the United States, or deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws.

"The legitimate exercise of the police power is not subject to restraint by constitutional provisions for the general protection of rights of individual life, liberty, and property." *State v. Schlemmer*, 42 La. Ann. 1166, 10 L.R.A. 135, 8 So. 307. And the 14th Amendment to the Constitution of the United States does not interfere with the proper exercise of that power. 6 R. C. L. ¶ 193, 194; *L'Hote v. New Orleans*, 177 U. S. 596, 44 L. ed. 903, 20 Sup. Ct. Rep. 788.

"However difficult it may be," say the authors, L.R.A. 1918C.

thorities, "to render a satisfactory definition of 'police power,' there seems to be no doubt that it extends to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals." 6 R. C. L. ¶ 199.

"This power also clearly extends to the regulation or suppression of houses of prostitution," etc. *Id.* ¶ 201.

If, in the interest of the public health, the state may establish hospitals for the segregation of persons affected with leprosy, smallpox, and other infectious diseases, it would hardly be contended that it could not make such measures effective by excluding therefrom, under penalty, persons likely to contract and communicate those diseases. If it may, in the interest of the public morals and health, regulate or suppress houses of prostitution, why may it not, as a means of regulation, or partial regulation, prohibit "male persons" from associating with the prostitutes and loitering in or about such houses? In *L'Hote v. New Orleans*, supra, the Supreme Court of the United States, speaking through Mr. Justice Brewer, and dealing with the interests not of the associates of the prostitutes and loiterers about their houses, but with the rights of a citizen whose property was injuriously affected by the establishment of a "restricted district" in its vicinity, said: "Obviously the regulation of houses of ill fame, legislation in respect to women of loose character, may involve one of three possibilities: First, absolute prohibition; second, full freedom in respect to place; . . . or third, a restriction of the location of such houses to certain defined limits. Whatever course of conduct the legislature may adopt is, in a general way, conclusive upon all courts, state and Federal. It is no part of the judicial function to determine the wisdom or folly of a regulation by the legislative body in respect to matters of a police nature."

There are other decisions of the same august tribunal, and of the other courts of the country, to the effect that the aid of the judiciary may be invoked to protect rights guaranteed by Constitutions from the arbitrary abuse of the police power, but the principle remains that the legitimate exercise of that power is a function of the legislative department, with the discharge of which the judiciary has no mission to interfere, and, as we are of opinion that in the present instance the power has been legitimately and properly exercised, we conclude that the statute complained of should be sustained.

It is therefore ordered that the judgment

appealed from be set aside, the indictment reinstated, and the case remanded to be proceeded with according to law and to the views hereinabove expressed.

Leche, J., takes no part.

Petition for rehearing denied January 3, 1918.

MASSACHUSETTS SUPREME JUDICIAL COURT.

FRANCES S. H. MASSALETTI

v.

MARY FITZROY.

(228 Mass. 487, 118 N. E. 168.)

Negligence — gratuitous guest — liability for injury to.

One inviting another to ride gratuitously in his automobile is not, in the absence of gross negligence, liable for injury to him by the overturning of the car by the chauffeur.

For other cases, see Automobiles, II. a, in Dig. 1-52 N. S.

(October 29, 1917.)

REPORT by the Superior Court for Middlesex County for determination by the Supreme Judicial Court of an action brought to recover damages for injuries sustained by plaintiff by the overturning of defendant's automobile in which she was riding at defendant's invitation, which resulted in a verdict for defendant. Judgment on the verdict.

The facts are stated in the opinion.

Messrs. Sawyer, Hardy, Stone, & Morrison for plaintiff.

Messrs. Whipple, Sears, & Ogden and James M. Hoy, for defendant:

There was no evidence that Smith was the servant of the defendant and was acting as such within the scope of his employment at the time of the accident.

Tornroos v. R. H. White Co. 220 Mass. 336, 107 N. E. 1015; W. S. Quimby Co. v. Estey, 221 Mass. 56, 108 N. E. 908; Shepard v. Jacobs, 204 Mass. 110, 26 L.R.A. (N.S.) 442, 134 Am. St. Rep. 648, 90 N. E. 392; Sprague v. General Electric Co. 213 Mass. 375, 100 N. E. 628; Fleischner v. Durgin, 207 Mass. 435, 33 L.R.A. (N.S.) 79, 93 N. E. 801, 20 Ann. Cas. 1291; Hussey v. Franey, 205 Mass. 413, 137 Am. St. Rep. 460, 91 N. E. 391; Bowie v. Coffin Valve Co. 200 Mass. 571, 86 N. E. 914, 206 Mass. 305, 92 N. E. 334; Quarman v. Burnett, 6 Mees. & W. 499, 151 Eng. Reprint. 509, 9 L. J. Exch. N. S. 308, 4 Jur. 969; Kellogg v. Church Charity Foundation, 203 N. Y. 191, 38 L.R.A. (N.S.) 481, 96 N. E. 406, Ann.

Note. — As to liability of owner or operator of automobile for injury to guest, see annotation following this case, post, 276. L.R.A.1918C.

Cas. 1913A, 883, 3 N. C. C. A. 444; Hartell v. T. H. Simonson & Son Co. 164 App. Div. 873, 148 N. Y. Supp. 433; Smith v. O'Brien, 46 Misc. 325, 94 N. Y. Supp. 673; Ouellette v. Superior Motor & Mach. Works, 157 Wis. 531, 52 L.R.A. (N.S.) 299, 147 N. W. 1014, 6 N. C. C. A. 357; Neff v. Brandeis, 91 Neb. 11, 39 L.R.A. (N.S.) 933, 135 N. W. 232; Sweetnam v. Snow, 187 Mich. 414, L.R.A. 1916B, 757, 153 N. W. 770; Henry v. Stanley Hod Elevator Co. 129 App. Div. 613, 114 N. Y. Supp. 38; Trombley v. Stevens-Duryea Co. 206 Mass. 516, 92 N. E. 764, 2 N. C. C. A. 806; D'Addio v. Hinckley Rendering Co. 213 Mass. 465, 100 N. E. 647, Ann. Cas. 1914A, 907.

There was no evidence warranting the jury in finding that the defendant violated any duty to the plaintiff.

Thomas v. Lane, 221 Mass. 447, L.R.A. 1916F, 1077, 109 N. E. 363; Feeley v. Doyle, 222 Mass. 155, L.R.A.1916F, 1121, 109 N. E. 902; Southcote v. Stanley, 1 Hurlst. & N. 247, 156 Eng. Reprint. 1195, 25 L. J. Exch. N. S. 339, 19 Eng. Rul. Cas. 60; Indermaur v. Dames, L. R. 1 C. P. 274; Beard v. Klusmeier, 158 Ky. 153, 50 L.R.A. (N.S.) 1100, 164 S. W. 319, Ann. Cas. 1915D, 342; Patnode v. Foote, 153 App. Div. 494, 138 N. Y. Supp. 221; Pigeon v. Lane, 80 Conn. 237, 67 Atl. 886, 11 Ann. Cas. 371; Mayberry v. Sivey, 18 Kan. 291; Coggs v. Bernard, 2 Ld. Raym. 909, 92 Eng. Reprint. 107, 1 Smith, Lead. Cas. 9th Am. ed. 370, 5 Eng. Rul. Cas. 247, 1 Am. Neg. Cas. 948; Ashton v. Boston & M. R. Co. 222 Mass. 65, L.R.A.1916B, 1281, 109 N. E. 820, 12 N. C. C. A. 837; Moffatt v. Bateman, L. R. 3 P. C. 115, 22 L. T. N. S. 140, 6 Moore, P. C. C. N. S. 369, 16 Eng. Reprint. 765; Bigwood v. Boston & N. Street R. Co. 209 Mass. 345, 35 L.R.A. (N.S.) 113, 95 N. E. 751.

Loring, J., delivered the opinion of the court:

While staying with the defendant as her guest the plaintiff, at the defendant's invitation, went out with the defendant in her motor car. The car was driven by a chauffeur furnished by the owner of the garage where it was kept. Through the negligence of the chauffeur the machine was overturned and fell on the plaintiff causing the injuries here complained of. The jury found that while driving the machine the chauffeur acted as the defendant's

servant, and this finding was warranted by the evidence. They also found that the accident was caused by the negligence of the chauffeur. Upon the jury making these findings the judge directed the jury to return a verdict for the defendant and reported the case to this court.

"At the trial the plaintiff did not claim that the jury could find from the evidence gross negligence on the part of the defendant." There was no question of negligence on the part of anyone but the defendant's chauffeur, and the plaintiff has not contended that there was. We therefore construe her concession to be a concession that she did not make out a case of gross negligence on the part of the chauffeur.

It was decided in *West v. Poor*, 196 Mass. 183, 11 L.R.A. (N.S.) 936, 124 Am. St. Rep. 541, 81 N. E. 980, that a defendant who invites a plaintiff to ride gratis in his carriage is liable to the same extent that a gratuitous bailee is liable. In *West v. Poor*, a milkman, on returning to his wagon after delivering some milk, found in it the plaintiff and some other children. He did not order them out of the wagon, but drove on. When the defendant stopped to make the next delivery, the plaintiff with the defendant's assistance undertook to get out of the wagon, and while she was in the act of getting out the horse started; the plaintiff was thrown to the ground and suffered the injuries complained of in that action. That case was disposed of by this court in these words: "He [the defendant] did nothing and said nothing to invite them; and the nearest analogy that occurs to us is that of a self-invited guest in whose presence the host acquiesces and whose enjoyment he seeks to promote, or that of a gratuitous bailee. In the former case the degree of care required is that of licensor and licensee (*Plummer v. Dill*, 156 Mass. 426, 32 Am. St. Rep. 463, 31 N. E. 128; *Hart v. Cole*, 156 Mass. 475, 16 L.R.A. 557, 31 N. E. 644), which, as has often been said, requires only that the licensor shall not set traps for the licensee, and shall refrain from reckless, wilful or wanton misconduct tending to injure him (*Massell v. Boston Elev. R. Co.* 191 Mass. 491, 78 N. E. 108). In the latter case, in order to render the bailee liable, it must appear that he has been guilty of culpable negligence. *Whitney v. Lee*, 8 Met. 91, 1 Am. Neg. Cas. 789; *Nolton v. Western R. Co.* 15 N. Y. 444, 69 Am. Dec. 623."

The liability "of a gratuitous bailee" was described by Chief Justice Shaw in the case of *Whitney v. Lee*, cited above, in these words: "Subject to these remarks upon the application of these distinctions [as to different degrees of negligence], we think it

well settled, that a bailee for safe-keeping, without reward, is not responsible for the article deposited, without proof that the loss was occasioned by bad faith or gross negligence. This rule was settled, on great consideration and after full deliberation, in *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168, 1 Am. Neg. Cas. 502; and this supersedes the necessity of any full review of the authorities."

The plaintiff in effect asks us to overrule *West v. Poor* so far as the second ground goes on which that case was decided. In that connection she has relied upon *Patnode v. Foote*, 153 App. Div. 494, 138 N. Y. Supp. 221; *Pigeon v. Lane*, 80 Conn. 237, 67 Atl. 886, 11 Ann. Cas. 371; and *Beard v. Klusmeier*, 158 Ky. 153, 50 L.R.A. (N.S.) 1100, 164 S. W. 319, Ann. Cas. 1915D, 342. In addition to these cases relied upon by the plaintiff, there are cases to the same effect not cited by her, which ought to be considered in connection with them. We take them up in their order. The first of these cases in point of time is *Mayberry v. Sivey*, 18 Kan. 291. That case was decided on the authority of this statement of Wharton in his textbook on Negligence: "A person who undertakes to do a service for another is liable to such other person for want of due care and attention . . . in the performance of the service, even though there is no consideration for such undertaking. . . . The confidence accepted is an adequate consideration to support the duty." [§ 355.]

But Mr. Wharton is of opinion that in the common law of England there are no degrees of negligence. This conclusion is based on Mr. Wharton's contention that the opinion of Chief Justice Holt in *Coggs v. Bernard*, 2 Ld. Raym. 909, 92 Eng. Rep. 107, 1 Smith, Lead. Cas. 370, 5 Eng. Rul. Cas. 247, 1 Am. Neg. Cas. 948, so far as it made a distinction between gross and ordinary negligence, was based on a misapprehension as to the rule of the civil law. See Wharton, Neg. 2d. ed. §§ 482-510. Whether different degrees of negligence are known to the common law is a question to be considered by itself and taken up later on.

The next case in point of time, and the most important of all these cases, is *Pigeon v. Lane*, 80 Conn. 237, 67 Atl. 886, 11 Ann. Cas. 371. In that case the defendants had sent a sleigh in charge of their servant Rinski by name, to bring their employees to their work, and there was evidence that the plaintiff was injured by Rinski's negligence. The presiding judge instructed the jury that it was immaterial whether the defendants were bound to send the sleigh to bring the plaintiff to his work,

or had sent the sleigh gratuitously; that in either case Rinski was the fellow servant of the plaintiff and the defendants were not liable. The supreme court of errors of Connecticut decided that, if the defendants sent Rinski gratuitously, he was not the plaintiff's fellow servant and for that reason the appeal was well taken. After that point had been decided this was added (80 Conn. at page 241): "Although, if the plaintiff was injured while riding upon the sleigh as a mere licensee, the defendants could be held liable only for their active negligence in causing the injury,—which would include their own or their servant Rinski's negligent acts, by which the danger of riding upon the conveyance was increased, or a new danger created, while the plaintiff was riding under such license (Pomponio v. New York, N. H. & H. R. Co. 66 Conn. 528, 538, 32 L.R.A. 530, 50 Am. St. Rep. 124, 34 Atl. 491),—the allegation that the injury was caused by the careless, negligent, and improper driving of the conveyance by the defendants' servant, in such a manner that it collided with the bridge, is a sufficient averment to permit proof of that negligence which would render the defendants liable as licensors."

Pomponio v. New York, N. H. & H. R. Co. 66 Conn. 528, 32 L.R.A. 530, 50 Am. St. Rep. 124, 34 Atl. 491 (on the authority of which this statement in *Pigeon v. Lane* is founded), was a case where, on the findings made, the plaintiff was crossing the defendant's track for his own convenience at a place planked as a crossing, but where neither the plaintiff nor the public had a right to cross, and was injured by the negligence of the defendant in the operation of one of its trains. It was held that, while the plaintiff, being on the defendant's premises for his own convenience, was a licensee, and therefore took the defendant's premises as he found them (in the absence of a trap), the defendant was liable for injuries suffered by the plaintiff by reason of active negligence in the operation of its trains. *Pomponio v. New York, N. H. & H. R. Co.* was decided on the authority of *Corrigan v. Union Sugar Refinery*, 98 Mass. 577, 96 Am. Dec. 685. That was a case in which the plaintiff was proceeding as a licensee along an alleyway on the premises of the defendant and was injured by the negligence of the defendant's servants in throwing down beer barrels into the alleyway. In *Pomponio v. New York, N. H. & H. R. Co.* *ubi supra*, the court quotes a reference of this court in *Stevens v. Nichols*, 155 Mass. 472, 475, 15 L.R.A. 459, 29 N. E. 1150, to the doctrine of *Corrigan v. Union Sugar Refinery*, which L.R.A.1918C.

was in these words: "The licensor has, however, no right to create a new danger while the license continues. *Oliver v. Worcester*, 102 Mass. 489, 502, 3 Am. Rep. 485; *Corrigan v. Union Sugar Refinery*, *supra*; *Corby v. Hill*, 4 C. B. N. S. 566, 140 Eng. Reprint, 1209, 27 L. J. C. P. N. S. 318, 4 Jur. N. S. 512, 6 Week. Rep. 575. So a railroad company which allows the public habitually to use a private crossing of its tracks cannot use active force against a person or vehicle crossing under a license, express or implied."

It is not necessary to consider whether this reference in *Stevens v. Nichols* to the doctrine of *Corrigan v. Union Sugar Refinery* is or is not a sufficiently careful statement of that doctrine to determine the reason on which it is founded or the limitations to which it is subject. The rule of *Corrigan v. Union Sugar Refinery* is a rule as to the liability of a licensor to a licensee. But where a defendant invites a plaintiff to ride gratis in his carriage, the question is not a question of the measure of liability of a licensor to a licensee. It is the question of the measure of the liability assumed in case of a gratuitous undertaking. For this reason the doctrine of *Pomponio v. New York, N. H. & H. R. Co.* and of *Corrigan v. Union Sugar Refinery* (the case on which *Pomponio v. New York, N. H. & H. R. Co.* was decided) is not applicable in the case at bar, where the defendant invited the plaintiff to ride gratis in her carriage.

The next case in point of time is *Patnode v. Foote*, 153 App. Div. 494, 138 N. Y. Supp. 221. In that case it was said that no decision upon the point had been found in New York, but that the case of *Pigeon v. Lane* in Connecticut "impresses us as stating the true rule." Without further discussion the court followed the opinion in *Pigeon v. Lane*. *Adams v. Tozer*, 163 App. Div. 751, 149 N. Y. Supp. 163 (the next case), was decided on the authority of *Patnode v. Foote* and of *Grimshaw v. Lake Shore & M. S. R. Co.* 205 N. Y. 371, 40 L.R.A.(N.S.) 563, 98 N. E. 762, Ann. Cas. 1913E, 571. The latter was a case where the plaintiff, being by license of the Wabash Railroad Company on an engine of that company, was injured in a collision at a grade crossing of the rails of the Wabash and of the defendant railroad company, caused by the negligence of those operating the defendant's engine. It was held that the defendant owed the plaintiff the duty of exercising due care not to injure him since he was lawfully on the Wabash engine, and that it was immaterial that he was lawfully there by license, and not by compensation paid by him to the

Wabash Railroad Company. In other words the point decided in *Grimshaw v. Lake Shore & M. S. R. Co.* *ubi supra*, is that decided in *Boutlier v. Malden*, 226 Mass. 479, 116 N. E. 251. It has no bearing upon the liability of a defendant who invites a plaintiff to ride gratis in his carriage. There is another case in New York (referred to in one of the cases to be considered later on), namely, *Birch v. New York*, 190 N. Y. 397, 18 L.R.A. (N.S.) 595, 83 N. E. 51. The point decided in that case was that a licensee entering on the wharf of a licensor takes the property as he finds it. In making that decision the court said obiter that the owner of land is liable to one entering upon it as licensee for active negligence on its part; that is to say, it was liable in a case like *Corrigan v. Union Sugar Refinery*. The next case in point of time is *Lochhead v. Jensen*, 42 Utah, 99, 129 Pac. 347. In that case a verdict was set aside on the ground that the plaintiff was allowed at the trial to recover for an injury not alleged in the complaint. After setting aside the verdict on that ground, the court (42 Utah at page 104) said, with respect to a new trial, that there was nothing in the defendant's contention "that 'the ride in the automobile was the mutual enjoyment of all three' occupants, and since the plaintiff did not show that the deceased protested against the manner of its operation, it must be presumed that he acquiesced therein; and therefore the negligence, if any, of the defendant, must be imputed to the deceased."

There was nothing else in the case which bears or might be thought to bear upon the question which we have under consideration. The next case in point of time is *Beard v. Klusmeier*, 158 Ky. 153, 50 L.R.A. (N.S.) 1100, 164 S. W. 319, Ann. Cas. 1915D, 342. That case was decided without discussion on the authority of *Lochhead v. Jensen* and *Patnode v. Foote*. The next is *Fitzjarrell v. Boyd*, 123 Md. 497, 91 Atl. 547. That case was decided on the authority of *Huddy, Automobiles*, § 113; *Patnode v. Foote*; *Beard v. Klusmeier*; *Pigeon v. Lane*; *Birch v. New York*; *Mayberry v. Sivey*, and *Lochhead v. Jensen*. After citing these authorities the court said (123 Md. at page 505): "The rule announced in these cases, we think, is the true and correct rule, and is controlling on this appeal."

There was no further discussion of the principles involved or of other decisions. It is apparent from this review of the decisions in conflict with *West v. Poor* that the question whether they are or are not correct depends upon the question whether degrees of negligence are known to the L.R.A.1918C.

common law, and whether the rule of *Corrigan v. Union Sugar Refinery* governs the liability of a defendant who invites a plaintiff to ride gratis in his carriage. Apart from the question whether degrees of negligence are a thing known to the common law (which was in reality what was decided in the negative in *Mayberry v. Sivey*, 18 Kan. 291), we are of opinion that these cases are not well decided and that they should not be followed.

Mr. Wharton is not alone in the conclusion reached by him that no such a thing as different degrees in negligence is known to the common law. It was said by Lord Cranworth (then Baron Rolfe) in *Wilson v. Brett*, 11 Mees. & W. 113, 115, 116, 152 Eng. Reprint, 737, that "I said I could see no difference between negligence and gross negligence,—that it was the same thing, with the addition of a vituperative epithet."

In *Beal v. South Devon R. Co.* 3 Hurlst. & C. 337, 341, 159 Eng. Reprint, 560, 11 L. T. N. S. 184, 12 Week. Rep. 1115, 18 Eng. Rul. Cas. 643, *Crompton, J.*, in delivering the judgment of the exchequer chamber, said that it was a mistake to say that there was no difference between ordinary and gross negligence "because a strict line of demarcation cannot be drawn between them." And in *Grill v. General Iron Screw Collier Co.* L. R. 1 C. P. 600, 4 Eng. Rul. Cas. 680, both *Willes, J.*, and *Montague Smith, J.*, expressed their dissatisfaction with the term "gross negligence." *Willes, J.*, went so far as to say, at page 612: "No information, however, has been given us as to the meaning to be attached to 'gross negligence' in this case: and I quite agree with the dictum of Lord Cranworth in *Wilson v. Brett*, that gross negligence is ordinary negligence with a vituperative epithet,—a view held by the exchequer chamber. *Beal v. South Devon R. Co.* 3 Hurlst. & C. 337, 159 Eng. Reprint, 560, 11 L. T. N. S. 184, 12 Week. Rep. 1115, 18 Eng. Rul. Cas. 643. Confusion has arisen from regarding negligence as a positive instead of a negative word."

But it is probable that an end was put in England to these objections to the term "gross negligence," by the decisions of the privy council in *Giblin v. McMullen*, L. R. 2 P. C. 317, 5 Moore, P. C. C. N. S. 434, 16 Eng. Reprint, 578, 38 L. J. P. C. N. S. 25, 21 L. T. N. S. 214, 17 Week. Rep. 445, the judgments of which, while not binding on the high court, are "entitled to very great weight indeed." *Dulieu v. White* [1901] 2 K. B. 669, at 677, 70 L. J. K. B. N. S. 837, 50 Week. Rep. 76, 85 L. T. N. S. 186, 17 Times L. R. 555. That was a case in its dramatic as well as in its legal aspects like *Foster v. Essex Bank*, 17 Mass.

479, 9 Am. Dec. 168, 1 Am. Neg. Cas. 502, and it was largely upon the authority of the decision in *Foster v. Essex Bank* that *Giblin v. McMullen* was decided. In delivering the judgment of the privy council in *Giblin v. McMullen*, Lord Chelmsford said, at pages 336, 337: "From the time of Lord Holt's celebrated judgment in *Coggs v. Bernard*, in which he classified and distinguished the different degrees of negligence for which the different kinds of bailees are answerable, the negligence which must be established against a gratuitous bailee has been called 'gross negligence.'"

After referring to Lord Cranworth's observation in *Wilson v. Brett*, and to the fact that "this critical observation has been since approved of by other eminent judges," he said: "Of course, if intended as a definition, the expression 'gross negligence' wholly fails of its object. But as there is a practical difference between the degrees of negligence for which different classes of bailees are responsible, the term may be usefully retained as descriptive of that difference. . . . No advantage would be gained by substituting a positive for a negative phrase, because the degree of care and diligence which a bailee must exercise corresponds with the degree of negligence for which he is responsible, and there would be the same difficulty in defining the extent of the positive duty in each case as the degree of neglect of it which incurs responsibility. In truth, this difficulty is inherent in the nature of the subject, and though degrees of care are not definable, they are with some approach to certainty distinguishable."

Giblin v. McMullen, ubi supra, established the rule laid down by Chief Justice Holt in *Coggs v. Bernard*, 2 Ld. Raym. 909, 913, 92 Eng. Reprint, 107, 1 Smith, Lead. Cas. 370, 5 Eng. Rul. Cas. 247, 1 Am. Neg. Cas. 948, that, to charge a defendant in case of gratuitous bailment, the plaintiff must prove gross negligence; and that rule has been applied in the only cases of gratuitous undertakings which have arisen in England since then. In *Moffatt v. Bateman*, L. R. 3 P. C. 115, 22 L. T. N. S. 140, 6 Moore, P. C. C. N. S. 369, 16 Eng. Reprint, 765, the question to be decided in the case at bar was before the court. It was held by the privy council that, in case of an invitation to ride gratis in the defendant's carriage, to make out liability, the plaintiff had to prove gross negligence. And in *Coughlin v. Gillison* [1899] 1 Q. B. 145, 68 L. J. Q. B. N. S. 147, 47 Week. Rep. 113, 79 L. T. N. S. 627, it was decided that, in the case of a gratuitous lending of an engine for the sole benefit of the borrower, the borrower, to make out liability, had to

prove a gross neglect on the part of the lender. In all three of these cases the decision was that the plaintiff took nothing because he had failed to make out gross negligence.

In *Philadelphia & R. R. Co. v. Derby*, 14 How. 468, 485, 486, 14 L. ed. 502, 509, 510, 10 Am. Neg. Cas. 602, Grier, J., said: "It is true, a distinction has been taken in some cases, between simple negligence and great or gross negligence; and it is said that one who acts gratuitously is liable only for the latter. But this case does not call upon us to define the difference (if it be capable of definition), as the verdict has found this to be a case of gross negligence. When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.'"

In *The New World v. King*, 16 How. 469, 474, 14 L. ed. 1019, 1021, Curtis, J. (after pointing out that the appellee was lawfully upon the steamboat of the plaintiff), said that it was not necessary to decide whether "precisely the same obligations in all respects" attached in that case as in case of an ordinary passenger paying fare. He then referred to the statement of Grier, J., in *Philadelphia & R. R. Co. v. Derby*, 14 How. 468, 14 L. ed. 502, 10 Am. Neg. Cas. 602, which we have just quoted, and he added: "We desire to be understood to reaffirm that doctrine." In addition he said: "The theory that there are three degrees of negligence, described by the terms slight, ordinary, and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice."

He then refers, among other cases, to *Wilson v. Brett*, 11 Mee. & W. 113, 152 Eng. Reprint, 737, 12 L. J. Exch. N. S. 264, and adds: "Some of the ablest commentators on the Roman law and on the Civil Code of France have wholly repudiated this theory of three degrees of negligence." See also in this connection *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 493-495, 23 L. ed. 374, 376; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 295, 296, 23 L. ed. 898, 899, 900, 7 Am. Neg. Cas. 331; *Northern P. R. Co. v. Adams*, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408.

But in the case of *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 382, 383, 21 L. ed. 627, 641, 10 Am. Neg. Cas. 624, Bradley, J., said: "We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply 'negligence.' And this seems to be the tendency of modern authorities. If they mean more than this, and seek to abolish the distinction of degrees of care, skill, and diligence required in the performance of various duties and the fulfilment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed. The compilers of the French Civil Code undertook to abolish these distinctions by enacting that 'every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.' Toullier, in his Commentary on the Code, regards this as a happy thought, and a return to the law of nature. But such an iron rule is too regardless of the foundation principles of human duty, and must often operate with great severity and injustice."

The last word of importance upon this point to be found in the decisions of the Supreme Court of the United States is in *Preston v. Prather*, 137 U. S. 604, 34 L. ed. 788, 11 Sup. Ct. Rep. 162, 1 Am. Neg. Cas. 599. In that case the rule of *Foster v. Essex Bank* was repudiated. In that case Field, J., said (137 U. S. 608, 609): "No one taking upon himself a duty for another without consideration is bound, either in law or morals, to do more than a man of that character would do generally for himself under like conditions. The exercise of reasonable care is in all such cases the dictate of good faith. . . . But what will constitute such reasonable care will vary with the nature, value, and

situation of the property, the general protection afforded by the police of the community against violence and crime, and the bearing of surrounding circumstances upon its security. . . . The general doctrine, as stated by text-writers and in judicial decisions, is that gratuitous bailees of another's property are not responsible for its loss unless guilty of gross negligence in its keeping. But gross negligence in such cases is nothing more than a failure to bestow the care which the property in its situation demands; the omission of the reasonable care required is the negligence which creates the liability; and whether this existed is a question of fact for the jury to determine, or by the court where a jury is waived. See *The New World v. King*, 16 How. 469, 474, 475, 14 L. ed. 1019, 1021, 1022, 10 Am. Neg. Cas. 614; *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 383, 21 L. ed. 627, 641, 10 Am. Neg. Cas. 624; *Milwaukee & St. Paul R. Co. v. Arms*, 91 U. S. 489, 494, 23 L. ed. 374, 376."

In this commonwealth the judges seem to have had little, if any, difficulty in recognizing degrees of negligence in case of gratuitous bailments, but to have had Lord Cranworth's difficulty (or rather the difficulty which those who followed Lord Cranworth put in articulate form) in other cases. The remarks to which we referred, but did not set forth when we quoted the opinion of Chief Justice Shaw in *Whitney v. Lee*, 8 Met. 91, 93, 1 Am. Neg. Cas. 789, were these: "The law has endeavored to make a distinction in the degrees of care and diligence to which different bailees are bound, distinguishing between gross negligence, ordinary negligence, and slight negligence; though it is often difficult to mark the line where the one ends and the other begins. And it must be often left to the jury, upon the nature of the subject-matter and the particular circumstances of each case, with suitable remarks by the judge, to say whether the particular case is within the one or the other."

In the later case of *Chandler v. Worcester Mut. F. Ins. Co.* 3 Cush. 328, Chief Justice Shaw was more pronounced in his views as to degrees of negligence. That was a case in which the defendant set up in defense to a claim on a fire insurance policy the fact that the fire had taken place through the gross neglect of the insured. After deciding that to make out the defense relied upon, the insurance company had to "show a culpable recklessness and indifference to the rights of others." Chief Justice Shaw added, at page 331: "The terms 'slight negligence,' 'want of ordinary care,' and 'gross negligence' are useful in their way, but they are not precise and

exact enough, without a statement of the facts designated by them, to enable a court to judge of the rights of parties thereby affected. The proper business of jurisprudence seems to be to take a series of facts and circumstances conceded or proved, and to declare what are the rights of the parties arising out of them."

In *Smith v. First Nat. Bank*, 99 Mass. 605, 97 Am. Dec. 59, 1 Am. Neg. Cas. 523 (a case of gratuitous bailment), Wells, J., ends the opinion (99 Mass. at page 612) in these words: "But the court are of opinion that the whole testimony did not furnish such evidence as would warrant a jury in finding that there was gross negligence on the part of the bank, and that the loss of the bonds resulted from such negligence. *Giblin v. McMullen*, L. R. 2 P. C. 317, 5 Moore, P. C. C. N. S. 434, 16 Eng. Reprint, 578, 38 L. J. P. C. N. S. 25, 21 L. T. N. S. 214, 17 Week Rep. 445. The exceptions must therefore be sustained upon that ground."

Gill v. Middleton, 105 Mass. 477, 7 Am. Rep. 548, was a case in which the defendant (the owner of the premises in question, then leased to the plaintiff's husband) had undertaken to repair them gratis. The presiding judge told the jury that the defendant was liable if the premises were "not put in safe repair by reason of the want of ordinary skill or care in workmanship or selection of materials on the part of the defendant." The defendant contended in support of an exception taken to this part of the charge, "that upon a gratuitous undertaking of this nature the defendant could only be held responsible for bad faith or for gross negligence." His contention was not sustained and his exceptions were overruled. Ames, J., in delivering the opinion of the court, said (105 Mass. at page 479, 480): "It appears to us that this is one of the cases in which there is no practical difference between gross negligence and the want of ordinary care and skill; and that the omission of what Baron Rolfe calls a mere vituperative epithet is not a valid objection to the judge's charge. The true question for the jury was whether the defendant had discharged the duty which he had assumed with that due regard to the rights of the other party which might reasonably have been expected of him under all the circumstances."

After referring to the case of *The New World v. King*, 16 How. 469, 14 L. ed. 1019, he added: "The law furnishes no definition of gross negligence as distinguished from want of reasonable and ordinary care, which can be of any practical utility. The question of reasonable care must always depend on the special circumstances of each

case, and is almost of necessity a question of fact rather than of law. The degrees of negligence, so often spoken of in the text-books, do not admit of such precision and exactness of definition as to be of any practical advantage in the administration of justice, without a detail of the facts which they are intended to designate. The *New World v. King*, supra; *Chandler v. Worcester Mut. F. Ins. Co.* 3 Cush. 328; *Wilson v. Brett*, 11 Mees. & W. 113, 152 Eng. Reprint, 737, 12 L. J. Exch. N. S. 264; *Grill v. General Iron Screw Collier Co.* L. R. 1 C. P. 600, 35 L. J. C. P. N. S. 321, 12 Jur. N. S. 727, 14 L. T. N. S. 711, 14 Week. Rep. 893, 4 Eng. Rul. Cas. 680."

The same learned judge in delivering the opinion of this court in the later case of *Jenkins v. Bacon*, 111 Mass. 373, at page 376, 15 Am. Rep. 33, 1 Am. Neg. Cas. 781 (a case of gratuitous bailment), said: "According to the well-settled rule, the bailee who acts without compensation can only be held responsible for bad faith or gross negligence, if the deposit should be lost or injured while in his custody. *Whitney v. Lee*, 8 Met. 91, 1 Am. Neg. Cas. 789; *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168, 1 Am. Neg. Cas. 502."

In *Smith v. Postal Tele. Cable Co.* 174 Mass. 576, at page 578, 47 L.R.A. 323, 75 Am. St. Rep. 374, 55 N. E. 380, 7 Am. Neg. Rep. 54, Holmes, Ch. J., said: "If the rule is to be adhered to, that there can be no recovery for sickness due to the purely internal operation of fright caused by a negligent act, it cannot be avoided by calling the negligence gross, and alleging that the defendant ought to have known that the result complained of would follow his act. Negligence with reference to a given consequence . . . ought to have been foreseen, and although the distinction between gross negligence and negligence is known to the law, still, having regard to the grounds for the above-mentioned rule, to allow it to be avoided by such an allegation would be to do away with it."

Apart from the opinions expressed in these common-law cases, the question whether, in the administration of justice, it is possible or practicable to draw a distinction between ordinary and gross negligence, has been put to rest in this commonwealth by decisions under statutes which have made a distinction between the two. It was provided as early as 1840 (Stat. 1840, chap. 80), and has been continued in a number of statutes enacted since then (for a collection of these statutes, see *Hudson v. Lynn & B. R. Co.* 185 Mass. 510, 71 N. E. 66, 16 Am. Neg. Rep. 366; *Brooks v. Fitchburg & L. Street R. Co.* 200 Mass. 8, 86 N. E. 289), that va

rious persons and corporations should be liable to a penalty if the death of a person was caused through the gross negligence of their servants.* And by Stat. 1871, chap. 352, now Rev. Laws, chap. 111, § 268, it was provided that a railroad corporation should be liable for an accident at a grade crossing where the statutory signals have not been given, unless "the person injured, or the person who had charge of his person or property, was, at the time of the collision, guilty of gross or wilful negligence, . . . and that such gross or wilful negligence . . . contributed to the accident." Both sets of statutes made a distinction between gross and ordinary negligence. Although judges of this court have had the same difficulty in determining the meaning of gross negligence under these statutes that they had as to the meaning of that term at common law (see Knowlton, J., in *Phelps v. New England R. Co.* 172 Mass. 98, 100, 51 N. E. 522, and Hammond, J., in *Evensen v. Lexington & B. Street R. Co.* 187 Mass. 77, 79, 72 N. E. 355), yet it is settled that the term "gross negligence" in these statutes means a materially greater want of care than ordinary negligence. The distinction between the two has been recognized in numberless cases, but the meaning of gross negligence as distinguished from a want of ordinary care has been defined (in the way stated above) in the following cases under the death statutes: *Galbraith v. West End Street R. Co.* 165 Mass. 572, 43 N. E. 501; *Morey v. Gloucester Street R. Co.* 171 Mass. 165, 50 N. E. 530; *Phelps v. New England R. Co.* 172 Mass. 98, 51 N. E. 522; *Evensen v. Lexington & B. Street R. Co.* 187 Mass. 77, 72 N. E. 355; *Brennan v. Standard Oil Co.* 187 Mass. 376, 73 N. E. 472; *Dolphin v. Worcester Consol. Street R. Co.* 189 Mass. 270, 75 N. E. 635; *Spooner v. Old Colony Street R. Co.* 190 Mass. 132, 76 N. E. 660; *Pearlstein v. New York, N. H. & H. R. Co.* 192 Mass. 20, 77 N. E. 1024; *Manning v. Conway*, 192 Mass. 122, 78 N. E. 401; *Lanci v. Boston Elev. R. Co.* 197 Mass. 32, 83 N. E. 1; *Dimauro v. Linwood Street R. Co.* 200 Mass. 147, 85 N. E. 894; *Devine v. New York, N. H. & H. R. Co.* 205 Mass. 416, 91 N. E. 522; *Renaud v. New York, N. H. & H. R. Co.* 206 Mass. 557, 92 N. E. 710; *Adams v. Boston Elev. R. Co.* 214 Mass. 1, 100 N. E. 1012. And it has been defined in the same way in three cases arising under the statutes as to the failure to give signals at grade crossings in Rev. Laws, chap. 111, § 268. *Copley v. New Haven*

& N. Co. 136 Mass. 6; *Debbins v. Old Colony R. Co.* 154 Mass. 402, 28 N. E. 274; *Emery v. Boston & M. R. Co.* 173 Mass. 136, 53 N. E. 278. In further explanation of the meaning of gross negligence under these statutes, it is settled that it is something less than the wilful, wanton, and reckless conduct which makes a defendant liable to a trespasser. *Banks v. Braman*, 188 Mass. 367, 74 N. E. 594. Note to *Fitzmaurice v. New York, N. H. & H. R. Co.* 192 Mass. 159, 162 [6 L.R.A. (N.S.) 1146, 116 Am. St. Rep. 236, 78 N. E. 418, 7 Ann. Cas. 586, 20 Am. Neg. Rep. 564]; *Lanci v. Boston Elev. R. Co.* 197 Mass. 32, 83 N. E. 1.

Whether Mr. Wharton and the commentators referred to by Mr. Justice Curtis in *The New World v. King*, *ubi supra*, are right or wrong as to the existence of degrees of negligence in the civil law, it is plain that in this commonwealth that distinction exists. And it is not necessary in deciding that question to go outside of the law which is administered here. The distinction was first put forward in England in 1703, in *Coggs v. Bernard*, 2 Ld. Raym. 909, 92 Eng. Reprint, 107, 1 Smith, Lead. Cas. 370, 5 Eng. Rul. Cas. 247, 1 Am. Neg. Cas. 948. It was adopted in this commonwealth in *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168, 1 Am. Neg. Cas. 502, in 1821, and the rule adopted in that case was (in the words of Chief Justice Shaw in *Whitney v. Lee*, *ubi supra*) "settled on great consideration and after full deliberation, . . . and this supersedes the necessity of any full review of the authorities." The decision in *Foster v. Essex Bank* (involving the distinction between gross and ordinary negligence) was affirmed by this court in *Whitney v. Lee*, 8 Met. 91, 1 Am. Neg. Cas. 789; *Smith v. First Nat. Bank*, 99 Mass. 605, 97 Am. Dec. 59, 1 Am. Neg. Cas. 523; and *Jenkins v. Bacon*, 111 Mass. 373, 15 Am. Rep. 33, 1 Am. Neg. Cas. 781. And (in spite of *Preston v. Prather*, 137 U. S. 604, 34 L. ed. 783, 11 Sup. Ct. Rep. 162, 1 Am. Neg. Cas. 599), that is the rule adopted generally in all other jurisdictions. *Giblin v. McMullen*, L. R. 2 P. C. 317, 5 Moore, P. C. C. N. S. 434, 16 Eng. Reprint, 578, 38 L. J. P. C. N. S. 25, 21 L. T. N. S. 214, 17 Week. Rep. 445; *Hibernia Bldg. Assn. v. McGrath*, 154 Pa. 206, 35 Am. St. Rep. 828, 26 Atl. 377; *Storer v. Gowen*, 18 Me. 174; *Michigan C. R. Co. v. Carrow*, 73 Ill. 348, 24 Am. Rep. 248; *Wiser v. Chesley*, 53 Mo. 547; *Illinois C. R. Co. v. Tronstine*, 64 Miss. 834, 2 So. 255. The doubt as to the existence of the distinction raised by the opinion of Ames, J., in *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 748, must be taken (even without regar

*The word "gross" was stricken out of the present statute in the case of railroads and street railways by Stat. 1907, chap. 392. L.R.A.1918C.

to the subsequent opinion of the same learned judge in *Jenkins v. Bacon*) to have been a doubt which, on a review of all the common-law authorities, no longer exists in this commonwealth. In addition, that doubt has been put at rest so far as this commonwealth is concerned by the decisions of this court under statutes which made the distinction between gross and ordinary negligence. No one familiar with the jurisprudence of Massachusetts could question to-day the existence in this commonwealth of the distinction between gross and ordinary negligence.

In spite of the decisions in *Giblin v. McMullen*, *supra*, *Moffatt v. Bateman*, L. R. 3 P. C. 115, 22 L. T. N. S. 140, 6 Moore, P. C. C. N. S. 369, 16 Eng. Reprint, 765, and *Coughlin v. Gillison* [1899] 1 Q. B. 145, 68 L. J. Q. B. N. S. 147, 47 Week. Rep. 113, 79 L. T. N. S. 627, a doubt arises as to the measure of liability in England in a case where a person enters upon a gratuitous undertaking. That doubt arises from the terms used by Chief Justice Holt in stating the liability of a bailee in case of the sixth sort of bailment discussed by him in his opinion in *Coggs v. Bernard*, 2 Ld. Raym. 909, 913, 92 Eng. Reprint, 107, 1 Smith, Lead. Cas. 307, 5 Eng. Rul. Cas. 247, 1 Am. Neg. Cas. 948, and those used by Collins, M. R., in delivering the judgment of the court of appeal in *Harris v. Perry & Co.* [1903] 2 K. B. 219, 226, 72 L. J. K. B. N. S. 725, 89 L. T. N. S. 174, 19 Times L. R. 537. In delivering the judgment in *Coggs v. Bernard*, Lord Holt first laid it down (page 913) that, in case of a gratuitous bailment of goods for the sole benefit of the bailor, the bailee "is not answerable if they are stole without any fault in him; neither will a common neglect make him chargeable, but he must be guilty of some gross neglect." This was the first sort of bailment considered by Chief Justice Holt in *Coggs v. Bernard*. When the chief justice came to the sixth sort of bailment considered by him in that judgment, namely, an undertaking to transport goods where the bailee was to have no reward for his pains, he said (at pages 918, 919): "Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In Bracton, lib. 3, 100, it is called 'mandatum.' . . . It is what we call in English 'an acting by commission.' And if a man acts by commission for another gratis, and in the executing his commission behaves himself negligently, he is answerable. . . . This undertaking obliges the undertaker to a diligent management." L.R.A.1918C.

Harris v. Perry & Co. *ubi supra*, was a case in which an inspector of work being done in the construction of an underground railway, at the time of the accident, was riding gratis for his own convenience at the invitation of one of the defendant's officers, on the engine of a construction train in place of using a plank walk constructed by the defendant to enable inspectors to oversee the work. While so riding he was injured by the negligence of the defendant's agents. In delivering the judgment of the court of appeal in that case. Collins, M. R. after stating that there was evidence of a trap and so liability even if the plaintiff was a licensee, said: "At all events, I think it was competent for the jury to find, as they must be taken to have found, a failure of that ordinary care which is due from a person who undertakes the carriage of another gratuitously. . . . There is an obvious difference between the measure of confidence reposed and responsibility accepted in the case of a person who merely receives permission to traverse the premises of another, and in the case where a person or his property is received into the custody of another for transportation. See in the case of goods, *Southcote's Case*, 4 Coke. 83b, 76 Eng. Reprint, 1061, cited in *Coggs v. Bernard*, and the notes thereto."

It would appear on the first reading of these two judgments that both the learned judges intended to make a distinction between the care which has to be exercised in case of a gratuitous bailment, and that which has to be exercised in case of a gratuitous undertaking of transportation. But upon a full consideration of the matter it cannot be taken that either of them intended to make that distinction.

Coggs v. Bernard was before the court on a motion in arrest of judgment after a verdict for the plaintiff. The motion in arrest of judgment was based on the ground, and solely on the ground, that it was not alleged in the declaration that the defendant was to be paid for his pains. All that was before the court was the proposition that a defendant could be liable in case of a gratuitous transportation. No question was raised as to the measure of the defendant's liability in a case of a gratuitous transportation if there was liability in such a case. The chief justice disposed of the contention that a gratuitous undertaking to transport was a nudum pactum by pointing out the distinction between the case where a defendant fails to enter upon a gratuitous undertaking and the case where, having entered upon it, he is negligent in carrying it out. The fact that, in stating that there was liability in a case where the defendant had entered upon a gratuitous undertaking,

Chief Justice Holt was not careful to state with accuracy the measure of that liability, cannot be taken to be decisive. That question was not up for decision at that time.

The same is true of that part of the judgment of Collins, M. R., in *Harris v. Perry & Co.*, quoted above. The contention in *Harris v. Perry & Co.* to which Collins, M. R., was addressing himself, was that the plaintiff in that case was a licensee, and that since he was a licensee he could not recover at all. In addressing himself to that contention Collins, M. R., said (first) there was evidence of a trap, and (secondly) that apart from that there was evidence on which the jury could find that there was a failure of care on the part of the defendant. To be sure he spoke of a lack of ordinary care in place of gross negligence. When one takes into account the fact that gross negligence is a term with which the English judges have quarreled continually, it is perhaps natural that Collins, M. R., did not go out of his way to speak of gross negligence, and did speak of "ordinary care." Moreover it is to be noticed that what Collins, M. R., said was: "A failure of that ordinary care which is due from a person who undertakes the carriage of another gratuitously."

But upon the question of the true interpretation of these two judgments there is more to be said. In his note to *Coggs v. Bernard*, Mr. Smith has this to say at pages 103, 104, 1 Smith, *Lead. Cas.* 1st Eng. ed.: "VI. Mandatum.—The sixth and last class of bailments is (according to Lord Holt) mandatum, or a delivery of goods to somebody who is to carry them, or to do something about them, gratis. And this might have been classed under the same head as depositum. For, as the *keeping, carrying, and working upon goods for hire* are all included, both by Lord Holt and Sir W. Jones, under the same head, there seems no good reason why the *keeping, carrying, and working upon them gratuitously* should not have been so likewise. Certain it is that the liabilities of the *depository* and of the *mandatary* are precisely the same; both (in the absence, at least, of a contract in special terms) are bound to *slight diligence*, and to *slight diligence* only, and liable for nothing short of *gross negligence*, the reason in each case being the same, namely, that neither is to receive any reward for his services. Accordingly, whenever the extent of a mandatary's liability is discussed, we find the cases respecting that of depositaries cited and relied upon, and so vice versa. The cases of *Beauchamp v. Powley*, 1 Moody & R. 38; *Shiells v. Blackburne*, 1 H. Bl. 158, 126 Eng. Reprint, 94, 2 Revised Rep. 750; and L.R.A.1918C.

Dartnall v. Howard, 4 Barn. & C. 345, 107 Eng. Reprint, 1088, the facts of which are respectively stated at the commencement of this note, were decisions on the responsibility of mandataries, and from those, as well as from the general principle, it appears that such bailees are liable for gross negligence, and for that only."

It is to be observed in connection with Mr. Smith's statement ("accordingly, whenever the extent of a mandatary's liability is discussed, we find the cases respecting that of depositaries cited and relied upon") that *Harris v. Perry & Co.*, a case of a gratuitous mandatum, was decided on the authority of *Southcote's Case*, 4 Coke, 83b, 76 Eng. Reprint, 1061, a case of a gratuitous depositum. And that is true of *West v. Poor*, 196 Mass. 183, 11 L.R.A.(N.S.) 936, 124 Am. St. Rep. 541, 81 N. E. 960, also; that case (a case of a gratuitous mandatum) was decided on the authority of *Whitney v. Lee*, 8 Met. 91, 1 Am. Neg. Cas. 789, which was the case of a gratuitous depositum. There is more to be said with respect to the proper interpretation of Lord Holt's judgment in *Coggs v. Bernard*, concerning a distinction between a gratuitous bailment and an undertaking of gratuitous transportation; that is that the third and fourth editions of Smith's *Leading Cases* were edited by Mr. (afterwards Mr. Justice) Keating and by Mr. (afterwards Mr. Justice) Willes, and that the seventh, eighth, and ninth editions of Smith's *Leading Cases* were edited (with Mr. Arbuthnot) by Lord (then Mr.) Collins, who, when master of the rolls, delivered the judgment in *Harris v. Perry & Co.* The statement of Mr. Smith quoted above (that there is no distinction between the measure of the liability in case of a gratuitous bailment and that in a case of a gratuitous transportation) has been left untouched by these three learned editors of that learned work. The fact that this statement was left untouched by Lord Collins would seem to be decisive of the question now under consideration so far as Lord Collins's judgment in *Harris v. Perry & Co.* is concerned. There were some additions made in these editions to Mr. Smith's statement, but these additions did not even modify, much less change, the statement of Mr. Smith which we have set forth above. These additions may be found at page 104 in the third English edition, page 184 in the fourth English edition, page 247 in the seventh English edition, page 261 in the eighth English edition, and page 397 in the ninth American edition, which is a reprint (with additional notes) of the ninth English edition.

A ruling at nisi prius upon the question

now before us was recently made in *Karavias v. Gallinocos*, 143 L. T. Jo. 237. In that case the jury found that the defendant was not guilty of gross, but was guilty of ordinary, negligence. Mr. Justice Avory (who made the ruling) stated that the question, "in the state of the authorities, [was] a fit question to be taken to the court of appeal," but since judgment was entered for the plaintiff in *Harris v. Perry & Co.* [1903] 2 K. B. 219, 228, 72 L. J. K. B. N. S. 725, 89 L. T. N. S. 174, 19 Times L. R. 537, on a finding that the defendant in that case was guilty of ordinary negligence, he felt bound to enter judgment for the plaintiff on the findings made in *Karavias v. Gallinocos*.

It would seem that in England the liability of a gratuitous bailee and the liability of one who undertakes a gratuitous transportation are the same. And to this one thing more must be added; namely, however much the English judges have quarreled with the meaning of the words "gross negligence," it is the fact that when pushed to a decision the judges of England have invariably held that to make out liability in case of a gratuitous undertaking (no matter what the nature of the gratuitous undertaking was) gross negligence has to be made out. *Giblin v. McMullen*, L. R. 2 P. C. 317, 5 Moore, P. C. 434, 16 Eng. Reprint, 578, 38 L. J. P. C. N. S. 25, 21 L. T. N. S. 214, 17 Week. Rep. 445; *Moffatt v. Bateman*, L. R. 3 P. C. 115, 22 L. T. N. S. 140, 6 Moore, P. C. G. N. S. 369, 16 Eng. Reprint, 765; *Coughlin v. Gillison* [1899] 1 Q. B. 145, 68 L. J. Q. B. N. S. 147, 47 Week. Rep. 113, 79 L. T. N. S. 627.

In holding that to charge a defendant with liability in case of a gratuitous undertaking to transport a person, the plaintiff must prove gross negligence, because that is the measure of liability in case of the gratuitous undertaking to keep or carry goods, it is not to be understood that gross negligence in the two cases is the same thing. In all cases (no matter whether the case is a case of ordinary or of gross negligence) the consequence likely to result is a fact to be taken into consideration in determining what ought to be done by the defendant to fulfil his measure of his liability. For example: It might be held that the omission to do a certain thing in the transportation of goods was not negligence, and that by reason of the seriousness of the consequences likely to result the omission to do the same thing in case of the transportation of a person would be negligence; and so in case of gross in place of ordinary negligence. For this general principle see, for example, *Hartford v. New* L.R.A.1918C.

York, N. H. & H. R. Co. 184 Mass. 365, 68 N. E. 835; *Mullins v. New York, N. H. & H. R. Co.* 201 Mass. 38, 87 N. E. 476; *Martin v. Boston & N. Street R. Co.* 205 Mass. 16, 91 N. E. 159.

This brings us to the consideration of *Davis v. Central Cong. Soc.* 129 Mass. 367, 37 Am. Rep. 368, a case upon which the plaintiff has placed great reliance. In that case it was decided that the defendant society was liable to the plaintiff, who had been invited to attend a conference held in the defendant society's church, at which the plaintiff was not a delegate, for injuries suffered by the plaintiff through a dangerous condition in the path leading to the church, upon the jury finding that the defendant was negligent in the matter. That case has usually been cited when the doctrine that a charity is not liable for torts under the decision in *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529, has been set up in defense. It has never been affirmed as a decision upon the duty owed by a defendant who invites a plaintiff to enter upon his (the defendant's) land solely for his (the plaintiff's) purposes, unless it can be held to have been affirmed or approved on that point by what was said by Barker, J., in *Chapin v. Holyoke Y. M. C. A.* 165 Mass. 280, 281, 42 N. E. 1130. Of the decision in *Davis v. Central Cong. Soc.* it is to be observed that it was decided at a time when the distinction between a person going on the premises of the defendant for business to be transacted with the defendant, and persons going upon those premises for business of their own (*Plummer v. Dill*, 156 Mass. 426, 32 Am. St. Rep. 463, 31 N. E. 128, and *Hart v. Cole*, 156 Mass. 475, 16 L.R.A. 557, 31 N. E. 644), had not been established. Were the case to arise to-day it might be contended that, since the plaintiff in *Davis v. Central Cong. Soc.* went on the defendant's premises for her own purposes, she was in no better position than the plaintiffs in *Plummer v. Dill* and *Hart v. Cole*. It is hard to see a distinction between the rights of a plaintiff expressly invited to attend a church conference to which she was not a delegate, and a plaintiff impliedly invited to attend a funeral or a wake. But however that may be, the decision in *Davis v. Central Cong. Soc.* has no bearing on the question now before us. Whether one invited to come onto the defendant's premises for his (the invitee's) purposes alone takes them as he finds them, or can hold the defendant for negligence in case the premises are in a dangerous condition, is a question of the obligation assumed by one inviting another to come upon his land; while the extent of the ob-

ligation assumed by inviting one to travel gratis in the inviter's carriage is a question of the liability of one who enters upon a gratuitous undertaking, whether it be a gratuitous undertaking to keep, carry, or lend.

As matter of authority *West v. Poor*, 196 Mass. 183, 11 L.R.A.(N.S.) 936, 124 Am. St. Rep. 541, 81 N. E. 960, ought not to be overruled. It must be taken to be established in this commonwealth that to charge a gratuitous bailee the plaintiff must make out gross negligence on his part. *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168, 1 Am. Neg. Cas. 502; *Whitney v. Lee*, 8 Met. 91, 1 Am. Neg. Cas. 780; *Smith v. First Nat. Bank*, 99 Mass. 606, 97 Am. Dec. 59, 1 Am. Neg. Cas. 523; *Jenkins v. Bacon*, 111 Mass. 373, 15 Am. Rep. 33, 1 Am. Neg. Cas. 781. The measure of liability of one who undertakes to carry gratis is the same as that of one who undertakes to keep gratis. To this is to be added the fact that, in every case in England in which the question of the measure of liability of a person who enters upon any gratuitous undertaking has arisen, the same conclusion has been reached. *Giblin v. McMullen*; *Moffatt v. Bateman and Coughlin v. Gillison*, supra. From an examination of the cases, apart from *Gill v. Middleton*, in which a contrary conclusion has been reached, it is apparent that they depend upon the decision in *Corrigan v. Union Sugar Refinery*, 98 Mass. 577, 96 Am. Dec. 685, or upon the proposition that degrees in negligence are not known to the common law. We are of opinion in the first place, for reasons already stated, that the principle of *Corrigan v. Union Sugar Refinery* does not bear upon the measure of liability of one who invites another to ride gratis in his carriage; and in the second place, that in this commonwealth at any rate degrees of negligence are known to the law. *Gill v. Middleton* was decided on the authority of cases in England and in the Supreme Court of the United States, since repudiated in *Giblin v. McMullen*, supra, and in New York *C. R. Co. v. Lockwood*, 17 Wall. 357, 382, 383, 21 L. ed. 627, 641, 10 Am. Neg. Cas. 624. In *Gill v. Middleton* the proposition was stated that "the law furnishes no definition of gross negligence, as distinguished from want of reasonable and ordinary care, which can be of any practical utility."

That proposition is not law in this commonwealth to-day. In addition the decision in *Gill v. Middleton* is in conflict with that in *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168, 1 Am. Neg. Cas. 502, and the subsequent cases affirming that decision, and with *West v. Poor*. We are of opinion L.R.A.1918C.

that *Gill v. Middleton* and the cases following it* are not law in this respect, and that they should be overruled in so far as they conflict with those cases. A word of explanation should be added with respect to what was said of *Gill v. Middleton* in the case of *Thomas v. Lane*, 221 Mass. 447, L.R.A.1916F, 1077, 109 N. E. 363. *Gill v. Middleton* involved inter alia these two propositions; namely, first, that a defendant who undertakes to do an act gratis for the benefit of the plaintiff is liable if guilty of the requisite negligence; and, second, that since "the law furnishes no definition of gross negligence, as distinguished from want of reasonable and ordinary care, which can be of any practical utility," the defendant is liable in such a case if the plaintiff proves that he was guilty of ordinary negligence. In *Thomas v. Lane*, supra, an attack was made upon the first of these two propositions. It was held that that attack had to fail. There was no occasion at that time to consider, or rather to reconsider, the second of these two propositions, and that proposition was not then passed upon. So far as the first of these two propositions is concerned *Gill v. Middleton* is law, as was stated in *Thomas v. Lane*, supra, but so far as the second proposition is concerned that case is now overruled.

Approaching the question apart from authority we are led to the same conclusion. Justice requires that the one who undertakes to perform a duty gratuitously should not be under the same measure of obligation as one who enters upon the same undertaking for pay. There is an inherent difficulty in stating the difference between the measure of duty which is assumed in the two cases. But justice requires that, to make out liability in case of a gratuitous undertaking, the plaintiff ought to prove a materially greater degree of negligence than he has to prove where the defendant is to be paid for doing the same thing. It is a distinction which seventy-five years' practice in this commonwealth has shown is not too indefinite a one to be drawn by the judge and acted upon by the jury.

We are of opinion that the decision in *West v. Poor* should be affirmed and followed in the case at bar.

In the view which we have taken it has not

*The rule of *Gill v. Middleton* was applied in *Riley v. Lissner*, 160 Mass. 330, 35 N. E. 1130; *Buldra v. Henin*, 212 Mass. 275, 98 N. E. 863; *McLeod v. Rawson*, 215 Mass. 257, 46 L.R.A.(N.S.) 547, 102 N. E. 429; and it was referred to as law in *Dix v. Old Colony Street R. Co.* 202 Mass. 518, 523, 24 L.R.A.(N.S.) 567, 89 N. E. 109, and in *Stewart v. Cushing*, 204 Mass. 154, 157, 90 N. E. 545.

been necessary to consider the doctrine of *Southcote v. Stanley*, 1 Hurlst. & N. 247, 156 Eng. Reprint, 1195, 25 L. J. Exch. N. S. 339, 19 Eng. Rul. Cas. 60, as to which see *Plummer v. Dill*, 156 Mass. 426, 427, 32 Am. St. Rep. 463, 31 N. E. 128, and *Hart v. Cole*, 156 Mass. 475, 477, 16 L.R.A. 557, 31 N. E. 644.

The plaintiff has sought to bring this case within *Loftus v. Pelletier*, 223 Mass. 63, 111 N. E. 712, by suggesting that the

jury could have found that the defendant gave the invitation to get the plaintiff's society at the time in question. In *Loftus v. Pelletier* the plaintiff had a right to be transported by reason of the fact that she had paid for such transportation by her services as a nurse. The transportation in the case at bar was gratuitous.

The entry must be: Judgment on the verdict.

Annotation—Automobiles: liability of owner or operator for injury to guest.

This note supplements the notes to *Beard v. Klusmeier*, 50 L.R.A.(N.S.) 1100, and *Perkins v. Galloway*, L.R.A. 1916E, 1190.

As to liability for injury to passenger by negligent operation of automobile, see notes to *Johnson v. Coey*, 21 L.R.A. (N.S.) 81, and *Hinds v. Steere*, 35 L.R.A. (N.S.) 658.

It will be noticed that the court in *MASSALETTI v. FITZROY*, ante, 264, imposes upon the owner of an automobile who has invited a guest to ride liability for an injury to the latter through the operation of the car only in case of gross negligence on the part of the owner or his servant. It goes to great length to show that the different degrees of negligence still obtain in Massachusetts. Aside from the fact that, in some jurisdictions at least, the different degrees of negligence are no longer recognized, the rule requiring the owner of an automobile to exercise ordinary and reasonable care toward a guest whom he has invited to ride with him appears sound, and not to impose too great a burden upon the owner. As stated in the earlier annotation, the tendency of the cases appears to be toward this rule, and it has been adopted in two cases decided since the preparation of the last note.

Thus, in *Jacobs v. Jacobs* (1917) 141 La. 272, L.R.A.1917F, 253, 74 So. 992, it was held that, although an invited guest of the driver of an automobile, being a mere licensee, was not entitled to the consideration due from a carrier to a passenger for hire, he was nevertheless entitled to the benefit of the provisions of the Civil Code that any act of negligence or imprudence that causes injury or loss to another obliges him who was at fault to pay for the injury or loss. The court here said, with regard to the care required of the driver of an automobile for the safety of a passenger riding as a L.R.A.1918C.

guest, that it did not recognize the distinction referred to in some jurisdictions between gross or wilful negligence and the ordinary negligence or imprudence referred to in the provisions of the Civil Code, and stated that it agreed with the doctrine recognized in *Beard v. Klusmeier* (1914) 158 Ky. 153, 50 L.R.A. (N.S.) 1100, 164 S. W. 319, Ann. Cas. 1915D, 342, which was approved in *Fitzjarrell v. Boyd* (1914) 123 Md. 497, 91 Atl. 547, that a guest in an automobile is entitled to demand that his host shall exercise ordinary care for his safety in driving the car, and that the latter's liability is not confined to acts of gross negligence or wilful recklessness. The evidence in this case, however, was held to show no negligence on the part of the defendant, and it was stated that the plaintiff's failure to warn the defendant when he saw that he did not know that the road ahead was unsafe was the only neglect on the part of any occupant of the car that caused or contributed to the accident.

On the second appeal of *Perkins v. Galloway* (1917) — Ala. —, 73 So. 956, in accord with the conclusion reached on the first appeal in (1915) 194 Ala. 265, L.R.A.1916E, 1190, 69 So. 875, it was held that the owner and driver of an automobile was liable for the wrongful death of an invited guest due to the owner's failure to exercise reasonable care in the operation of the car. The court said: "It does seem to be a harsh or hard rule which makes the carrier or host liable to the passenger or guest as for injury or death in the absence of gross negligence or wantonness, especially when the passenger or guest is treated by the carrier or host just as the latter himself is treated, and when both are injured by the same accident, as in this case. If this be so, the reply is: The law is so written, and cannot and should not be changed to meet hard cases; such

instability would make shipwreck of the law. The liability of the owner of an automobile to a guest riding for pleasure only was recognized, but not decided, in the case of *Powers v. Williamson* (1915) 189 Ala. 600, 66 So. 585. That decision, however, went off on the ground that the owner of the machine was not in that case liable for the negligence of his son, who was operating the car; that is, that the doctrine of respondeat superior did not apply in that case. It is, however, a necessary conclusion that the owner would have been held liable in that case had the son been held to be the agent of his father, the defendant, or had the father, who was the owner, been operating the machine and been guilty of negligence proximately contributing to the injury. It is very true that it has been held that a gratuitous carrier of goods, like a gratuitous bailee of goods, is not liable to the owner of the goods in the absence of gross negligence. This distinction is well pointed out by Mr. Hutchinson (*Carriers*, vol. 2, § 1022, p. 1179), who says: 'This, it will be observed, is different from the well-settled rule in regard to the gratuitous carriage of goods, which, as has been seen, does not impose upon the common carrier the same degree of responsibility as when the carriage is for compensation, and this illustrates the different light in which the two kinds of business are viewed by the law. The carrier of goods becomes an insurer of their safety only when he is paid to become so; but the carrier of the passenger is bound to the utmost care and caution whether paid

by the passenger or not; and this distinction is based upon wholly different reasons of public policy, being in the one case the value which it puts upon human life and personal safety, and in the other the necessity of preventing frauds and combinations, to the "undoing of all persons" who may have dealings of that kind with the carrier. This distinction between the gratuitous bailment of goods to the carrier and the gratuitous carriage of the passenger is, upon this ground, well established, and in the latter case the carrier's liability is the same as when he is paid for the carriage.' "

In this case, although the guest was not invited to ride by the defendant, but by another person who was in the automobile, it was held that, as the defendant knew of the guest's presence in the car, the duty not to injure him was the same as if he had expressly invited him to ride.

In *Karavias v. Gallinocoe* (1917) 143 L. T. Jo. (Eng.) 237, where the defendant had invited the plaintiff to ride in his motor car and the latter had sustained an injury, it was held that the plaintiff was entitled to recover, the jury having found that the defendant had failed to exercise reasonable care, but that he was not guilty of gross negligence. The court, however, expressed some doubt upon the question involved, and stated that it was a fit question to be taken to the court of appeals whether in such a case it was necessary for the plaintiff to prove gross negligence to entitle him to recover.

J. T. W.

TEXAS CRIMINAL COURT OF APPEALS.

EX PARTE TOM O. STOUT.

(— Tex. Crim. Rep. —, 198 S. W. 967.)

Municipal corporations — power to prevent picketing.

1. Power to prevent the use of sidewalks for picketing is conferred upon a municipal corporation by charter authority to control the streets and highways, to abate nuisances, and to preserve order.

For other cases, see *Municipal Corporations*, II. c. 4, b, (1), in *Dig. 1-52 N. S.*

Note. — As to validity of statute or ordinance against picketing, see annotation following this case, post, 282.
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Constitutional law — freedom of speech — prohibition of picketing.

2. The constitutional freedom of speech is not infringed by forbidding the use of the sidewalks of a municipal corporation for picketing.

For other cases, see *Constitutional Law*, II. d, in *Dig. 1-52 N. S.*

Municipal corporations — ordinance — conflict with statute — picketing.

3. A statute authorizing the formation of trade unions and making it lawful for members thereof to induce persons to quit their employment or not to enter them does not prevent the enactment of an ordinance forbidding the use of the sidewalks to persuade by signs or word of mouth persons from patronizing certain places of business. For other cases, see *Municipal Corporations*, II. c. 4, b, (1), in *Dig. 1-52 N. S.*

Same — reasonableness of ordinance.

4. An ordinance forbidding the use of the sidewalks for picketing to prevent persons from patronizing certain places of business is not unreasonable.

For other cases, see Municipal Corporations, II. c. 4, b, (1), in Dig. 1-52 N. S.

(November 21, 1917.)

APPPLICATION for a writ of habeas corpus to secure petitioner's release from custody to which he had been committed for picketing in alleged violation of an ordinance of the city of El Paso. Petitioner remanded.

The facts are stated in the opinion.

Messrs. Hudspeth, Dale, & Harper for petitioner.

Messrs. J. M. McBroom and E. B. Hendrick, Assistant Attorney General, for the State.

Prendergast, J., delivered the opinion of the court:

Before May 14, 1917, the city council of El Paso, its lawmaking power, duly enacted, and on that date was in force, the following ordinance:

"An Ordinance to Regulate Walking Back and Forth, Loitering or Remaining on the Streets and Sidewalks in the City of El Paso, Texas.

"Be it Ordained by the City Council of the City of El Paso, Texas:

"Section 1. It shall be unlawful for any person or persons to walk back and forth, loiter or remain, or cause any person to walk back and forth, loiter or remain upon the streets or sidewalks in the city of El Paso, Texas, in front of any business house for the purpose of persuading any person or persons by word of mouth from entering said place or places of business for the purpose of transacting business therein.

"Sec. 2. It shall be unlawful for any person or persons to walk back and forth, loiter or remain, or cause any person to walk back and forth, loiter or remain upon the streets or sidewalks in the city of El Paso, Texas, in front of any business house for the purpose of persuading any person or persons by signs carried from entering said place or places of business for the purpose of transacting business therein.

"Sec. 3. Provided, that neither of the foregoing sections shall be held to render it unlawful for any member or members of any trade union, organization or association, or any other person to induce, or attempt to induce by peaceable and lawful means, any person to accept any particular employment, or quit or relinquish any particular employ-

ment in which such person may then be engaged, or to enter any pursuit, or refuse to enter any pursuit, or quit or relinquish any pursuit in which such person may then be engaged: Provided, that such member or members shall not have the right to invade or trespass upon the premises of another without the consent of the owner thereof.

"Sec. 4. Any person or persons violating the foregoing ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not in excess of two hundred (\$200) dollars.

"Sec. 5. Should it hereafter be discovered or adjudged by any court that any section or portion of this ordinance is unconstitutional, void or invalid for any reason, it shall not affect the validity or constitutionality of the remaining portions of this ordinance, unless such portion so declared unconstitutional, void or invalid is so interwoven with, or dependent upon other portions of said ordinance that the same cannot be enforced as intended by this ordinance.

"Sec. 6. Whereas, the fact that there is at present no sufficient ordinance regulating the standing, loitering or remaining upon the streets and sidewalks in the city of El Paso, Texas, creates a public emergency justifying the suspension of the charter rule requiring that all ordinances be read at two regular meetings of the city council, and the same is hereby suspended by the consent of the mayor and the unanimous vote of all aldermen present, and this ordinance shall take effect and be in force from and after its passage, approval and publication."

Said Stout was prosecuted for the violation of § 2 of said ordinance before the corporation court, was convicted, and fined \$25, which he refused to pay. He was thereupon taken into custody by the chief of police of El Paso and held. He sued out a writ of habeas corpus before this court. The facts were agreed upon. At the time he was arrested he was doing "picketing" on the sidewalk in front of the Java Café at 314 San Antonio street in the city of El Paso, which consisted of his walking up and down the outer edge of the sidewalk, and back and forth in front of said café, carrying what is termed a "sandwich" badge on his breast, and a like badge on his back, which contained the following words: "This restaurant unfair to organized labor and sympathizers. Cooks', Waiters', & Waitresses' Union, Local 848. Labor is worthy of its hire." He did not engage in conversation, nor was anything said to him by anyone while so "picketing." He was a member of the Cooks', Waiters', & Waitresses' Union, Local 848, and was doing the "picketing" by authority of that union, and because the

Java Café was not employing union cooks, waiters, and waitresses.

He attacks the validity of said ordinance:

1. Because he claims the city of El Paso had no authority to pass such an ordinance.

The charter of El Paso was a special act of the legislature of 1907, p. 24. Section 2 thereof gives said city this power and authority: "The city of El Paso shall have power to enact and to enforce all ordinance necessary to protect health, life and property, and to prevent and summarily abate and remove nuisances, and to preserve and enforce the good government, order and security of the city and its inhabitants; to protect the lives, health and property of the inhabitants of said city, and to enact . . . any and all ordinances upon any subject: Provided, that no ordinance shall be enacted inconsistent with the laws of the state of Texas, or inconsistent with the provisions of this act; and provided, further, that the specification of particular powers shall never be construed as a limitation upon the general powers herein granted; it being intended by this act to grant and bestow upon the inhabitants of the city of El Paso full power of self-government, and it shall have and exercise all powers of municipal government not prohibited to it by this chapter or by some general law of the state of Texas or by the provisions of the Constitution of the state of Texas."

Section 56 also gives the city this power and authority: "The city council shall have complete and exclusive control and power over the streets, alleys, and highways of the city, and to abate and remove encroachments thereon; to open, alter, close, widen, extend, establish, regulate, sell, lease, grade, clean or otherwise improve said streets: Provided, no street shall ever be closed, sold or leased except for an adequate consideration, and not then except by the vote of at least three fourths of the aldermen and the approval of the mayor; to put drains or sewers therein and to prevent the encumbering thereof in any manner and to protect the same from encroachment or injury: Provided, that the city shall not be liable in damages at the suit of any person for injury, either to person or property, arising from an unsafe condition or want of repair of any street, square, alley, plaza, park, sidewalk, or public place in the city unless at least ten days before the injury occurred a notice in writing shall have been filed with the city clerk for the city council specifically pointing out the nature and exact locality of the defect, obstruction, or other thing that afterward occasions the injury."

The very object and purpose of municipal governments is to pass and enforce ordinances to preserve and enforce the good govern-

ment, order, and security of it and its inhabitants, and to protect the lives, health, and property of its inhabitants. If they had no power to do these things their creation and maintenance might be useless. This power and authority given said city is ample and complete to authorize it to pass and enforce said ordinance for any of the objects or purposes specified, unless there is some constitutional or statutory provision which would prevent or prohibit it. Ex parte Sullivan, 77 Tex. Crim. Rep. 87, P.U.R. 1915E, 441, 178 S. W. 537, and authorities cited; Strauss v. State, 76 Tex. Crim. Rep. 135, 173 S. W. 663, and authorities cited.

2. The relator contends that said ordinance violates § 8, art. 1, of the Constitution of Texas, which provides: "Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press."

And he states it also violates subdivision 1 of the 14th Amendment to the Constitution of the United States, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Under this attack he presents only the claimed invalidity under said provision of our state Constitution, and cites Ex parte Neill, 32 Tex. Crim. Rep. 276, 40 Am. St. Rep. 776, 22 S. W. 923; Ex parte Foster, 44 Tex. Crim. Rep. 427, 60 L.R.A. 631, 100 Am. St. Rep. 866, 71 S. W. 593; Mitchell v. Grand Lodge, F. A. M. 56 Tex. Civ. App. 306, 121 S. W. 179; St. Louis v. Gloner, 210 Mo. 502, 15 L.R.A. (N.S.) 973, 124 Am. St. Rep. 750, 109 S. W. 30, as sustaining him.

The Neill Case held an ordinance of Seguin void which enacted that the "Sunday Sun," a paper published at Chicago, was a nuisance, and prohibited its circulation in Seguin, and made it an offense for any person to sell it therein. This court therein held: "We are not informed of any authority which sustains the doctrine that a municipal corporation is invested with the power to declare the sale of newspapers a nuisance. The power to suppress one concedes the power to suppress all, whether such publications are political, secular, religious, decent or indecent, obscene or otherwise. The doctrine of the Constitution must prevail in this state, which clothes the citizen with liberty to speak, write, or publish his opinion on any and all subjects, subject alone

to responsibility for the abuse of such privilege."

The Foster Case held a district judge could not, by an order in a criminal case, prohibit a newspaper from publishing the evidence given in the trial while being tried, and then punish for contempt one who did so publish the evidence, mainly because the Constitution required such trials to be public.

The court of civil appeals in the Mitchell Case held an injunction would not lie to prohibit the publication of a libel but said our supreme court had never so held, and that the courts of other states differed on the question. That court must have overlooked the cases of *Ex parte Dupree*, 101 Tex. 150, 105 S. W. 493; *Ex parte Allison*, 99 Tex. 463, 2 L.R.A. (N.S.) 1116, 122 Am. St. Rep. 653, 90 S. W. 870. These cases were passing primarily on statutory provisions, but the principles announced would embrace rights without regard to statutory provisions. But whether these cases were overlooked or not, this case is not applicable, if for no other reason, because the offense had already been committed, and he was convicted for that, and this was no proceeding to enjoin or otherwise prevent him from committing such offense in future.

The Gloner Case from Missouri shows an altogether different case from this: that the ordinance held void made it a misdemeanor merely "for any person to lounge, stand, loaf around, about, or at street corners in the day or nighttime." That court said: "There is no pretense that defendant was at the time of this arrest in any way obstructing the street, or interfering with the rights of any person."

Section 2 of this ordinance does not make such an act only an offense, but makes it "unlawful for any person to walk back and forth upon the streets or sidewalks of the city of El Paso, in front of any business house, for the purpose of persuading any person, by signs carried, from entering said place of business for the purpose of transacting business therein."

The difference in this and the Missouri ordinance is so marked as to make comment unnecessary.

In *Fitts v. Atlanta*, 121 Ga. 567, 67 L.R.A. 803, 104 Am. St. Rep. 167, 49 S. E. 793, the ordinance prohibited anyone from making a speech on the streets without license from the city authorities, and made it an offense if one did so. Fitts so made a speech without license and was arrested and fined therefor. He refused to pay the fine, and was taken and held in custody, and sued out a writ of habeas corpus, seeking discharge, because of his constitutional

right of free speech. Among other things the court held:

"The primary object of streets is for public passage. They should be kept open and unobstructed for that purpose. If damage accrues to passers by reason of improperly allowing them to be used for other purposes, the city may become liable. The streets of the city are peculiarly within the police control for the purpose of preserving and protecting their use by the public as thoroughfares. A man has many constitutional and legal rights which he cannot lawfully exercise in the streets of a city. Thus, every citizen has a right to lawfully acquire and hold personal property; but he has no right, constitutional or otherwise, to insist on storing his possessions in the street. Every man has the inalienable right to sleep and eat (if he has the edibles), but he has no constitutional right to make his bed or set his table in the street. Every man has not only the right to, but he should, bathe and cleanse himself, and change his raiment, if he has a change. This is a duty imposed by his individual constitution, if not by that of his country. But there is no constitutional right on his part to perform his ablutions or exercise the most necessary demands of his nature in the public streets. At proper times and in proper places one may make loud noises, or shoot a gun, or test his lung power vocally to a considerable extent, without offending against any law; but there is no right, inherent or constitutional, to make vociferous outcries or practise gunnery in the street. If Professor Fitt's idea of constitutional law were correct, I see no reason why every citizen should not claim a right to use the public streets for the exercise of his trade, calling, or profession, which may be much more essential to his welfare and that of the public than speechmaking by the plaintiff in certiorari, however eloquent, and regardless of the soundness or unsoundness of his argument.

"If the Constitution, state or Federal, guarantees to Professor Fitts the right to make public speeches on the streets of Atlanta, why does it not also guarantee the same right to every lecturer who may not desire to hire a hall, and to every showman who wishes to exhibit on the highway, or to every mechanic, artisan, merchant, or other citizen the right to ply his lawful vocation in the public thoroughfare? The constitutional right to exercise one's lawful vocation is quite as sacred, and often more important, than the right to make speeches; but the exercise of either right must yield to the municipal power properly exercised over the streets for the primary objects for which they were established. If

everyone who has some constitutional right has also the constitutional right to exercise it in the streets of a city regardless of municipal regulations, these thoroughfares may soon become a gathering place of a numerous clan rivaling those adjuncts of modern exhibitions, which, since the term was used during the Columbian Exposition at Chicago in 1893, have come to be distinguished by the name of 'Midway Plaisance.' The right of the public in regard to the streets is to use them for passage as public highways, provided they are used lawfully for that purpose. But even the right of passage is subject to reasonable legislative regulations for the general good. Thus, idling and loitering in the public streets have generally been prohibited, and no one has yet doubted the constitutionality of such legislation."

See *Love v. Judge of Recorder's Ct.* (Love v. Phalen) 128 Mich. 545, 55 L.R.A. 618, 87 N. W. 785; *Com. v. Davis*, 162 Mass. 510, 26 L.R.A. 712, 44 Am. St. Rep. 389, 39 N. E. 113; and also *Goldberg, B. & Co. v. Stablemen's Union*, 149 Cal. 429, 8 L.R.A. (N.S.) 460, 117 Am. St. Rep. 145, 86 Pac. 806, 9 Ann. Cas. 1219; *Jensen v. Cook & Waiters' Union*, 39 Wash. 531, 4 L.R.A. (N.S.) 302, 81 Pac. 1069; *Barnes v. Chicago Typographical Union*, 232 Ill. 424, 14 L.R.A. (N.S.) 1018, 83 N. E. 940, 13 Ann. Cas. 54.

The principles applicable to "picketing," made illegal as by this ordinance, have been held valid in other jurisdictions. See *Re Williams*, 158 Cal. 550, 111 Pac. 1035; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; *Otis Steel Co. v. Local Union (C. C.)* 110 Fed. 698; *Knudsen v. Benn (C. C.)* 123 Fed. 636; and other cases.

In *Re Williams*, 158 Cal. 550, 111 Pac. 1035, such an ordinance, even less specific than this, was held valid. In the *Beck Case*, 118 Mich. 520, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13, the court held: "To picket complainants' premises in order to intercept their teamsters or persons going there to trade is unlawful. It itself is an act of intimidation, and an unwarrantable interference with the right of free trade. . . . It will not do to say that these pickets are thrown out for the purpose of peaceable argument and persuasion. They are intended to intimidate and coerce."

In the *Otis Steel Co. Case*, 110 Fed. 700, the court held: "Whether this picketing has been accompanied with violence or not we need not consider. It was certainly one of the means used by this defendant organization to enforce its mandate. While picketing may not be an occasion of war it certainly is an evidence that war exists, L.R.A.1918C.

and the term is appropriately borrowed from the nomenclature of actual warfare. This system, constantly kept up, in its nature leads to disturbance, and has a tendency to intimidate. . . . It is certainly true that this system of picketing, although it may not have been accompanied by violence on the part of those who have served as pickets, has and will do injury."

3. Relator further contends that said ordinance conflicts with articles 5244 and 5245 of the Revised Civil Statutes, and article 1478 of the Penal Code, and is therefore void on that account. Articles 5245 (Rev. Stat.) and 1478 (Penal Code) are exactly the same.

Whether these articles are in such conflict with said ordinance as to render it void is almost, if not entirely, a question of fact, to be determined by an inspection of them. In order to show clearly that they are not the same they will be quoted in parallel columns:

Art. 5244 (Rev. Stat.) is: It shall be lawful for any and all persons engaged in any kind of work or labor, manual or mental, or both, to associate themselves together and form trades unions and other organizations for the purpose of protecting themselves in their personal work, personal labor, and personal service, in their respective pursuits and employments.

Sec. 2 of said ordinance is: It shall be unlawful for any person or persons to walk back and forth, loiter or remain or cause any person to walk back and forth, loiter or remain upon the streets or sidewalks in the city of El Paso, Texas, in front of any business house for the purpose of persuading any person or persons by signs carried from entering said place or places of business for the purpose of transacting business therein.

Art. 5245 (Rev. Stat.) (Id. 1478, Penal Code) is: It shall not be held unlawful for any member or members of such trades union or other organization or association, or any other person, to induce or attempt to induce by peaceable and lawful means, any person to accept any particular employment, or quit or relinquish any particular employment in which such person may then be engaged, or to enter any pursuit, or refuse to enter any pursuit, or quit or relinquish any pursuit in which such person may then be engaged: Provided, that such member or members shall

Sec. 3 of said ordinance is: Provided, that neither of the foregoing sections shall be held to render it unlawful for any member or members of any trade union, organization, or association or any other person to induce, or attempt to induce by peaceable and lawful means, any person to accept any particular employment or quit or relinquish any particular employment in which such person may then be engaged, or to enter any pursuit or refuse to enter any pursuit or quit or relinquish any pursuit in which such person may then be engaged: Provided,

not have the right to invade or trespass upon the premises of another without the consent of the owner thereof.

that such member or members shall not have the right to invade or trespass upon the premises of another without the consent of the owner thereof.

It is unnecessary to here copy § 1 of said ordinance. It and also the others have already been copied herein. Section 3 of the ordinance makes it perfectly plain that it was the intention of the city council of El Paso in passing the ordinance to expressly avoid conflict with both the civil and penal articles copied above. It is clear that they accomplished such intent. What was made lawful by said articles was for any and all persons engaged in any kind of labor to associate themselves together and form trades unions for the purpose of protecting themselves in their personal work and in their respective pursuits and employments; and that it should not be held unlawful for any member of said unions to induce, or attempt to induce, by peaceable and lawful means, any person to accept any particular employment or quit the same in which such person may be engaged, or to enter any pursuit or to refuse to do so, or quit or relinquish any pursuit in which any such person may then be engaged.

As stated above, § 2 of said ordinance made it an offense and unlawful for any person to walk back and forth upon the sidewalks of said city in front of any business house for the purpose of persuading any person by signs carried from entering said place of business for the purpose of transacting business therein,—a very distinct and different thing from that made lawful by articles 5244, 5245 (Rev. Stat.). It seems so clear that the ordinance is not in conflict with said statute that it is deemed unnecessary to further discuss the question. Of course, if there had been such conflict between the statute and the ordinance the ordinance could not stand, but would be invalid. Appellant cites a number of cases to the effect that where there

is such conflict the ordinance is invalid. It is unnecessary to cite or discuss them, because the legal proposition laid down by them is correct.

4. The ordinance is not unreasonable, nor is it vague, uncertain, etc., so that it cannot be understood. The ordinance seems clear, plain, and easily understood. Instead of being unreasonable, it is most reasonable, under the circumstances. Authorities above are quoted which show that the acts of relator which are denounced by said ordinance were clearly intended to intimidate and coerce all union labor folks and their sympathizers, and others, from going into said restaurant or café and getting their meals, or having any other business transaction with the owner or proprietor thereof,—in other words, to injure and break up the proprietor's business. Such conduct as his would naturally lead to disturbances, and had a tendency to intimidate and prevent all persons from entering said restaurant, and would necessarily injure the proprietor in his business. There can be no doubt but that the proprietor or owner of said restaurant had a right to conduct his business to suit himself, and to employ union or nonunion laborers as suited him, and no one has the right to injure or disturb his business because he so chose to run it. The fact that his restaurant abutted upon the portion of the sidewalk where the relator was undertaking to injure and disturb him and his business of itself would give him some rights. It was the duty of the city of El Paso by such an ordinance to protect him in the conduct of his business, otherwise the city would not have been doing its duty to him and other citizens, "to preserve and enforce good government, order and security of the city and its inhabitants, and to protect the lives, health and property of its inhabitants."

The ordinance is not invalid and void, but, on the contrary, is valid and legal. The relator is therefore remanded to the custody of the marshal of the city of El Paso.

Annotation—Validity of statute or ordinance against picketing.

For cases dealing with picketing generally, especially injunctions against the same, see notes to *Jensen v. Cooks' & Waiters' Union*, 4 L.R.A.(N.S.) 302, and *Re Langell*, 50 L.R.A.(N.S.) 412.

The authorities are meager upon the question. In *Ex PARTE STOUT*, ante, 277, the court upholds the validity of a municipal ordinance forbidding the use of the sidewalks for picketing.

In *Hardie-Tynes Mfg. Co. v. Cruise* L.R.A.1918C.

(1914) 189 Ala. 66, 66 So. 657, which was a suit to enjoin defendant from interfering with plaintiff's employees, the court, in answer to a contention that the bill was demurrable in so far as it sought to prevent peaceable picketing and a peaceable persuasion of complainant's workmen to leave their employment, held that their statute which made it a misdemeanor for any persons or person to picket the works or place of busi-

ness of another person, firm, or corporation for the purpose of interfering with or injuring any lawful business or enterprise, did not permit them to so hold, and held that such statute prohibited peaceful picketing when done for the purpose named in the statute, saying: "Perhaps our legislature has taken the view adopted by some of the courts, that in actual practice there is and can be no such thing as peaceful picketing or peaceful persuasion. Certainly this is the effect of our statutes." And in answer to a suggestion that their construction of the statute as inhibiting picketing even where threats or violence were not used rendered it unconstitutional, the court said: "No intimation is offered as to what provision of the Constitution is thereby offended, and we can think of none. Certain it is that a right to actively and directly interfere with and prevent the operation of the lawful business of another is not included among the inalienable rights of 'life, liberty, and the pursuit of happiness.' The 'liberty' guaranteed by the Constitution (art. I, § 1) is liberty regulated by law and the social compact;

and in order that all men may enjoy liberty it is but the tritest truism to say that every man must renounce unbridled license. So, wherever the natural rights of citizens would, if exercised without restraint, deprive other citizens of rights which are also and equally natural, such assumed rights must yield to the regulations of municipal law. If one man asserts the constitutional right of preventing another from the pursuit of a lawful business, what is to become of the undoubted constitutional right of that other person to pursue his business unmolested? It is clear that this motion of liberty utterly ignores 'the other fellow,' and denies to him the very freedom it claims for itself."

And in *Re Williams* (1910) 158 Cal. 550, 111 Pac. 1035, an appeal from a conviction under an ordinance making it a misdemeanor to picket premises for the purpose of intimidating, threatening, and coercing persons, to prevent them from doing and performing services on such premises, the court said it had no doubt that the ordinance was a valid exercise of the powers of the local legislature. R. L. S.

UNITED STATES SUPREME COURT.

FIRST NATIONAL BANK OF BAY CITY,
Plff. in Err.,

v.

GRANT FELLOWS, Attorney General of
Michigan. EX REL. UNION TRUST
COMPANY et al.

(244 U. S. 416, 61 L. ed. 1233, 37 Sup. Ct.
Rep. 734.)

**National banks — conferring authority
to act as trustee, executor, adminis-
trator, or registrar.**

1. Congress did not exceed its power under U. S. Const. art. I, § 8, clause 18, to make "all laws which shall be necessary and proper for carrying into execution" the powers expressly given by the Constitution,

Note. — The constitutionality of the provisions of the Federal Reserve Act, which authorizes the Federal Reserve Board to grant by special permit to national banks applying therefor, when not in contravention of state or local laws, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the board may prescribe, is now established by the decision of the United States Supreme Court in the case above reported, which reverses the contrary decision of the Michigan supreme court in *Atty. Gen. ex rel. Union Trust Co. v. First Nat. Bank*, 192 Mich. 640, 159 N. W. 335. I.R.A.1918C.

when giving authority to the Federal Reserve Board by the Act of December 23, 1913, to grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the board may prescribe.

For other cases, see Banks, I. in Dig. 1-52 N. S.

Constitutional law — delegation of power — Federal Reserve Act.

2. Legislative power was not unconstitutionally conferred on the Federal Reserve Board by the Act of December 23, 1913, giving authority to that board to grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds, under such rules and regulations as the board may prescribe.

For other cases, see Constitutional Law, I. d. 4, in Dig. 1-52 N. S.

Courts — conflicting jurisdiction — quo warranto — national bank.

3. The institution by a state attorney general in a state court of the proceeding in the nature of quo warranto to test the authority of a national bank, under the Act of December 23, 1913, to act as trustee, executor, administrator, or registrar of stocks and bonds, was impliedly, if not expressly, authorized by the provisions of that section giving such power only "when not in

contravention of state or local law," and of the Act of June 3, 1864, making controversies concerning national banks cognizable in state courts.

For other cases, see Courts, IV. d, in Dig. 1-52 N. S.

(Mr. Justice Van Devanter and Mr. Justice Day dissent.)

(June 11, 1917.)

ERROR to the Supreme Court of the State of Michigan to review a judgment which, in a proceeding in the nature of quo warranto, held that the respondent could not be clothed with power by the Federal Reserve Board to act as trustee, executor, administrator, or registrar of stocks and bonds. Reversed.

The facts are stated in the opinion.

Messrs. Edward S. Clark and H. M. Gillett, for plaintiff in error:

The Federal Reserve Act was within the implied powers of Congress.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; *Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. ed. 196; *Easton v. Iowa*, 188 U. S. 220, 47 L. ed. 452, 23 Sup. Ct. Rep. 288, 12 Am. Crim. Rep. 522; *Stewart v. Kahn* (*Stewart v. Bloom*) 11 Wall. 493, 507, 20 L. ed. 176, 179; *Juilliard v. Greenman*, 110 U. S. 421, 28 L. ed. 204, 4 Sup. Ct. Rep. 122; *Legal Tender Cases*, 12 Wall. 457, 20 L. ed. 287; *Dooley v. Smith*, 13 Wall. 604, 20 L. ed. 547; *Ex parte Yarbrough*, 110 U. S. 651, 658, 28 L. ed. 274, 276, 4 Sup. Ct. Rep. 152; *Luxton v. North River Bridge Co.* 153 U. S. 529, 38 L. ed. 810, 14 Sup. Ct. Rep. 891; *United States v. Gettysburg Electric R. Co.* 160 U. S. 668, 681, 40 L. ed. 576, 577, 16 Sup. Ct. Rep. 427; *Wilson v. Shaw*, 204 U. S. 24, 51 L. ed. 351, 27 Sup. Ct. Rep. 233; *United States v. Fisher*, 2 Cranch, 358, 396, 2 L. ed. 304, 316; *Martin v. Hunter*, 1 Wheat. 304, 326, 327, 4 L. ed. 97, 102, 103; *Re Rapier*, 143 U. S. 110, 134, 36 L. ed. 93, 102, 12 Sup. Ct. Rep. 374; *Logan v. United States*, 144 U. S. 263, 283, 36 L. ed. 429, 435, 12 Sup. Ct. Rep. 617; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 471, 38 L. ed. 1047, 1055, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; *Boske v. Comingore*, 177 U. S. 459, 468, 469, 44 L. ed. 846, 850, 20 Sup. Ct. Rep. 701; *Lottery Case* (*Champion v. Ames*) 188 U. S. 321, 355, 47 L. ed. 492, 560, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; *Northern Securities Co. v. United States*, 193 U. S. 197, 336, 48 L. ed. 679, 699, 24 Sup. Ct. Rep. 436; *McCray v. United States*, 195 U. S. 27, 55, 56, 49 L. ed. 78, 95, 96, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 58, 55 L. ed. L.R.A.1918C.

364, 368, 31 Sup. Ct. Rep. 364; *Flint v. Stone Tracy Co.* 220 U. S. 107, 175, 176, 55 L. ed. 380, 423, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; *McDermott v. Wisconsin*, 228 U. S. 115, 128, 57 L. ed. 754, 764, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39.

As soon as any one of the implied powers of Congress is defined and confirmed by the decisions of this court, it becomes in effect an express power.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; *Osborn v. Bank of United States*, 9 Wheat. 738, 860, 861, 6 L. ed. 204, 230, 233.

Every reasonable presumption must be indulged in favor of the validity of an act of Congress.

United States v. Harris, 106 U. S. 629, 636, 27 L. ed. 290, 292, 1 Sup. Ct. Rep. 601; *United States v. Gettysburg Electric R. Co.* 160 U. S. 668, 681, 40 L. ed. 576, 581, 16 Sup. Ct. Rep. 427; *Boske v. Comingore*, 177 U. S. 459, 470, 44 L. ed. 846, 850, 20 Sup. Ct. Rep. 701; *Fairbank v. United States*, 181 U. S. 283, 285, 45 L. ed. 862, 863, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; *Sweet v. Rechel*, 159 U. S. 380, 392, 393, 40 L. ed. 188, 193, 194, 16 Sup. Ct. Rep. 43; *Knoxville v. Knoxville Water Co.* 212 U. S. 1, 8, 53 L. ed. 371, 378, 29 Sup. Ct. Rep. 148.

There is no such necessary dissimilarity between the business of trust companies and the business of national banks as to make the act of Congress in conferring upon the latter some or all of the functions of the former unconstitutional.

Bank for Savings v. The Collector (*Bank for Savings v. Field*) 3 Wall. 495, 18 L. ed. 207; *Oulton v. German & L. Sav. Soc.* 17 Wall. 109, 21 L. ed. 618; *Engel v. O'Malley*, 219 U. S. 128, 136, 55 L. ed. 128, 136, 31 Sup. Ct. Rep. 190; *MacLaren v. State*, 141 Wis. 577, 135 Am. St. Rep. 55, 124 N. W. 667, 18 Ann. Cas. 826; *Western Invest. Bkg. Co. v. Murray*, 6 Ariz. 215, 56 Pac. 728.

Mr. W. C. Elliott also for plaintiff in error.

Messrs. Henry M. Campbell and John G. Johnson, for defendant in error:

The United States government is one of limited powers, and Congress possesses only such powers as are expressly enumerated and such incidental or implied powers as are necessary to give effect to the powers expressly conferred upon it.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97; *United States v. Harris*, 106 U. S. 635, 27 L. ed. 292, 1 Sup. Ct. Rep. 601; *Kansas v. Colorado*, 206 U. S. 46, 82, 87, 51 L. ed. 956, 968, 970, 27 Sup. Ct. Rep. 655.

The Federal Constitution does not expressly authorize Congress to create corporations for any purpose. Congress has, however, implied authority to create them, as an appropriate means of executing powers of government expressly granted. Beyond this the authority does not extend.

M'Culloch v. Maryland, 4 Wheat. 377, 379, 4 L. ed. 594, 595; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. ed. 196; *Davis v. Elmira Sav. Bank*, 161 U. S. 283, 40 L. ed. 701, 16 Sup. Ct. Rep. 502; *Luxton v. North River Bridge Co.* 153 U. S. 529, 38 L. ed. 810, 14 Sup. Ct. Rep. 891; *McClellan v. Chipman*, 164 U. S. 357, 41 L. ed. 466, 17 Sup. Ct. Rep. 85.

Congress can confer upon national banks only such additional powers as are properly incidental to the exercise of their functions as agencies of the Federal government and necessary for that purpose.

United States v. Harris, 106 U. S. 636, 27 L. ed. 292, 1 Sup. Ct. Rep. 601.

A state has exclusive jurisdiction and authority over persons and property within its borders.

Pennoyer v. Neff, 95 U. S. 722, 24 L. ed. 568; *Overby v. Gordon*, 177 U. S. 214, 222, 44 L. ed. 741, 744, 20 Sup. Ct. Rep. 603; *Brown v. Fletcher*, 210 U. S. 82, 89, 52 L. ed. 966, 970, 28 Sup. Ct. Rep. 702; *United States v. Fox*, 94 U. S. 320, 24 L. ed. 192; *Michigan Trust Co. v. Ferry*, 228 U. S. 353, 57 L. ed. 874, 33 Sup. Ct. Rep. 560; *Dickinson v. Seaver*, 44 Mich. 624, 7 N. W. 182; *Lafferty v. People's Sav. Bank*, 76 Mich. 35, 43 N. W. 34; *American Missionary Asso. v. Hall*, 138 Mich. 247, 101 N. W. 535.

There are no laws which national banks, upon which these fiduciary powers may be conferred, can be compelled to obey in the administration of them.

Osborn v. Bank of United States, 9 Wheat. 823, 6 L. ed. 224; *First Nat. Bank v. Converse*, 200 U. S. 438, 50 L. ed. 342, 26 Sup. Ct. Rep. 306; *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; *Easton v. Iowa*, 188 U. S. 229, 47 L. ed. 456, 23 Sup. Ct. Rep. 288, 12 Am. Crim. Rep. 522; *Christopher v. Norvell*, 201 U. S. 225, 50 L. ed. 736, 26 Sup. Ct. Rep. 502, 5 Ann. Cas. 740; *Yates v. Jones Nat. Bank*, 206 U. S. 178, 51 L. ed. 1014, 27 Sup. Ct. Rep. 638; *People v. Fonda*, 62 Mich. 401, 29 N. W. 26.

Legislative powers cannot be delegated.

Cooley, Const. Lim. 6th ed. 137; *Marshall Field & Co. v. Clark*, 143 U. S. 694, 36 L. ed. 310, 12 Sup. Ct. Rep. 495; *Consolidated Coal Co. v. Illinois*, 185 U. S. 210, 46 L. ed. 877, 22 Sup. Ct. Rep. 616; *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; *Union Bridge Co. v. I.R.A.* 1918C.

United States, 204 U. S. 364, 385, 51 L. ed. 523, 533, 27 Sup. Ct. Rep. 367; *United States v. Grimaud*, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480; *Red "C" Oil Co. v. Board of Agriculture*, 222 U. S. 394, 56 L. ed. 245, 32 Sup. Ct. Rep. 152; *Interstate Commerce Commission v. Goodrich Transit Co.* 224 U. S. 214, 56 L. ed. 738, 32 Sup. Ct. Rep. 436; *Cincinnati, W. & Z. R. Co. v. Clinton County*, 1 Ohio St. 88; *State v. Great Northern R. Co.* 100 Minn. 445, 10 L.R.A.(N.S.) 250, 111 N. W. 289; *King v. Concordia F. Ins. Co.* 140 Mich. 267, 103 N. W. 616, 6 Ann. Cas. 87.

The Federal Reserve Board exercises legislative power when it grants to a national bank, by special permit, the right to act as trustee, etc.

Marshall Field & Co. v. Clark, 143 U. S. 694, 36 L. ed. 310, 12 Sup. Ct. Rep. 495; *United States v. Grimaud*, 220 U. S. 520, 55 L. ed. 569, 31 Sup. Ct. Rep. 480.

Messrs. John W. Davis, Joseph P. Cotton, and Milton C. Elliott, amici curie for the United States:

A state court is without jurisdiction to enjoin the operation of a Federal agency.

Ableman v. Booth, 21 How. 506, 16 L. ed. 169; *State v. Curtis*, 35 Conn. 374, 95 Am. Dec. 263; *Tarble's Case*, 13 Wall. 397, 20 L. ed. 597; *Van Reed v. People's Nat. Bank*, 198 U. S. 554, 557, 49 L. ed. 1161, 1162, 25 Sup. Ct. Rep. 775, 3 Ann. Cas. 1154.

An act of Congress is constitutional unless its repugnancy to the Constitution is clearly apparent.

Buttfield v. Stranahan, 192 U. S. 470, 492, 48 L. ed. 525, 534, 24 Sup. Ct. Rep. 349.

Congress has the power to incorporate banking associations to be used as instrumentalities of the government in the conduct of its fiscal affairs.

Easton v. Iowa, 188 U. S. 220, 229, 47 L. ed. 452, 456, 23 Sup. Ct. Rep. 288, 12 Am. Crim. Rep. 522; *M'Culloch v. Maryland*, 4 Wheat. 316, 401, 4 L. ed. 579, 600; *Osborn v. United States Bank*, 9 Wheat. 738, 861, 6 L. ed. 204, 233; *Slaughter-House Cases*, 16 Wall. 36, 64, 21 L. ed. 394, 404; *Legal Tender Case*, 110 U. S. 421, 445, 28 L. ed. 204, 213, 4 Sup. Ct. Rep. 122; *Luxton v. North River Bridge Co.* 153 U. S. 525, 529, 38 L. ed. 808, 810, 14 Sup. Ct. Rep. 891; *Christopher v. Norvell*, 201 U. S. 216, 226, 50 L. ed. 732, 736, 26 Sup. Ct. Rep. 502, 5 Ann. Cas. 740; *Wilson v. Shaw*, 204 U. S. 24, 34, 51 L. ed. 351, 357, 27 Sup. Ct. Rep. 233; *Robinson v. Turrentine*, 59 Fed. 555; *Dolley v. Abilene Nat. Bank*, 179 Fed. 465; *Larabee v. Dolley*, 175 Fed. 392; *Veazie Bank v. Fenno*, 8 Wall. 533, 551, 19 L. ed. 482, 488; *Mercantile Trust Co. v. Texas & P. R. Co.* 216 Fed. 231; *Easton v. Iowa*, 188 U. S. 220, 229, 47 L. ed. 452, 456, 23

Sup. Ct. Rep. 288, 12 Am. Crim. Rep. 522; *Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 29, 33, 23 L. ed. 196, 198.

The character of the powers conferred on a bank and the degree of their necessity are matters of legislative discretion.

Easton v. Iowa, 188 U. S. 220, 238, 47 L. ed. 452, 459, 23 Sup. Ct. Rep. 28, 12 Am. Crim. Rep. 522; *Osborn v. Bank of United States*, 9 Wheat. 860, 861, 864, 6 L. ed. 233, 234.

Experience has demonstrated that, while the National Bank Act provided a uniform and stable currency system, it lacked elasticity and was otherwise defective.

Holdsworth, Money & Bkg. pp. 330, 331; *Paine, Nat. Bkg. Laws*, 7th ed. p. 18.

The power of the Federal Reserve Board is administrative, not legislative.

Mutual Film Corp v. Industrial Commission, 236 U. S. 230, 59 L. ed. 552, 35 Sup. Ct. Rep. 387, Ann. Cas. 1916C, 296; *People ex rel. First Nat. Bank v. Brady*, 271 Ill. 100, L.R.A.—, 110 N. E. 864; *United States v. Grimaud*, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480.

Mr. Chief Justice White delivered the opinion of the court:

We are of opinion that the procedure resorted to was appropriate and that the state court was competent to administer relief, but we postpone stating our reasons on the subject until the merits have been passed upon.

The court below held that an act of Congress conferring on national banks additional powers was in excess of the authority of Congress, and was hence repugnant to the Constitution. 192 Mich. 640, 159 N. W. 335. The correctness of this conclusion is in substance the sole question for decision on the merits.

Although the powers given were new, the principles involved in the right to confer them were long since considered and defined in adjudged cases. We shall first consider the leading of such cases and then, after stating this case, determine whether the subject they are controlling, causing the subject not to be open for original consideration.

In *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 679, the bank had been incorporated by Congress with powers to transact business of both a governmental and of a private character. The question which was decided was the authority of Congress to grant such charter. Without undertaking to restate the opinion of Mr. Chief Justice Marshall, it suffices for the purpose of the matter now before us to say that it was held that although Congress was not expressly given the power to confer the charter, authority to do so was to be implied as appro-

priate to carry out the powers expressly given. In reaching this conclusion it was further decided that to recognize the existence of the implied power was not at all in conflict with article 1, § 8. clause 18, of the Constitution, providing that Congress should have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," since that provision did not confine the implied authority to things which were indispensably necessary, but, on the contrary, gave legislative power to adopt every appropriate means to give effect to the powers expressly given. In terms it was pointed out that this broad authority was not stereotyped as of any particular time, but endured, thus furnishing a perpetual and living sanction to the legislative authority within the limits of a just discretion, enabling it to take into consideration the changing wants and demands of society and to adopt provisions appropriate to meet every situation which it was deemed required to be provided for. In fact, the rulings which we have stated were all summed up in the following passage, which ever since has been one of the principal tests by which to determine the scope of the implied power of Congress over subjects committed to its legislative authority:

"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." p. 421.

In *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204, where substantially the subject was presented in the same form in which it had been passed upon in *M'Culloch v. Maryland*, yielding to the request of counsel, the whole subject was re-examined and the previous doctrines restated and upheld. Considering more fully, however, the question of the possession by the corporation of private powers associated with its public authority, and meeting the contention that the two were separable, and the one, the public power, should be treated as within, and the other, the private, as without, the implied power of Congress, it

was expressly held that the authority of Congress was to be ascertained by considering the bank as an entity possessing the rights and powers conferred upon it, and that the lawful power to create the bank and give it the attributes which were deemed essential could not be rendered unavailing by detaching particular powers and considering them isolatedly, and thus destroy the efficacy of the bank as a national instrument. The ruling in effect was that although a particular character of business might not be, when isolatedly considered, within the implied power of Congress, if such business was appropriate or relevant to the banking business, the implied power was to be tested by the right to create the bank and the authority to attach to it that which was relevant, in the judgment of Congress, to make the business of the bank successful. It was said: "Congress was of opinion that these faculties were necessary, to enable the bank to perform the services which are exacted from it, and for which it was created. This was certainly a question proper for the consideration of the national legislature." p. 864.

As the doctrines thus announced have been reiterated in a multitude of judicial decisions, and have been undeviatingly applied in legislative, and enforced in administrative, action, we come at once to state the case before us to see whether such doctrines dispose, without more, as a mere question of authority, of the subject under consideration.

Section 11(k) of the Act of Congress approved December 23, 1913, establishing the Federal Reserve Board (38 Stat. at L. 251, 262, chap. 6, Comp. Stat. 1916, §§ 9785, 9794), gives to that board authority "to grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe."

The First National Bank of Bay City, having obtained the certificate required, began the exercise of the powers stated. Thereupon certain trust companies which, under the laws of Michigan, had the authority to do the same character of business, petitioned the attorney general of the state to test the right of the national bank to use the functions, on the ground that its doing so was contrary to the laws of the state of Michigan, and that the action of the Federal Reserve Board, purporting to give authority, was in contravention of the Constitution of the United States. The attorney general then, on the relation of the trust companies, commenced in the su-

preme court of the state a proceeding in the nature of quo warranto to test the right of the corporation to exercise the functions. The bank, in defense, fully stated its Federal charter, the rights given by the act of Congress, and the action of the Federal Reserve Board taken thereunder. The attorney general demurred to this defense, first, because Congress had no power to confer the authority which was called in question; second, because if it had the power, it was without right to delegate to the Reserve Board the determination of when it should be used; and third, because the exercise of the powers was in contravention of the laws and authority of the state, and the Reserve Board, therefore, under the act, had no power to grant the certificate.

The case was heard by the full court. In an opinion of one judge, which, it would seem, was written before the opinion of the court was prepared, it was elaborately reasoned that the exercise by a national bank of the functions enumerated in the section of the act of Congress under consideration would be contrary to the laws of the state, and therefore the Reserve Board, under the terms of the act of Congress, had no power to authorize their exertion. The opinion of the court, however, fully examining the grounds thus stated and disagreeing with them, expressly decided that corporations were authorized by the state law to perform the functions in question, and that the mere fact that national banks were Federal corporations did not render them unfit to assume and perform such duties under the state law, because the mere difference existing between the general administrative rules governing national banks and state corporations afforded no ground for saying that it would be contrary to state law for national banks to exert the powers under consideration. The authority conferred by the act of Congress and the rights arising from the certificate from such point of view were therefore upheld. Looking at the subject, however, from a consideration of the legislative power of Congress in the light of the decisions in *McCulloch v. Maryland* and *Osborn v. Bank of United States*, and recognizing that it had been settled beyond dispute that Congress had power to organize banks and endow them with functions both of a public and private character, and in the assumed further light of the rule that every reasonable intendment must be indulged in in favor of the constitutionality of a legislative power exercised, it was yet decided that Congress had no authority to confer the powers embraced in the section of the act under consideration, and hence that the section was void. The court, fol-

lowing its reference to *M'Culloch v. Maryland* and *Osborn v. Bank of United States*, and to passages in the opinions in those cases, upholding the rightful possession by the bank of both public functions and private banking attributes, stated the grounds which led it to conclude that the rulings in the decided cases were distinguishable and therefore not controlling. It said:

"But in the reasoning of the judges, in the opinions to which I have referred, I find, I think, a conclusive argument supporting the proposition that Congress has exceeded its constitutional powers in granting to banks the right to act as trustees, executors, and administrators. If for mere profit it can clothe this agency with the powers enumerated, it can give it the rights of a trading corporation, or a transportation company, or both. There is, as Judge Marshall points out, a natural connection between the business of banking and the carrying on of Federal fiscal operations. There is none, apparently, between such operations and the business of settling estates, or acting as the trustee of bondholders. This being so, there is in the legislation a direct invasion of the sovereignty of the state which controls not only the devolution of estates of deceased persons and the conducting of private business within the state, but as well the creation of corporations and the qualifications and duties of such as may engage in the business of acting as trustees, executors, and administrators. Such an invasion I think the court may declare and may prevent by its order operating upon the offending agency." [192 Mich. 633, 159 N. W. 339.]

But we are of opinion that the doctrine thus announced not only was wholly inadequate to distinguish the case before us from the rulings in *M'Culloch v. Maryland* and *Osborn v. Bank of United States*, but, on the contrary, directly conflicted with what was decided in those cases; that is to say, disregarded their authority so as to cause it to be our duty to reverse for the following reasons:

1. Because the opinion of the court, instead of testing the existence of the implied power to grant the particular functions in question by considering the bank as created by Congress as an entity, with all the functions and attributes conferred upon it, rested the determination as to such power upon a separation of the particular functions from the other attributes and functions of the bank, and ascertained the existence of the implied authority to confer them by considering them as segregated; that is, by disregarding their relation to the bank as component parts of its operations,—a doctrine which, as we have seen, was in the

most express terms held to be unsound in both of the cases.

2. Because while, in the premise to the reasoning, the right of Congress was fully recognized to exercise its legislative judgment as to the necessity for creating the bank, including the scope and character of the public and private powers which should be given to it, in application the discretion of Congress was disregarded or set aside by exercising judicial discretion for the purpose of determining whether it was relevant or appropriate to give the bank the particular functions in question.

3. Because even under this mistaken view the conclusion that there was no ground for implying the power in Congress was erroneous because it was based on a mistaken standard, since, for the purpose of testing how far the functions in question which were conferred by the act of Congress on the bank were relevant to its business, or had any relation to discrimination by state legislation against banks created by Congress, it considered not the actual situation, that is, the condition of the state legislation, but an imaginary or nonexistent condition; that is, the assumption that, so far as the state power was concerned, the particular functions were in the state enjoyed only by individuals or corporations not coming at all, actually or potentially, in competition with national banks. And the far-reaching effect of this error becomes manifest when it is borne in mind that, plainly, the particular functions enumerated in the statute were conferred upon national banks because of the fact that they were enjoyed as the result of state legislation, by state corporations, rivals in a greater or less degree of national banks.

4. In view of the express ruling that the enjoyment of the powers in question by the national bank would not be in contravention of the state law, it follows that the reference of the court below to the state authority over the particular subjects which the statute deals with must have proceeded upon the erroneous assumption that, because a particular function was subject to be regulated by the state law, therefore Congress was without power to give a national bank the right to carry on such functions. But if this be what the statement signifies, the conflict between it and the rule settled in *M'Culloch v. Maryland* and *Osborn v. Bank of United States* is manifest. What those cases established was that although a business was of a private nature and subject to state regulation, if it was of such a character as to cause it to be incidental to the successful discharge by a bank chartered by Congress of its public functions, it was competent for Congress to

give the bank the power to exercise such private business in co-operation with or as part of its public authority. Manifestly this excluded the power of the state in such case, although it might possess in a general sense authority to regulate such business, to use that authority to prohibit such business from being united by Congress with the banking function, since to do so would be but the exertion of state authority to prohibit Congress from exerting a power which, under the Constitution, it had a right to exercise. From this it must also follow that even although a business be of such a character that it is not inherently considered susceptible of being included by Congress in the powers conferred on national banks, that rule would cease to apply if, by state law, state banking corporations, trust companies, or others which, by reason of their business, are rivals or quasi rivals of national banks, are permitted to carry on such business. This must be, since the state may not by legislation create a condition as to a particular business which would bring about actual or potential competition with the business of national banks, and at the same time deny the power of Congress to meet such created condition by legislation appropriate to avoid the injury which otherwise would be suffered by the national agency. Of course, as the general subject of regulating the character of business just referred to is peculiarly within state administrative control, state regulations for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came, in virtue of authority conferred upon them by Congress, to exert such particular powers. And these considerations clearly were in the legislative mind when it enacted the statute in question. This result would seem to be plain when it is observed (a) that the statute authorizes the exertion of the particular functions by national banks when not in contravention of the state law; that is, where the right to perform them is expressly given by the state law; or, what is equivalent, is deducible from the state law because that law has given the function to state banks or corporations whose business in a greater or less degree rivals that of national banks, thus engendering from the state law itself an implication of authority in Congress to do as to national banks that which the state law has done as to other corporations; and (b) that the statute subjects the right to exert the particular functions which it confers on national banks to the administrative authority of the Reserve Board, giving

besides to that board power to adopt rules regulating the exercise of the functions conferred, thus affording the means of coordinating the functions when permitted to be discharged by national banks with the reasonable and nondiscriminating provisions of state law regulating their exercise as to state corporations,—the whole to the end that harmony and the concordant exercise of the national and state power might result.

Before passing to the question of procedure we think it necessary to do no more than say that a contention which was pressed in argument, and which it may be was indirectly referred to in the opinion of the court below, that the authority given by the section to the Reserve Board was void because conferring legislative power on that board, is so plainly adversely disposed of by many previous adjudications as to cause it to be necessary only to refer to them. *Marshall Field & Co. v. Clark*, 143 U. S. 649, 38 L. ed. 294, 12 Sup. Ct. Rep. 495; *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; *United States v. Grimaud*, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480; *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 54 L. ed. 435, 30 Sup. Ct. Rep. 356; *Intermountain Rate Cases (United States v. Atchison, T. & S. F. R. Co.)* 234 U. S. 476, 58 L. ed. 1408, 34 Sup. Ct. Rep. 986.

The question of the competency of the procedure and the right to administer the remedy sought then remains. It involves a challenge of the right of the state attorney general to resort in a state court to proceedings in the nature of quo warranto to test the power of the corporation to exert the particular functions given by the act of Congress because they were inherently Federal in character, enjoyed by a Federal corporation, and susceptible only of being directly tested in a Federal court. Support for the challenge in argument is rested upon *Ableman v. Booth*, 21 How. 506, 16 L. ed. 169; *Tarble's Case*, 13 Wall. 397, 20 L. ed. 597; *Van Reed v. People's Nat. Bank*, 198 U. S. 554, 557, 49 L. ed. 1161, 1162, 25 Sup. Ct. Rep. 775, 3 Ann. Cas. 1154; *State ex rel. Wilcox v. Curtis*, 35 Conn. 374, 95 Am. Dec. 263. But, without inquiring into the merits of the doctrine upon which the proposition rests, we think when the contention is tested by a consideration of the subject-matter of this particular controversy it cannot be sustained. In other words, we are of opinion that, as the particular functions in question, by the express terms of the act of Congress, were given only "when not in contravention of state or local law," the state court was, if not expressly, at least impliedly, authorized by Congress to consider

and pass upon the question whether the particular power was or was not in contravention of the state law, and we place our conclusion on that ground. We find no ambiguity in the text, but if it be that ambiguity is latent in the provision, a consideration of its purpose would dispel doubt; especially in view of the interpretation which we have given the statute, and the contrast between the clause governing the subject of the state law and the provision conferring administrative power on the Reserve Board. The nature of the subject dealt with adds cogency to this view, since that subject involves the action of state courts of probate in a universal sense, implying from its very nature the duty of such courts to pass upon the question, and the power of the court below, within the limits of state jurisdiction, to settle, so far as the state was concerned, the question for all such courts by one suit, thus avoiding the confusion which might arise in the entire system of state probate proceedings and the very serious injury to many classes of society which also might be occasioned. And our conclusion on this subject is fortified by the terms of § 57, chap. 106, 13 Stat. at L. 116, making controversies concerning national banks cognizable in state courts because of their intimate relation to many state laws and regulations, although, without the grant of the act of Congress, such controversies would have been Federal in character.

As it follows from what we have said that the court below erred in declaring the section of the act of Congress to be unconstitutional, the judgment must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

Mr. Justice Van Devanter, dissenting: I dissent from the conclusion that this proceeding could be brought and maintained in the state court. It is an information in the nature of a quo warranto against a Federal corporation,—a national bank. It calls in question the bank's right to exercise a privilege claimed under an act of Congress, the privilege, under the terms of the act, being conferred only when "not in contravention of the state or local law." The information was brought by the attorney general of the state in his own name, and charges that the bank's exercise of the privilege is "in contempt of the people of the state," by which it is meant, as the record discloses, first, that the exercise of the privilege by the bank is in contravention of the law of the state, and, second, that the act of Congress under which the privilege is claimed transcends the power of L.R.A.1918C.

Congress and is void. The state court dealt with both grounds. The first was overruled and the second sustained. The judgment rendered enjoins and excludes the bank from exercising the privilege.

The writ of quo warranto was a prerogative writ, and the modern proceeding by information is not different in that respect. When it is brought to exclude the exercise of a franchise, privilege, or power claimed under the United States, it can only be brought in the name of the United States and by its representative, or in such other mode as it may have sanctioned. *Wallace v. Anderson*, 5 Wheat. 291, 5 L. ed. 91; *Nebraska v. Lockwood*, 3 Wall. 236, 18 L. ed. 437; *Newman v. United States*, 238 U. S. 537, 59 L. ed. 1446, 35 Sup. Ct. Rep. 881. As is said in the *Lockwood Case*: "The right to institute such proceedings is inherently in the government of the nation." This is particularly true of national banks, for they not only derive all their powers from the United States, but are instrumentalities created by it for a public purpose, and "are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the government may permit." *Davis v. Elmira Sav. Bank*, 161 U. S. 275, 283, 40 L. ed. 700, 701, 16 Sup. Ct. Rep. 502; *Van Reed v. People's Nat. Bank*, 198 U. S. 554, 557, 49 L. ed. 1161, 1162, 25 Sup. Ct. Rep. 775, 3 Ann. Cas. 1154. Indeed, they are upon much the same plane as are officers of the United States, because their conduct can only be controlled by the power that created them. *M'Clung v. Silliman*, 6 Wheat. 598, 605, 5 L. ed. 340, 342. If it were otherwise, the supremacy of the United States and of its Constitution and laws would be seriously imperiled. *Ableman v. Booth*, 21 How. 506, 16 L. ed. 169; *Tarble's Case*, 13 Wall. 398, 20 L. ed. 597; *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648; *State ex rel. Wilcox v. Curtis*, 35 Conn. 374, 95 Am. Dec. 263.

Thus much, as I understand it, is conceded in this court's opinion, the conclusion that the state court could entertain the information and proceed to judgment thereon, as was done, being rested upon an implied authorization by Congress. This authorization is thought to be found in the provision stating that the privilege claimed is given only "when not in contravention of state or local law," and in the provision in the Act of June 3, 1864, chap. 106, § 57, 13 Stat. at L. 116, now in Rev. Stat. § 5198, Comp. Stat. 1916, § 9759, which makes suits against national banks cognizable in certain state courts. I do not find any such authorization in either provision.

The first does no more than to withhold the privilege in question from national

banks located in states whose laws are opposed to or not in harmony with the possession and exercise of such a privilege on the part of the banks. It says nothing about judicial proceedings,—nothing about who shall bring them or where they shall be brought. There is in it no suggestion that quo warranto proceedings were in the mind of Congress. Had there been a purpose to do anything so unusual as to authorize a state officer to institute and conduct such a proceeding in a state court against a Federal corporation, is it not reasonable to believe that Congress would have given expression to that purpose? As before indicated, it said nothing upon the point,—just as it would have done had no such purpose been in mind. But if the words “when not in contravention of state or local law” could be regarded as giving any warrant for a quo warranto proceeding by a state officer in a state court, I should say they would do no more than to permit such a proceeding to determine whether the privilege was in contravention of the state law. There is nothing in them which points even remotely to a purpose to sanction a proceeding to determine the power of Congress under the Constitution to clothe a national bank with the privilege indicated. That would be without any precedent in the legislation relating to Federal corporations, and I submit that it is most improbable

that Congress either did or would entertain such a purpose.

The provision cited from the Act of 1864 has been in the statutes for fifty-three years, and no one seems ever to have thought until now that it was intended to authorize a proceeding such as this against a national bank. I think its words do not fairly lend themselves to that purpose. They have hitherto been regarded, and in practice treated, as referring to ordinary suits such as may be conveniently prosecuted against a bank in its home town and county. Besides, the terms of the provision show that it can have no application here. After providing for suing a national bank in the Federal or territorial court of the district in which it is established, the provision adds, “or in any state, county or municipal court in the county or city in which said association is located.” This bank, as the record discloses, is located in Bay City, Bay county. The proceeding was begun and had in the supreme court of the state at the capital, which is Lansing, Ingham county. Therefore the provision can give no support to the proceeding.

For these reasons I think the judgment should be reversed, with a direction to dismiss the information for want of jurisdiction.

Mr. Justice Day authorizes me to say that he concurs in this dissent.

WASHINGTON SUPREME COURT. (Department No. 2.)

ROY C. WELLS, Appt.,
v.

REGINA WELLS, Respnt.

(— Wash. —, 169 Pac. 970.)

Contempt — failure to pay money — duty to seek new employment.

One decreed to pay money toward the support of his children is not bound to abandon his usual occupation and seek a new one to avoid punishment for contempt when the former becomes temporarily unprofitable so that he is unable to make the payments.

For other cases, see *Contempt*, I. c. in *Dig.* 1-52 N. S.

(January 16, 1918.)

APPEAL by plaintiff from an order of the Superior Court for Whatcom County adjudging him guilty of contempt for

Note. — For inability to pay alimony as a defense to contempt, see notes to *Staples v. Staples*, 24 L.R.A. at page 437; *Messervy v. Messervy*, 30 L.R.A.(N.S.) 1001; and *Fowler v. Fowler*, L.R.A.1917C, 97.

failure to meet overdue payments for the support of his children. Reversed.

The facts are stated in the opinion.

Mr. John J. Pinckney, for appellant:

Inability to pay is a complete defense.

1 R. C. L. 962; *Holcomb v. Holcomb*, 53 Wash. 611, 102 Pac. 653; *Boyle v. Boyle*, 74 Wash. 529, 133 Pac. 1009; *Gust v. Gust*, 78 Wash. 412, 139 Pac. 199; *Crombie v. Crombie*, 88 Wash. 520, 153 Pac. 306.

A court has no right to compel a man to change his occupation, or to sentence him to jail for contempt of court if he does not change it.

1 R. C. L. 962; *Messervy v. Messervy*, 85 S. C. 189, 30 L.R.A.(N.S.) 1001, 67 S. E. 130, 137 Am. St. Rep. 873, note; *Ex parte Todd*, 119 Cal. 57, 50 Pac. 1071.

Mr. A. J. Craven, for respondent:

Plaintiff cannot excuse himself from making the payments upon the ground that he has not earned enough in crab fishing.

Fowler v. Fowler, — Okla. —, L.R.A. 1917C, 89, 161 Pac. 227.

Holcomb, J., delivered the opinion of the court:

On April 23, 1914, a decree of divorce was

entered in the superior court of Whatcom county upon the complaint of appellant, dissolving the marriage theretofore existing between the parties and awarding the custody of the two children, aged respectively seven years and five years, to the respondent, the mother, on account of their tender ages. The court awarded to appellant a tract of unimproved, nonproducing land, containing about 80 acres, near Blaine, and awarded to respondent two lots with a dwelling thereon in Blaine, and required appellant to pay the taxes and assessments upon the lots, and further provided that appellant should pay the sum of \$15 per month for the support of the minor children, beginning the first Saturday in May, 1914.

Appellant paid the taxes and assessments upon the property awarded to respondent as required by the decree, and also made the payments of \$15 per month up to and including the payment of September, 1915, but defaulted in the payments for October, November, and December, 1915. On December 7, 1915, respondent secured an order requiring appellant to appear on January 11, 1916, and show cause why he should not be punished for contempt by reason of his failure to make such overdue payments. On January 11, 1916, appellant appeared personally without counsel. After hearing the evidence the court continued the matter until February 7, 1916, and ordered appellant to pay the sum of \$25 to respondent on or before February 7th, and ordered further that he pay to respondent on the first Saturday of each month the sum of \$5 in addition to the regular instalments until the overdue instalments were paid, and that he pay a doctor's bill of \$28.50 incurred for medical treatment of the minor children, and the costs of the hearing, taxed at \$18.80, on or before the first Saturday in March, 1916. The matter was then continued from time to time upon motion, and appellant at various times introduced numerous affidavits to substantiate his contention that he was unable to make the payments ordered by the court. On December 18, 1916, the court entered the order adjudging appellant guilty of contempt and committing him to jail in default of the payments in arrears. At that time he was in arrears \$125, having paid \$90 to apply on the overdue instalments subsequent to the date of the original hearing.

The affidavit of the respondent initiating the contempt proceeding alleged, among other things, that appellant is a strong, able-bodied man, and able to earn good wages in various employments. The affidavits presented by appellant at the several hearings, among them many of entirely disinterested persons, establish the facts that appellant

is a crab fisherman and unskilled at any other labor or employment; that he is industrious, sober, and extremely economical, honest, and generally pays all of his debts and obligations; that during the preceding two years crab fishing had been exceedingly unprofitable, and crab fishermen had been unable to make much, if anything, more than their expenses; that during such time appellant had been unable to clothe himself properly and had not proper shoes or other clothing; that, notwithstanding this, he had made some small payments of the amounts ordered to be paid for his children. It was shown that crab fishing had been rendered unprofitable during the preceding two years by reason of the occurrence of unusual winds, which prevented him and other crab fishermen from fishing their traps as often as usual, and thus prevented obtaining the usual catch; that during the closed season appellant endeavored to secure other work than crab fishing and was promised work in a cannery at Blaine, but failed to secure the work on account of the light run of salmon during the salmon fishing season; that he obtained some work in British Columbia, but was compelled to relinquish it on account of the sickness and death of his father, and upon his return to the place of work was unable to secure further work; and in general it seems to be shown beyond any doubt that he made every effort to secure employment and to earn an income during the crab fishing season to the best of his ability.

The only circumstance that appears to indicate a contumacious disposition concerning the payment of the sums ordered for his children is that he sold to his brother, for crab fishing gear valued at \$400, the 80 acres of land awarded to him as separate property, which a witness valued at \$1,600, subject to some delinquent taxes, the amount of which was not shown. This land, however, was unimproved and produced no income, and his disposition thereof as shown may have been as much in good faith with the intention of procuring sufficient gear to increase his income from crab fishing, as in bad faith with the intention to defeat his obligations toward his minor children.

The trial court indicated that, being convinced that appellant was a strong, able-bodied man and able to work (which is not denied), and that work is in demand and mills are running, he should abandon crab fishing and obtain other work and provide for his children. There is no doubt, and appellant conceded, that he was under a strong moral as well as legal obligation to provide for his children. But, where the inability to pay is bona fide, a court cannot compel the delinquent father to learn a new trade or

acquire a profession or find employment, and thus derive the means wherewith to pay the alimony allotted. 1 R. C. L. 962. The same situation might well have existed in the following cases decided by this court: *Holcomb v. Holcomb*, 53 Wash. 611, 102 Pac. 653; *Boyle v. Boyle*, 74 Wash. 529, 133 Pac. 1009; *Crombie v. Crombie*, 88 Wash. 520, 153 Pac. 306. In none of those cases did the court require the defaulting husband or father to abandon his regular, and search for a new, occupation. The condition shown by appellant in this case is a more precarious one than that shown in either the *Holcomb* or the *Crombie* Case.

We are of the opinion that the appellant showed by a great preponderance of facts his inability to make the payments during the time he was in default and to comply with the order at the time it was made, and purged himself of any wilful and

contumacious intention to avoid the payment of the money. His inability is real, but apparently temporary. His obligations under the decree will continue and accumulate until his actual ability to pay recurs. It is only where the inability is wilfully brought about by himself, with intent to avoid payment, that the refusal to pay becomes contumacious, and such inability would not purge him of contempt. But imprisonment certainly should not be ordered when it appears that the default is the result of honest inability to pay on account of business misfortunes, lack of earning ability, or other fortuitous circumstances which are not the fault of the party. That is the spirit of our decided cases.

Order reversed.

Ellis, Ch. J., and Mount, Morris, and Chadwick, JJ., concur.

ALABAMA SUPREME COURT.

ALABAMA CENTRAL RAILROAD COMPANY, App't.,

v.

ALABAMA PUBLIC SERVICE COMMISSION et al.

(— Ala. —, 76 So. 862.)

Carrier — use of tracks under license — compulsory service.

A railroad company which has a mere license to use the tracks of a lumber company cannot be compelled to put in sidings to serve rivals of the track owner, although a provision in the contract forbidding it to render service to such rivals is void.

For other cases, see *Carriers*, IV. a, 1, in Dig. 1-52 N. b.

(November 15, 1917.)

APPEAL by complainant from a decree of the Circuit Court for Montgomery County sustaining a demurrer to a bill filed to enjoin the defendant commission from further enforcing its order requiring the construction of a sidetrack by complainant. Reversed.

Statement by Mayfield, J.:

Appellant is a common carrier by rail. It owns and operates a railroad from Jas-

per, Alabama, to Manchester, Alabama, a distance of 6 miles. The Manchester Sawmill Company, a purely private corporation engaged in the lumber business, owns and operates a logging road which extends several miles north of Manchester and into a belt of pine timber which is being cut and manufactured into lumber by the sawmill company, and over said logging road this purely private company transports its logs and its manufactured lumber to and from its mills,—its logs from the forest to its mills situate on said road, and its lumber from the mills to Manchester, and thence to other markets over lines of public service corporations.

About April 10, 1915, appellant, a public service corporation, and the sawmill company, entered into a contract whereby appellant acquired the license or right to operate its trains and service over the logging road, for the purpose of carrying freight and passengers for hire, but did not acquire the right to haul or transport pine logs or pine lumber over such logging road, except for its own use. The sawmill company, however, retained the paramount right to the use of the tracks, to the end that it should not be delayed in the transaction of its own business. The sawmill company also retained or reserved the right to take up the track, or change the location thereof, at its will or pleasure, and by the contract the sawmill company was under no duty to keep the logging road in such repair as to be suitable for operating trains thereon. Appellant, however, had the right, under certain conditions, to repair and keep up, and, under certain other conditions, to purchase, the track and the rights of the

Note.—The power to compel a railroad to build, maintain, or connect with sidetrack for the accommodation of shippers is discussed in the notes to State ex rel. Mt. Hope Coal Co. v. White Oak R. Co. 28 L.R.A. (N.S.) 1013; *McInnis v. New Orleans & N. E. R. Co.* L.R.A.1915E, 682; and State ex rel. Chicago, M. & St. P. R. Co. v. Public Service Commission, L.R.A.1918B, 786. L.R.A.1918C.

sawmill company. Appellant also acquired the right to use a Y of the logging company, and to erect upon the property of the sawmill company switches, sidetracks, and platforms for loading purposes, which might be necessary to the conduct of its business as a common carrier, but subject to the reasonable regulations of the sawmill company.

About October 27, 1916, while appellant was thus using the logging road, M. Aaron and J. H. McNeal, a partnership, applied to the Alabama Public Service Commission to require appellant to put in a sidetrack on the logging road of the sawmill company, for the use of the partnership in the transporting of pine lumber and other shipments through the agency of appellant as a common carrier. A hearing was had before the commission, and appellant was ordered to proceed to put in such sidetrack. Appellant notified the sawmill company of the proceedings, and of the order requiring the construction of the sidetrack, and the sawmill company would not consent to the construction of the sidetrack. To the notice the sawmill company made this reply:

December 7, 1916.

Mr. W. C. Davis,
Jasper, Alabama.

Dear Sir:—

Aaron & McNeal v. Ala. Central R. R. Co.

Replying to your notice that the Alabama Railroad Commission has ordered the Alabama Central Railroad to put in a sidetrack for Aaron & McNeal's sawmill on the logging road of the Manchester Sawmills, we beg to say, in behalf of the Manchester Sawmills, that the logging road, together with the right of way upon which it is built, belongs to them; that it is purely a private industry, and not a common carrier, and that it does not intend, at its expense, to furnish a logging road for its competitors in the lumber business; and that it will not permit the Alabama Central to build any spur track off of its logging road for the accommodation of McNeal & Aaron.

The Manchester Sawmills will resist to the full extent of the law any effort to build such a track. They will not only have any persons attempting to do so arrested for trespass, but will take such forcible action as it is advised it has power to take, to prevent the construction of such a track, and, if such a track is surreptitiously built, they will promptly tear the same out. We are writing you so that you may fully understand that the Manchester Sawmills will under no conditions permit the Alabama Central to build a switch or sidetrack, as contemplated, for the Aaron & McNeal Sawmill, unless they are required,

by the highest court to which they can go, to do so.

We hope this statement will leave no misunderstanding of their attitude.

Very sincerely,

JHBjr. [Signed] Bankhead & Bankhead.

Appellant then filed this its bill in the circuit court of Montgomery county, against the members of the Public Service Commission, to enjoin them from further enforcing the order requiring the construction of the sidetrack as prayed in the petition, and as ordered to be done by the commission. The commission, or its members, demurred to the bill for want of equity. The trial court sustained the demurrer, and from its decree in that behalf appellant prosecutes this appeal.

Mr. W. C. Davis for appellant.

Messrs. W. L. Martin, Attorney General, and Lawrence E. Brown, Assistant Attorney General, for appellee.

Mayfield, J., delivered the opinion of the court:

If it be conceded that the contract between appellant and the sawmill company, for the use of the logging track of the latter by the former as a common carrier, is void by reason of the stipulation that the carrier should not haul pine logs or pine lumber over the logging road, or for other reasons, this would not authorize the Public Service Commission to require appellant to violate its void agreement, or to trespass upon, or use without authority, the property of the logging company. The only right, title or interest which appellant has in or to the logging road depends solely upon contract, and if the contract is void, then appellant has no rights whatever,—has no right to the use of the logging road for any purpose. While the contract authorizes appellant to purchase the logging road, appellant has never exercised this option; and neither the commission nor the courts can compel it to exercise the option. Neither the commission nor the courts have the power to make or alter contracts between parties. If the carrier owned or controlled the logging road under a valid lease, then the commission could compel it to serve all the public of the same class alike, and to provide facilities reasonably adequate to accommodate shippers desiring service of the carrier. In such cases, where the carrier owns, or, by lease or otherwise, has the control of, the tracks and lines over which it operates its trains, it can be required to serve all customers of the same class on equal terms, and thus avoid discriminations; and the carrier cannot, by contract with some of its

customers or with third parties, exempt or excuse itself from thus treating all alike, and thus discharging its duties as common carrier to the public. But where the carrier does not own or control the track which it uses, but uses the same as a mere licensee, or under an agreement such as is found in this case, the commission or the courts cannot authorize, much less compel, the carrier, thus operating under a mere license, to improve or change the main lines, sidetracks, or the loading facilities of the line over which it is so operating without right of control, but with the mere right to repair and keep up the lines, as in this case.

This distinction is well pointed out by the courts, state and Federal, in the cases of *Oman v. Bedford-Bowling Green Stone Co.* 67 C. C. A. 190, 134 Fed. 64, and (C. C.) 134 Fed. 441, and 115 Ky. 369, 73 S. W. 1038. The holdings in these cases, which are here applicable, are well stated in headnotes in the report of the cases, as follows:

"2. Railroads—private switches—use for public business. Persons who have no property rights in a private switch over another's land cannot compel the latter to permit the railroad to receive and ship their freight over the switch to the railroad's own track.

"3. Same—sale of switch—right of stranger to complain. A contract by which a railroad operates, in its capacity as common carrier, a switch over private property, may be abrogated at will by the railroad and the owner of the property, and the switch may be sold to the latter regardless of the motives of the parties to the contract in so doing; and a stranger to the contract, who is interested in the maintenance of the switch by the railroad as a carrier, cannot complain of the contract as fraudulent merely because the purchase price was not paid in cash, but promissory notes were given therefor."

"5. Carriers—duty to receive freight—private switches. A common carrier cannot be required to receive freight on or along a private switch, but its duty in that regard is confined and limited to its own depots or shipping and receiving points."

(C. C.) 134 Fed. 441.

If the logging road in question were a public highway, or a railroad in which the public had acquired rights by condemnation proceedings or by dedication to a public use, and its owners or those who had acquired control of it were common carriers, or were engaged in the business of a public service, then the Public Service Commission or the courts, when authorized by the legislature, could regulate and control the use of the railroad so as to serve the public, and do so without discrimination. Here, however, the

road involved is a private road, and not a public one, and those who own, and have the exclusive control of it are private individuals or corporations who have merely consented or agreed that appellant, a public service corporation, may use it under certain restrictions and regulations. It may be, as we have said, that this contract or agreement is void, because against public policy; but, if so, it cannot be relieved against by compelling the parties to make a new contract, nor by compelling them to so modify it as to make it legal and binding on both parties. Neither the Public Service Commission nor the courts possess such powers. While the common carrier is so using this private road under a void contract, it may be liable as for damages for unwarranted discriminations, and its illegal contract might not excuse or justify for such discriminations; yet the common carrier has no right to put in switches or sidetracks on this logging road without the consent of its owners, and, if such were placed, the owners would have the absolute right to remove them, and even the main line, and to wholly prevent the use of the road by appellant or by the public. Surely the Public Service Commission nor the courts ought to compel a common carrier to use or improve private property in a way or manner in which it has no right so to use it, and could not voluntarily use it.

It may be (but as to this we do not decide) that, if the proceeding to require the construction of the sidetrack were against the logging company, this decision would be different,—that the use to which the logging company has put its private road, or allowed it to be put, in virtue of our Constitution and statutes, would be held to have converted the private road into a public one, and brought it within the jurisdiction of the Public Service Commission. But this question is not before us; there has been no proceeding against the logging company; it has had no opportunity of being heard, and is not even a party to this bill.

Here, however, the only party who would have a right to voluntarily construct, or authorize the construction of, the sidetrack, is not before the court, and was not before the commission. Conceding that the facts stated in the bill are true,—and on demurrer the court must treat them so to be,—appellant not only has no right to do what the commission has ordered it to do, but is under contract or agreement not to do that identical thing; and, should it obey the commission's order, it would forfeit all right to use any part of the logging road, and be subject to suit for damages by the owners of the road, and if it built the sidetrack voluntarily it would be a trespasser.

Unquestionably, the commission has no power to compel appellant to be a trespasser, nor to exempt appellant from liability, should it build the sidetrack, as for a trespasser. Nor would the commission's order to build the sidetrack have the effect to make its construction rightful and lawful. If appellant owned or had the control of the logging road which it was so using, it could avoid being a trespasser in constructing the sidetrack by purchasing the land; but it neither owns nor controls the logging road to the extent that it would have the right to condemn to such end. If it had the right and power to condemn, then it is possible that it might be compelled to condemn; but having no such right to condemn the particular land in question for a sidetrack to be used in connection with the logging road, it ought not to be compelled to take it by force, nor to condemn it.

There is no contention that it should build a sidetrack or spur from the point in question to its own line of road, and no such order has been sought or made. The bill shows that the only right it has to operate its trains over the logging road rests solely upon a contract, which contract not only fails to authorize it to do what the commission directs it to do, on and with the property of the logging road, but expressly prohibits it from doing; and that if appellant voluntarily, or by force of the act and order of the commission, does the acts so required of it, it thereby forfeits all its rights under the contract, and subjects itself to an action for damages.

To this the answer is made that such provisions of the contract are void as against public policy, and that they are not binding upon the parties or the public. This may be true; but, if so, the fact confers no right or power upon the commission or the courts to make a new contract or to modify the one made in material respects, to the extent that one party thereto would not have made the modified contract originally. In other words, the contract cannot be enforced unless it be valid and binding. Moreover, to enforce the order of the commission would violate the contract instead of enforcing it as made.

In speaking of void leases of one road, to operate that of another, the law is thus stated by Mr. Elliott: "It is evident that it may be liable for its torts in operating the road, and yet not bound to perform the obligations which the law requires the lessor to perform. If the lease is void, it neither confers a right nor creates a duty. In a well-reasoned opinion it was adjudged that, where a lease was executed without authority, the lessee could not be compelled to L.R.A.1918C.

operate the leased road, and that mandamus would not lie." 1 Elliott, Railroads, 2d ed. § 457.

In a note the author cites and quotes from the case as follows: "People ex rel. Van Dyke v. Colorado C. R. Co. (C. C.) 42 Fed. 638. In the course of the opinion Caldwell, J., said: 'As the relator and the respondents are agreed that the lease was void, that ends the case as to the Union Pacific Railroad Company; for, if the lease is void, it imposes no obligation on the Union Pacific Railroad Company to operate the road.' The decision was placed on the ground that the lease was void, for it was affirmed that mandamus lies where there is a duty to operate a railroad. The court cited *State v. Sioux City & P. R. Co.* 7 Neb. 357; *Com. v. Fitchburg R. Co.* 12 Gray, 180." Id., note to § 457.

These authorities are a complete answer to the question of the right of the commission to compel appellant to operate under a void lease or contract.

The case in hand is distinguishable from the cases relied upon by appellees and by the trial court. In *Agee's Case*, 142 Ala. 353, 37 So. 680, it was merely held that, while a common carrier is using a spur or sidetrack in its business as a common carrier, it will not be allowed to discriminate between customers of the same class, nor even by contract with other parties could it justify its discrimination.

The *Oman Case*, 115 Ky. 369, 73 S. W. 1038, has heretofore been shown not to be applicable to a case like this. The other cases relied upon, reported in *State ex rel. Ellis v. Atlantic Coast Line R. Co.* 52 Fla. 646, 12 L.R.A.(N.S.) 506, 41 So. 705; *Chesapeake & O. R. Co. v. Standard Lumber Co.* 98 C. C. A. 81, 174 Fed. 107, and *Louisville & N. R. Co. v. Pittsburg & K. Coal Co.* 111 Ky. 960, 55 L.R.A. 601, 98 Am. St. Rep. 447, 64 S. W. 969, are distinguishable, because there the common carrier either owned or controlled the line of road and sidetracks in question. Here appellant does not own the main line of the logging road, not even the ties and the rails, much less the right of way, and has no control thereof, except to run its trains thereover, and to repair the same strictly for the purposes and under the rights acquired by its contract. If its contract is valid, it has agreed not to do what the commission requires it to do. If its contract is void, it has no right to use the logging road for any purpose, much less to put in or use a sidetrack on the right of way of the logging road. While under the contract it has the option to buy the logging road, the courts cannot compel it to exercise the option. If the facts averred in the bill

are true, it would be utterly useless to compel appellant to put in a sidetrack, for the reason that the logging company, who own the land and the road, would not only remove it, but also the main track at that point, and absolutely prevent its use by appellant for the purposes intended by the order.

It therefore follows that the trial court was in error in sustaining the demurrers to the bill, but should have overruled them. Reversed, rendered, and remanded.

Anderson, Ch. J., and Somerville and Thomas, JJ., concur.

FLORIDA SUPREME COURT.

ROBERT W. SIMMS, Plff. in Err.,
v.

FLORENCE KENNEDY.

(— Fla. —, 76 So. 739.)

Landlord and tenant — injury to stranger — liability.

1. A tenant or occupant of premises having the entire control thereof is, so far as third persons are concerned, the owner. He is therefore usually deemed to be prima facie liable for all injuries to third persons occasioned by the condition of the demised premises.

For other cases, see Landlord and Tenant, III. c. 1, in Dig. 1-52 N. S.

Same — liability of landlord.

2. A lessor landlord may be liable to third persons for injuries caused by defects in leased premises during the term of the lease, when the defect in or condition of the premises at the time of the lease was a violation of law, or was in the nature of a nuisance existing or incipient because of negligent construction or otherwise, or when the lessor has entire or partial control of the premises, or is required by law or undertakes to keep or to assist in keeping the premises in repair, or where his negligence or participation is a proximate cause of the injury. Liability of the lessor may also flow from special circumstances or from applicable provisions of law.

For other cases, see Landlord and Tenant, III. c. 1, in Dig. 1-52 N. S.

Same — liability for defects.

3. Prima facie where the lessee is in entire possession, occupancy, and control of the premises under a lease, and the premises were in good condition when leased, the lessor is not liable in damages for injuries to third persons caused by defects in the premises.

Headnotes by WHITFIELD, J.

Note.—The liability of a landlord to third persons not in privity with the tenant, for the condition of premises in possession of the tenant, is treated in the note to Knight v. Foster, 50 L.R.A.(N.S.) 286. Specifically, as to liability to such persons for injuries or damages by things falling because of the condition of the premises, see the note to Brewer v. Farnam, 50 L.R.A.(N.S.) 312. L.R.A.1918C.

And where an action for damages is brought against the lessor, he may plead specially the lease to and the possession, occupancy, and control of the premises by another in bar of the action, in each case setting up the facts affording the bar.

For other cases, see Landlord and Tenant, III. c. 1, in Dig. 1-52 N. S.

(December 5, 1917.)

ERROR to the Circuit Court for Duval County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. John E. Hartridge and Julian Hartridge for plaintiff in error.

Mr. Austin Miller, for defendant in error:

Defendant was liable for the injury sustained by plaintiff.

Potter v. Rorabaugh-Wiley Dry Goods Co. 83 Kan. 712, 32 L.R.A. (N.S.) 45, 112 Pac. 613; Waller v. Ross, 100 Minn. 7, 12 L.R.A. (N.S.) 721, 117 Am. St. Rep. 661, 110 N. W. 252, 10 Ann. Cas. 715, 21 Am. Neg. Rep. 166; Atchison v. Plunkett, 8 Kan. App. 308, 55 Pac. 677, 5 Am. Neg. Rep. 343; McCrorey v. Garrett, 109 Va. 645, 24 L.R.A.(N.S.) 139, 64 S. E. 978; Mitchell v. Brady, 124 Ky. 411, 13 L.R.A. (N.S.) 751, 124 Am. St. Rep. 408, 99 S. W. 266; Riley v. Simpson, 83 Cal. 217, 7 L.R.A. 622, 23 Pac. 293; Brown v. White, 202 Pa. 297, 58 L.R.A. 321, 51 Atl. 962; Maloney v. Hayes, 206 Mass. 1, 28 L.R.A. (N.S.) 200, 91 N. E. 911, 3 N. C. C. A. 137; Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530; 4 R. C. L. 409; 1 Thomp. Neg. §§ 1313, 1314.

Whitfield, J., delivered the opinion of the court:

Defendant in error brought an action against Robert W. Simms to recover damages for personal injuries sustained by her as she passed along the sidewalk on a public street in Jacksonville, Florida, by the falling of a part of an awning overhanging the sidewalk and attached to a building belonging to Simms, but occupied by another person under a lease from Simms. The first count of the declaration alleges, in effect,

that on November 11, 1914, the defendant "was the owner of a certain building and metal awning attached thereto and being a part thereof, and extending over and above the public sidewalk in front and to the west side of the said building, situated on the northeast corner of Bay and Hogan streets, in the city of Jacksonville, county and state aforesaid; that the defendant failed to keep the said awning in the proper repair, as he was bound to do, but negligently and carelessly allowed it, the said awning, to remain broken, in unrepair, and in a dangerous condition to persons passing thereunder; that on the day aforesaid plaintiff was a pedestrian walking along the said public sidewalk, in front of said building, as she had a right to do, and under the said awning, and a piece of the said awning fell upon the said plaintiff with great force and violence, whereby the plaintiff was" injured as alleged.

The second count alleges that the defendant was the owner of the building "occupied at the present time by Levy's store," and also of a "certain metal awning attached to and being a part of the said building, and extending over and above the public sidewalk in front and to the west side of the said building; that the said awning was broken and in a dangerous condition for the safety of persons passing along said public sidewalk, of which fact defendant well knew; that on the day aforesaid plaintiff was passing along said sidewalk and under the said awning, and by no fault of hers a piece of the said awning fell with great force and violence onto and against the said plaintiff, whereby she was thrown or knocked to the said sidewalk" and injured as stated.

A plea of not guilty and two special pleas were filed, the special pleas being stricken on motion. At the trial the defendant offered the following pleas: "That prior to the happening of the alleged accident he had leased the said building described in the declaration, owned by him and located at the northeast corner of Bay and Hogan streets, in the city of Jacksonville, Duval county, Florida, to one B. S. Levy, and by the terms of said leases the said B. S. Levy was to make every and all repairs of every kind and character to said building; that pursuant to the leases to the said B. S. Levy, and before the happening of the alleged accident which is the subject of this suit, the said B. S. Levy had gone into possession and taken control of said building, and that at the time of the said B. S. Levy going into possession of said building, the said building and every part thereof, and the part complained of in plaintiff's declaration, were in good repair and condition; and L.R.A.1918C.

that at the time of the happening of said alleged accident the said B. S. Levy was in actual and exclusive possession, occupancy, and control of said building under the terms of said leases, and had been in possession and control of said building for, to wit, more than two years prior thereto. And for a second additional plea the defendant says that prior to the happening of the alleged accident he had leased said building described in the declaration, owned by him and located at the northeast corner of Bay and Hogan streets, in the city of Jacksonville, Duval county, Florida, to one B. S. Levy; that pursuant to the leases to the said B. S. Levy, and before the happening of the alleged accident which is the subject of this suit, the said B. S. Levy had gone into possession and taken control of said building, and that at the time of the said B. S. Levy going into possession of said building, the said building and every part thereof, and the part complained of in plaintiff's declaration, were in good repair and condition; and that at the time of the happening of said alleged accident the said B. S. Levy was in actual and exclusive possession, occupancy, and control of said building, and had been in possession and control of said building for, to wit, more than two years prior thereto."

The court refused to permit the pleas to be filed, to which the defendant excepted. Verdict and judgment were rendered for the plaintiff, and the defendant took writ of error.

The trial judge certifies that the "bill of exceptions contains only so much and such parts of the evidence as are necessary to enable the appellate court to properly review the rulings of the trial court mentioned in the assignment of errors in the above case."

If, under the circumstances stated in the quoted additional special pleas, the defendant is not liable, there was harmful error in refusing to permit the pleas to be filed at the trial. The court had, on the ground that it "could not avail the defendant," stricken a special plea averring that the defendant was not in possession or control of the building, but that the same had been leased for a term of years to B. S. Levy, and was in the care, custody, and control of B. S. Levy, the lease not yet having expired; and the court refused to admit in evidence the leases referred to in the pleas. Such pleas were manifestly designed to explain the character of the occupancy of the building "by Levy's store," as alleged in the second count of the declaration.

It is obvious from the several rulings made that the trial court held defendant to be liable even though the building was

in the possession, custody, and control of another under a lease which required the lessee to make necessary repairs to the building during the period of the lease, the lessor having under the lease no right to possession or control of the building.

In *King v. Cooney-Eckstein Co.* 66 Fla. 246, 63 So. 659, Ann. Cas. 1916C, 163, where the action was against the lessees of a wharf to recover for personal injuries sustained by reason of a defect in the wharf, it is said: "Both the lessor and the lessee may be liable under certain circumstances, and that prima facie the liability rests primarily upon the one in actual occupancy and control of the premises."

A tenant or occupant of premises having the entire control thereof is, so far as third persons are concerned, the owner. He is therefore usually deemed to be prima facie liable for all injuries to third persons occasioned by the condition of the demised premises. 16 R. C. L. 1063, 1095; *Nelson v. Liverpool Brewery Co.* L. R. 2 C. P. Div. 311, 46 L. J. C. P. N. S. 675, 25 Week. Rep. 877.

A lessor landlord may be liable to third persons for injuries caused by defects in leased premises during the term of the lease, when the defect in or condition of the premises at the time of the lease was a violation of law, or was in the nature of a nuisance existing or incipient because of negligent construction or otherwise, or when the lessor has entire or partial control of the premises, or is required by law or undertakes to keep or to assist in keeping the premises in repair, or where his negligence or participation is a proximate cause of the injury. Liability of the lessor may also flow from special circumstances or from applicable provisions of law.

But prima facie where the lessee is in entire possession, occupancy, and control of the premises under a lease, and the premises were in good condition when leased, the lessor is not liable in damages for injuries to third persons caused by defects in the premises. And where an action for damages is brought against the lessor, he may plead specifically the lease to and the possession, occupancy, and control of the premises by another, in bar of the action, in each case setting up the facts affording the bar. See *Fellows v. Gilhuber*, 82 Wis. 639, 17 L.R.A. 677, 52 N. W. 307; *Kalis v. Shattuck*, 69 Cal. 593, 58 Am. Rep. 568, 11 Pac. 346; *Knight v. Foster*, 163 N. C. 329, 50 L.R.A. (N.S.) 286, 79 S. E. 614; *Miller v. Fisher*, 111 Md. 91, 50 L.R.A. (N.S.) 295, 73 Atl. 891; *Cerchione v. Hunnewell*, 215 Mass. 588, 50 L.R.A. (N.S.) 300, 102 N. E. 908; *Lee v. McLaughlin*, 86 Me. 410, 26 L.R.A. 197, 30 Atl. 65; *Atwill v. Blatz*, 118 Wis. 226, 95 L.R.A. 1918C.

N. W. 99, 14 Am. Neg. Rep. 242; *Munroe v. Carlisle*, 176 Mass. 199, 57 N. E. 332; *Uggla v. Brokaw*, 117 App. Div. 586, 102 N. Y. Supp. 857; 3 Shearm. & Redf. Neg. § 708; 1 Taylor, Land. & T. 674 et seq.; 24 Cyc. 1114 et seq. See also extensive notes in 92 Am. St. Rep. 499; *Johnson v. McMillan*, 69 Mich. 36, 36 N. W. 803, 18 Am. & Eng. Enc. Law, 2d ed. 240; *Hett v. Janzen*, 22 Ont. Rep. 414; 15 Eng. Rul. Cas. 335.

The proffered pleas aver that prior to the alleged injury the defendant had leased the building to B. S. Levy; that by the terms of the leases the lessee was to make every and all repairs of every kind and character to said building; that pursuant to the leases and before the alleged injury the said B. S. Levy had gone into possession and taken the control of said building; that at the time the lessee took possession the building and every part thereof, and the part complained of, were in good repair and condition; that at the time of the alleged injury the said B. S. Levy was in actual and exclusive possession, occupancy, and control of said building under the terms of the leases, and had been in possession and control of said building for more than two years.

These pleas tendered an issue that, if sustained, would have been a defense to the action, and permission to file them should have been allowed.

The judgment is reversed and a new trial awarded.

Browne, Ch. J., and Taylor, Ellis, and West, JJ., concur.

Petition for rehearing denied January 10, 1918.

MINNESOTA SUPREME COURT.

FANNIE M. KEIPER, Admrx., etc., of Edward E. Keiper, Deceased, Resp.,
v.

A. R. ANDERSON et al., Appts.

(— Minn. —, 165 N. W. 237.)

Landlord and tenant — breach of contract — liability.

The complaint alleged negligence in the performance by a landlord of his contract with a tenant to keep the leased premises heated, causing the death of the tenant.

Headnote by BUNN, J.

Note. — There are two important questions of law considered and passed upon by the court in the above case. The question involving liability of the lessor for personal

Though the action is based on the contract, and is therefore an action on contract, it is held that the complaint states a cause of action to recover damages for the tenant's death as caused by the wrongful acts and omissions of defendants.

For other cases, see Landlord and Tenant, III. c, 2, a, in Dig. 1-52 N. S.

(Brown, Ch. J., and Holt, J., dissent.)

(November 30, 1917.)

APPEAL by defendants from an order of the District Court for St. Louis County overruling demurrers to the complaint in an action brought to recover damages for the death of plaintiff's husband, alleged to have been caused by the wrongful acts or omissions of the defendants. **Affirmed.**

The facts are stated in the opinion.

Messrs. **Francis H. De Groat** and **Brown & Guesmer**, for appellants:

The obligation of the landlord being imposed by contract only, and the alleged breach of duty being the violation of an obligation imposed by contract, and not by law, and there being no tort liability, there is presented a state of facts not reached by § 8175 of the statute.

Anderson v. Fielding, 92 Minn. 42, 104 Am. St. Rep. 666, 99 N. W. 357, 16 Am. Neg. Rep. 92; *Clay v. Chicago, M. & St. P. R. Co.* 104 Minn. 1, 115 N. W. 949; 8 Am. & Eng. Enc. Law, 2d ed. 858, 859; *Buch v. Amory Mfg. Co.* 69 N. H. 257, 76 Am. St. Rep. 163, 44 Atl. 809; *Dustin v. Curtis*, 74 N. H. 266, 11 L.R.A.(N.S.) 504, 67 Atl. 220, 13 Ann. Cas. 169; *Cooley, Torts*, 3d ed. p. 3; *McDonald v. Brown*, 23 R. I. 546, 58 L.R.A. 768, 91 Am. St. Rep. 659, 51 Atl. 213; *Clark v. Gates*, 84 Minn. 381, 87 N. W. 941; *Webb's Pollock, Torts*, p. 20; *Moe v. Smiley*, 125 Pa. 136, 3 L.R.A. 341, 17 Atl. 228.

There is no duty to heat imposed by law upon the landlord in favor of the tenant, and a failure to heat creates no tort liability in favor of the tenant.

injuries to the lessee, or those standing in a similar position, where the injury is due to defects in the leased premises, is covered in notes in 34 L.R.A. 827; 34 L.R.A.(N.S.) 798; 48 L.R.A.(N.S.) 917; and L.R.A.1916D, 1227; where the property is leased for public or quasi public purpose, in a note in L.R.A.1915B, 364. There is also a series of notes in L.R.A.1916F, on questions involving the liability of the lessor to different classes of persons other than the tenant. These notes are all referred to in a footnote appended to *Glidden v. Goodfellow*, L.R.A. 1916F, 1073.

Upon the specific question raised in *KEIPER v. ANDERSON*, as to the liability of the landlord in tort upon his covenant to repair, see the following notes in 11 L.R.A. L.R.A.1918C.

Dustin v. Curtis, 74 N. H. 266, 11 L.R.A.(N.S.) 504, 67 Atl. 220, 13 Ann. Cas. 169; *Willcox v. Hines*, 100 Tenn. 538, 41 L.R.A. 278, 66 Am. St. Rep. 770, 46 S. W. 297.

Defendants' duty to heat being created by contract and being dependent upon contract, and it being necessary for the plaintiff to plead and prove the contract in order to make out a cause of action, the action is one on contract, no matter what form the complaint takes.

Whittaker v. Collins, 34 Minn. 299, 57 Am. Rep. 55, 25 N. W. 632; *Finch v. Bursheim*, 122 Minn. 152, 142 N. W. 143; *East Grand Forks v. Steele*, 121 Minn. 296, 45 L.R.A.(N.S.) 205, 141 N. W. 181, Ann. Cas. 1914C, 720.

While a landlord who has agreed to repair or to heat can be held liable in tort to a third person, he is under no tort liability to the tenant.

Glidden v. Goodfellow, 124 Minn. 101, L.R.A.1916F, 1073, 144 N. W. 428; *Glidden v. Second Ave. Invest. Co.* 125 Minn. 471, L.R.A.1915C, 190, 147 N. W. 658, 6 N. C. C. A. 743; 18 Am. & Eng. Enc. Law, 2d ed. 226, 235; *Dustin v. Curtis*, 74 N. H. 266, 11 L.R.A.(N.S.) 504, 67 Atl. 220, 13 Ann. Cas. 169; *Sargent v. Mason*, 101 Minn. 319, 112 N. W. 255.

Messrs. **Drill & Drill**, for respondent:

The cause of action "elected" by the complaint is in tort.

Glidden v. Goodfellow, 124 Minn. 101, L.R.A.1916F, 1073, 144 N. W. 428; *Glidden v. Second Ave. Invest. Co.* 125 Minn. 473, L.R.A.1915C, 190, 147 N. W. 658, 6 N. C. C. A. 743; *Barron v. Liedloff*, 95 Minn. 474, 104 N. W. 289; *Good v. Von Hemert*, 114 Minn. 393, 131 N. W. 466; *Stillwell v. South Louisville Land Co.* 22 Ky. L. Rep. 785, 52 L.R.A. 325, 58 S. W. 696; *Walsh v. Schmidt*, 34 L.R.A.(N.S.) 806, note.

Where the landlord by the terms of his lease covenants with the tenant to properly heat the leased premises, and negligently fails to do so, or performs the act

(N.S.) 504; 34 L.R.A.(N.S.) 804; 48 L.R.A.(N.S.) 919; and L.R.A.1916D, 1227.

The question as to several actions for wrongful death is also the subject of several notes in L.R.A. These are referred to in a note appended to *Rowe v. Richards*, L.R.A.1915E, 1076.

As to the beneficiaries and parties plaintiff to action for death, see note in L.R.A. 1916E, 118; and as to the statutory right of an adult child to recover for the death of a parent, see note in the same volume at page 176; and as to the parent's right to recover for the death of an adult child, see note in the same volume at page 190.

On the question of inadequate or excessive damages for personal injury resulting in death, see note in L.R.A.1916C, 820.

of heating in a negligent manner, and the tenant is injured by reason of such negligence, the tenant has a cause of action against his landlord for damages for his personal injuries resulting proximately from such negligence.

Glidden v. Goodfellow, 124 Minn. 101, L.R.A.1916F, 1073, 144 N. W. 428; Bowe v. Hunking, 135 Mass. 380, 46 Am. Rep. 471; Jaffe v. Harteau, 56 N. Y. 398, 15 Am. Rep. 438; Nash v. Minneapolis Mill Co. 24 Minn. 501, 32 Am. Rep. 349; Farley v. Byers, 106 Minn. 260, 130 Am. St. Rep. 613, 118 N. W. 1023; Williams v. Dickson, 122 Minn. 49, 141 N. W. 849; Good v. Von Hemert, 114 Minn. 393, 131 N. W. 466; Gill v. Middleton, 105 Mass. 477, 7 Am. Rep. 548; Glickauf v. Maurer, 75 Ill. 289, 20 Am. Rep. 238; Sontag v. O'Hare, 73 Ill. App. 432; Schwandt v. Metzger Linseed Oil Co. 93 Ill. App. 365; Crane Elevator Co. v. Lippert, 11 C. C. A. 521, 24 U. S. App. 176, 63 Fed. 942; O'Donnell v. Rosenthal, 110 Ill. App. 225; Brady v. Klein, 2 Ann. Cas. 466, note; Stillwell v. South Louisville Land Co. 22 Ky. L. Rep. 785, 52 L.R.A. 325, 58 S. W. 696; Rosenberg v. Zeitchik, 52 Misc. 153, 101 N. Y. Supp. 591; Thompson v. Clemens, 96 Md. 196, 60 L.R.A. 580, 53 Atl. 919; White v. Sprague, 9 N. Y. S. R. 220; Werthimer v. Saunders, 95 Wis. 573, 37 L.R.A. 146, 70 N. W. 824, 2 Am. Neg. Rep. 480; Callahan v. Loughran, 102 Cal. 476, 36 Pac. 835.

Bunn, J., delivered the opinion of the court:

The defendants demurred separately to the complaint on the ground that the facts stated did not constitute a cause of action. Both demurrers were overruled, and, the court certifying that the questions presented were in its opinion important and doubtful, each defendant appealed from the order overruling his demurrer.

Plaintiff is the widow and administratrix of the estate of Edward E. Keiper, deceased, and brings the action under Gen. Stat. 1913, § 8175, to recover damages for his death on the theory that it was caused by the wrongful acts or omissions of the defendants. The allegations of the complaint which are essential to an understanding of the questions involved may be stated as follows:

Defendant A. R. Anderson was the owner of a certain store building in Minneapolis. March 14, 1914, he leased the premises to Edward E. Keiper, for the term of one year, for use as a drug store. By the terms of the lease the lessor agreed "to keep said premises heated to a comfortable and proper temperature from October to April of each year, inclusive." The lessor main-

tained a heating plant in the basement of the building; defendant Arthur W. Anderson was in charge of the heating plant, as the agent of the lessor. Keiper went into possession of the store. From December 27, 1915, to January 14, 1916, the weather was intensely cold. Notwithstanding the terms of the lease, and their duties and obligations in the premises, the defendants "negligently and carelessly failed to properly attend to the heating plant," failed to keep the same in a good working condition and free from obstructions, failed to keep fuel in the same, and negligently allowed the fire in said furnace to go out or to get so low as to allow the premises to become cold and dangerous as to the occupancy thereof by the tenant and his licensees. This condition is alleged to have existed during the last days of December; on the 30th plaintiff contracted a severe cold, became ill, and was obliged to remain at his home for several days. On January 3d, he returned to work at the store, relying upon promises of the defendants to do better. He remained there until January 11th, when defendants carelessly and negligently allowed the heating plant to become cold for lack of fuel, causing the premises to become so cold that Keiper became ill, repaired to his bed, and died June 24, 1916, of the illness so acquired. It is unnecessary to further state the allegations of the complaint, except to say that negligence and carelessness on the part of the defendants are frequently alleged as the cause of Keiper's death.

Defendants claim that the action will not lie because it is on contract, not in tort, and because the statutory action to recover for death caused by wrongful act or omission can be maintained only when the cause of action is in tort.

Had Keiper survived, his cause of action would have been for breach of the contract to heat the premises, as proof of the contract would have been necessary to create any cause of action. This is settled in this state. Whittaker v. Collins, 34 Minn. 299, 57 Am. Rep. 55, 25 N. W. 632; Sargent v. Mason, 101 Minn. 319, 112 N. W. 255; East Grand Forks v. Steele, 121 Minn. 296, 45 L.R.A.(N.S.) 205, 141 N. W. 181, Ann. Cas. 1914C, 720; Finch v. Bursheim, 122 Minn. 162, 142 N. W. 143; Glidden v. Goodfellow, 124 Minn. 101, L.R.A.1916F, 1073, 144 N. W. 428.

It is just as true that the present action is based on the contract; there could be no recovery except for the contract. Though negligence or wrongdoing be alleged, the action is founded on contract, and therefore classed as one, in substance, on the contract. Whittaker v. Collins, *supra*. In the cases cited it was necessary to call the ac-

tion either one in tort or one on contract in order to decide which of two rules applied; in *Whittaker v. Collins*, supra, whether it was necessary to join all parties jointly liable; in *Sargent v. Mason and East Grand Forks v. Steele*, what the proper measure of damages was; in *Finch v. Bursheim*, what Statute of Limitations applied. Of these cases perhaps *Sargent v. Mason* is most directly in point, as that action was based on the failure of a landlord to perform his contract to heat the leased premises. This court granted a new trial because the trial court gave the jury the rule of damages applying to torts instead of that applying to breach of contract.

All the numerous allegations of negligence and wrongdoing in the complaint before us come to but one point, the failure of the landlord to heat the premises as he had agreed to do. The gist of the action is the breach of the contract, and, as said in *Whittaker v. Collins*, supra: "It is in substance, whatever may be the form of pleading, an action on the contract." The cases of *Barron v. Liedloff*, 95 Minn. 474, 104 N. W. 289; *Good v. Von Hemert*, 114 Minn. 393, 131 N. W. 466; and *Glidden v. Goodfellow*, 124 Minn. 101, L.R.A.1916F, 1073, 144 N. W. 428, are not in conflict with this view. There was no contract relation in those cases between the injured person and the landlord. In the *Barron* Case the plaintiff was sublessee of the tenant, in the *Good* Case a member of his family, and in the *Glidden* Case an employee. The liability of the landlord was in each case based on his negligence. See note to *Dustin v. Curtis*, 11 L.R.A.(N.S.) 504.

How far is this decisive of the question whether the complaint shows that the death of plaintiff's intestate was caused by the "wrongful act or omission" of defendants? Counsel for defendants insist that no action for death by wrongful act will lie unless the wrongful act or omission is a tort, negligence unconnected with contract. They say that an act or omission is not wrongful—does not constitute negligence—unless it is a breach of some duty imposed by law, not merely one imposed by contract. They point out that the right of action given by the statute is a new and distinct right of action, not a survival of the right of action which the injured person had before his death to recover damages. This is correct under our decisions. *Anderson v. Fielding*, 92 Minn. 42, 104 Am. St. Rep. 665, 99 N. W. 357, 16 Am. Neg. Rep. 92; *State ex rel. Carlson v. District Ct.* 113 Minn. 98, 154 N. W. 661, 11 N. C. C. A. 630. See note to *Rowe v. Richards*, L.R.A.1915E, 1095, in which the author expresses the opinion that "the better rule will be found to be that based upon

the theory that the cause of action is the injury to the person of the deceased, for which coexistent remedies or an exclusive remedy is given."

This means that the cause of action under the death statute remains the same cause of action that the injured person had before his death, the statute merely giving a new remedy. Such a rule would be a help in determining whether, when the cause of action survives, two actions may be maintained, one that of the estate of the deceased, the other that of the widow and next of kin. It might also be useful in a case such as *Rowe v. Richards*, 32 S. D. 66, L.R.A.1915E, 1069, 142 N. W. 664, where the South Dakota court held that a release by the injured person did not bar an action after his death brought under the statute for the benefit of the widow and children. See also notes to *Lhota v. Oppenheimer*, L.R.A.1915E, 1104; *Edwards v. Interstate Chemical Corp.* L.R.A.1916D, 121. But it is unnecessary to pursue this subject. Its chief importance here is with reference to the point that Keiper's cause of action, being based on breach of contract, survived his death. That is used as an argument in favor of the contention that the present action cannot be maintained. But whether the premise is sound or not, we find little weight in the argument. The books are full of cases where a right of action exists both under survival statutes and under statutes patterned after Lord Campbell's Act. Neither Keiper in his lifetime nor his personal representatives brought an action to recover damages for personal injuries. Whether such an action may still be maintained we need not consider.

Returning to the argument which is the real basis of counsel's contention that the action will not lie, that is, that the wrongful act or omission, or negligence, must be a breach of a duty imposed by law, not merely one imposed by contract. While, as we have held, the action is for breach of contract, the complaint abounds in charges of negligent and wrongful acts and omissions of the defendants. It alleges that Keiper's death was caused by these acts and omissions. Unless we can say that this cannot be, because there was no breach of a legal duty, it is apparent enough that the action will lie. The language of the statute is that where "death is caused by the wrongful act or omission of any person," the action may be maintained. Counsel cites some authorities to support this position. In *Clark v. Gates*, 84 Minn. 381, 87 N. W. 941, Justice Lovely used this expression: "To constitute a tort the act or omission must be entirely independent of contract.

rights." Citing 1 Hilliard, Torts, § 1. That was said in connection with the question for decision in that case, whether the evidence showed fraud or merely a breach of contract. It is doubtless true that the word "tort," as well as the word "wrongful," usually signifies a breach of legal duty, independent of contract rights. But this is by no means always true. Take such contract relations as carrier and passenger, physician and patient, attorney and client, landlord and tenant; when there is actual negligence or wrong on the part of the carrier, physician, attorney, or landlord, is it not still negligence or a wrong notwithstanding that the duty is imposed by the contract? There may be a breach of a contract without negligence, but there may be negligence or wrongful acts or omissions in the performance of a contract. It seems to us to make no difference whether the duty to use due care is one imposed directly by law, or exists because of the contract relation of the parties. We are unable to see why the complaint in this case does not allege negligence on the part of defendants, and that Keiper's death was caused by their wrongful acts and omissions.

We do not find support for the proposition of defendants' counsel that because the duty breached by defendants was one imposed by contract, this action will not lie. It is difficult for us to distinguish the multitude of cases where recovery has been allowed for the death of passengers, though no liability could exist except for the contract. And there have been cases where the liability of physician or surgeon for the death of a patient caused by his negligence has been upheld. 30 Cyc. 1578; *Murdock v. Walker*, 43 Ill. App. 590; *Gores v. Graff*, 77 Wis. 174, 46 N. W. 48. *Staloch v. Holm*, 100 Minn. 276, 9 L.R.A.(N.S.) 712, 111 N. W. 284, was a death case, and it apparently did not occur to the court that there was any doubt the action would lie. The same may be said of *Martin v. Courtney*, 75 Minn. 255, 77 N. W. 813, id. 87 Minn. 197, 91 N. W. 487. These cases are significant in view of the settled rule in this state that such an action is for breach of contract. We have found no malpractice case where a recovery for death has been denied on the ground that the statutory action could not be maintained.

As to the relation of landlord and tenant, we have been able to find no cases where a recovery was sought for death caused by a failure to keep a promise to repair or to furnish heat. The cases previously cited, *Baron v. Liedloff*, *Good v. Von Hemert*, and *Glidden v. Goodfellow*, indicate pretty clearly the position of this court that there may

be such a thing as negligence in the performance of a contract duty.

Our conclusion is that we should not say, taking allegations of the complaint as true, that the death of plaintiff's intestate was not caused by the wrongful acts or omissions of the defendants. What the evidence will show we have no means of knowing. It may show no negligence, or contributory negligence. We simply hold that the complaint states a cause of action.

Order affirmed.

Brown, Ch. J., dissenting:

I am unable to concur in the decision in this case and therefore respectfully dissent. The sole question presented, stated in a word, is whether the next of kin of a deceased person may maintain an action in tort under the death by wrongful act statute, for an act alleged to have caused his death, which as to decedent amounted to nothing more than a breach of contract. In my opinion the question should be answered in the negative.

It seems well settled by the authorities that, where the act constituting a breach of contract is one of misfeasance, because prohibited by statute, or because a violation of some duty or obligation imposed by law as incident to particular contract relations, and in addition to those expressly stipulated by the parties, the injured party has the election to sue in tort or for a breach of the contract, as he deems best suited to appropriate and adequate relief. But where the act is one of nonfeasance, mere negligence unaccompanied by affirmative unlawful acts, the exclusive remedy is for a breach of the contract. *Tuttle v. George H. Gilbert Mfg. Co.* 145 Mass. 169, 13 N. E. 465; *Lane v. Raynes*, 223 Mass. 515, 112 N. E. 152; *Flint & W. Mfg. Co. v. Beckett*, 167 Ind. 491, 12 L.R.A.(N.S.) 924, 79 N. E. 503; *Dustin v. Curtis*, 74 N. H. 266, 11 L.R.A.(N.S.) 504, 67 Atl. 220, 13 Ann. Cas. 169; *Mulvey v. Staab*, 4 N. M. 173, 12 Pac. 699; *Samuel v. Novak*, 99 Md. 558, 58 Atl. 19; *Nevin v. Pullman Palace Car Co.* 106 Ill. 222, 46 Am. Rep. 688. The doctrine is stated with citation of authorities in the note to *Flint & W. Mfg. Co. v. Beckett*, 12 L.R.A.(N.S.) 924. *Bishop, Non-Contract Law*, § 76. It was applied by this court in *Sargent v. Mason*, 101 Minn. 319, 112 N. W. 255, an action like that at bar, for the failure of the landlord to heat the rented premises. In this case the complaint brings the action within the nonfeasance rule, there being no allegation therein showing anything more than a negligent failure to perform the contract. The obligation violated was imposed by express contract stipulation, not by law, and decedent, had he survived, could

have recovered only for the breach of the contract. And in this respect it is unimportant in what language the breach of the contract is charged, since the complaint as a whole discloses a simple failure to perform and nothing more. And since the sole remedy of decedent would have been for a breach of the contract, his personal representatives or next of kin have no greater right under the wrongful death statute, for the intent of that law was to extend to them the same right that was vested in decedent at his death. *McLean v. Burbank*, 12 Minn. 530, Gil. 438, wherein Mr. Justice Berry said in the course of the opinion therein: "The natural construction of this language would appear to be that the representatives may maintain their action for the same kind of act or omission, causing death, for which the intestate might have maintained an action had the resulting injury fallen short of death."

While a new action is given by the statute,—one that did not exist prior to its enactment,—it is founded wholly upon a right possessed by decedent, namely, a right of action in tort, and not in contract. That right, and only that right, passes by the statute to the next of kin. An attempt to proceed under the wrongful death statute for the failure of the landlord to perform the conditions of the lease was unsuccessful in *Davis v. Smith*, 26 R. I. 129, 66 L.R.A. 478, 106 Am. St. Rep. 691, 58 Atl. 630, 3 Ann. Cas. 832.

The demurrer to the complaint should be sustained.

Holt, J.: I concur in the views of the Chief Justice.

Petition for rehearing denied.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA

v.

C. H. HOLM et al.

(— Minn. —, 166 N. W. 181.)

Army — deterring enlistments — Liability.

1. Circulating a pamphlet which impugns the motives of the President and Congress in entering into the war, and seeks by unfounded assertions to incite antagonism to the war, the natural tendency of which is to deter enlistments, is a violation of chapter 463 of the Laws of 1917.

Same — validity of statute.

2. Chapter 463 of the Laws of 1917, making it a criminal offense to advocate that men should not enlist in the military forces or aid in prosecuting the war, does not infringe the constitutional provision conferring upon Congress the power to raise armies, nor the constitutional provision preserving freedom of speech and of the press, and is not abrogated or superseded by Act Cong. June 15, 1917, known as the Espionage Law.

(January 25, 1918.)

CERTIFICATION by the District Court for Ramsey County for the opinion of the Supreme Court of questions arising after the overruling of a demurrer to an indictment charging defendants with violation of

Headnotes by TAYLOR, C.

Note.—The power of a state under the Federal Constitution to legislate with respect to Army or Navy is treated in the annotation following this case, post, 307. L.R.A.1918C.

a statute against discouraging enlistments in the military or naval forces of the state or United States. Questions answered.

The facts are stated in the Commissioner's opinion.

Mr. Hermon W. Phillips, for defendants:

Enlistment is, in its inception, a contract, and the act of making this contract, of entering the Army, is a purely voluntary act on the part of the person entering the service of the government as a soldier.

Re *Grimley*, 137 U. S. 147, 34 L. ed. 636, 11 Sup. Ct. Rep. 54.

The national government having the sole power to raise and support armies, and to make all needful rules in relation thereto, it is beyond the power of the state to add to or take from such provisions as Congress has enacted; indeed, it is beyond the power of the state to act in the matter at all, whether Congress has acted or not.

Prigg v. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060; *Houston v. Moore*, 5 Wheat. 1, 5 L. ed. 19; *Tarble's Case*, 13 Wall. 397, 20 L. ed. 597.

The act under consideration is repugnant to the clause of § 1, art. 14, of the Federal Constitution, providing that "no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States."

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; *Crandall v. Nevada*, 6 Wall. 36, 18 L. ed. 745; *Twining v. New Jersey*, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14; *Minor v. Happersett*, 21 Wall. 162, 171, 22 L. ed. 627, 629; *United States v. Hall*, Fed. Cas. No. 15,282.

Sole and exclusive power to legislate on the matters now under consideration is vested in Congress.

Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Hendrick v. Maryland*, 235 U. S. 610, 59 L. ed. 335, 35 Sup. Ct. Rep. 140; *Kane v. New Jersey*, 242 U. S. 160, 61 L. ed. 222, 37 Sup. Ct. Rep. 30; *Clark Distilling Co. v. Western Maryland R. Co.* 242 U. S. 311, 61 L. ed. 326, L.R.A.1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845; *Ohio v. Thomas*, 173 U. S. 276, 43 L. ed. 699, 19 Sup. Ct. Rep. 453.

Messrs. *Lyndon A. Smith*, Attorney General, *Ambrose Tighe*, Special Assistant Attorney General, and *R. D. O'Brien*, for the State:

A person is enlisted whose name is duly entered upon the military rolls; and it applies to those who are drafted as well as to those who volunteer.

Sheffield v. Otis, 107 Mass. 282.

It is not necessary, to constitute an offense under the act, even if it applies to voluntary enlistment only, that the pamphlet should in express terms refer to voluntary enlistment as such, or should in express terms advise against it. It is sufficient if its contemplated purpose or reasonable effect is to dissuade men from so joining the Army.

Masses Pub. Co. v. Patton, — C. C. A. —, 245 Fed. 102.

One can say or write what he pleases, but may be punished if he says or writes something which the legislature has forbidden.

Rex v. St. Asaph, 3 T. R. 428, note, 100 Eng. Reprint, 657, note; 4 Bl. Com. 151; *State v. Pioneer Press Co.* 100 Minn. 173, 9 L.R.A. (N.S.) 480, 117 Am. St. Rep. 684, 110 N. W. 867, 10 Ann. Cas. 351; *State v. McKee*, 73 Conn. 18, 49 L.R.A. 542, 84 Am. St. Rep. 124, 46 Atl. 409; *Re Banks*, 56 Kan. 242, 42 Pac. 698; *State v. Van Wye*, 136 Mo. 227, 58 Am. St. Rep. 627, 37 S. W. 988; *Patterson v. Colorado*, 205 U. S. 454, 51 L. ed. 879, 27 Sup. Ct. Rep. 556, 10 Ann. Cas. 689.

Taylor, C., filed the following opinion: Chapter 463 of the Laws of the State of Minnesota approved April 20, 1917, provides:

"It shall be unlawful from and after the passage of this act for any person to print, publish or circulate in any manner whatsoever any book, pamphlet, or written or printed matter that advocates or attempts to advocate that men should not enlist in the military or naval forces of the United States or the state of Minnesota." § 1.

"It shall be unlawful for any person to teach or advocate by any written or printed L.R.A.1918C.

matter whatsoever, or by oral speech, that the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States." § 3.

The defendants were indicted upon the charge that they had violated this statute by circulating a pamphlet which is set forth in full in the indictment. They demurred to the indictment. The trial court overruled the demurrer, and then, at their request, certified four questions to this court which may be summarized as follows:

(1) Whether the facts stated in the indictment constitute a public offense.

(2) Whether the statute conflicts with § 8 of article 1 of the Federal Constitution.

(3) Whether the statute conflicts with § 1 of the 14th Amendment to the Federal Constitution.

(4) Whether the Act of Congress of June 15, 1917,—the so-called Espionage Law,—supersedes, suspends, or annuls the state statute.

The pamphlet is, in the main, an attack upon the Act of Congress of May 18, 1917, commonly known as the Selective Draft Law; but it does not stop with an attack upon that law. It asserts, among other things, that "this war was arbitrarily declared against the will of the people;" that the people are ten to one against it; that "the President and Congress have forced this war upon the United States;" that now "they are attempting by military conscription to force us to fight a war to which we are opposed;" that "the integrity of the country is being menaced;" that "this war was declared to protect the investments of Wall street in the bonds of the Allies."

It then asks: "Why should the entire population be called upon to suffer and die because a few individuals have invested their surplus wealth unwisely? Are you ready to give your life to save their dollars?"

Defendants contend that the term "enlist" as used in the state statute refers only to voluntary enlistments, and that the statute is not violated by an attempt to deter men from complying with the Conscription Law; while the state contends that the term "enlist" as used in the statute is broad enough to include enlistments under the Conscription Law as well as voluntary enlistments, and that the statute is violated by an attempt to deter men from complying with the Conscription Law as well as by an attempt to deter them from enlisting voluntarily. It is not necessary to determine this question in this case for the pamphlet does not confine itself to opposing the means adopted for raising troops, but impugns the motives which induced the President and Congress

to enter into the war, and attempts by unfounded and unwarranted assertions to incite opposition to the war and to create a feeling that we have been brought into it for mercenary and unworthy purposes. It manifests not merely opposition to conscription, but opposition to the war and to carrying on the war in any manner. Without saying in so many words "that men should not enlist," the whole tenor of the article is calculated to incite opposition to the war and to deter men from enlisting or otherwise aiding in carrying it on. To violate the statute it is not necessary that the pamphlet circulated should directly and expressly urge men to refrain from enlisting, but the statute is violated if the natural and reasonable effect of the pamphlet circulated is to deter men from doing so. *Masses Pub. Co. v. Patten* (C. C. A.) 245 Fed. 102; *United States v. Pierce* (D. C.) 245 Fed. 878. We think that such is the effect of the pamphlet in question, and the contention of defendants that, although the pamphlet opposes compliance with the Conscription Law, it does not oppose voluntary enlistment, and for that reason does not transgress the statute, cannot be sustained.

Defendants also contend in effect that as § 8 of article 1 of the Federal Constitution confers upon Congress the power to declare war and raise armies and to make all laws which shall be necessary and proper for carrying into effect the powers so conferred, it is beyond the power of the state to prohibit its citizens from hindering or interfering with the raising of such armies; that laws to accomplish that purpose can be enacted only by Congress.

These constitutional provisions and the laws of Congress passed pursuant thereto were under consideration in *Presser v. Illinois*, 116 U. S. 252, 29 L. ed. 615, 6 Sup. Ct. Rep. 580, and in *Houston v. Moore*, 5 Wheat. 1, 5 L. ed. 19. In the *Presser* Case it was held that a law of the state of Illinois prohibiting any body of men, other than the militia of the state and the troops of the United States, from drilling or parading with arms without a license from the governor, did not infringe either the Federal Constitution or the Federal laws, as it did not interfere with the organization, arming, and drilling of the militia as provided by the Federal laws. In the *Houston* Case a statute of the state of Pennsylvania providing that a member of the militia of that state who was called into the service of the United States and who refused to obey such call should be tried by a state court-martial and be liable to the penalties prescribed by the act of Congress was held valid as the delinquent had not actually entered the Federal service, and the Federal jurisdiction L.R.A.1918C.

had not become exclusive. It is clear from these and numerous other Federal decisions that state statutes do not offend against the constitutional provisions cited unless they trench upon the power of the national government to raise troops, or interfere with or hinder the operation of the Federal laws governing such matters. The statute here in question does neither; it merely prohibits advocating, within this state, that men should not enlist and should not aid in prosecuting the war against the public enemies. In enacting it as a police regulation, the legislature was well within its province.

Neither do we think that the so-called Espionage Law of June 15, 1917, passed by Congress, abrogates or supersedes this statute. The citizens of the state are also citizens of the United States and owe a duty both to the state and to the United States. The state is a part of the nation and owes a duty to the nation to support, in full measure, the efforts of the national government to secure the safety and protect the rights of its citizens and to preserve, maintain, and enforce the sovereign rights of the nation against the public enemies, and to that end the state may require its citizens to refrain from any act which will interfere with or impede the national government in effectively prosecuting the war against such public enemies. It is the duty of all citizens of the state to aid the state in performing its duties as a part of the nation, and the fact that such citizens are also citizens of the United States and owe a direct duty to the nation does not absolve them from their duty to the state, nor preclude the state from enforcing such duty. *Halter v. Nebraska*, 205 U. S. 34, 51 L. ed. 696, 27 Sup. Ct. Rep. 419, 10 Ann. Cas. 525. True, the state cannot make or enforce requirements which are inconsistent with those of the national government, for those of the national government are paramount in case of conflict. But here there is no conflict between the state statute and the Federal law, and both may subsist and be given effect. *Presser v. Illinois*, supra.

"Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable . . . for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both." *Moore v. Illinois*, 14 How. 13, 14 L. ed. 306.

"Where a person owes a duty to two sovereigns, he is amenable to both for its performance, and either may call him to account." *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717.

See also *Fox v. Ohio*, 5 How. 410, 12 L. ed. 213; *United States v. Marigold*, 9 How. 560, 13 L. ed. 257; *Cross v. North Carolina*, 132

U. S. 131, 33 L. ed. 287, 10 Sup. Ct. Rep. 47; *Re Green*, 134 U. S. 377, 33 L. ed. 951, 10 Sup. Ct. Rep. 586; *Davis v. Beason*, 133 U. S. 333, 33 L. ed. 637, 10 Sup. Ct. Rep. 299, 8 Am. Crim. Rep. 89; *Crossley v. California*, 168 U. S. 640, 42 L. ed. 610, 18 Sup. Ct. Rep. 242; *Grafton v. United States*, 206 U. S. 333, 51 L. ed. 1084, 27 Sup. Ct. Rep. 749, 11 Ann. Cas. 640; *Reid v. Colorado*, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; *State v. Oleson*, 26 Minn. 507, 5 N. W. 959; *State v. Lee*, 29 Minn. 445, 13 N. W. 913.

The state statute prohibits citizens of the state from discouraging enlistment in either the state or national military forces and from advocating that citizens of the state should not aid in carrying on the war. The act of Congress provides: "Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both."

Defendants recognize and call attention to the wide difference between these laws. The one is designed to enforce a duty which the citizen of the state owes to the state; the other to enforce a duty which the citizen of the United States owes to the United States. There are many acts which may violate one, but not the other, of these laws, and there are also many acts which may violate both, but the state statute is not necessarily invalid for that reason. There is nothing in the statute which is inconsistent with the Federal law, nor which in any manner interferes with, hinders, or delays the operation of that law. The state has control of its internal affairs, and in the exercise of its police power may prescribe rules of conduct for its citizens, and may forbid whatever is inimical to the public interests, or contrary to the public policy of the state. 6 R. C. L. p. 191, § 190. That the state is inhibited from exerting its police power to ob-

struct the operations of the national government, or to regulate matters controlled and regulated by the national government, does not mean that in time of war it may not make the national purposes its own purposes to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes.

Defendants also contend that the statute abridges the freedom of speech and of the press secured to citizens of the United States by the 1st section of the 14th Amendment to the Federal Constitution. To what extent this Amendment takes from the states the power to place legislative restrictions upon the freedom of speech and the freedom of the press is still a mooted question; but, conceding that it protects this right from abridgment by the states, the freedom secured thereby is not an unlimited license to speak and to publish whatever one may choose. It is settled that the state may prohibit publications or teachings which are injurious to society, or which tend to subvert or imperil the government or to impede or hinder it in the performance of its public and governmental duties without infringing the constitutional provisions which preserve freedom of speech and of the press. These constitutional provisions preserve the right to speak and to publish without previously submitting for official approval the matter to be spoken or published, but do not grant immunity to those who abuse this privilege, nor prevent the state from making it a penal offense to publish or advocate matters or measures inimical to the public welfare. *State v. Pioneer Press Co.* 100 Minn. 173, 9 L.R.A. (N.S.) 480, 117 Am. St. Rep. 684, 110 N. W. 867, 10 Ann. Cas. 351; *Patterson v. Colorado*, 205 U. S. 454, 51 L. ed. 879, 27 Sup. Ct. Rep. 556, 10 Ann. Cas. 689; *United States v. Pierce* (D. C.) 245 Fed. 878; *People v. Most*, 171 N. Y. 423, 58 L.R.A. 509, 64 N. E. 175; *Respublica v. Dennie*, 4 Yeates, 267, 2 Am. Dec. 402; 2 Story, Const. § 1880.

The United States is at war, and we think the legislature did not exceed its power in making it a criminal offense to advocate that men should not enlist in the military forces or aid in prosecuting the war.

The first question is answered in the affirmative and each of the others in the negative; and the case will be remanded for further proceedings in the trial court.

Annotation—Power of state under Federal Constitution to legislate with respect to Army and Navy.

This note purports to include in general only cases involving the validity of state laws relating to the Army and

Navy as affected by the power of Congress or of the Federal government over the same. In other words, the question

considered is one of conflict of authority; and cases involving the validity of state legislation as affected by other considerations are not covered. Nor does the note include cases treating merely the question of the powers of the state courts.

The Federal Constitution, in art. 1, § 8, provides that the Congress shall have power "to raise and support armies, but no appropriation of money to that use shall be for a longer time than two years; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions; to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." It also provides in art. 1, § 10, that no state shall, without the consent of Congress, keep troops or ships of war in time of peace.

STATE v. HOLM, ante, 304, in upholding the constitutionality of a state law prohibiting the publication or circulation of any book, pamphlet, etc., advocating that men should not enlist in the military or naval forces of the state or of the United States, seems to be clearly in accord with the interpretation placed by earlier decisions on the Federal Constitution and laws of Congress enacted pursuant thereto, although no case of a precisely similar nature has been found. The statute in the *HOLM CASE* was held not an interference with the power of Congress over the Army and Navy, nor inconsistent with any act of Congress with respect thereto.

Most of the cases on the question of the power of the states under the Federal Constitution to legislate with respect to the Army and Navy have been concerned with legislation relating to the militia; and many of these decisions are now of historical interest only, because of subsequent changes in the laws enacted by Congress. The respective powers of Congress and of the states will be made clearer, however, by a reference to some of these cases; but it should be observed that there are other cases also on the same ultimate question which do not involve the validity of state laws, and therefore are not included in the note.

The restriction on the power granted

to Congress in the reservation to the states of the appointment of officers and the training of the militia was not intended as an expression of the only power which was left to the states over the militia. *Ansley v. Timmons* (1825) 3 M'Cord, L. (S. C.) 329; *Dunne v. People* (1879) 94 Ill. 120, 34 Am. Rep. 213.

Thus, it is said in *People ex rel. Leo v. Hill* (1891) 126 N. Y. 497, 27 N. E. 789, and the statement is supported by other cases cited in the note, that the power conferred upon Congress by the Federal Constitution to provide for organizing, arming, and disciplining the militia "does not exclude state legislation upon the same subject, unless the power conferred on Congress is actually exercised. The power to control and organize the militia resided in the several states at the time of the adoption of the Constitution of the United States, and was not taken away by that instrument. The power of legislation over the subject after its adoption was concurrent in the states and in Congress, and the power of state legislation remained until Congress, in the exercise of the power conferred upon it by the Constitution, had legislated. State legislation in relation to the militia is only excluded when repugnant to or inconsistent with Federal legislation, enacted within the purview of the power conferred by the Federal Constitution; and there is authority for regarding state legislation as inconsistent, which undertakes to supplement laws passed by Congress, covering the subject of the power, by annexing new qualifications or incidents not prescribed by the Federal law."

And it was held in *People ex rel. Leo v. Hill* (N. Y.) supra, that a state law conferring on the governor, as commander in chief, the power to disband national guard organizations, did not violate the Federal Constitution. The court stated that, assuming that authority to disband a company must be found in the Federal statutes, this power was implied in that conferred by the act of Congress declaring that the militia of each state shall be arranged into divisions, brigades, etc., "as the legislature of the state may direct." To the effect, however, that a governor of a state has no power to depose an officer in or disturb the organization of militia or volunteer regiments after they are mustered into the service of the United States, see (1862) 10 Ops. Atty. Gen. 279, and (1898) 22 Ops. Atty. Gen. 225. See, in

this connection, note to *Lewis v. Lewelling*, 23 L.R.A. 510, on the power of the governor to disband militia.

The Illinois Statute of 1879, providing for the organizing, arming, drilling, and maintaining of the state militia, was held in *Dunne v. People* (Ill.) *supra*, not invalid as in conflict with the Federal Constitution or the laws of Congress. And the fact that the state law might not be in harmony with the acts of Congress in minor matters as to detail of organization was held not to render the state law invalid, especially where the repugnancies were in those sections of the law relating to the organization of the active militia when organized for state purposes, and not in those sections relating to the entire body of the militia, nor to the militia when called into the service of the United States.

And the above statute was held also, in *Dunne v. People* (Ill.) *supra*, not in violation of the provision of the Federal Constitution prohibiting states from keeping "troops" in time of peace.

Under the provision of the Federal Constitution that no state shall, without the consent of Congress, keep troops in time of peace, the court was of the opinion in *Smith v. Wanser* (1902) 68 N. J. L. 249, 52 Atl. 309, that a state is prohibited from organizing or maintaining any state force other than militia, in time of peace, unless the consent of Congress has first been obtained. And although holding that the state legislature by the Act of 1900 did not intend to create an organized body of troops known as the National Guard, distinct from and not included within the militia, the court stated in effect that if the act in question was so intended, it violated this provision of the Federal Constitution.

It was held in *State ex rel. Madigan v. Wagner* (1898) 74 Minn. 518, 42 L.R.A. 749, 73 Am. St. Rep. 369, 77 N. W. 424, that the national guard or active militia of the state, organized under state law, the members of which, when not engaged, at stated periods, in drilling and training for military duty, were employed in their usual civil avocations, subject to call for military service when public exigencies should require, were neither "troops," within the meaning of the above provision of the Federal Constitution, nor a "standing army," within the meaning of § 14 of the Bill of Rights of the state Constitution.

Under the Act of Congress of 1792, providing that persons of the age of eighteen years and under the age of

forty-five years, except as thereafter provided, should be enrolled in the militia, and exempting from military duty certain officers and "all persons who now are or may hereafter be exempted by the laws of the respective states," it was competent for the legislature to exempt from enrolment in the militia persons of certain ages, as those under twenty-one and over thirty years of age. Opinion of Justices (1839) 22 Pick. (Mass.) 571.

In Opinion of Justices (1860) 14 Gray (Mass.) 614, it was held that, as the Federal government had authority to determine who should compose the militia, and had so determined by the Act of Congress of 1792, a state legislature could not constitutionally provide for the enrolment in the militia of any persons other than those enumerated in such act.

However, a state law declaring aliens between the ages of eighteen and forty-five, who had resided in the state for six months, to be subject to militia duty, was held in *Ansley v. Timmons* (1825) 3 M'Cord, L. (S. C.) 329, not invalid as offending against the Federal Constitution or statutes or the Law of Nations. The note does not cover the general question whether an alien is subject to military duty.

The cases of *Presser v. Illinois* (1886) 116 U. S. 252, 29 L. ed. 615, 6 Sup. Ct. Rep. 580, and *Houston v. Moore* (1820) 5 Wheat. (U. S.) 1, 5 L. ed. 19, sustaining respectively the validity of statutes of Illinois and of Pennsylvania, are set out in *STATE v. HOLM*, ante, 304.

Presser v. Illinois (U. S.) *supra*, was followed in *Com. v. Murphy* (1896) 166 Mass. 172, 32 L.R.A. 608, 44 N. E. 138, holding that the constitutional right to bear and keep arms for the common defense was not violated by a statute prohibiting unauthorized bodies of men to associate together as a military organization, or to drill and parade with arms in cities and towns; and that the fact that the statute exempted certain independent military bodies from its operation did not render it unconstitutional as class legislation. In this connection, see annotation on "Constitutional right to bear arms," appended to *State v. Keet*, L.R.A. 1917C, 63, and earlier notes therein referred to.

In *Re Fair* (1900) 100 Fed. 149, in holding that the state courts were without jurisdiction to try one accused of murder where it appeared that the act was done in the performance of his duty as a soldier of the United States, the court said: "In the matter before us the

petitioners were acting for and on behalf of the United States, under the military authority of the United States,—a subject-matter the control of which, under the Constitution, is vested solely in the general government. The state cannot in any particular, either through its legislature or judicial department, regulate or circumscribe the powers of the United States in respect thereto. The wisdom, expediency, or justness of the military laws, rules, and regulations adopted and prescribed by the United States are no concern of the state. The proper enforcement of such laws, rules, and regulations cannot be measured and determined by state laws."

Although the note does not purport to cover questions as to the validity of statutes respecting the Army and Navy arising merely under the state Constitution or laws, attention is called to the recent case of *State ex rel. Morris v. Handlin* (1917) 38 S. D. 550, 162 N. W. 379, holding that the state Constitution was not violated by a statute enacted by the legislature of South Dakota in 1917, providing that every enlisted man in the Fourth South Dakota Infantry (which had been drafted into the Federal service and had served on the Mexican border) should be paid at the time of his return from the Federal service the sum of \$75, and making an appropriation there-

for. The statute declared that the payment was made for the "purpose of encouraging military training, the payment for services of the members of said regiment for Federal services upon the Mexican border, and for continued service in the National Guard Reserve of the United States." And the provisions of the state Constitution which it was contended were violated were that "no indebtedness shall be incurred or money expended by the state, and no warrant shall be drawn upon the state treasurer except in pursuance of an appropriation for the specific purpose first made;" that the legislature should not grant any extra compensation to any public officer, employee, or agent after the service shall have been rendered or the contracts made, nor authorize the payment of any claims created against the state under any agreement or contract made without express authority of law, except that the legislature might make appropriations for expenditures incurred in suppressing insurrection or repelling invasion; and that the legislature should not make donations to individuals, associations, or corporations.

The question whether state militias are subject to the Articles of War of the United States is treated in a note to *State ex rel. Poole v. Peake*, 40 L.R.A. (N.S.) 354. R. E. H.

MISSISSIPPI SUPREME COURT. (Division A.)

LONDON GUARANTEE & ACCIDENT
COMPANY, Limited, Appt.,
v.

J. J. NEWMAN LUMBER COMPANY.

(— Miss. —, 77 So. 522.)

Contract — signed by agent — who bound.

A guaranty in a letter from insurance agents to a policyholder, stating that "our office personally guarantees" a given rate, binds the agents and not the principal, although the letter is signed by them "Managers."

For other cases, see Principal and Agent, III. in Dig. 1-52 N. S.

(January 28, 1918.)

Note. — The question as to the personal liability of one who signs a contract by adding words indicating a representative capacity to his signature is treated in the note to *Gavazza v. Plummer*, 42 L.R.A. L.R.A.1918C.

APPEAL by plaintiff from a judgment of the Circuit Court for Forrest County in its favor, for a part only of its claim, in an action brought to recover a balance alleged to be due on the premium on an employers' liability policy issued by plaintiff to defendant. Reversed.

Statement by Smith, Ch. J.:

This action was begun in the court below by appellant, to recover of appellee a balance alleged to be due it on the premium on an employers' liability policy issued by it to appellee on March 31, 1909. Several pleas were filed by appellee, in one of which is alleged the breach of a collateral agreement alleged to have been entered into by appellant with appellee when a similar policy was issued by it to appellee in 1908, by reason of which appellant is indebted to appellee in an amount in excess of that sued

(N.S.) 1; and see later cases, *Clark v. Talbott*, 44 L.R.A.(N.S.) 731; *Denman v. Brenneman*, L.R.A.1915E, 1047; and *Ellis v. Stone*, L.R.A.1916F, 1228.

for; by another plea, however, an indebtedness of something over \$200 was admitted, and the tender thereof to appellant made. At the close of the evidence, and at the request of appellee, the jury were peremptorily instructed to find for appellant for the amount admitted to be due by appellee, and there was a verdict and judgment accordingly.

Louis V. Clark & Co. are insurance agents, doing business at Birmingham, Alabama, and represent a number of fire, accident, and industrial insurance companies, among which are appellant and the Industrial Insurance Company of Birmingham, Alabama, neither of which have any connection with the other. Clark & Co. are the managers of appellant's Southern Department, composed of the states of Alabama and Mississippi. The Industrial Insurance Company was organized by Louis V. Clark himself, who is also the president and principal stockholder thereof. For a number of years prior to the institution of this suit appellee had been obtaining annually through Clark & Co. two insurance policies, one an employers' liability, and the other a workmen's collective, policy; the former indemnifying it for all money paid to employees as damages for injuries suffered by them on account of appellee's negligence, and the latter indemnifying it for money paid to employees for certain losses sustained by them for which appellee was not legally responsible. Separate written applications were annually made by appellee for each of these policies, both of which would be at times written by appellant, and were so written by it in March, 1906, the policies expiring in March, 1907. The premiums on the policies were based on a per cent of the total amount of wages paid by appellee to its employees during the period of time covered by the policies. When the two policies issued by appellant in 1906 were about to expire, appellee declined to renew them unless the premiums thereon were reduced, whereupon Louis V. Clark went in person to appellee's place of business, and in an interview with L. L. Major, its manager, it was agreed that the employers' liability policy should be written by appellant at the premium rate of 80 cents on each \$100 of wages paid by appellee, and that the workmen's collective policy should be written by the Industrial Insurance Company at the rate of \$1.70 for each \$100 of wages paid by appellee, making a total rate on the two policies of 2½ per cent on the amount of wages paid; Clark promising and for his agency personally guaranteeing that the net amount to be paid the Industrial Insurance Company in premiums would be reduced to such an extent that the total amount paid both companies

would not exceed 2 per cent of the amount of wages paid its employees by appellee. This reduction was to be brought about in the manner set forth in the letters hereinafter set out. Upon Clark's return to Birmingham he mailed the policies to appellee, the letter inclosing the policy of the Industrial Company being as follows:

London Guarantee & Accident Company, Limited, of London, England. United States Branch: Head Office, Chicago, Ill. A. W. Masters, General Manager. Southern Department: Louis V. Clark & Co., Managers, 214-216 North 20th Street, P. O. Drawer 891, Birmingham, Ala. Long Distance Telephone 807.

Birmingham, Ala., April 10, 1907.

J. J. Newman Lumber Company,
Hattiesburg, Miss.

Dear Sirs:—

No. 10782—Industrial Insurance Co. Inclosed herewith is the above-numbered policy issued in lieu of No. 10728, which you will kindly return to us for cancellation. In connection with the policy inclosed, and B-7723—London Guarantee & Accident Company, covering employers' liability, we wish to say to you that this office personally guarantees that the rate your company will have to pay shall not exceed 2 per cent total, and shall be as much less as you can help us to make it by reducing the losses to a minimum and keeping down the hospital and medical charges, which no other company allows, so far as we are aware, in what is known as their workmen's collective policy. At the end of the year, we will give you an itemized statement showing all expenditures, including indemnity, hospital and medical charges, and such other items not contemplated by the policy which we may allow, and incidental home office expenses of conducting the business, and this sum total will be subtracted from the sum total of premium, and the difference divided equally between your office and our own, which gives you the benefit of our seventeen years' continuous connection as agents and adjusters of losses at the least possible cost. We make this concession confidentially, because it is not, generally speaking, a strictly business underwriting proposition, yet we have had your plant continuously since 1890, and feel that we can make a concession that would be valuable to your interests, especially so since Messrs. Major and Sowers are of so great value in assisting us in the settlement of claims, which keeps our loss ratio down to a minimum, and in consequence think your company should enjoy the benefits. We would not like this to be known among the other milling interests, which pay us large

ly in excess of your charges, for the reason that we could not afford to make so low a rate where the service rendered by the assured is not of the same degree of intelligence and activity in handling claims promptly. Kindly sign the inclosed application and return, together with policy No. 10726, greatly obliging

Yours very truly,

Louis V. Clark & Co.,

RS Enc.

Mgrs. So. Dept.

Upon the expiration of these policies they were each renewed upon written applications therefor, the renewals being mailed by Clark & Co. to Major under the same cover, the letter accompanying them being practically a duplicate of the one hereinbefore set out, by which the industrial policy of the preceding year had been forwarded, and is as follows:

London Guarantee & Accident Company, Limited, of London, England. United States Branch: Head Office, Chicago, Ill. A. W. Masters, General Manager. Southern Department: Louis V. Clark & Co., Managers, 214-216 North 20th Street, P. O. Drawer 891, Birmingham, Ala. Long Distance Telephone 607.

Birmingham, Ala., April 1, 1908.

Mr. L. L. Major,

c/o J. J. Newman Lbr. Co.,
Hattiesburg, Miss.

Dear Sir:—

10925—Industrial—B—11350—L. G. & A. Inclosed herewith are the above-numbered policies, issued in accordance with applications a few days since. In this connection we wish to confirm the verbal agreement that our office personally guarantees that the rate your company will have to pay shall not exceed 2 per cent total, and shall be as much less as you can help us to make it, by reducing the losses to a minimum and keeping down the hospital and medical charges, and such other charges which we have been paying in the past, not contemplated nor included in the policies, which no other company allows, so far as we are aware, in what is known as the workmen's collective policy. At the end of the year we will give you an itemized statement showing all expenditures, including indemnity, hospital and medical charges, and other items not contemplated by the policy, which you may allow, and incidental home office expenses in conducting the business. This sum will be subtracted from the sum total of the premium on the workmen's collective policy, and the difference divided between your office and our own. This gives you the benefit of our eighteen years' continuous management and adjustment of

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your losses, which with your assistance we have been able to keep at a minimum. This concession is made to your company personally on your account, in a confidential way, because it is not, generally speaking, a strictly business underwriting proposition, yet we are glad personally to make this special concession to your company, for the reason that at the rates written we have to regard it more as a sentimental than business proposition. And again, we feel that our losses will be kept down by the excellent management of yourself, assisted by Mr. Sowers, to that point which guarantees safety on the proposition as a whole. . . . Kindly acknowledge receipt, and oblige,

Yours truly,

Louis V. Clark & Co.,

ES Enc.

Mgrs. So. Dept.

The premiums due each of these companies on the policies issued by them in 1907 and 1908 were paid according to the stipulations therein and without any complaint on the part of appellee. Prior to the expiration of the policies issued in April, 1908, Major severed his connection with appellee, and when the policies expired in 1909 his successor declined to renew the same on the old basis, and the negotiations between him and Clark & Co. relative thereto resulted in appellant issuing to appellee an employers' liability policy on which the premium to be paid was 55 cents on each \$100 of wages paid by it to its employees, and the Industrial Company issuing to it a workmen's collective policy, on which the premium to be paid was \$1.25 on each \$100 of wages paid by it to its employees. When appellant's policy was issued, the amount of wages that would probably be paid its employees by appellee during the period covered by it was estimated, and a premium based thereon paid, but at the end of the period it developed that appellee had paid its employees an amount of wages largely in excess of that estimated, resulting in a balance being due by it to appellant of something over \$1,000. This it declined to pay, claiming that appellant had guaranteed, when the policies were renewed in 1908, that the combined rate to be paid it and the Industrial Company by appellee would not exceed 2 per cent of the amount of wages paid by appellee to its workmen. but that each company had collected the full rate provided by the policies, so that appellee had paid a total rate of 2½ per cent on the amount of wages paid its employees. from which it follows that appellant is indebted to it in the amount thus overpaid the two companies, which amount exceeds that due by appellee to appellant on the policy written in 1909. Appellant knew

nothing of the arrangement made by Clark & Co. with appellee relative to premiums to be paid on any of these policies to the Industrial Insurance Company.

Messrs. Stevens & Cook for appellant.

Mr. S. E. Travis, for appellee:

The written guaranty made contemporaneously with the policy in consideration thereof is a part of the written contract.

Atkinson v. Whitney, 67 Miss. 655, 7 So. 644; Doe ex dem. Caillard v. Bernard, 7 Smedes & M. 223; Seieroe v. First Nat. Bank, 50 Neb. 612, 70 N. W. 220; Bernheimer v. Prince, 29 Misc. 308, 60 N. Y. Supp. 449; Eastern Mfg. Co. v. Brenk, 32 Tex. Civ. App. 97, 73 S. W. 538.

A general agent of an insurance company, such as Louis V. Clark & Company is admitted to be, has all the authority of the company itself.

Liverpool & L. & G. Ins. Co. v. Sheffy, 71 Miss. 923, 16 So. 307; New Orleans Ins. Asso. v. Matthews, 65 Miss. 301, 4 So. 62; Phenix Ins. Co. v. Bowdre, 67 Miss. 620, 19 Am. St. Rep. 326, 7 So. 596; Germania L. Ins. Co. v. Bouldin, 100 Miss. 660, 56 So. 610.

Smith, Ch. J., delivered the opinion of the court:

Appellee's claim is based altogether upon

the second letter written by Clark & Co. to Major, inclosing the two policies issued in April, 1908, and it objected in the court below to the introduction by appellant of the letter written by Clark & Co. in 1907, inclosing the policy of the Industrial Insurance Company then issued, and also to the testimony hereinbefore set out, of the matters which rest in parol. It will be unnecessary for us to pass upon the rulings of the court below on the objections interposed to this evidence, for the reason that the guaranty contained in the letter relied on by appellee from Louis V. Clark & Co. to Major, appellee's manager, that the total premium to be paid by appellant on the two policies inclosed therein "shall not exceed 2 per cent" (on the total amount of wages paid by appellee to its employees), purports, and consequently must be held, to be the personal guaranty of the agents, and not of their principal, for the body of the letter, and not the form of the signature thereto, must control. Revolving Scraper Co. v. Tuttle, 61 Iowa, 423, 47 Am. Rep. 816, 16 N. W. 353; Leach v. Blow, 8 Smedes & M. 221; 2 C. J. p. 674, § 327; 4 Elliott, Contr. §§ 2834 et seq.

Reversed and remanded.

Suggestion of error overruled.

OKLAHOMA SUPREME COURT.

L. P. SMARTT, Sheriff, Plff. in Err.,
v.

BOARD OF COUNTY COMMISSIONERS
OF CRAIG COUNTY.

(— Okla. —, 169 Pac. 1101.)

County — cost of feeding prisoners.

Moneys lawfully expended by a sheriff in the feeding of prisoners, and fees earned by him in the discharge of duties imposed upon him by the Constitution and laws of the state, constitute a valid charge against the county, and are not within the limitations imposed upon the county by § 28, art. 10, Constitution.

For other cases, see *Counties, II. b, in Dig.* 1-52 N. S.

(Thacker, J., dissents.)

(December 11, 1917.)

Headnote by HARDY, J.

Note. — The creation of indebtedness within the meaning of debt-limit provisions is treated in the annotation to Hagan v. Commissioners' Ct. 37 L.R.A. (N.S.) 1058, and Anderson v. International School Dist. L.R.A.1917E, 437. It will be observed that L.R.A.1918C.

ERROR to the District Court for Craig County to review a judgment in favor of defendant in an action brought to recover judgment on claims against the county for a certain amount for the board of prisoners, payment of which had been refused by defendant. Reversed.

The facts are stated in the opinion.

Mr. Willard H. Voyles for plaintiff in error.

Mr. W. H. Kornegay for defendant in error.

Hardy, J., delivered the opinion of the court:

L. P. Smartt, sheriff of Craig county, commenced this action against the board of county commissioners of Craig county to recover judgment on claims against said county to the amount of \$282.34, for the board of prisoners, etc., payment of which had been refused on the ground that the revenue provided for such purposes for the

the opinion in Craig County v. Smartt, — Okla. —, L.R.A.1916F, 892, 158 Pac. 601, which is cited at page 451 of the latter note, is overruled, and in effect withdrawn, by the opinion in the above-reported case.

fiscal year, during which said claims arose, had been exhausted prior to the accrual or presentation thereof. Judgment was for the county, and plaintiff appeals. The case was submitted to the trial court on an agreed statement of facts, from which it appears that the claims were chargeable to and payable out of the contingent fund for the fiscal year 1912-1913; that the estimate of the contingent fund for said year was \$5,000, the assessed value of said property for said county was \$15,178,000, and that a levy of .36 mills was regularly made to produce \$5,000, and 10 per cent additional for delinquent taxes, and that on and prior to May 5, 1913, legal claims had been filed against said funds, and had been regularly audited and allowed, in the sum of \$4,998.53, for which warrants had been issued on and prior to May 5, 1913, and that the services covered by said claims were rendered and performed prior to the services represented by the claims of plaintiff; that three fifths of the voters of said county, voting at an election held for that purpose, had not, during said fiscal year and prior to February 20, 1915, assented to the county becoming indebted for any purpose to an amount exceeding in said fiscal year the income and revenue of said fund for said year.

It is contended that the claims presented by plaintiff constitute no valid charge against the county, and therefore the judgment in his favor was erroneous. This contention was based upon the application of § 26, art. 10 (§ 291, Wms. Anno.), Const., which provides: "No county . . . shall be allowed to become indebted, in any manner, or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of three fifths of the voters thereof, voting at an election, to be held for that purpose. . . ."

It is the clear intention of this provision that counties shall not be allowed to become indebted except in the manner provided, and if the claims of plaintiff come within its terms the judgment was erroneous. We do not think, however, that such claims are affected thereby. Section 18, art. 25 (§ 382, Wms. Anno.), Const., is as follows: "Until otherwise provided by law, the terms, duties, powers, qualifications, and salary and compensation of all county and township officers, not otherwise provided by this Constitution, shall be as now provided by the laws of the territory of Oklahoma for like named officers. . . ."

Section 2 of article 17 (§ 320a, Wms. Anno.), Const., creates, subject to change by the legislature, certain offices for each organized county, including the office of sheriff, and his duties, salary, and compensation L.R.A.1918C.

were fixed by § 18, art. 25, according to the duties, salaries, and compensation performed and enjoyed by sheriffs at the time the Constitution was adopted. Referring to § 2995, Wilson's Rev. & Anno. Stat. 1903, we find the rate of compensation allowed the sheriff for services of the character herein involved and the rate therein fixed continued until changed by § 3197, Rev. Laws 1910, which made some unimportant changes in the rate of compensation for such duties, and, by virtue of the change, the sheriff is entitled to receive compensation under the provisions of said law as changed, unless prevented by § 26, art. 10. It is clear from the nature of the claims presented that the services were rendered in the discharge of plaintiff's duty as sheriff, and some of those duties he could neglect only at grave peril to himself. The keeping of prisoners confided to his custody is enjoined upon him by law, and should he refuse to receive any person as a prisoner he would, by § 2245, Rev. Laws 1910, be guilty of a misdemeanor, and if, after receiving any such prisoner in his custody, he should wilfully or carelessly allow such prisoner to escape or go at large except as might be permitted by law, he would, under § 2244, be guilty of a felony and subject to prosecution therefor. So we have this situation: An officer compelled to perform at his peril certain duties which involve the expenditure of his private funds, and subject to imprisonment for a failure to do so, is penalized by being denied compensation therefor.

It may be contended with some show of reason that § 26, art. 10, taken alone, would bear the construction urged, but it is a fundamental rule of construction that to determine the meaning and scope of one provision it must be read in the light of and with due regard for other provisions. *Re Application of State to Issue Bonds*, 33 Okla. 797, 127 Pac. 1065.

The very purpose of creating a state government by the people is to delegate thereto the performance of certain functions looking to the common safety and welfare, and the necessity for the performance of these functions through the agency of the state and its various subdivisions is the sole object for its creation. The people have provided in the Constitution for a full set of state officers, and have created separate departments and co-ordinate branches of the government and various municipal subdivisions, and confided to each the performance of certain duties which are made mandatory because necessary for the protection and well-being of the people composing the state. There has been much controversy among publicists and thinkers, and much

conflict in the decisions of the courts, as to the proper and necessary limitations upon the powers delegated to the different departments and arms of the state government; but it is conceded by all that certain necessary fundamental functions must always be actively exercised in order to preserve the existence of the state and secure to the people the rights guaranteed to them, among which are the right to life, liberty, the possession of property, and the pursuit of happiness, and, should the state become so impotent as to be unable to discharge these functions, there would result a failure of the purposes for which government was established. The surest way to bring about this result is to construe the Constitution in such a way as to place it in the power of one set of officials to deprive another of the means necessary for the performance of the duties imposed upon that other. If we give the Constitution such construction, the enforcement of laws for the regulation and protection of the public peace and safety in any county might, in its ultimate analysis, depend upon the whim and caprice of certain local officials, who might, by failing and refusing to make proper provision therefor, render it impossible to secure an enforcement of such laws by the officers charged with the duty of so doing. The items embraced in plaintiff's claim, being incurred in the necessary discharge of his duties imposed upon him by the imperative mandate of the law, are not within the limitation imposed by § 26, art. 10. A similar question was presented in *Re Application of State to Issue Bonds*, supra. That was an application by the state to determine the existence, character, and amount of the legal outstanding indebtedness of the state, and to issue funding bonds therefor. Warrants were issued from time to time during the fiscal year ending June 30, 1911, in payment of the ordinary, current expenses of maintaining the state government pursuant to valid legislation, for which provisions had been made by the levy of taxes which, in addition to the revenues expected to be derived from other sources, was believed to be sufficient to meet the ordinary current expenses for which the warrants were drawn. It is true in that case that the warrants were within the amount appropriated, while here the claims exceed the estimate made by the board of county commissioners, but the case is in point in principle because, by § 23, art. 10 (§ 288, Wms. Anno.), Const., the state was prohibited from contracting debts on account of deficits or failures in revenue to exceed at any one time \$400,000, and it was contended that the warrants, which amounted to something in excess of \$2,000,000, were void because

issued in violation of said § 23, art. 10. The limitations imposed by that section were held not to apply to that class of pecuniary obligations arising out of the ordinary, necessary current expenses of maintaining the state government which were otherwise legal and valid.

Similar provisions have been construed in other states by the courts of last resort, holding that the ordinary expenses of maintaining a county and municipal government are not within the limitation of constitutional provisions such as § 26, art. 10.

Section 18 of article 11 of the California Constitution is as follows: "No county, city, town, township, board of education, or school district shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two thirds of the qualified" voters, etc.

The supreme court of that state in *Lewis v. Widber*, 99 Cal. 412, 33 Pac. 1128, held that this clause of the Constitution referred only to an indebtedness or liability which one of the municipalities mentioned had itself incurred, and did not include a liability for the salary of a municipal officer whose office had been created and salary fixed by the statute.

Section 6, art. 8, of the Constitution of Washington provides: "No county, city, town, school district, or other municipal corporation, shall for any purpose become indebted in any manner to an amount exceeding one and one half per centum of the taxable property in such county, . . . without the assent of three fifths of the voters therein voting at an election . . . for that purpose. . . ."

In *Rauch v. Chapman*, 16 Wash. 568, 36 L.R.A. 407, 58 Am. St. Rep. 52, 48 Pac. 253, the court reviewed the authorities upon this question and reached the conclusion that said provision did not apply to fees of witnesses in criminal cases and to fees of sheriffs for serving criminal process, or to the expenses of the general state election, since both of the former were necessary under the Bill of Rights of that state, and the latter was necessary under another provision of the Constitution providing for such elections. *Duryee v. Friars*, 18 Wash. 55, 50 Pac. 583; *Hull v. Ames*, 26 Wash. 272, 90 Am. St. Rep. 743, 66 Pac. 391; *Gladwin v. Ames*, 30 Wash. 608, 71 Pac. 189; *Pilling v. Everett*, 67 Wash. 109, 120 Pac. 873; *Farquharson v. Yeargin*, 24 Wash. 549, 64 Pac. 717.

Section 12 of article 10 of the Constitution of Missouri prohibited any political corporation or subdivision of the state from becoming indebted in any manner or for

any purpose to an amount exceeding in any year the income and revenue for such year without the assent of two thirds of the voters thereof, voting at an election to be held for that purpose. The supreme court of that state, in *Potter v. Douglas County*, 87 Mo. 239, held that this provision had no application to a debt incurred by the county for the keeping and transportation of its prisoners by the sheriff or jailer to another county, under the provisions of the statute then in force.

In *Grant County v. Lake County*, 17 Or. 453, 21 Pac. 447, the supreme court of Oregon construed the constitutional inhibition of that state that no county should create any debts or liabilities which should singly or in the aggregate exceed the sum of \$5,000, except to suppress insurrection or repel invasion, and held that such provision only applied to debts and liabilities which a county in its corporate character, and as an artificial person, voluntarily created, and did not include such debts and liabilities as were imposed upon them by law. *Eaton v. Mimnaugh*, 43 Or. 465, 73 Pac. 754.

Section 157 of the Constitution of Kentucky provides: "No county, city, town, taxing district, or other municipality shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two thirds of the voters thereof, voting at an election to be held for that purpose. . . ."

And this provision has been construed as not applying to claims other than those which the municipality might incur of its own volition. In other words, that it did not include expenses necessary for the maintenance of the municipal government. *O'Bryan v. Owensboro*, 113 Ky. 680, 68 S. W. 858, 69 S. W. 800; *Hopkins County v. St. Bernard Coal Co.* 114 Ky. 153, 70 S. W. 289.

Section 5 of article 11, Constitution of Texas, prohibited any city from creating any debt unless at the same time provision was made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent thereon, and it is held by the Texas courts that a debt contracted by a city for current expenses was not within the class of debts contemplated by that section of its Constitution. *Dwyer v. Brenham*, 65 Tex. 526; *Terrell v. Dessaint*, 71 Tex. 770, 9 S. W. 593; *Biddle v. Terrell*, 82 Tex. 335, 18 S. W. 691.

Other decisions under similar constitutional and statutory provisions, holding the views herein expressed, are as follows: L.R.A.1918C.

Sackett v. New Albany, 88 Ind. 473, 45 Am. Rep. 467; *Thomas v. Burlington*, 69 Iowa, 140, 28 N. W. 480; *Leonard v. Long Island City*, 65 Hun, 621, 47 N. Y. S. R. 761, 20 N. Y. Supp. 26; *McGrath v. Grout*, 171 N. Y. 7, 63 N. E. 547; *Upton v. Strommer*, 101 Minn. 97, 111 N. W. 956; *Barnard v. Knox County (C. C.)* 2 L.R.A. 426, 37 Fed. 563; *Laycock v. Baton Rouge*, 35 La. Ann. 479; *State ex rel. Marchand v. New Orleans*, 37 La. Ann. 13.

The Constitution of Colorado (§ 2, art. 11) contained a similar provision which was construed by the supreme court of that state to be absolute. *People ex rel. Seeley v. May*, 9 Colo. 80, 10 Pac. 641. This construction was also given to the Constitution of that state by the Supreme Court of the United States in *Lake County v. Rollins*, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651. This has led to some curious makeshifts by the legislature of Colorado which have been approved by the supreme court of the state. Following the opinion of the Supreme Court of the United States in *Lake County v. Rollins*, supra, the supreme court of Missouri in *Barnard v. Knox County*, 105 Mo. 382, 13 L.R.A. 244, 16 S. W. 917, in effect overruled its former opinion in the case of *Potter v. Douglas County*, supra.

It is evident from the conflicting constructions which have been placed upon similar provisions that it is possible to give different meanings and effect thereto, and in this situation we are required to apply the rules of judicial determination that prevail in such situation, and the rule applicable here is that effect must be given if possible to each and every clause of the Constitution, and it should be the aim of the court to adopt a construction which will render every provision operative, for it is scarcely conceivable that any portion of the Constitution was not intended to have some operation and effect. The Constitution did not create the state, but, on the contrary, is itself a creature of the people and the instrument of their convenience, designed for their protection and to secure enjoyment of the rights and powers which they possessed before the Constitution was written, and is merely the concrete expression of the will of the people, based upon the pre-existing condition of laws, rights, habits, and modes of thought which had prevailed, and was an enumeration of certain fundamental principles that should continue thereafter. *Cooley, Const. Lim.* 37-58.

In addition to the protection of life, liberty, and property and the conservation of the public peace, health, and safety, there are certain other functions of government which are elementary and indestructible,

such, for example, as the administration of justice in the courts and the maintenance of a public school system for the education of all the children residing within the state; and to permit the performance of these mandatory duties to depend upon the making of provision therefor by certain subordinate municipal officers would render the life of the state and the security of the citizen precarious indeed. In many instances the amount necessary for a proper performance of such duties could not be reasonably foreseen, for it is not always possible to tell in advance how much will be required. The net result of the decisions holding that constitutional provisions such as article 10, § 26, do not apply to those liabilities which are not voluntarily incurred by the municipality, is that they are careful to limit the application of the rule to those liabilities which are imposed upon the municipality by the superior power of the sovereignty, as expressed in the Constitution or valid acts of the legislature. The items claimed were earned by plaintiff in the performance of duties imposed upon him by the state in which he had no discretion, and were not included within the limitations of article 10, § 26.

The judgment of the trial court in *Re Application of State to Issue Bonds*, supra, was reversed and the case again reached this court (40 Okla. 145, 136 Pac. 1104, Ann. Cas. 1916E, 399), where the rule announced upon the original appeal was adhered to. In *Campbell v. State*, 23 Okla. 109, 99 Pac. 778, plaintiff sought to enjoin the board of county commissioners and the county clerk of Washita county from issuing certain warrants in payment of semi-annual instalments upon a written contract for a courthouse, and it was held that § 2, art. 8, chap. 32, Session Laws of Oklahoma 1897, which authorized the court fund to be used for an annual rental for courthouses and jails, and authorized an additional levy not exceeding 3 mills for the purposes enumerated in said section, was repugnant to § 26, art. 10, of the Constitution, and the issuance of such warrants was enjoined. In *Kerr v. State*, 33 Okla. 110, 124 Pac. 284, mandamus was sought to compel the county clerk to issue and deliver certain warrants for claims which had been allowed by the board of county commissioners in excess of 80 per cent and within 100 per cent of the estimated income and revenue for the year in which said claims had accrued. The issuance of the writ was objected to on the ground that by § 1, chap. 16, Session Laws 1895 (§ 1683, Comp. Laws 1909), a limitation was placed upon the amount of warrants which could be issued not to exceed 80 per cent of the amount

levied for the fund against which said warrant was drawn. The question decided in *Shannon v. State*, 33 Okla. 293, 125 Pac. 1106, was that by virtue of § 9, chap. 80, Laws 1910-11, entitled "An Act Relating to the Issuance of Warrants and Certificates of Indebtedness," the board of county commissioners was without authority to allow and approve a claim against any fund of the county, or order a warrant therefor issued on such fund, where, during the fiscal year in which the claim was presented, claims had already been allowed and approved on such fund equal to the estimate made and approved by the excise board for such fund for the current fiscal year; and this was held to be true, although there was to the credit of such fund an unexpended balance derived from the revenues during the preceding year. In *State ex rel. Decker v. Stanfield*, 34 Okla. 524, 126 Pac. 239, mandamus was sought against defendant, as judge, requiring him to hold a term of court in Creek county. The writ was allowed requiring defendant to hold a term of court for the purpose of transacting business which might be carried on without imposing a charge on the court fund, or to impanel a jury, or incur any expense which would be a charge against that fund. In none of the cases heretofore decided by this court has the precise question here involved been presented nor determined. The case of *Re Application of State to Issue Bonds*, supra, is the nearest in point in principle. While in some of the cases there is a discussion which would seem to indicate that, in the opinion of the writer, obligations of the character here involved would be invalid, the decision of this point was not necessary to the determination of the case. In *Shannon v. State*, supra, relator was county jailer of Creek county, and sought mandamus to compel the board of county commissioners to approve certain claims for boarding and keeping state and county prisoners in his custody. It was admitted in that case that the county was indebted to him in the sum claimed; that the claim was correct and due by the county and a proper charge against the contingent fund. The court in the opinion did not question this concession of counsel, but simply held that the board could not be compelled by mandamus to allow said claims, nor make payment thereof.

The judgment is reversed, and cause remanded.

Thacker, J., dissenting (December 24, 1917):

I appreciate the force of the reasons for the opinion of the court; but I dissent for reasons stated in *Campbell v. State*, 23

Okla. 109, 99 Pac. 778, in *Shannon v. State*, 33 Okla. 293, 125 Pac. 1106, in *Buxton & S. Stationery Co. v. Craig County*, — Okla. —, 155 Pac. 215, in *Kerr v. State*, 33 Okla. 110, 124 Pac. 284, and, especially, for reasons stated in *State ex rel. Decker v. Stanfield*, 34 Okla. 524, 126 Pac. 239, which case finds ample support in *Lake County v. Rollins*, 130 U. S. 662, 32 L. ed. 1060, 9 Sup.

Ct. Rep. 651, *Wisconsin C. R. Co. v. Taylor County*, 52 Wis. 37, 8 N. W. 833, and *Grand Island & N. W. R. Co. v. Baker*, 6 Wyo. 369, 34 L.R.A. 835, 71 Am. St. Rep. 926, 45 Pac. 494, cited by Commissioner Bleakmore in the original, but now rejected opinion in this case, reported in — Okla. —, L.R.A.1916F, 892, 158 Pac. 601, which I think is correct.

WASHINGTON SUPREME COURT. (Department No. 1.)

STATE OF WASHINGTON v.

FRANK HARRIS, Appt.

(— Wash. —, 169 Pac. 971.)

Appeal — allowing separation of mixed jury — effect.

Permitting separation of mixed juries during recesses and intermissions in the trial, by allowing the men and women respectively to go to different rooms, is not reversible error if they are at all times under supervision of sworn bailiffs so that no strangers are permitted to communicate with them.

For other cases, see Appeal and Error, VII. m, 7, in Dig. 1-52 N. S.

(January 15, 1918.)

APPEAL by defendant from a judgment of the Superior Court for Spokane County convicting him of robbery. Affirmed.

The facts are stated in the opinion.

Messrs. W. C. Donovan and George H. Armitage, for appellant:

Defendant was deprived of a fair trial by reason of the separation of the jury without his consent.

State v. Morden, 87 Wash. 465, 151 Pac. 832; *State v. Strodemier*, 41 Wash. 159, 111 Am. St. Rep. 1012, 83 Pac. 22; *State v. Place*, 5 Wash. 773, 32 Pac. 736; *State v. Bennett*, 71 Wash. 673, 129 Pac. 409; *Linbeck v. State*, 1 Wash. 336, 25 Pac. 452; *State v. Myers*, 8 Wash. 177, 35 Pac. 580, 756; *State v. Hanes*, 84 Wash. 601, 147

Pac. 193; *Early v. State*, 1 Tex. App. 248, 28 Am. Rep. 409; *Peiffer v. Com.* 15 Pa. 408, 53 Am. Dec. 605; *Brown v. State*, 38 Tex. 483; *Organ v. State*, 26 Miss. 83; *Woods v. State*, 43 Miss. 364.

Mr. John B. White, for the State:

No separation of the jury actually occurred.

State v. Johnston, 83 Wash. 5, 144 Pac. 944; *Loy v. Northern P. R. Co.* 77 Wash. 25, 137 Pac. 446; *State v. Ross*, 85 Wash. 228, 147 Pac. 1149; *State v. Stockhammer*, 34 Wash. 263, 75 Pac. 810; *State v. Tommy*, 19 Wash. 275, 53 Pac. 157; *Edwards v. Territory*, 1 Wash. Terr. 197.

Fullerton, J., delivered the opinion of the court:

By an information filed in the superior court of Spokane county the appellant Frank Harris was charged, jointly with one Karl Size, with the crime of robbery. The cause was brought on for trial on December 14, 1916, each of the defendants appearing by separate counsel. The trial lasted until December 17, 1916, when the jury returned a verdict of guilty as to the appellant and disagreed as to the defendant Size. Thereafter a judgment of guilty was pronounced against the appellant, and he was sentenced to a term in the state penitentiary.

At the appropriate stage of the case the appellant moved for a new trial, basing his motion on the ground, among others, of irregularity in the proceedings of the court and jury during the progress of the trial, in that the jurors were permitted to separate without the consent of the defendant and to remain separated for long periods of

Note. — Aside from *STATE v. HARRIS*, no reported case has been found which has considered the question of the right to permit a separation of a jury according to sexes.

In the absence of a statute regulating this question, there can be little doubt but that in jurisdictions where women are eligible as jurors the rule adopted in the *HARRIS CASE* will prevail. Jurisdictions which recognize the right to permit a separation from necessity will, of course, find no trouble on that score. Jurisdictions, if any, which do not recognize such rule will be forced to L.R.A.1918C.

permit the separation under the rule of decency and propriety.

As to permitting separation of jury in capital case, see note to *Armstrong v. State*, 24 L.R.A.(N.S.) 776.

As to right to permit separation of jury in criminal cases, other than capital, after finding but before rendition of verdict, see note to *State v. Duffek*, 31 L.R.A.(N.S.) 1005.

As to women as grand jurors, see note to *State v. Russell*, 28 L.R.A. 204.

time. The court denied the motion, and whether it erred in so doing is the only question presented on this appeal.

The record discloses that the jury was composed of one woman and eleven men. During the intermissions of the trial permitted by the court and the noon recesses, the woman juror was permitted to retire to the judge's chambers, where she remained until the incoming of the court. The record makes it clear that during these periods the ingresses to the room remained closed under the supervision of duly sworn bailiffs, and that no communication during these periods was had by anyone with the juror. The men jurors retired to the regular jury room during these periods. Nothing is shown as to the disposition of the jury during the adjournment from day to day; yet it appears that two nights intervened between the commencement and the conclusion of the action. It was the failure to keep the jury together during the intermissions and recesses mentioned that constitutes the separation of which complaint is made.

Our own cases on what will and what will not constitute a separation of the jury may not be entirely harmonious. We think, however, it is unnecessary to review them here. In none of them is it denied that separation from necessity is permissible, and in some of them the rule is distinctly recognized. See *State v. Burns*, 19 Wash. 52, 52 Pac. 316; *State v. Strodemier*, 41 Wash. 159, 111 Am. St. Rep. 1012, 83 Pac. 22.

It is our opinion that the separation here complained of can be justified on this latter ground. The statute making women eligible to jury service of itself necessitated, and was of itself, a change in the existing system relating to the separation of juries. In trials protracted over considerable periods of time the rules of society, propriety, and common decency require that mixed juries be allowed to separate according to sexes at stated intervals during its progress.

It may be questioned, moreover, whether the courts have not placed a too narrow construction on the word "separate," as used in the statutes. The object and purpose of keeping them sequestered is, and has always been, to keep them from being influenced with reference to the matters given them in charge, by ulterior practices. This purpose is as well accomplished when the jury are kept singly under the charge of sworn officers of the court as it is when they are kept under like officers in a body.

But, giving the defendant the benefit of the more rigid rules, it is clear that he was not prejudiced in fact by the separation here complained of, and we are not able to conclude that the separation was so far unnecessary as to require us to hold that he was prejudiced in law.

The judgment is affirmed.

ELIAs, Ch. J., and Webster, Main, and Parker, JJ., concur.

CALIFORNIA SUPREME COURT. (In Banc.)

HENRY BLACK, Resp.,
v.

ROBERT S. KNIGHT
and
HENRIETTA C. KNIGHT, Appt.

(— Cal. —, 169 Pac. 382.)

Landlord and tenant — judgment of unlawful detainer — eviction.

Voluntary abandonment of the premises by a tenant because of the entry of a judgment against him in unlawful detainer proceedings, which is reversed on appeal, does not constitute an eviction which will entitle him to damages against the landlord.

For other cases, see *Landlord and Tenant*, 11. d, in *Dig. 1-52 N. S.*

(December 14, 1917.)

Note—As to liability of landlord who brings an unfounded action to dispossess tenant, see annotation following this case, post, 323.
L.R.A.1918C.

APPEAL by defendant Henrietta C. Knight from a judgment of the Superior Court for the City and County of San Francisco in favor of plaintiff, and from an order denying a motion for new trial, in an action brought to recover damages for alleged unlawful eviction from premises held and occupied by plaintiff as tenant under a lease. Reversed.

The facts are stated in the opinion.

Messrs. Samuel Knight and Carl H. Abbott, for appellant:

No judgment is recoverable against appellant.

2 *Tiffany, Land. & T.* § 277, pp. 1779-1781; 1 *Tiffany, Land. & T.* § 78, ¶ 3; *Tewksbury v. Magraff*, 33 Cal. 237; *Wagoner v. Silva*, 139 Cal. 559, 73 Pac. 433; *Rauer's Law & Collection Co. v. Berthiaume*, 21 Cal. App. 670, 132 Pac. 596, 833.

There is no evidence to support the judgment as to the amount of damages awarded.

2 *Tiffany, Land. & T.* § 185, p. 1260; *Tyson v. Chestnut*, 118 Ala. 387, 24 So. 73, 105 Ala. 149, 53 Am. St. Rep. 101, 16 So.

723; *Lock v. Furze*, L. R. 1 C. P. 441, 15 Eng. Rul. Cas. 723.

No such damages are recoverable by a tenant against his landlord where the latter has prosecuted in good faith, and without malice or abuse of process, dispossession proceedings against his tenant, although they have finally terminated unsuccessfully.

24 Cyc. 1463; 2 *Tiffany*, Land & T. § 185, pp. 1290-1292; *Hegan Mantel Co. v. Cook*, 22 Ky. L. Rep. 427, 57 S. W. 929; *Cook v. Jones*, 96 Ky. 283, 28 S. W. 960, — Ky. —, 114 S. W. 200; *Sasse v. Rogers*, 40 Ind. App. 107, 81 N. E. 590; *O'Dell v. Hatfield*, 40 Misc. 13, 81 N. Y. Supp. 158; *Wakely v. Johnson*, 115 Mich. 285, 73 N. W. 238; *Tyler v. Smith*, 25 R. I. 486, 56 Atl. 683; *Bekkeland v. Lyons*, 64 L.R.A. 486, and note, 96 Tex. 255, 72 S. W. 56; *Graver v. Fehr*, 3 *Sadler* (Pa.) 203, 18 W. N. C. 311, 6 Atl. 80; *Porter v. Johnson*, 96 Ga. 145, 23 S. E. 123; *Woods v. Kernan*, 57 Hun, 215, 10 N. Y. Supp. 654; *State, Coe, Prosecutor, v. Haines*, 44 N. J. L. 134; *Halperin v. Henry*, 144 App. Div. 658, 129 N. Y. Supp. 599; *Ashcroft v. Bourne*, 3 *Barn. & Ad.* 684, 110 Eng. Reprint, 250, 1 L. J. K. B. N. S. 209.

The husband cannot be presumed to have been the agent of his wife in the management of her separate property, from the mere fact of the married relation.

Wagoner v. Silva, 139 Cal. 559, 73 Pac. 433; *Rust-Owen Lumber Co. v. Holt*, 60 Neb. 80, 83 Am. St. Rep. 512, 82 N. W. 112; 21 Cyc. 1238-1240.

Mr. Arthur H. Barendt, for respondent:

Plaintiff was under no obligation to apply for permission to remain in the premises pending appeal on filing a supersedeas bond, and it was not a matter of right.

Lee Chuck v. Quan Wo Chong Co. 81 Cal. 222, 15 Am. St. Rep. 50, 22 Pac. 594; *Gross v. Kelleher*, 73 Cal. 639, 15 Pac. 362; *Bateman v. Superior Ct.* 139 Cal. 140, 72 Pac. 922.

Obedience to a judgment of ouster is an eviction.

2 *Underhill*, Land. & T. § 675; 1 *Taylor*, Land. & T. § 311; 2 *Tiffany*, Land. & T. §§ 184, 185; *Levitzy v. Canning*, 33 Cal. 299; *Agar v. Winslow*, 123 Cal. 587, 69 Am. St. Rep. 84, 56 Pac. 422.

An agency in fact may, as in the case of other persons, be implied from the conduct of the wife in allowing her husband to act for her, or other circumstances tending to show authority in fact, and the relation between them may be taken into consideration in connection with other circumstances in determining whether there was authority in fact.

1 *Clark & S. Agency*, p. 196; 21 Cyc. L.R.A.1918C.

1240; *Rauer's Law & Collection Co. v. Berthiaume*, 21 Cal. App. 675, 132 Pac. 596, 833; *Wagoner v. Silva*, 139 Cal. 559, 73 Pac. 433; *Puget Sound Lumber Co. v. Krug*, 89 Cal. 237, 26 Pac. 902.

The surrender of possession in obedience to a judgment which by its terms required "the tenant to deliver possession to the landlord" is not a voluntary surrender.

Conley v. Schiller, 24 N. Y. Supp. 473; *Home L. Ins. Co. v. Sherman*, 46 N. Y. 373; *Hyman v. Boston Chair Mfg. Co.* 26 Jones & S. 282, 11 N. Y. Supp. 52.

Angellotti, Ch. J., delivered the opinion of the court:

This is an action for damages for the alleged unlawful eviction of plaintiff by his landlord from premises held and occupied by him as a tenant under a lease. Judgment was given for the sum of \$10,449, and the appeal is from such judgment and from an order denying a motion for a new trial. All but \$586 of the amount awarded was on account of the value of the unexpired term of the lease (fixed at \$11,544), such \$586 being for expense and damage incurred in defending the unlawful detainer action.

The only alleged eviction found was the prosecution by the landlord to judgment in the superior court of an unlawful detainer proceeding on account of the alleged violation by the tenant of a covenant of the lease, the judgment entered therein declaring the lease canceled and forfeited, and adjudging that the tenant "restore" and the landlord "have" possession of the demise premises, and that the landlord recover from the tenant \$2,250 damages, \$200 attorney fees, and \$30 costs. The tenant appeals from the judgment, staying by bond the enforcement of the judgment pending appeal in so far as the money recovery was concerned, but not seeking any stay as to the portion of the judgment relative to possession of the demise premises. In the complaint it was alleged that by the judgment the tenant was required to "and did surrender possession of said premises" to the landlord. By the answer, it was denied that "the tenant was obliged to surrender possession of the premises, or that he was deprived of the possession thereof by either of defendants." It was further alleged that without asking for any stay, "and before the issuance of any writ of execution or assistance whatever," the tenant "abandoned the possession of the said premises." The trial court found simply that the tenant, "in compliance with said judgment was required to and did surrender possession of said demise premises" to the landlord. This finding is assailed as being without sufficient support in the evidence. The

was no evidence whatever as to the circumstances attending the change of possession; nothing tending to show that the tenant, without the issuance of any writ and without any demand by the landlord, did not abandon possession to the landlord upon the entry of the judgment. For all the purposes of this appeal it must be assumed that he did actually abandon the premises without being compelled to do so under any process issued and served under the judgment in the unlawful detainer proceeding. On appeal, the judgment in the unlawful detainer action was reversed, and the cause remanded for a new trial. The landlord then tendered possession of the premises to the tenant for the unexpired portion of the term, but the tender was not accepted. The unlawful detainer action was then dismissed by the landlord. In view of the record it must also be assumed for all the purposes of this appeal that the unlawful detainer action was commenced and prosecuted to the end in good faith and without malice. The judgment herein was for the amount found to be the full value of the unexpired term at the time the tenant surrendered possession, plus the amount of the expenses of the tenant in defending his possession, less certain counterclaims aggregating \$1,891.

The theory upon which this judgment is sought to be sustained is that the prosecution by the landlord of the unlawful detainer action to a judgment in his favor, which judgment, by its terms, required the tenant to deliver possession to the landlord, entitled the tenant to treat the conduct of the landlord as a breach of the covenant of quiet enjoyment and an unlawful eviction, with the result that not only could he regard the lease upon voluntary surrender of possession as at an end, and himself exempt from liability for further rent, etc., thereunder, but, also, treating the lease as still in force, recover as damages the value of the unexpired term thereunder, in the event that he succeeded on his appeal from the judgment.

Consideration of the authorities satisfies us that such a theory finds no substantial support therein. It may be assumed purely for the purposes of this decision that, if the tenant is actually ousted from possession under process issued upon such a judgment, he may treat such ouster as a breach of the implied covenant for quiet enjoyment, and recover his damages in the event of a reversal of the judgment. Certain states have statutes providing for the recovery of such damages, among which is New York, where the statute provides substantially that, if the final order in such a summary proceeding is reversed upon appeal, the

person dispossessed may maintain an action to recover the damage sustained by the dispossession. Even under such a statute it has been held that actual dispossession of the tenant by the landlord is essential to a right of recovery, and that, where the tenant removes from the premises without the taking of any steps on the part of the landlord to enforce the judgment, he cannot maintain the action. See *Halperin v. Henry*, 144 App. Div. 658, 129 N. Y. Supp. 599; *State, Coe, Prosecutor, v. Haines*, 44 N. J. L. 134. There is no such statute in this state. It seems to us that wherever the tenant's claim is based solely on an alleged deprivation of actual possession, and is for the consequent damages, no other rule can logically or reasonably be applied.

It is elementary that the covenant for quiet enjoyment goes only to the possession, and that to constitute a violation thereof, as said in *Levitzky v. Canning*, 33 Cal. 299, "there must be some act of molestation, affecting, to his prejudice, the possession of the covenantee." It is true that a complete physical ouster of the tenant is not always essential to an eviction, and it has often been declared that any wrongful act of the landlord which directly results in depriving the tenant of the full beneficial enjoyment of the premises is an eviction. In *Levitzky v. Canning*, supra, where the tenant was never actually ousted from or abandoned the premises, the slandering of the tenant's possession, the giving out and pretending publicly that the tenant had no right to possession, and the bringing of two actions at law to recover possession from the tenant and his subtenants, under the pretense that the lease had expired (one of which actions was dismissed by the landlord, and the other of which resulted in judgment for the tenant), with the result that the subtenants quit the premises by reason of their doubts caused thereby as to the lawfulness of the tenant's possession, leaving them vacant, and he was unable to let to other parties, were held to disturb and interrupt the possession of the tenant to his injury, in violation of the covenant for quiet enjoyment, to the same extent as if he had taken plaintiff's tenants by the shoulders and forcibly ejected them. But that there must be an actual deprivation of the beneficial enjoyment of the premises to constitute an eviction was emphatically stated, and the case is not authority for the proposition that the mere institution and prosecution, by the landlord, even to judgment, of an unlawful detainer action, in good faith and without malice, can be held to constitute an invasion of the beneficial enjoyment of the premises guaranteed the tenant by his covenant for quiet enjoyment. This was

clearly and distinctly shown in the later case of *Agar v. Winslow*, 123 Cal. 587, 69 Am. St. Rep. 84, 56 Pac. 422, in which there was involved the question whether the previous institution of an action in ejectment by the landlord constituted an eviction of the tenant. As substantially stated in that case, the essential thing in *Levitzky v. Canning*, supra, was "that the acts complained of as amounting to an eviction had the effect to make the tenants of the lessee quit the premises, leaving them vacant." In the case at bar, if the tenant had been actually ousted from possession by the landlord, under process issued upon the unlawful detainer judgment, it might well be argued that *Levitzky v. Canning*, supra, required a conclusion, contrary to very respectable authority, that there had been a wrongful deprivation of possession by the landlord, constituting a breach of the covenant for quiet enjoyment. But, as we have seen, that element must be held to be lacking here.

So long, certainly, as there is no disturbance of the tenant's beneficial enjoyment of the premises caused thereby, the right of a landlord, acting in perfect good faith and without malice, to prosecute an action in the courts for the purpose of obtaining a determination of the question whether the tenant has not forfeited his term because of violation of some covenant of the lease, without making himself amenable to the tenant in damage, cannot well be disputed. Indeed, there is much authority which goes further in favor of the landlord's rights in this respect. It is substantially said in *2 Tiffany, Landlord and Tenant*, § 289, that the general rule is that, in order to make one liable for the institution of a civil suit, it must have been with malice and without probable cause, and that, under this rule, a landlord would not be liable to his tenant for damage to the latter arising from his wrongful institution of a summary proceeding to recover possession, unless it was instituted maliciously and without probable cause. See also *Porter v. Johnson*, 96 Ga. 145, 23 S. E. 123; *Hegan Mantel Co. v. Cook*, 22 Ky. L. Rep. 427, 57 S. W. 929. It has been declared that an entry by the landlord by virtue of summary process under the Landlord and Tenant Act for nonpayment of rent is not an eviction (24 Cyc. 1132, note); and also, substantially, that the right to damage in such cases exists only where the dispossession proceedings have been instituted maliciously and without probable cause; or where the process has been used excessively or for a purpose which it was not intended by law to effect, as in cases of abuse of process; or when expressly provided by statute. See 24 Cyc. 1462. But certainly there can be no eviction or liability in damage on the L.R.A.1918C.

part of the landlord in such a case so long as there is no disturbance of the tenant's beneficial enjoyment of the premises. The mere pendency of the suit constitutes no such disturbance. The claim of learned counsel for plaintiff is based principally upon the fact that here a judgment was obtained in the superior court which, by its terms, required restoration of the premises to the landlord. It seems to us that this fact does not assist, and that the utmost that may reasonably be claimed by the tenant under these circumstances is that the landlord may not enforce his judgment by actually ousting the tenant from possession under the judgment, without making himself liable for the damage resulting from this deprivation of possession, in the event of a reversal of the judgment. Until the landlord does so enforce the judgment, he does not actually disturb the possession and beneficial enjoyment, and the case in this respect is just as it was before entry of judgment. The landlord is not compelled to carry the judgment into execution simply because it has been given and entered. He may well decide to withhold execution until the final determination of his action,—until it has been finally determined that the tenant has forfeited his term, and that he may treat the term as forfeited and safely enforce his judgment. The tenant has no right to assume from the mere entry of judgment that the landlord intends to do otherwise. Authorities are, of course, ample to the effect that the tenant may accept not only the prosecution to judgment of such an action, but also the mere institution thereof, as such an election on the part of the landlord to terminate the lease that he will be justified in treating the lease as ended, and may yield possession of the premises and be free from further liability under the terms of the lease. Such is the meaning of the declaration in § 675 of *Underhill on Landlord and Tenant*, relied on by plaintiff, where *Jennings v. Bond*, 14 Ind. App. 282, 42 N. E. 957, is cited, the same being an action for rent after a suit in ejectment maintained by landlord and after a subsequent offered surrender of the premises by the tenant. This, however, is an entirely different proposition from the one involved in this case. Here the tenant so yielding possession without being required to do so is insisting that the act of the landlord in prosecuting his action to judgment shall be treated as an eviction, and the landlord held liable to him for any loss suffered from his failure to enjoy the remainder of the term. To our minds neither reason nor authority warrants the holding that such position is correct, where the tenant actually abandons the possession without being compelled to do

so under any process issued and served under the judgment in the unlawful detainer proceeding, and the proceeding was brought and maintained in good faith and without malice. As we read 1 Taylor on Landlord and Tenant, § 311, and 2 Tiffany on Landlord and Tenant, §§ 184, 185, we find nothing contrary to this view.

Decisions to the effect that the establishment of a title paramount to that of the landlord by decree of a court of competent jurisdiction warrants the tenant in yielding possession to the true owner without waiting to be dispossessed under a writ of possession, and in treating the judgment as an eviction by title paramount, are, of course, not in point. In *Black v. Patchin*, 20 How. Pr. 20, id. 42 N. Y. 167, 1 Am. Rep. 506, a case strongly relied on by plaintiff, the tenant was compelled to yield possession by virtue of a writ of assistance issued in foreclosure of mortgage proceedings, the mortgage being prior in right to his interest as lessee. The writ had been issued and placed in the hands of the sheriff, who "by virtue of it demanded the possession of" the tenant. It appeared further that the landlord had expedited, if he did not instigate, the foreclosure of the mortgage, and was a joint purchaser on the mortgage sale, and a joint petitioner, with the other purchaser, for the writ of assistance. In short, he had apparently actually connived, for his own benefit, in having the tenant dispossessed by paramount title.

We are not interested here in determining just what acts of a landlord interfering with the beneficial enjoyment by the tenant of the premises, short of actual physical ouster, will warrant the latter in abandoning possession, and treating the conduct of the landlord as an unlawful eviction, with the right to the damage consequent upon being deprived of the remainder of his term. It is sufficient for the purposes of this case to hold, as we do, that the mere prosecution to judgment by the landlord of an unlawful detainer action, in good faith and without malice, for the purpose of obtaining a judicial determination of the question whether he is entitled to possession by reason of some default on the part of the tenant, and possession in the event that the determination is in his favor, is not such an act.

From what we have said it necessarily follows that, upon the record before us, the recovery against appellant cannot be sustained in whole or in part. It appears unnecessary to consider other points made by her for a reversal.

The judgment and order denying a new trial are reversed.

We concur: Shaw, J.; Melvin, J.; Sloss, J.; Lawlor, J.; Henshaw, J.; Victor E. Shaw, Judge pro tem.

Petition for rehearing denied January 10, 1918.

Annotation—Liability of landlord who brings an unfounded action to dispossess tenant.

It is a general rule that the courts are open for the purpose of determining the existence of rights to which any person may conceive himself entitled. If a person brings an action in good faith and without malice, he is not liable beyond the costs that may be assessed against him in the action, however unfounded the action may be. It is only when he prosecutes an action maliciously and without probable cause that he renders himself liable in damages. Liability for the malicious prosecution of civil actions is sometimes limited to cases in which there has been an interference with the person or property. The present note is concerned with the question whether these general rules apply to and govern the liability of a landlord who has brought an unfounded suit against his tenant. A contract relation exists between a landlord and his tenant; the contract, that is, the lease, usually con-

tains covenants. It may be stated generally at this point in the discussion that, if the action of the landlord amounts to a breach of his covenants, he renders himself liable therefor irrespective of the existence of malice or lack of probable cause. In the absence of a breach in the contractual relation existing between the parties, the general rule applies, and the landlord is not liable, in the absence of malice or lack of probable cause. It is assumed in the foregoing statement that the landlord has taken no action but what was regular under the proceedings brought by him; he may by taking illegal action render himself liable on this ground.

An action in damages by the tenant may therefore be based upon one or both of two grounds: (a) It may be based upon malice and lack of probable cause in the landlord's action; or (b) it may be based upon the theory that the land-

lord's action constituted a breach of the contractual relation existing between the landlord and tenant.

In the absence of a breach of contract or trespass, the tenant must show malice and lack of probable cause to maintain an action against his landlord.¹ The bringing of forcible detainer proceedings does not entitle the tenant to recover damages upon the proceedings terminating in favor of the tenant, in the absence of malice and lack of probable cause.² Nor does the landlord render himself liable in damages for bringing an action to determine the validity of a contract for a lease under which the tenant is in possession.³ If the landlord does, before the expiration of the term, sue out a dispossessory warrant and cause the tenant to be evicted, maliciously and without probable cause, he is liable to the tenant.⁴

It being assumed in *BLACK v. KNIGHT*, ante, 319, that the landlord's action was commenced and prosecuted to the end in good faith and without malice, that action was based upon the theory that the bringing of the action was a breach of the contractual relation existing between the landlord and tenant, more specifically that it was a breach of the covenant of quiet enjoyment and an unlawful eviction, for which the tenant was entitled to recover damages. It has been held that an action brought by the landlord which results in a breach of his covenant in the lease renders him liable to his tenant in damages irrespectively of malice or lack of probable cause.⁵ The question thus remains in *BLACK v.*

KNIGHT, whether the landlord's action was a breach of this contractual relation. The court holds that the action was not a breach of the contractual relation, the tenant having voluntarily surrendered possession upon an adverse verdict in the trial court, which upon appeal was reversed; the landlord's action is held to be neither a breach of his covenant for quiet enjoyment nor an unlawful eviction. The covenant most frequently involved in such actions is that of quiet enjoyment. What amounts to a breach of this covenant, entitling the tenant to an action in damages therefor, is a question that can be answered best by references to the cases. It may be stated generally, to use the language of *BLACK v. KNIGHT* in quoting from an earlier California case,⁶ that "it is elementary that the covenant for quiet enjoyment goes only to the possession, and that to constitute a violation thereof, . . . 'there must be some act of molestation, affecting, to his prejudice, the possession of the covenantee.'" It has been held that an action which proves to be unfounded, to recover possession of the leased premises under the pretense that the lease has expired, where, as a result, subtenants of the lessee quit the premises and the lessee is put to expense in defending, is a breach of the landlord's covenant of quiet enjoyment.⁶ For such breach of the covenant, the landlord is liable to the tenant in damages.⁷

The question is sometimes discussed from the standpoint of whether the action constitutes an eviction. It has been

¹ *Porter v. Johnson* (1895) 96 Ga. 145, 23 S. E. 123.

² *Hegan Mantel Co. v. Cook* (1900) 22 Ky. L. Rep. 427, 57 S. W. 929.

Hegan Mantel Co. v. Alford (1908) — Ky. —, 114 S. W. 290. In this case it was held that an action for malicious prosecution will not lie merely because the action upon which it is founded was instituted maliciously; it must also appear that it was instituted without probable cause. As the judgment of the lower court in the forcible detainer proceeding was in favor of the landlord, it was held that probable cause was conclusively shown although that judgment was reversed upon appeal.

³ *Aull v. Bowling Green Opera House Co.* (1908) 130 Ky. 789, 114 S. W. 284. In this case there had been a judicial sale of property to a number of purchasers; the lease of a tenant in possession of the property being about to expire, he made an agreement for another lease with one of the purchasers, who claimed to own a majority interest. Subsequently, a corporation was organized by the purchasers and the title L.R.A.1918C.

to the property assigned to the corporation, which asked for a writ of possession in the judicial proceeding in which the property had been sold. The tenant appeared and offered to file his petition asking to be made a party to the action, claiming that he had a lease. This was refused by the trial court, but upon appeal the judgment of the trial court was reversed. Subsequently, the corporation obtained a writ of forcible detainer against the tenant, and by agreement possession was surrendered, and thereafter an action was brought by the corporation for the rent, in which the defendant sought to set off the damages incurred by him in defending the previous proceeding.

⁴ *Sturgis v. Frost* (1876) 56 Ga. 188; *McSwain v. Edge* (1909) 6 Ga. App. 9, 64 S. E. 116.

⁵ *Levitzky v. Canning* (1867) 33 Cal. 299. This is admitted in *BLACK v. KNIGHT*, ante, 319.

⁶ *Levitzky v. Canning* (Cal.) supra. See further as to this case in *BLACK v. KNIGHT*.

⁷ *Levitzky v. Canning* (Cal.) supra.

held that the bringing of action which does not disturb the beneficial enjoyment of the lessee does not amount to an eviction which will relieve the tenant of the payment of rent, although a subtenant of the lessee does not thereafter pay rent to the lessee, he, however, being under bond so that the rent is secure.⁸

That there is no eviction where the premises are voluntarily surrendered, although the judgment in the trial court directs that the landlord have possession, is the theory of the decision of *BLACK v. KNIGHT*. It has been held, however, that there is an eviction where a tenant against whom the landlord brought an action to dispossess on the ground of holding over surrendered possession of the premises under protest, so as to entitle the tenant to damages if he was not in fact a tenant holding over.⁹ This decision is based upon the theory that the landlord has breached his contract with the tenant. In the absence of a contractual relation, there can, of course, be no recovery for breach of contract.¹⁰

Where the landlord has issued process on the judgment, and caused the tenant to be dispossessed, the tenant is entitled to recover damages if the judg-

ment under which the writ of possession was awarded is reversed.¹¹ Such a dispossession is an eviction.¹² A difference of opinion exists as to this, however, and it has been held that a tenant who has been evicted by virtue of a writ issued in a dispossessory proceeding before a justice has no right of action against the landlord, although the judgment of the justice is subsequently reversed upon appeal.¹³ The Pennsylvania court¹⁴ first considers the action as one for breach of a contract of lease, and states that the evidence fails to show any breach of contract, unless the securing of judgment ordering execution to be issued and the receiving possession of the property from the officer who executed the writ constitutes a breach. Continuing, the court states that, "if the contract was such that the defendant had no right to possession, the plaintiff had opportunity to defend before the justice. The matter in dispute was adjudicated and enforced by execution." And the court concludes that the tenant "may be entitled to remedy, but not in this form; that is, if the action is to be treated as a case for breach of contract with nothing to constitute a breach save the former suit between the

⁸ *Agar v. Winslow* (1899) 123 Cal. 587, 69 Am. St. Rep. 84, 56 Pac. 422.

⁹ *Smith v. Eubanks* (1884) 72 Ga. 280. The court, referring to the proceeding to dispossess the tenant, stated: "It was simply the ordinary process legally authorized to eject a tenant holding over. A counter affidavit was put in and bond given by plaintiffs; no harshness of any sort was resorted to; it was simply a test of the question, according to law, whether the plaintiffs were tenants holding over or not. The plaintiffs declined the contest, and thus that proceeding was ended by their relinquishing possession under protest, according to their own evidence. That did not deprive them, it is true, of recovering their legitimate damages flowing from the breach of contract when evicted, and by reason of the eviction, if they gave up under protest." The principal dispute in this connection was as to the measure of damages, the tenant claiming that he was entitled to damages because of evidence of oppressiveness in the proceeding to dispossess, a claim that was denied.

¹⁰ *Porter v. Johnson* (1895) 96 Ga. 145, 23 S. E. 123, holding that there can be no recovery on the ground of breach of contract against a landlord who sues out a dispossessory warrant against the tenant of a prior owner.

¹¹ *Mengelle v. Abadie* (1896) 48 La. Ann. 669, 19 So. 670; *Small v. Clark* (1903) 97 Me. 304, 54 Atl. 758.

A landlord was held liable in *Hickey v. L.R.A.1918C*.

Conley (1902) 18 Montg. Co. L. Rep. (Pa.) 124, for damages for the eviction of his tenant under a judgment which was decided to be illegal upon certiorari. No statute is referred to authorizing the action in damages. See other cases from this jurisdiction *infra*, notes 14, 15, 17.

¹² *Mengelle v. Abadie* (La.) *supra*.

¹³ *Graver v. Fehr* (1886) 3 Sadler (Pa.) 203, 18 W. N. C. 311, 6 Atl. 80.

In *Ashcroft v. Bourne* (1832) 3 Barn. & Ad. 684, 110 Eng. Reprint, 250, a landlord who had made complaint before a justice under the statute relating to deserted and unoccupied tenements, and had been by the justices put into possession of the premises, was held not liable to the tenant in an action of trespass, where upon appeal the judgment of the justices was reversed and the tenant again put into possession of the premises. The court, after referring to the proceeding, states that the landlord was put into possession of the premises by act of the law, and "he is not a trespasser. It turns out that the justices had mistaken the law; but it would be hard if the landlord, who had submitted his case fairly and honestly to them, should therefore be deemed a trespasser ab initio. If it had appeared that the proceedings had been maliciously commenced or persisted in, that might have been the ground of an action on account of his having misled the justices; but in the present case this is not imputed."

¹⁴ *Graver v. Fehr* (Pa.) *supra*.

parties." The court then considers the action as one for malicious prosecution, and states that the reversal of the judgment of the justice did not settle that the landlord maliciously brought the suit, and continues: "The judgment of the justice established the existence of a cause of action; and whether that judgment was discontinued after appeal to the common pleas, or was reversed when brought into this court, these plaintiffs have no case for maliciously obtaining judgment and enforcing it by execution, unless there be proof of an excessive use of the process." There being no claim that there had been an excessive use of the process, the liability of the landlord to damages on this theory was denied also.

Some statutes expressly provide for damages for eviction in summary proceedings where the judgment against the tenant is subsequently reversed.¹⁵ But under such a statute a tenant who voluntarily removed from the premises on the rendering of a decision in favor of the landlord in summary proceedings instituted to obtain possession of the property was held to have no right of action for damages for such dispossession, although the judgment in the summary proceedings was reversed upon appeal.¹⁶ And under a statute authorizing the damages to be assessed upon the appeal from the decision of the justice, it has been held that no damages can be recovered by a tenant who has been dispossessed, where the justice's judgment is reversed upon certiorari, the court stating that if the tenant desires to re-

cover damages, his remedy is by appeal.¹⁷

A writ of sequestration is provided for in some jurisdictions, by virtue of which the possession is delivered to the landlord upon his filing a bond conditioned to pay all damages that may be awarded against him, and costs, in case sequestration is wrongfully issued. Under such a statute a landlord who has obtained a writ of sequestration has been held liable in damages, where it was determined that the writ was wrongfully issued.¹⁸

When the tenant has been evicted by legal process under a judgment which is unreversed, his right of action for such eviction depends upon different considerations from those which govern the case of a reversed judgment. A judgment in summary proceedings has been treated the same as a judgment in any other proceeding, that is, it has been held to be conclusive as to the rights of the parties and to protect the landlord in any regular action that he may take thereunder. A tenant who has been ejected under a writ issued in an action by the landlord to obtain possession has no right of action against his landlord for injuries suffered through the legal execution of the writ.¹⁹ It has been held that a tenant who has been evicted under a writ issued in a dispossession proceeding cannot maintain trespass *quare clausum fregit* against his landlord.²⁰ But if the proceedings are irregular,²¹ as, for instance, a proceeding in which the essential jurisdictional facts are not averred, a judgment therein is no protection to the landlord; an evic-

¹⁵ *Hayden v. Florence Sewing Mach. Co.* (1873) 54 N. Y. 221; *Woods v. Kernan* (1890) 57 Hun. 215, 10 N. Y. Supp. 654; *Witherbee, S. & Co. v. Wykes* (1913) 150 App. Div. 24, 143 N. Y. Supp. 1067; *Uffman v. Meyle* (1917) — App. Div. —, 168 N. Y. Supp. 483; *Broadwell v. Holcombe* (1883) 4 N. Y. Civ. Proc. Rep. 159; *Burwell v. Brodie* (1904) 134 N. C. 540, 47 S. E. 47; *Quinn v. McCarty* (1876) 33 Phila. Leg. Int. (Pa.) 312.

A tenant who had been dispossessed under a warrant which was subsequently vacated was permitted to recover damages against his landlord, in *Hong Sing v. Wolf Fein* (1901) 33 Misc. 608, 67 N. Y. Supp. 1100.

It was apparently under such a statute that *Koenig v. Bauer* (1867) 1 Brewst. (Pa.) 304, allowing damages to the tenant, was decided.

¹⁶ *Halperin v. Henry* (1911) 144 App. Div. 658, 129 N. Y. Supp. 599.

¹⁷ *Leese v. Horne* (1900) 30 Pittsb. L. J. N. S. (Pa.) 316. But see *Hickey v. Conley*, *supra*, note 11. L.R.A.1918C.

¹⁸ *Wilkinson v. Stanley* (1897) — Tex. Civ. App. —, 43 S. W. 606.

¹⁹ *McClelland v. Patterson* (1886) 4 Sadler (Pa.) 264, 10 Atl. 475. The action in this case was by the tenant and his wife against the landlord to recover damages alleged to have been sustained by the wife by reason of the ejectment. The court further holds in this case that the landlord was responsible for any illegal act done by those parties whom he specially employed, or by himself; that as to illegal acts done by the officer, who was the proper party to execute the writ, the landlord was liable for whatever was done either expressly or impliedly by his direction.

Juergen v. Allegheny County (1903) 204 Pa. 501, 54 Atl. 281 (action in trespass).

²⁰ *Melson v. Dickson* (1879) 63 Ga. 682, 36 Am. Rep. 128. But see *Richardson v. Callihan*, *infra*, notes 31, 33.

²¹ *Gaertner v. Bues* (1901) 109 Wis. 165, 85 N. W. 388.

A grantee of property who dispossessed a tenant thereof under a warrant which is

tion of the tenant is illegal and the landlord is liable in damages.²² Or if, in serving the writ, the statute has not been complied with, the parties, including the landlord, are trespassers, and liable to the tenant in damages.²³ A landlord has been held liable where the writ of possession was prematurely issued.²⁴ And where the tenant is dispossessed by virtue of an irregular writ, the landlord is liable in damages.²⁵ A tenant who has been dispossessed by virtue of a writ issued upon a judgment against her husband has a cause of action against her landlord.²⁶ It has also been held that an affidavit used in a summary proceeding which is decided in favor of the tenant cannot be used as the foundation of a new proceeding, and when so used and the tenant is turned out of possession, the subsequent proceedings are void and trespass lies against the landlord.²⁷ Some statutes confine the tenant's remedy, where it appears that the landlord was entitled to possession, but where there has been irregularity in the proceeding, to an action on the case founded on the special damage arising to him from the irregularity or informality; where no special damage is alleged under such a statute, there can be no recovery.²⁸

Where the judgment in the summary proceedings is treated as conclusive, and such judgment is unreversed, the distinctive question treated in this note does not arise. The liability of the landlord, if any exists, is based not upon the bringing of an unfounded action, but upon irregular or wrongful use of process. But a judgment in summary proceedings is not conclusive in all jurisdictions. Some statutes provide that, where the landlord has recovered possession of real property by summary proceedings because of nonpayment of rent, the lessee may within a stated time, by

tendering the rent in arrears with interest and costs of action, and performing all other covenants, be restored to possession according to the terms of the original lease.²⁹ A tender made by the tenant after judgment in favor of the landlord, and before eviction, the tender being kept good by him, has been held to entitle him to retain possession; hence eviction by the landlord by writ under his judgment was held wrongful and entitled the defendant to recover damages; the statutory remedy of restitution was held not to be exclusive.³⁰ It is expressly provided in some statutes that a judgment in forcible entry and detainer shall not bar an action of trespass between the same parties respecting the same tenement.³¹ Under such a statute a tenant who has been ejected by a writ sued out by his landlord in a summary proceeding has a right of action against his landlord for any wrong or oppression inflicted in enforcing the writ.³² It has been held that a tenant ejected in a forcible detainer proceeding brought by a subsequent lessee at the instigation of the landlord has the right to show that such eviction was wrongful and recover damages of the landlord.³³

But a judgment obtained in an action by a landlord to dispossess his tenant was held not to be a trespass which would sustain an action by the tenant, who had removed from the premises after an officer of the court had told him that if he did not remove he would be removed by force, but before the officer had come with the writ to effect the removal.³⁴ The court states that the removal of the tenant by virtue of the warrant to dispossess is the act which, if shown to be unlawful, becomes the basis of the action of trespass, and as this act had not taken place there was no trespass.

stated to have been "unlawfully sued out," before the expiration of the period of the lease, was held liable in damages to the tenant in *Elam v. Carter* (1909) 55 Tex. Civ. App. 649, 119 S. W. 914.

²² *Sperry v. Seidel* (1907) 218 Pa. 16, 66 Atl. 853.

²³ *Pausch v. Guerrard* (1881) 67 Ga. 319.

²⁴ *Roettger v. Riefkin* (1908) 130 Ky. 197, 113 S. W. 88.

²⁵ *Block v. Bonnet* (1876) 28 La. Ann. 540.

²⁶ *Morrison v. Price* (1908) 130 Ky. 139, 112 S. W. 1090; *Fults v. Munro* (1911) 202 N. Y. 34, 37 L.R.A.(N.S.) 600, 95 N. E. 23, Ann. Cas. 1912D, 870.

²⁷ *McCoy v. Hyde* (1827) 8 Cow. (N. Y.) 64.

²⁸ *Delaney v. Fox* (1856) 1 C. B. N. S. L.R.A.1918C.

166, 140 Eng. Reprint, 70, 26 L. J. C. P. N. S. 5, 2 Jur. N. S. 1233, 5 Week. Rep. 148.

²⁹ *Wacholz v. Griesgraber* (1897) 70 Minn. 220, 73 N. W. 7; *Terwilliger v. Browning, K. & Co.* (1912) 152 App. Div. 552, 137 N. Y. Supp. 572, s. c. on second appeal in (1915) 165 App. Div. 799, 151 N. Y. Supp. 335.

³⁰ *Wacholz v. Griesgraber* (Minn.) supra.

³¹ *Richardson v. Callihan* (1895) 73 Miss. 4, 19 So. 95; *McWilliams v. King* (1866)

32 N. J. L. 21; *State, Coe, Prosecutor, v. Haines* (1882) 44 N. J. L. 134; *Sanders v. Cline* (1908) 22 Okla. 154, 101 Pac. 267.

³² *Sanders v. Cline* (Okla.) supra.

³³ *Richardson v. Callihan* (Miss.) supra.

³⁴ *State, Coe, Prosecutor, v. Haines*, (N. J.) supra. W. A. E.

CALIFORNIA SUPREME COURT.
(In Banc.)

D. C. PAYNE, Respt.,
v.

COMMERCIAL NATIONAL BANK OF
LOS ANGELES, Appt.

(— Cal. —, 169 Pac. 1007.)

**Check — discrepancy between words
and figures.**

1. A check for "\$500.00 Five and no/100 dollars" is void for uncertainty, and cannot be explained by evidence as to the intention of the parties.

For other cases, see Evidence, VI. c, in Dig.
1-52 N. S.

Pleading — denial of surplusage.

2. Denial of an allegation in a suit to recover the amount paid on a void check that by inadvertence and mistake plaintiff wrote the figures 500, instead of 5, raises no issue on which evidence is admissible, where the check shows a fatal variance between words and figures on its face, since the allegation is mere surplusage.

For other cases, see Pleading, I. q, in Dig.
1-52 N. S.

(December 27, 1917.)

A PPEAL by defendant from a judgment of the Superior Court for Los Angeles County in favor of plaintiff, and from an order denying a new trial, in an action brought to recover an amount alleged to have been paid by defendant on a void check. Affirmed.

The facts are stated in the opinion.

Messrs. Paul Burks and F. J. Held, Jr., for appellant:

A check is a contract, which must be construed according to the exclusive rules of construction prescribed by the Code.

Raesser v. National Exch. Bank, 112 Wis. 591, 56 L.R.A. 174, 88 Am. St. Rep. 979, 88 N. W. 618; *Haynes v. Wesley*, 112 Ga. 668, 81 Am. St. Rep. 72, 37 S. E. 990; *Connor v. Becker*, 56 Neb. 343, 76 N. W. 893.

A check is substantially the same as an inland bill of exchange and, in general, is governed by the law applicable to bills of exchange and promissory notes, and decisions as to bills of exchange are applicable to cases involving checks.

Harlan v. Gladding, McB. & Co. 7 Cal. App. 49, 93 Pac. 400; *First Nat. Bank v. Nelson*, 105 Ala. 180, 16 So. 707; *Neal v. Coburn*, 92 Me. 139, 69 Am. St. Rep. 495, 42 Atl. 348; *Barnet v. Smith*, 30 N. H. 256, 64 Am. Dec. 290; *Foster v. Paulk*, 41 Me. 425; *Veazie Bank v. Winn*, 40 Me. 60.

Note. — As to discrepancy between words and figures in the body of a check describing the amount thereof, see annotation following this case, post, 331.
L.R.A.1918C.

It was made mandatory upon the court to receive parol evidence for the purpose of ascertaining and explaining the intent of the maker "by reference to the circumstances under which it was made."

Lassing v. James, 107 Cal. 348, 40 Pac. 534; *Baker v. Clark*, 128 Cal. 182, 60 Pac. 677; *First Nat. Bank v. Bowers*, 141 Cal. 253, 74 Pac. 856; *Hurwitz v. Gross*, 5 Cal. App. 614, 91 Pac. 109.

It was the imperative duty of the trial court, in view of the issue joined, to receive such evidence as would have enabled it to "place itself in the position of the parties, and consider the circumstances, to ascertain their intent at the time of the execution of the contract," by taking the instrument before it as a whole.

Mesick v. Sunderland, 6 Cal. 298; *Saunders v. Clark*, 29 Cal. 300; *Thompson v. McKay*, 41 Cal. 221; *Martin v. Lloyd*, 94 Cal. 195, 29 Pac. 491; *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62; *Friedlander v. Bank of California*, 119 Cal. 93, 51 Pac. 24; *Waterman v. Morrell*, 68 Cal. 217, 9 Pac. 71; *Hill v. McKay*, 94 Cal. 5, 29 Pac. 406; *First Nat. Bank v. Bowers*, 141 Cal. 253, 74 Pac. 856; *Stein v. Archibald*, 151 Cal. 220, 90 Pac. 536; *Los Angeles Gas & E. Co. v. Amalgamated Oil Co.* 156 Cal. 776, 106 Pac. 55; *Jones v. Van Nuys*, 161 Cal. 158, 118 Pac. 541; *Hurwitz v. Gross*, 5 Cal. App. 614, 91 Pac. 109; *Rockwell v. Light*, 6 Cal. App. 563, 92 Pac. 649; *Henne v. Summers*, 16 Cal. App. 67, 116 Pac. 86; *Bonslett v. Butte County Canal Co.* 18 Cal. App. 149, 122 Pac. 821; *Gazos Creek Mill Co. v. Coburn*, 8 Cal. App. 150, 96 Pac. 359.

The figures "\$500.00" as they appear in said check are not "marginal figures," because they appear in the body of and constitute a part of that instrument equally as important as any of its words.

4 Am. & Eng. Enc. Law, 130; *Chestnut v. Chestnut*, 104 Va. 539, 2 L.R.A.(N.S.) 879, 52 S. E. 348, 7 Ann. Cas. 802.

Messrs. Kemp, Mitchell, & Silberberg for respondent.

Angellotti, Ch. J., delivered the opinion of the court:

This is an action by a depositor against a bank in which he had a commercial account, to recover money claimed to have been improperly paid by the bank on a purported check drawn by him against the bank, in favor of one Russell, and improperly charged to his account. Russell was not made a party to the action. Plaintiff obtained judgment for the amount claimed (\$495). This is an appeal by defendant from the judgment and from an order denying its motion for a new trial. The appeal is in this court by transfer hereto after

decision of the district court of appeal of the second appellate district.

On May 7, 1914, the plaintiff drew and delivered to D. W. Russell, the payee therein named, the check here involved. It was in the following form.

Los Angeles, Cal., May 7, 1914. No. 379
Commercial National Bank of Los Angeles:
18-17

Pay to the order of D. W. Russell \$500.00
Five and no/100 dollars. D. C. Payne.

On May 9, 1914, the check was presented to defendant bank for payment, and the bank, with full notice and knowledge of the variance in the check between the written and "marginal figures," refused to pay the same. On May 13, 1914, the check was again presented for payment, and the bank thereupon paid the sum of \$500 thereon, and charged plaintiff's account in said sum. At the time of said payment plaintiff had on deposit a sum exceeding \$500. Upon these facts, alleged in the complaint, established by the evidence without conflict, and found by the trial court, judgment was given for plaintiff for \$495.

Of course the bank was authorized to pay out money on plaintiff's account only upon authorization from plaintiff so to do. *Janin v. London & S. F. Bank*, 92 Cal. 22, 14 L.R.A. 320, 27 Am. St. Rep. 82, 27 Pac. 1100. The check hereinbefore set forth is the only authorization relied on.

Clearly there is no rule of construction which would warrant this check being read as one for \$500, rather than as one for only \$5.

It might well be argued that it must be construed as a check for only \$5. This argument might not be sustainable under the rule of such cases as *Poorman v. Mills*, 39 Cal. 345, 350, 2 Am. Rep. 451, to the effect that, if there is a difference in the sum stated in the body of the check or bill and that stated in figures in the margin or superscription, the words written in the body must control without regard to the figures in the margin or superscription. The idea underlying this rule appears to be that such a marginal note or superscription is but a memorandum, constituting no part of the body of the bill or check, and that what is clearly specified in the body must control. It is said with much force that this rule can have no application here for the reason that the figures "500.00" in this check do not constitute a marginal note or superscription, but are, equally with the written words and figures "Five and no/100 dollars," a part of the body of the check. But there is a general rule of construction recognized by some of the authorities to the effect that where both written words and

figures are used in a contract to express the same number, and there is a discrepancy between the two, the written words must prevail over the figures. See 2 Elliott, *Contr.* § 1527; *Bradshaw v. Bradbury*, 64 Mo. 334; *Gran v. Spangenberg*, 53 Minn. 42, 54 N. W. 933; *United Surety Co. v. Summers*, 110 Md. 95, 72 Atl. 775. The theory is that a man is more apt to commit an error with his pen in writing a figure than in writing a word, and that the words ought to be deemed the better and more solemn statement, and therefore should govern. It is unnecessary to determine here whether such a rule obtains in this state. If such should be held to be our rule, the check would have to be construed as one for \$5 only, and parol evidence would not be admissible to make it otherwise. This would necessarily compel an affirmance of the judgment and order. In passing it may be noted that the legislature, at its last session, enacted certain rules of construction for negotiable instruments, one of which is that, "where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable." Civ. Code, § 3098, subd. 1.

Purely for the purposes of this decision we shall assume that no such rule can be applied here, and that the case is as stated by learned counsel for defendant in the following language: "In the instant case, the written instrument set out in the complaint as constituting the basis of a recovery shows upon its face that there were incorporated therein with equal prominence two different and entirely inconsistent statements, as to the amount of money which appellant was thereby directed to pay."

The result of course would be that we have an instrument which, on its face, is apparently void for uncertainty. Unless the uncertainty could properly be removed by evidence aliunde, the judgment of the trial court cannot be disturbed.

The principal claim of appellant bank is that the trial court erred in refusing to receive parol evidence of the transaction between the plaintiff and the payee named in the check, culminating in the giving of the check, for the purpose of showing the intention of plaintiff to give a check for \$500 to the payee. It seems to be the theory of learned counsel for defendant that under various sections of our Civil Code (1635-1637, 1640, 1641, 1643, 1647, 1654), which simply lay down well-settled rules for the construction of the language used in a contract, the ambiguity may be removed and the check treated as one for \$500. This theory is without any support in the authorities. Rules provided for the construc-

tion of contracts are simply for the purpose of ascertaining the true intent and meaning of the language used therein. Under these rules parol evidence is admissible where it tends to show the correct interpretation of the language used, the purpose being to enable the court or jury to understand, in the light of the circumstances shown, what the words employed really mean, and to interpret those words, in so far as this can reasonably be done, in accord with the intention of the parties as the same may be shown by such circumstances. But no authority sustains the proposition that under the guise of construction or explanation a meaning can be given to the instrument which is not to be found in the instrument itself, but is based entirely upon direct evidence of intention independent of the instrument. It has been well said that in the admission of extrinsic evidence the line which separates evidence which aids the interpretation of what is in the instrument from direct evidence of intention independent of the instrument must be kept steadily in view, the duty of the court being to declare the meaning of what is written in the instrument, and not what was intended to be written. See 17 Cyc. 675. It is well settled that parol evidence is not admissible to explain such a patent ambiguity as we have in this case. It may not be correct to say that a *prima facie* patent ambiguity can never be explained by evidence aliunde, for it may be that such evidence will sometimes show that the apparent uncertainty in the language used does not in truth exist. But this cannot be true of such an ambiguity as we have here. Whatever parol evidence might be introduced in this case, we would still have the "two different and entirely inconsistent statements," each statement absolutely clear and unambiguous and capable of meaning only one thing. So far as the language of the instrument is concerned, the uncertainty would be just as hopeless as it was without the evidence, and the true intent could not be ascertained from the language of the instrument. No authority to which we have been referred or that we have found sustains the proposition that evidence aliunde is admissible to explain such an ambiguity. All appear to be directly opposed to any such view. See in this connection *Browne*, Parol Ev. pp. 116-120; 2 *Elliott*, Contr. §§ 1655-1658; 1 *Beach*, Contr. § 742. This was recognized in the opinion of *Poorman v. Mills*, supra, where it was said by this court: "The most that can be claimed for this memorandum. in L.R.A.1918C.

figures, is that its presence on the face of the certificate serves to create a patent ambiguity; but this cannot be helped by averment, or evidence aliunde."

See also *Hall v. Bartlett*, 158 Cal. 641, 112 Pac. 176; *Brandon v. Leddy*, 67 Cal. 43, 7 Pac. 33.

In the case at bar the proposed evidence was at best but mere evidence of intention, in no degree assisting in the construction of the language used.

The complaint in this action contained an allegation as follows: "That by inadvertence and mistake of plaintiff herein plaintiff wrote the figures \$500.00 on the margin of said check: that said marginal figure was intended to be the sum of \$5.00."

This was in addition to the other allegations which, in accord with the view we have expressed, stated a complete cause of action against the bank. This allegation was denied by the answer, wherein the bank also set up the facts it relied on to show that the check should have been for \$500. Plaintiff tendered no proof in support of this allegation, and the court made no finding thereon. It is claimed that, in view of the presence of this allegation and the attempted issue made thereon, the proposed evidence was admissible. In view of what we have said, it is clear that the allegation was altogether immaterial in so far as plaintiff's right to recover was concerned. His cause of action was complete without this allegation, which was mere surplusage, and the denial did not make a material issue of fact. Code Civ. Proc. § 590. "The fact that the answer alleged facts which were irrelevant, immaterial, or incompetent as a defense, gave no right to establish them by proof." *Braun v. Woollacott*, 129 Cal. 113, 61 Pac. 801.

What we have said makes it apparent that § 1856, Code of Civil Procedure, cannot be held to have application here. The case is not one in which "a mistake or imperfection of the writing is put in issue by the pleadings."

We are satisfied that the trial court did not err in excluding the proffered evidence. Of course defendant is not in a position to complain that the judgment against it is for \$5 less than the amount to which, it may be assumed, plaintiff was entitled.

The judgment and order denying a new trial are affirmed.

We concur: *Sloss, J.; Shaw, J.; Melvin, J.; Henshaw, J.; Victor E. Shaw*, Judge pro tem.

Annotation—Discrepancy between words and figures in the body of a check describing the amount thereof.

According to the authorities, it is a general rule that, where there is a difference between marginal figures and words in a negotiable instrument, evidence cannot be received to explain it, but the words in the body of the paper must control. 1 Dan. Neg. Inst. § 86. That the words in the body of the instrument control where there is a discrepancy between them and marginal figures has been held in case of checks (*National Bank v. Second Nat. Bank* (1880) 69 Ind. 479, 35 Am. Rep. 236), and drafts (*Smith v. Smith* (1850) 1 R. I. 398, 53 Am. Dec. 662; *Saunderson v. Piper* (1839) 5 Bing. N. C. 425, 132 Eng. Reprint, 1163, 7 Scott, 408, 2 Arnold, 58, 7 Dowl. P. C. 632, 3 Jur. 773). Evidence that a draft containing marginal figures of "245" and words in the body thereof, "two hundred pounds," to indicate the amount, was intended as a draft for £245 is not admissible; the instrument will be treated as one for £200. *Saunderson v. Piper* (Eng.) supra.

The figures in the check involved in *PAYNE v. COMMERCIAL NAT. BANK*, ante, 328, were not marginal figures, but were written in the body of the check. A different situation is thus presented. The court assumes that the check was void because of the discrepancy between the figures thus written and the words indicating the amount. There is very little authority on the effect of a discrepancy between figures in the body of the check and words to indicate the amount.

In *State v. Bank of Western* (1892) 34 Neb. 175, 51 N. W. 749, the plaintiff

had purchased of a bank a draft intended to be for \$500; a draft was issued to him reading "Pay to the order of . . . \$500.00, five and no/100 dollars." In the space below the number of the draft, in the upper right-hand corner, was cut through the paper with a perforator or machine usually employed by banks for that purpose, the following, "\$500\$,"—the dollar mark being placed both before and after the figures; the purchaser paid to the bank the full sum of \$500 for the draft; it was intended by all parties to be for the sum of \$500, but, by mistake, the word "hundred" was omitted in the words indicating the amount; the check was indorsed by the payee and presented to the drawee bank; payment thereof was refused by the drawee for a larger sum than five dollars, the amount written in the body of the check in words; upon notice being given to the drawer bank, the cashier made affidavit that the draft was intended for \$500, and, by mistake, the word "hundred" was omitted from the clause indicating the amount in words; the drawee bank, however, refused to pay more than \$5 on the draft; in the meantime the drawer bank had become insolvent, whereupon the purchaser filed his petition in the insolvency proceedings, asking to be allowed the \$500. The receiver of the insolvent bank admitted the facts as aforesaid, and the case was submitted on the pleadings. The court, after stating that the draft was clearly intended as one for \$500, rendered judgment for the plaintiff for the \$500 without any further discussion.

W. A. E.

ILLINOIS SUPREME COURT.

CYRUS N. FLETCHER et al.

v.

GRANVILLE OSBORN.

GRANT FLETCHER, Appt.

(282 Ill. 143, 118 N. E. 446.)

Contract — incidental restraint of marriage — effect.

A contract to give property in considera-

tion of the promisee's living with and caring for the promisor and his property is not rendered void by the fact that the promisee agrees to refrain from marrying until the death of the promisor.

For other cases, see *Contracts*, III. c, 1, in *Dig.* 1-52 N. E.

(December 19, 1917.)

APPEAL by cross complainant from a decree of the Circuit Court for Fayette

Note.—Specific performance of a contract to leave property in consideration of services or support is the subject of a note appended to *Bennett v. Burkhalter*, 44 L.R.A. (N.S.) 733; and see later case, *Smith v. Cameron*, 52 L.R.A. (N.S.) 1057. L.R.A.1918C.

Various phases of the subject of restraints on marriage are treated in notes cited in the L.R.A. Indexes under the title, "Marriage."

County dismissing his bill filed to enforce specific performance of a contract to convey certain property in consideration of services rendered by him to deceased and granting the prayer of the original bill filed for the partition of real estate. Reversed.

The facts are stated in the opinion.

Messrs. Brown & Burnside for appellant.

Messrs. John H. Webb, W. B. Rogers, Fred A. Meyers, and T. W. Hoopes, for appellees:

Where the contract sought to be specifically enforced required the making of a different disposition of the property of the deceased person from that which the law prescribes, a court of equity will look with jealousy upon the evidence offered in support of such contract, and will weigh such evidence in the most scrupulous manner.

Mould v. Rohm, 274 Ill. 547, 113 N. E. 991; Sloniger v. Sloniger, 161 Ill. 270, 43 N. E. 1111; Woods v. Evans, 113 Ill. 186, 55 Am. Rep. 409.

The filing of a claim against the estate of the deceased by appellant is inconsistent with his bill for specific performance.

Richardson v. Lander, 267 Ill. 188, 108 N. E. 46.

A court of equity will not specifically enforce a contract which is illegal or opposed to public policy.

Africani Home Purchase & Loan Asso. v. Carroll, 267 Ill. 395, 108 N. E. 322.

A contract in restraint of marriage is illegal as opposed to public policy.

3 Addison, Contr. § 1348; Bishop, Contr. §§ 59, 473; 2 Parsons, Contr. chap. 10, § 3; Bostick v. Blades, 59 Md. 231, 43 Am. Rep. 548; Sterling v. Sinnickson, 5 N. J. L. 756; Hogan v. Curtin, 88 N. Y. 162, 42 Am. Rep. 244; Chalfant v. Payton, 91 Ind. 202, 46 Am. Rep. 586; James v. Jellison, 94 Ind. 292, 48 Am. Rep. 151.

Where part of the consideration is void and cannot be separated, the whole becomes invalid and void.

Bishop, Contr. §§ 74, 471; Tenney v. Foote, 95 Ill. 99; Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770; Chase v. Burkholder, 18 Pa. 50; Hynds v. Hays, 25 Ind. 31; Rucker v. Steelman, 73 Ind. 406.

If any part of a consideration for a promise, or any part of an entire promise, is illegal, whether at common law or by statute, the whole contract is void.

1 Wait, Act. & Def. 106; 1 Parsons, Contr. § 380; Henderson v. Palmer, 71 Ill. 679, 22 Am. Rep. 117.

Before courts will decree specific performance of an oral contract, it must appear that all acts of the parties were by virtue of and under the terms of the contract, and all acts performed must relate

exclusively to the contract, and must be so clearly proved as to leave no reasonable doubt in the mind of the court as to its terms.

Reynolds v. Wetzler, 254 Ill. 607, 98 N. E. 993; Lonergan v. Daily, 266 Ill. 192, 107 N. E. 460; Rotes v. Rotes, 277 Ill. 185, 115 N. E. 116; Mould v. Rohm, 274 Ill. 547, 113 N. E. 991.

The fact that appellant came into the home of the deceased and his mother at a tender age gave him no right, as it was not alleged or proved that he was in any worse position than if he had not come.

Snyder v. French, 272 Ill. 43, 111 N. E. 489; Pond v. Sheean, 132 Ill. 312, 8 L.R.A. 414, 23 N. E. 1018.

Where the defendants are the heirs of a deceased person, courts listen with reluctance to what dead men have said.

Ackerman v. Ackerman, 24 N. J. Eq. 315; Shaw v. Schoonover, 130 Ill. 448, 22 N. E. 589; Shahan v. Swan, 48 Ohio St. 25, 29 Am. St. Rep. 517, 26 N. E. 222; Wallis's Appeal, 111 Pa. 460, 56 Am. Rep. 288, 5 Atl. 220.

Acts of part performance relied upon to take an oral contract relating to land out of the Statute of Frauds must refer exclusively to the contract, and be such as cannot be explained consistently with any other contract than the one alleged, and such as would not have been performed but for the contract.

Christensen v. Christensen, 265 Ill. 170, 106 N. E. 627; Kane v. Hudson, 273 Ill. 350, 112 N. E. 683; Wolf v. Lawrence, 276 Ill. 18, 114 N. E. 567.

Cooke, J., delivered the opinion of the court:

Granville V. E. Fletcher died in Fayette county January 20, 1915, at the age of seventy-two years. He left as his only heirs at law two uncles, Cyrus N. Fletcher, who lived at St. Elmo, in Fayette county, a brother of the father of deceased, who was then seventy-four years of age, and Granville Osborn, who resided in Ohio, a brother of the mother of deceased. Cyrus N. Fletcher and deceased were not on friendly terms, and, according to the testimony of Cyrus, had not spoken to one another for more than ten years prior to the death of deceased. No last will and testament was found among deceased's effects, and Cyrus N. Fletcher was appointed administrator of the estate by the probate court of Fayette county upon his own petition. The existence of Granville Osborn was unknown at that time to Cyrus N. Fletcher, who described himself in the petition as the sole heir of deceased. The deceased died seised of 642 acres of land near St. Elmo and personal property of the

value of \$6,000 or \$7,000. Shortly after his appointment as administrator Cyrus N. Fletcher filed his bill in the circuit court of Fayette county for the partition of said real estate, making Granville Osborn the only defendant, alleging that each was the owner of an undivided one-half interest in the real estate of which Granville V. E. Fletcher died seised. After the filing of the bill Grant Fletcher, the appellant, asked leave to be made a party defendant, and, the same being granted, he filed his answer to the bill, and also filed a cross bill. By his cross bill he alleged that about the year 1877, when he was eleven years of age, his father and mother both being dead, he was taken by the deceased and his mother into their home, where he lived as a member of the family until the death of the mother of deceased; that the deceased was a bachelor, never having married; that he prevailed upon appellant to remain with him and work for him, take care of the land and the crops growing thereon, and assist in every way in the management of the farm, live stock, and personal property; that deceased did not pay appellant any sum of money as wages, but always promised that he would take care of him and give him lands and other property; that in February, 1898, appellant was desirous of having a more definite arrangement as to the compensation for his years of service, and deceased entered into a contract and agreement with him, in and by which appellant agreed to remain with deceased during the remainder of the lifetime of deceased and care for his real estate and look after all his interests in a general way, and deceased agreed and promised appellant that, in consideration of the years of service rendered theretofore by him, and in consideration of appellant's promise to remain with and take care of deceased and his property so long as deceased should live, he would convey and transfer to appellant all the property, real and personal, that he owned at that time or might thereafter acquire, and the benefits, use, and right to sell and convey said lands and personal property should accrue to and vest in appellant at the death of deceased; that, pursuant to said contract, appellant remained with and cared and provided for deceased; that the family consisted of appellant and deceased, and that, from that time until the death of deceased, appellant gave all his time and labor to the management, control, and care of deceased and of his farm and personal property; that for ten years preceding the death of deceased, appellant had the absolute control of all his real and personal property, residing upon the land with deceased, renting certain portions of it, and collecting the

rents therefor, employing and discharging men who worked upon the premises, selling the crops grown thereon, and at all times leaving with deceased the proceeds arising therefrom, to be held and enjoyed by him during his lifetime; that during that time deceased did not interfere with appellant's possession of the land or of the personal property, but at all times said that appellant was the owner of all of said land and personal property; that deceased stated to him that he had executed the necessary papers to transfer title to appellant, and that at his death the title, possession, and right to use and dispose of all the property, real and personal, would be found in appellant. The bill then alleges that the deceased repeatedly told his intimate friends that said real and personal property belonged to appellant and that he had no interest therein other than the use thereof during his natural life; that during all these years the deceased paid nothing to appellant except his necessary living expenses, and on one occasion the sum of \$1,000; that from time to time he gave appellant certain articles of personal property in pursuance of the contract; that appellant has fully performed his part of the agreement by giving to deceased thirty-eight years of service, and is entitled to the specific performance of the contract so entered into, and to have all the lands of which Granville V. E. Fletcher died seised conveyed to him free and clear from the rights or interests of the other parties to the proceedings. The bill concludes with a prayer for specific performance of the contract, and that the court decree the execution of sufficient deeds of conveyance to appellant of the real estate of which Granville V. E. Fletcher died seised. The defendants in the cross bill answered, the cause was heard by the chancellor, and a decree entered finding that appellant had failed to establish the contract set up in his cross bill by clear, explicit, and satisfactory proof, dismissing the cross bill for want of equity, and granting the prayer of the original bill. This appeal has been perfected from that decree.

The appellant sought to prove the existence of the contract and its terms by declarations made by Granville V. E. Fletcher and by appellant during the lifetime of Granville V. E. Fletcher and by the conduct of the parties to the contract. It is insisted on the part of appellees that proof of this character is insufficient. On numerous occasions we have been called upon to determine the quantum of proof required in cases of this kind and the competency of the evidence offered. The rules applicable are thus stated in *Kane v. Hudson*, 273 Ill. 350, 112 N. E. 683, together

with the authorities there cited in support thereof: "If an oral contract to convey land has been made, and there has been such performance in reliance upon the contract as will take it out of the Statute of Frauds, it will be enforced by a court of equity. Such a contract must be clear and definite and unequivocal in its terms, and it must be clearly and satisfactorily proved. It is indispensable that the acts done in performance of the contract shall be referable to the contract alone, and to have been done in performance of it. It is not necessary that the contract shall be proved by the testimony of any witness who heard it made, and it may be proved by declarations of the parties not in the presence of each other, together with evidence of acts and conduct of the parties which shows that the agreement was made; but it cannot be proved by declarations or acts of only one party to the alleged contract not binding upon the other. *Geer v. Goudy*, 174 Ill. 514, 51 N. E. 623; *Seitman v. Seitman*, 204 Ill. 504, 68 N. E. 461; *Standard v. Standard*, 223 Ill. 255, 79 N. E. 92; *Watson v. Watson*, 225 Ill. 412, 80 N. E. 332; *Daly v. Kohn*, 234 Ill. 259, 84 N. E. 901; *Dalby v. Maxfield*, 244 Ill. 294, 135 Am. St. Rep. 312, 91 N. E. 420; *Gladville v. McDole*, 247 Ill. 34, 93 N. E. 86; *Willis v. Zorger*, 258 Ill. 574, 101 N. E. 963; *Christensen v. Christensen*, 265 Ill. 170, 106 N. E. 627; *Loneragan v. Daily*, 266 Ill. 189, 107 N. E. 460."

The principal question raised is one of fact, whether the evidence is sufficient to prove clearly and satisfactorily that a contract was entered into, and what its terms were. Twenty witnesses were called to testify on behalf of appellant. These were all persons who lived in St. Elmo or in that vicinity, and who knew Granville V. E. Fletcher well in his lifetime, and some of them were among his most intimate friends. They were all disinterested witnesses, and were engaged in various pursuits. Among them were farmers living in the vicinity of the Fletcher farm, merchants engaged in business in St. Elmo, a physician, a minister, and mechanics. These witnesses testified to conversations had with the deceased during the last twenty-five years of his life. Many of them testified to repeated conversations on the subject of the agreement or contract which the deceased stated he had entered into with appellant. The general effect of this testimony was that Granville V. E. Fletcher stated that he had made an agreement with appellant that, if appellant would remain with him and care for him and take charge of his property and superintend the farm during his lifetime, he should have whatever property the de-

ceased possessed at the time of his death. One witness testified that in 1896 the deceased told him at the farm that he had entered into an agreement with appellant that, if he should stay there and remain single until the deceased should die, he was to get everything that was there. The same witness testified that in the fall before Fletcher died he had a conversation with him at St. Elmo in which he stated that he did not own anything on the farm but the horse he was driving; that appellant owned everything else; and that the deceased further stated that appellant had about filled his part of the contract, and he was satisfied he would stay with him until he died. Another witness, a hardware merchant at St. Elmo and a man who had been intimately acquainted with deceased for more than fifty years, testified that deceased often came into his private office and discussed his affairs with him, and at one time, twenty-five years prior to his death, the deceased told him that, if appellant stayed with him as long as he lived, he had agreed with him that he should have all the property deceased had, both real and personal; that deceased had discussed the same matter with him a number of times since, the last conversation being about a year before his death, at which time he repeated, in substance, the statement he had made on the first occasion. This witness further testified that he was in the habit of visiting frequently at the deceased's home on the farm, and that on one of these occasions he had a conversation with deceased, in the presence and hearing of appellant, in which the deceased said, "That fellow there," pointing to appellant, "owns everything here," and stated further that appellant was to have everything that was there. Two witnesses testified to statements made by the deceased in the office of a police magistrate in St. Elmo about two months before he died, in which he stated that he was going to give all his property to appellant and that he had it all fixed. Another testified that he stopped frequently at the home of deceased, and that on one occasion the deceased told him that he did not own any property; that it all belonged to appellant; and that all he owned was the old horse and buggy. Another testified that fourteen years prior to his death he had worked for the deceased for a year; that on one occasion deceased said, referring to appellant, "There is a fellow, if he stays with me until I am dead and gone, gets everything I have got;" that he stated that appellant was to stay single while he was there, and if he stayed with him and remained single, he was to have everything, he owned, and that he intended to make a

will to that effect. Another witness, a minister, testified that he heard the deceased state to a sister of appellant shortly before her death, and when she was suffering from her last illness, that she need not worry about her brother's condition in life; that he had fixed everything; and that appellant was to have everything he had. Another witness testified that about fifteen years previously deceased had talked to him about the disposition of his property, and stated that he had arranged with appellant that, if he stayed with him and remained single as long as deceased lived, when he was done with his property appellant should have all of it; that the deceased made the same statement to him, in substance, on several occasions; that the last time he mentioned it to him was about two years prior to his death, on which occasion he said that everything he had was appellant's, and that everything down there (referring to the farm) belonged to appellant. Another witness, a retired farmer, testified that he accompanied the deceased to St. Elmo on one occasion about a year before he died, when he stated to him that he had given everything to appellant, and that he was to have everything he owned if he stayed with him and remained single until he died. Another witness testified that on one occasion when he was attempting to buy some mules from deceased he informed him that he would have to see appellant, as all the property belonged to him. Another witness testified that he had known deceased for ten years, and deceased had boarded at his hotel four or five years prior to his death; that appellant came to see deceased frequently while he was there; and that deceased stated to him that appellant had lived with him from the time he was eleven years old, and he ought to be attentive to him because he was to get everything he had after he was gone. Another witness who owned a farm adjoining that of deceased, and who had known him all his life, testified that about a year before his death he had a conversation with him in which they were discussing appellant and what a good boy he had been to stay with him; that deceased said that appellant had served him there a long time, and he did not do anything at all any more; that he expected some day to give appellant all his property; that at one time he had told appellant he would make him a deed for the land, but they had talked the matter over, and thought it was not the best thing to do, as appellant might die before he did; that deceased said he would fix it anyway so appellant would get it when he was through with it. The witness further testified that he had another con-

versation with deceased about four years before he died, in which he stated that appellant would have plenty to do him after he died; as he had it fixed so that he would get all his property. Another witness testified that on Thanksgiving Day prior to the death of deceased he asked his permission to hunt quail on his farm, and that deceased told him he would not allow his best friend to do that, but when he was through with it appellant could do as he pleased about it. Another witness testified that at one time he attempted to rent land of deceased, and that he informed him he would not rent his land to anyone as long as he lived, but when he was through appellant could do as he pleased. Another witness testified that during the summer before he died the deceased informed him that he and appellant had a contract that, if appellant stayed with him as long as he lived he was to get everything he had. Another witness who owned an adjoining farm and had known the deceased all his life testified that in 1914 deceased came to him and told him that appellant wanted to see the witness about getting him to put in his part of a division fence; that appellant wanted the fence through, as he desired to use the land for pasture; that the witness told deceased he would not put in the fence, and deceased then asked him to see appellant; that he talked with appellant, and finally agreed with him what part he was to build and what part appellant was to build; that afterward deceased told him whatever arrangement he made with appellant was satisfactory to him; that he was allowing appellant to fix things to suit himself, as then, maybe, it would suit him better after awhile; that he had things already fixed that way, and asked the witness to say nothing about that for the present; that after the fence was fixed the witness asked the deceased to come out and see how he liked what they had done, and deceased remarked, "You know what I told you." Another witness testified that the fall before he died deceased told him that all the property he owned then was a horse and buggy, and that all the other property belonged to appellant; that he did not know how long he was going to live; that he had arranged everything; that he had fixed out the papers to appellant, and appellant was to get everything he had. Another witness testified that deceased told him during the last four or five years of his life that he had turned everything over to Grant; that he did not own anything any more except his horse; that he had fixed everything for Grant, as he had taken care of the deceased, and he meant to take care of him. A physician living at St.

Elmo testified that he had known the deceased and appellant for thirty-three years and was their family physician; that deceased came to his office almost every time he was in St. Elmo, and on numerous occasions had talked with him about his business relations with appellant, and that when the witness asked him what he expected to do with his property when he was done with it, he stated that it was all appellant's; that six months before his death he stated that appellant was to have all he had, that he had been a good boy and stayed with him, and that it was all his. Mrs. Nancy Walker testified that appellant was her nephew, and that about the year 1877, when appellant was eleven years of age, she took him to the home of deceased and had a talk with him about the conditions under which the boy was to be taken into the family; that deceased told her he would treat the boy as he would his own child as long as he stayed with him; that he could attend the common schools, and if he wanted to go he would send him to college; that he would provide for him as if he were his own son, and if he stayed with him and his mother while they lived he would be their sole heir. She testified that the mother of the deceased also made the same promise. This witness frequently visited the Fletcher home, and testified that during the last five years of his life deceased told her he had fixed everything for appellant; that he had an agreement that everything was to be appellant's if he remained with him and remained single. A number of witnesses testified that appellant stated to them during the lifetime of deceased that he had a contract or agreement with deceased that, if he stayed there and took care of deceased during his lifetime, he was to receive everything.

At the time appellant was taken into the family of the deceased he owned a small interest in some property located in St. Elmo. The deceased was appointed guardian of appellant, and acted in that capacity during his minority. The testimony all discloses that during the time from about 1877, when he was taken into the family of deceased, until the death of deceased, appellant remained there constantly, and after he had grown to manhood he assumed the active management and superintendence of the real estate and personal property belonging to deceased. Appellant was a cousin of deceased, being a son of a brother of deceased's father. After the death of the mother of deceased he and appellant lived alone on the farm, doing their own housework and managing the general farmwork. It appears that during all these years ap-

pellant faithfully complied with the provisions of the contract.

The defendants in the cross bill, who are appellees here, called a number of witnesses in an attempt to meet the allegations of the cross bill. A number of these witnesses corroborated the contention of appellant that the contract alleged in the cross bill had been entered into between him and deceased, by testifying to statements made by deceased which strongly tended to show the existence of the agreement. Many of appellees' witnesses testified simply to the fact that they had transacted some business with the deceased during the last ten years of his life. This testimony has but a slight bearing upon the issues. It was not contended that under the agreement appellant was to have the present title to and possession of the property, but that he was simply to superintend and manage it. The mere fact that deceased may have transacted some of the business relative to the buying and selling of property, and received the money for property sold, does not tend to contradict the claim of appellant that the contract alleged had been entered into. One witness for appellees testified that in 1910 deceased asked him to come and live with him; that he was getting old and wanted someone to help around the house; that he made the witness the proposition that, if he would come and live with him during the remainder of his lifetime, he would give him one half of what he owned, stating that it would probably amount to about \$30,000, but the witness did not accept the proposition. Another witness, one of the attorneys for Cyrus N. Fletcher, testified, over objection to his competency, that on two occasions deceased told him that, if he could leave his property to the Masonic Lodge, it would be about the best thing he could do, and that he did not know but the lodge would be a good party to leave property to. The testimony of these two witnesses was objected to as incompetent. Assuming that it was competent, it was not sufficient to discredit or overthrow the proof made by appellant as to the existence of the contract.

Appellee Cyrus N. Fletcher, his attorney, and another witness all testified that, after Cyrus N. Fletcher had been appointed administrator, he met appellant at the farm of deceased, and appellant told the attorney he had a gun there that deceased had given to him which he would like to have, and that he also had a Bible and his mother's picture in his room, and asked if he could have those; that the attorney then asked him if that was all, and he said, "No; the horses in the barn are mine;

that is all I claim." It is contended that this conduct is inconsistent with the claim of appellant that he was the owner of all the property after the death of deceased. Cyrus N. Fletcher was appointed administrator January 27th. On February 24th a stipulation was filed in the probate court whereby it was stipulated between appellant and Cyrus N. Fletcher, who was described as administrator and sole heir at law of Granville V. E. Fletcher, that the administrator should proceed to sell all the property on the farm at public sale; that appellant should not be required to replevin or claim any of the specific property, but that thereafter he should be permitted to make such proof as he could introduce that he was the owner of the property, and that the money arising from the sale was to stand in the place of the property, and be the subject of the litigation just as though claim had been made to the specific property. It does not appear from the record when this stipulation was entered into or the exact date the conversation at the farm occurred between appellant, Cyrus N. Fletcher, and his attorney, but the transactions were contemporaneous, and, conceding that appellant made the statements as testified to by these witnesses (although he denies this), there is nothing in them inconsistent with the position of the parties at that time and their attitude toward one another in the light of this stipulation. Cyrus N. Fletcher also testified that on this occasion appellant informed him that he had no contract, written or verbal, with the deceased in reference to his services there or to what he should receive. This is flatly denied by appellant. In the light of all the proof and all the circumstances shown in the case, the testimony of Cyrus N. Fletcher on this point is too improbable to entitle it to serious consideration.

It appears that some time prior to the hearing on the bill and cross bill appellant filed a claim against the estate of Granville V. E. Fletcher. The record does not disclose the amount of this claim or what it was for. It simply shows that a claim was filed, and it is insisted that this strongly tends to show that no such contract as is alleged was entered into between appellant and deceased. It is true that the filing of a claim against this estate by appellant on any account is inconsistent with his claim that he owned all the property upon the death of deceased. It is not conclusive, however, that no such contract as that alleged had been entered into. Appellant undoubtedly realized that it would be difficult to make the required proof of a contract of this kind, and determined, in the event he failed to prove his contract, to secure some

remuneration for the services he had performed. While the filing of the claim tends to disprove appellant's claim that a contract had been entered into, when it is considered together with all the evidence in the case, its effect is so slight as to become insignificant. The great weight of the evidence shows that the contract had been entered into by deceased with appellant as alleged, and that appellant fully performed his part of it.

The evidence is convincing, and establishes beyond a doubt that the deceased promised appellant, if he would live with him, take care of him, and manage his property during his lifetime, appellant should have all his property. The fact that deceased stated on a number of occasions that he had fixed it so appellant would own the property at his death, that he had executed papers to that effect, and that he had executed a will is not inconsistent with the claim of appellant that the contract was entered into. Had the deceased done any of these things, it would have been simply for the purpose of executing the agreement he had entered into. It may be that, in fact, he did execute a will or a deed that may yet be found, whereby he has executed this contract. The court erred in holding that the contract had not been clearly and satisfactorily proven.

The only question remaining is whether the contract as proven was illegal and void as against public policy. It clearly appears that one of the provisions of the contract was that appellant should remain unmarried during the lifetime of Granville V. E. Fletcher. The subject-matter of the contract was not, however, in reference to restraint of marriage. Appellant and deceased did not contract expressly for a restraint upon the marriage of appellant, but they were contracting for the services of appellant in caring for deceased and in superintending the management of his property. The provision that appellant should remain unmarried during this period of service was merely an incident to the main object of the contract. There can be no question that, if these parties had contracted expressly for a restraint upon the marriage of appellant, their contract, under all the authorities, would be void and unenforceable. There is a dearth of authority upon the effect of a contract where the restraint upon the marriage is a mere incident to the main object and purpose of the contract. In *King v. King*, 63 Ohio St. 363, 52 L.R.A. 157, 81 Am. St. Rep. 635, 59 N. E. 111, a contract was entered into by which one person agreed to live with and take care of another during his life, and further agreed not to marry during such service, in consideration of the

agreement of the other that he would provide for her sufficiently to make her comfortable and well off. It was there held that this contract was not necessarily invalid; that, although the promise not to marry is in itself a void promise, as against public policy, yet it was a mere incident to the main engagement, which was for labor and care, and if that service was fully performed, and the recipient failed to perform his engagement during life, the other might maintain an action against his estate on the contract. The holding was also based on the further ground that in such cases the mischiefs likely to ensue to the public by permitting a recovery notwithstanding the void stipulation would be less than those likely to follow a holding which would encourage the violation of contracts and the repudiation of just obligations after full value had been received. To the same effect is *Crowder-Jones v. Sullivan*, 9 Ont. L. Rep. 27, where a like situation was presented and a like holding had. These two cases are nearly identical in their facts with the case at bar, and in our judgment correctly state the law as applied to such a contract and such facts as are shown here. In *Shackelford v. Hall*, 19 Ill. 212, it was held that a devise in a will with a condition that the devisee shall not marry until he or she arrives at the age of twenty-one years is lawful, and that a violation of it after notice must be held to have forfeited the estate devised. In arriving at this con-

clusion we said: "Whoever will take the trouble to examine this branch of the law attentively will find that the testator may impose reasonable and prudent restraints upon the marriage of the objects of his bounty by means of conditions precedent or subsequent, or by limitations, while he may not, with one single exception, impose perpetual celibacy upon the objects of his bounty by means of conditions subsequent or limitations. That exception is in the case of a husband in making bequests or legacies to his own wife. . . . An examination of the subject will show that the courts have very rarely held such condition void, although it might appear harsh, arbitrary, and unreasonable, so as it did not absolutely prohibit the marriage of the party within the period wherein issue of the marriage might be expected."

The contract entered into between appellant and the deceased was not for the express purpose of restraining marriage, nor did it, as an incident, impose perpetual celibacy upon appellant. Under the authorities cited the contract was not void for the reasons urged.

The decree of the Circuit Court is reversed, and the cause is remanded, with directions to dismiss the original bill and grant the relief prayed in the cross bill.

Petition for rehearing denied February 7, 1918.

MISSISSIPPI SUPREME COURT. (Division A.)

H. J. WOODS, Appt.,
v.

R. W. STURGES et al., Exrs., etc., of Theodore Sturges, Deceased.

(— Miss. —, 77 So. 186.)

Gift — donor's promissory note.

A demand note delivered by the maker as a gift with the understanding that it is not to be payable until after his death cannot be enforced as a gift inter vivos.

For other cases, see *Gift*, I. in *Dig.* 1-52 N. S.

(January 7, 1918.)

APPEAL by defendant from a decree of the Chancery Court for Lauderdale County in favor of plaintiffs in a suit for the cancellation of a certain promissory note. Affirmed.

The facts are stated in the opinion.

Note. — For check or note as subject of gift by maker, see annotation following this case, post, 340.
L.R.A.1918C.

Messrs. J. B. Harris and F. V. Brahan for appellant.

Messrs. R. M. Bourdeaux and A. S. Bozeman, for appellees:

The promissory note of a donor is not the subject of a gift that can be enforced by the donee against the donor or against his estate after his death.

3 R. C. L. p. 937, § 133; 20 Cyc. 1211, 1240; 14 Am. & Eng. Enc. Law, 2d ed. 1030, 1063; *Sullivan v. Sullivan*, 7 L.R.A.(N.S.) 156 and note, 122 Ky. 707, 92 S. W. 966, 13 Ann. Cas. 163.

Stevens, J., delivered the opinion of the court:

This appeal presents for decision the validity of a promissory note in the sum of \$5,000, executed by one Theodore Sturges in his lifetime, payable to appellant, H. J. Woods, upon demand. Appellant married the daughter of Theodore Sturges, but the daughter predeceased her father, who, in disposing of his estate, left a valid last will and testament which has been duly probated, and by which he devises and bequeaths his

entire estate to his three living children and two grandchildren. His son, R. W. Sturges, and R. M. Bourdeaux, appellees herein, were appointed executors. The executors duly qualified, and as such instituted this suit in the chancery court of Lauderdale county, praying the cancellation and delivery up of the promissory note held by Mr. Woods. The bill charges that the note was executed without consideration, and evidences an unexecuted gift for \$5,000. Conceding, for the purpose of this statement, the competency of Mr. Woods as a witness, it appears from the testimony taken before the chancellor that the testator, Theodore Sturges, many years ago, stated to Mr. Woods that he (Sturges) desired to make Woods a gift, but in doing so he preferred not to mention or provide for the gift in his will, and requested Mr. Woods to consult an attorney to determine whether the gift could be made in the form of a promissory note. It appears from Mr. Woods's testimony that he then accepted the note as a gift. The original note was executed about 1909, and in 1915 the testator executed and delivered a renewal note payable upon demand. The renewal note was executed in January, 1915, and in December following Sturges duly executed his will. The will makes no mention of the Woods note or of any gift to Woods. After notice was published to creditors to probate claims, Woods filed his note with the chancery clerk and had the same registered and allowed. There is proof tending to show that after the death of the testator Mr. Woods admitted that his note was without consideration and invalid, and that he promised not to probate it. After its probate the executors exhibited a bill in this case to enjoin appellant from assigning or pledging the note to a third party, and to cancel the same. There is a controversy between the parties as to the competency of appellant as a witness, but the law point determinative of this case renders unnecessary a discussion of any question save the one considered below. The chancellor decreed in favor of the complainants in the court below, and disallowed appellant's claim.

The most that could be said for appellant's case is that Mr. Sturges, the testator, executed a demand note; that this demand note was intended to evidence a mere gratuity; that the note was duly delivered by the maker to the payee, but was not in fact intended to be paid, and was not paid, before the maker's death. Can the note, therefore, be upheld as a gift *inter vivos*? The authorities answer this question in the negative. In the case note to *Sullivan v. Sullivan*, 7 L.R.A. (N.S.) 156, it is stated: "The weight of authority at the present time has

established as a general rule of law that one cannot make his own promissory note the subject of a gift to such an extent that it can be enforced by the donee against the donor in the latter's lifetime, or against his estate after his death."

This was the conclusion reached by the Kentucky court in the *Sullivan Case*, there reported, and this conclusion is supported by numerous authorities cited in the footnote. One of the leading cases is *Parish v. Stone*, 14 Pick. 198, 25 Am. Dec. 378, where the court, by Shaw, Ch. J., very pointedly and accurately says: "It was simply a promise to pay money, and as such, and as a gift of a sum of money, it wants the essential requisite of an actual delivery."

There is a subsequent case note on checks and promissory notes as a subject of gift in 27 L.R.A. (N.S.) 308, and in this note the maker's own check is placed in the same category as a promissory note. The authorities are abundantly collated in this note, and are against the contention of appellant in the present case. Counsel have not brought to our attention any decision of our own court where an alleged gift in the form of the maker's own note has been considered. But the spirit and trend of our decisions point to the general rule, and place this court within the spirit of the case just referred to. In *Meyer v. Meyer*, 106 Miss. 638, 64 So. 420, the general rule that a gift must be completed by actual delivery was announced, and it was expressly held that profits from business credited upon the books to the sons of one of the partners, but not actually paid over before death, could not be claimed as a gift; there being no delivery of the profits. It was there stated that the entry of the credit upon the books kept in the business "constitutes, at most, nothing more than a written evidence of the promise; and the written promise or declaration of an intention to give is no more valid or binding than a verbal one. It is simply easier to prove."

That is the case here. The note relied upon is a written promise by the maker to pay appellant \$5,000. The promise was never executed, and indeed was not intended to be complied with, until after the maker's death, although the maturity of the note was on the face thereof stated to be "on demand." The same reasoning is employed in *Kingsbury v. Gastrell*, 110 Miss. 96, 69 So. 661, where the court uses this expression: "The gift was never consummated by delivery of the notes and the cancellation of the indebtedness."

See also 3 R. C. L. p. 937, § 133, and authorities cited; 14 Am. & Eng. Enc. Law, 2d ed. 1030 and 1063.

The cases relied upon by appellant pre-

sented instances where there was a voluntary conveyance of land or other property by the deceased in his lifetime, absolute conveyances, and delivery of property. In the case at bar Mr. Woods lays no claim to any specific property conveyed him, and he is in no wise named in the will as one of the beneficiaries. To enforce now the unexecuted

promise of the testator to pay appellant a sum of money would necessarily reduce the estate and take from the devisees that which by solemn will has been expressly devised them.

There is no merit in any of the assignments of error, and the decree complained of is affirmed.

Annotation—Check or note as subject of gift by maker.

Earlier cases on this question are collected and discussed in notes to *Richardson v. Richardson*, 26 L.R.A. 305; *Sullivan v. Sullivan*, 7 L.R.A.(N.S.) 156; and *Foxworthy v. Adams*, 27 L.R.A.(N.S.) 308. The note in 7 L.R.A.(N.S.) 156, discusses the question, however, from a different viewpoint; namely, as to whether a promissory note executed by a parent to a child may be the subject of a valid gift by the former to the latter.

It is said in the note in 27 L.R.A.(N.S.) 308, that the great weight of authority supports the proposition that one cannot make his own check or promissory note the subject of a gift, so that, in the absence of payment, it can be enforced against the donor or his representative. In addition to the cases cited in the earlier notes supporting this proposition, it is supported by the following more recent decisions: *Wisler v. Tomb* (1915) 169 Cal. 382, 146 Pac. 876 (the note was delivered to a trustee for the donee, with a written declaration of trust); *Walker v. Rockwood* (1915) 26 Cal. App. 624, 147 Pac. 992 (note); *Abelman v. Haehnel* (1914) 57 Ind. App. 15, 103 N. E. 869 (note); *Meginnes v. Copeland* (1916) — *Iowa*, —, L.R.A. 1917E, 1060, 160 N. W. 50 (note), overruling, so far as it conflicted therewith, *Harman v. Harman* (1914) 167 *Iowa*, 106, 149 N. W. 72; *Cox v. Walker* (1910) 140 Ky. 172, 140 Am. St. Rep. 367, 130 S. W. 984 (death of the maker of a check given to the payee as a gift, before presentation for payment, revokes the gift); *Graf v. Graf* (1912) 150 Ky. 226, 150 S. W. 55, Ann. Cas. 1914C, 1138 (note); *Meyer v. Meyer* (1914) 106 *Miss.* 638, 64 So. 420 (obiter); *Woods v. STURGES*, ante, 338; *Nelson v. Diffenderfer* (1914) 178 Mo. App. 48, 163 S. W. 271 (recognizing the rule, but holding that in this case there was sufficient evidence of a consideration for the check to support recovery thereon); *Provident Inst. for Sav. v. Sisters of the Poor* (1917) — *N. J. Eq.* —, 100 Atl. 894 (a check was given on a savings account, and the L.R.A.1918C.

pass book was loaned to the donee to enable it to cash the check, but the bank refused payment until it could investigate, and the donor died before the check was paid); *Re Wiles* (1917) 101 Misc. 701, 168 N. Y. Supp. 940 (note); *Bainbridge v. Hoes* (1914) 163 App. Div. 870, 149 N. Y. Supp. 20 (holding that a check for substantially all the amount of his deposit, mailed by the maker to his fiancée and received and presented for payment after his death by suicide, did not constitute a valid gift either inter vivos or causa mortis); *Bade v. Feay* (1908) 63 W. Va. 166, 61 S. E. 348 (note); *Blythe v. Atkinson* [1916] 1 Ch. (Eng.) 579, 114 L. T. N. S. 1157, 85 L. J. Ch. N. S. 644, 60 Sol. Jo. 539 (donor's note held not the subject of a gift causa mortis); *McLellan v. McLellan* (1911) 23 Ont. L. Rep. 654, affirmed in (1911) 25 Ont. L. Rep. 214 (a check for less than the amount of a deposit, though accompanied by delivery of the pass book to facilitate payment, if not presented for payment until after the maker's death, will not operate as a gift either inter vivos or causa mortis); *Re Bernard* (1911) 2 Ont. Week. N. 716, 18 Ont. Week. Rep. 525 (donor's check held not the subject of a gift causa mortis).

Except as otherwise indicated, the attempted gift was regarded in the above cases apparently as one inter vivos. But the rule appears to be the same whether the check or note is intended as a gift inter vivos or causa mortis. Thus, it is said in *Meginnes v. Copeland* (1916) — *Iowa*, —, L.R.A.1917E, 1060, 160 N. W. 50, that practically all the authorities construe a note of the donor made to the donee as a gift merely as a promise to make a gift, and declare that such promise is revoked by the promisor's death, whether the proposed gift is inter vivos or causa mortis.

The reasons for the above doctrine as applied to a check are stated in *Provident Inst. for Sav. v. Sisters of the Poor* (N. J.) supra, as follows: It is well settled that a gift cannot be effected by the delivery of a check upon an ordina-

ry bank of deposit where the drawer's account is good for the amount. The reason is that until the check is cashed the drawer may stop payment. In such a case the donative purpose may be absolute when the check is given, and ten minutes or ten hours or ten days later, at any time before the check has been cashed, such donative purpose may be wholly changed and abrogated. The fundamental principle of the law of gifts is that the gift, to be effective, must place the thing donated beyond the control of the donor."

If a note is given without any consideration, it cannot be regarded as an executed gift because made payable at a bank. *Abelman v. Haehnel* (1914) 57 Ind. App. 15, 103 N. E. 869, citing *Mader v. Cool* (1896) 14 Ind. App. 299, 56 Am. St. Rep. 304, 42 N. E. 945.

Of course, if the check is paid prior to the donor's death, there is a complete gift which cannot afterwards be assailed. This was the situation in *Sharpe v. Sharpe* (1916) 105 S. C. 459, 90 S. E. 34, where the check was given as a gift causa mortis to a third person, who, prior to the donor's death, cashed it and placed the amount to his own account in the bank, afterwards giving the donee a check for the money, which the bank refused to pay. It was held that there was a sufficient delivery to sustain the gift.

In the note on this question in 27 L.R.A.(N.S.) on page 310, it is said that some cases hold that, if a check intended as a gift is drawn for the full amount of the donor's deposit, it will be regarded as an assignment of the fund. To this effect is *First Nat. Bank v. O'Byrne* (1913) 177 Ill. App. 473, where a check intended as a gift causa mortis, for a

greater amount than the donor had on deposit (the donor, being unable to find her bank book, made the check in such sum as would insure the payee's obtaining the entire deposit), was held to operate as an assignment of the deposit to the donee, and its validity as a gift was sustained. The court was of the opinion, however, in this case, that in any event a check signed by the donor and delivered to the donee should operate as a valid gift, on the ground that it was not a mere promise to pay, as was a promissory note.

A similar conclusion was reached in *Aubrey v. O'Byrne* (1914) 188 Ill. App. 601, an action apparently by the same donee to recover from the executor of the estate of the donor, money which the donor had deposited in another bank, and which was claimed by the donee as a gift causa mortis under a check executed by the donor and delivered to the donee for an amount exceeding that on deposit. The check was held to constitute a completed gift causa mortis of the amount of the deposit, and to entitle the donee to maintain an action against the executor to recover the same, where the latter wrongfully withdrew it from the bank.

It was held in *Maris v. Adams* (1914) — Tex. Civ. App. —, 166 S. W. 475, that the donor's note did not constitute a gift inter vivos for the reason that there was no delivery thereof to the payee during the maker's lifetime.

As to the right of one who makes a gift of his note, and is compelled to pay the same to a bona fide holder for value, to recover from the donee the amount so paid, see *Dickinson v. Carroll*, 37 L.R.A.(N.S.) 286, and the footnote thereto.

R. E. H.

NEBRASKA SUPREME COURT.

CHARLES MEYERS

v.

GERMAN FIRE INSURANCE COMPANY
et al., Appts.

(— Neb. —, 166 N. W. 247.)

Insurance — additional — class of property.

1. The rule that the taking of additional insurance on property insured, without the

Headnotes by CORNISH, J.

Note. — For pro rata clause as a waiver of provision against additional insurance, see annotation following this case, post, 343.

Various questions in relation to the re-L.R.A.1918C.

consent of the company, renders the policy void, is not obviated by the fact that the original insurance is on a class of property rather than any particular property.

For other cases, see *Insurance*, III. c, 1, e, in Dig. 1-52 N. S.

Same — unearned premium.

2. "When an insurer has elected to treat a policy of insurance as void for breach of condition providing for a forfeiture, the assured has no claim upon the company for any unearned premium."

For other cases, see *Insurance*, III. h, in Dig. 1-52 N. S.

turn of unearned premiums are treated in notes cited in the L.R.A. Indexes under the title, "Insurance," subtitle, "Premiums; assessments; rates."

Same — pro rata clause — application.

3. What is known as the "pro rata clause" in a policy of insurance, providing that concurrent insurers of the property shall share the loss, if any, applies only in case the defendant's policy is valid, and does not constitute a waiver of a provision for forfeiture in case of additional insurance being taken without the consent of the company.

For other cases, see Insurance, III. e, 1, e, in Dig. 1-52 N. S.

(December 1, 1917.)

APPEAL by defendants from a judgment of the District Court for Valley County in favor of plaintiff in an action brought to recover the amount alleged to be due on two fire insurance policies. Reversed.

The facts are stated in the opinion.

Messrs. Stout, Rose, & Wells, for appellants:

The policy stipulations relied upon by the defendants were valid and enforceable, and the admitted violation thereof bars a recovery in this case.

Hughes v. Insurance Co. of N. A. 40 Neb. 626, 59 N. W. 112; *Home F. Ins. Co. v. Wood*, 50 Neb. 381, 69 N. W. 941; *Slobodisky v. Phenix Ins. Co.* 52 Neb. 395, 72 N. W. 483; *Nebraska Mercantile Mut. Ins. Co. v. Sasek*, 64 Neb. 17, 89 N. W. 428.

The evidence was insufficient to sustain the plea that the defendants had, by any conduct of their representatives, waived their right to insist that their policies were rendered void by reason of the violation of the stipulations against other insurance.

Hamilton v. Home F. Ins. Co. 42 Neb. 883, 61 N. W. 93; *Driscoll v. Modern Brotherhood*, 77 Neb. 282, 109 N. W. 158; *German Ins. Co. v. Heiduk*, 30 Neb. 288, 27 Am. St. Rep. 402, 46 N. W. 481; *Schmidt v. Williamsburgh City F. Ins. Co.* 95 Neb. 43, 51 L.R.A.(N.S.) 261, 144 N. W. 1044.

Plaintiff's violation of the policies was not waived by the defendants' failure to formally cancel the same or return a part of the premium before the loss occurred.

Richards, Ins. 3d ed. §§ 141, 143, pp. 176, 177; *Farmers Mut. Ins. Co. v. Home F. Ins. Co.* 54 Neb. 740, 74 N. W. 1101; *Home F. Ins. Co. v. Kuhlman*, 58 Neb. 488, 76 Am. St. Rep. 111, 78 N. W. 936; *Farmers' Mut. Ins. Co. v. Phenix Ins. Co.* 65 Neb. 14, 90 N. W. 1000, 95 N. W. 3; *Schmidt v. Williamsburgh City F. Ins. Co.* supra.

Mr. E. P. Clements also for appellants.

Messrs. E. J. Babcock and A. Norman for appellee.
L.R.A.1918C.

Cornish, J., delivered the opinion of the court:

Defendant appeals from a judgment in suit on a fire insurance policy.

It appears that without the knowledge or consent of defendant plaintiff violated the forfeiture provision against additional insurance. In the absence of waiver, this rendered the policy void or voidable at the instance of the insurance company. *Hughes v. Insurance Co. of N. A.* 40 Neb. 626, 59 N. W. 112; *Home F. Ins. Co. v. Wood*, 50 Neb. 381, 69 N. W. 941; *Slobodisky v. Phenix Ins. Co.* 52 Neb. 395, 72 N. W. 483; *Nebraska Mercantile Mut. Ins. Co. v. Sasek*, 64 Neb. 17, 89 N. W. 428.

It is argued that, if the facts of the case do not bring, within the reason and purpose of the rule, the mischief intended to be met by it, the rule does not apply. This is true. It is said that there could be no such thing as overinsurance in this case, because no particular property was insured. Being blanket insurance on horses, cattle, hay, etc., of which the insured might have much or little at the time of the fire, the recovery being limited to actual value regardless of the amount of insurance, it is thought additional insurance could not profit the insured, but rather the insurer because of its right to prorate.

Let us consider this argument. The courts have always held that, regardless of the amount, number, or kind of policies, or even of the insertion of this provision, the contract being one of indemnity only, the total recovery is limited to actual loss. *German Ins. Co. v. Heiduk*, 30 Neb. 288, 27 Am. St. Rep. 402, 46 N. W. 481; 19 Cyc. 892.

Why is the provision against overinsurance considered material to the risk and enforceable? Is it not because additional insurance increases the moral hazard? The more insurance, the less care to protect and save the property, and, as stated in *Hughes v. Insurance Co. of N. A.* supra: "It is designed as a check upon the disposition of the evil-minded to overinsure their property and destroy it."

In this case plaintiff was also proceeding against the other company. This increased risk applies to one kind of insurance about the same as to another. The argument proves too much. Why take additional insurance unless with the expectation of either collecting on both policies or relinquishing the first one? If we could assume that the plaintiff and others overinsuring in this case would know that they could not profit by it, either lawfully or by unlawful means, then the argument would be good. This cannot be assumed as a fact. The provision being material to the risk,

good faith or mistake in a particular case could make no difference. 19 Cyc. 767.

The fact that some investigation of loss was made by the defendant is not evidence of waiver. At least, this is true when considered in connection with the nonwaiver agreement introduced in evidence by plaintiff. *Schmidt v. Williamsburgh City F. Ins. Co.* 95 Neb. 43, 51 L.R.A.(N.S.) 261, 144 N. W. 1044.

The failure of the insurance company to return the consideration of the policy before standing upon its terms does not constitute a waiver. The company does not fail in its promise by insisting on the conditions of its policy; "not having broken its contract, it has a right to retain the consideration." *Schmidt v. Williamsburgh City F. Ins. Co.* supra, 95 Neb. 51, 51 L.R.A.(N.S.) 261, 144 N. W. 1044. See also *Farmers' Mut. Ins. Co. v. Home F. Ins. Co.* 54 Neb. 740, 74 N. W. 1101; *Home F. Ins. Co. v. Kuhlman*, 58 Neb. 488, 76 Am. St. Rep. 111, 78 N. W. 936; *Farmers' Mut. Ins.*

Co. v. Phoenix Ins. Co. 65 Neb. 14, 90 N. W. 1000, 95 N. W. 3.

The "pro rata clause" in the policy, providing that concurrent insurers of the property shall share the loss, if any, applies only in case the defendant's policies are valid. It applies where the provision against additional insurance has been complied with by making a written indorsement on the policy consenting to such additional insurance, or where the breach of the provision has been waived. It does not constitute a waiver.

An examination of the evidence does not show that the defendant at any time waived the forfeiture provision of the policy. On the contrary, after learning of the forfeiture, it at all times treated the policy as not in force.

For the foregoing reasons, the judgment of the District Court is reversed, and the cause remanded for further proceedings.

Rose and Sedgwick, JJ., not sitting.

Annotation—Pro rata clause as a waiver of provision against additional insurance.

It will be noticed that the court in *MEYERS v. GERMAN F. INS. CO.* ante, 341, holds that a pro rata clause providing that concurrent insurers should share the loss applies only in case the policy is valid, and in case the provision against additional insurance has been complied with by making a written indorsement on the policy, or a breach of the provision had been waived, and that it does not constitute a waiver of the provision for forfeiture if additional insurance is taken without the consent of the insurer.

If the only provision in the policy involved in that case was that concurrent insurers of the property should share the loss, it may be reconcilable with some of the cases following; but if, as was probably the case, there were further provisions with reference to the carrying of concurrent insurance, similar to those in the cases mentioned, it is apparently in conflict with them.

Thus, in *Bolte v. Equitable Fire Asso.* (1909) 23 S. D. 240, 121 N. W. 773, where an insurer without the request of the insured added a rider providing that if, at the time of loss, the whole amount exceeds 75 per cent of the actual cash value, the insurer should not be liable to pay more than its pro rata share of 75 per cent of the actual cash value of the property, it was held that this was a consent to concurrent insurance, and a waiver of a clause providing for a for-

feiture if the insured had procured at the time of obtaining the policy, or should thereafter procure, any other insurance; and it was therefore held that a false answer in the application as to the existing insurance on the property was immaterial. The court said: "The principal and legitimate purpose of such a warranty in the application and forfeiture clause in the policy of insurance is to protect the insurer against the hazard of overinsurance, and is regarded as a just and reasonable provision for that purpose; but such conditions, like others working forfeitures, will be strictly construed. . . . Two clauses or methods of accomplishing this purpose are found discussed in the textbooks on insurance and in the decisions of courts: First, a provision may be inserted in the policy for an absolute forfeiture of the insured of all rights under the policy, if other insurance exists on the property and such insurance is not disclosed in the application or assented to by the insurer, or if the insured shall take out additional insurance without the assent of the insurer; second, a provision may be inserted in or added to the policy, limiting the liability of the insurer to a percentage of the value of the property less than its real value, and providing that such reduced valuation of property in case of loss shall be ratably divided between the several insurers,

thus limiting the recovery of the insured in case of loss to an amount less than the real value of the property insured. By either method the moral hazard of the insurer is lessened or eliminated. While adapted to the same end, the two methods are wholly different in operation and effect, and it is difficult to see how both can consistently be applied and given full effect in the same contract of insurance. In the case at bar the policy itself contained a provision for absolute forfeiture in case of other insurance not consented to; but the provision requiring assent to additional insurance implies, we think, that the company would be willing to protect itself against overinsurance by adopting the other method indicated above."

And in *Sheets v. Iowa State Ins. Co.* (1911) 153 Mo. App. 620, 135 S. W. 80, where a rider was attached to a policy, providing that the total insurance should be limited to three fourths of the cash value of the property, and that the insurer should not be liable in case of loss for any greater amount than three fourths of the actual cash value of the property, nor for more than the company's proportion of three fourths of the cash value in case of other insurance thereon, and that if the amount of the policy, together with all other insurance on the property, should exceed three fourths of the cash value, the policy should be void, it was held that the policy was not avoided on the ground of a violation of the provision against other insurance, by the taking of additional insurance, with the knowledge and consent of the insurer's local agent, which did not increase the insurance beyond the limit fixed by the rider.

In *Pool v. Milwaukee Mechanics' Ins. Co.* (1895) 91 Wis. 530, 51 Am. St. Rep. 919, 65 N. W. 54, the policy contained provisions that it should be void if the insured procured any other insurance, unless otherwise provided by agreement indorsed thereon, and further provided that the insurer was to be liable for only such proportion of the loss as the amount of the policy should bear to the whole insurance on the property, and that the policy was made and accepted subject to the stipulations and conditions therein, "together with such other provisions, agreements, or conditions" as might be indorsed thereon or added thereto, and that the provisions or conditions of the policy should be waived only by agreement in writing indorsed thereon, and that any privilege or permission affecting the insurance should

be written thereon or attached thereto, and it further appeared that there was a written statement bearing even date with the policy and attached thereto, and signed by the insurer's agent, to the effect that, "if at the time of the fire the whole amount of insurance on the property covered by this policy be less than 80 per cent of the actual cash value thereof," then the insurer shall, "in case of loss or damage, be liable for only such proportion of such loss or damage as the amount insured by this policy shall bear to the said 80 per cent of the actual cash value of such property." It was held that, while this provision for prorating did not expressly authorize additional insurance without the insurer's consent, yet it did, by necessary implication, authorize such insurance, and make it an object for the insured to take additional insurance until 80 per cent of the actual cash value of the property should be obtained, and it was held that it should be especially so construed where the defendant's agent had placed, or procured the placing of, the whole of the additional insurance obtained, which did not exceed the prescribed limit, and that, consequently, the risk was not avoided by reason of the obtaining of such additional insurance.

And in *Bush v. Missouri Town Mut. Ins. Co.* (1900) 85 Mo. App. 155, there was held to be no breach of the provision against other insurance, since permission had been granted to procure insurance to three fourths of the value of the property, where a rider was attached providing that the insurer should not be liable for a greater amount than three fourths of the actual cash value of the property covered by the policy at the time of loss, and in case of other insurance then only for its pro rata proportion of such three-fourths value, and further providing, "Total insurance permitted is hereby limited to three fourths of the actual cash value of the property covered." And a like conclusion was reached in *Strauss v. Phenix Ins. Co.* (1897) 9 Colo. App. 386, 48 Pac. 822.

And in *Palatine Ins. Co. v. Ewing* (1899) 34 C. C. A. 236, 92 Fed. 111, where a rider was attached to a policy, providing that the insurer should not be liable for an amount greater than three fourths of the actual cash value of the property covered, and that in case of other insurance only for its pro rata proportion of such three fourths, and further providing, "Total insurance permitted is hereby limited to three fourths of the cash value of the property," and stating

that such rider was attached to and formed a part of the policy, it was held that it constituted an agreement permitting insurance already existing at the issuance of the policy, and also additional insurance not in violation of the three-fourths clause, obtained thereafter, and that there was no violation of the provision of the policy for a forfeiture if the insured had at the time of its issuance, or should thereafter procure, other insurance, unless otherwise provided by agreement indorsed on or added to the policy.

And in *Dolan v. Missouri Town Mut. Ins. Co.* (1901) 88 Mo. App. 666, there was held to be no violation of a provision against additional insurance where there was a clause in the policy providing that the insured should maintain insurance to the extent of at least 75 per cent of the actual cash value, and that failing to do so the insured should be an insurer to the extent of such deficit, and to that extent should bear his proportion of any loss, this clause being interpreted as a consent that insurance might be taken out to an amount not exceeding three fourths of the value of the property.

But in *Cutler v. Royal Ins. Co.* (1898) 70 Conn. 566, 41 L.R.A. 159, 40 Atl. 529, a clause stamped on the face of the policy, providing that the insured should maintain insurance on the property to the extent of at least 80 per cent of the

actual cash value thereof, and that failing to do so the insured should to that extent be an insurer and bear his proportion of any loss, was held not to supersede a provision that the policy should be void in case of other insurance, at least where the policy itself was for more than 80 per cent of the value of the property.

And in *Nestler v. Germania F. Ins. Co.* (1904) 91 N. Y. Supp. 29, affirming (1904) 44 Misc. 97, 89 N. Y. Supp. 782, it was held that the 80 per cent average or coinsurance clause of a policy did not constitute a waiver of a forfeiture by reason of other insurance taken without the insurer's permission beyond the 80 per cent limit.

And in *Woolford v. Phenix Ins. Co.* (1906) 190 Mass. 233, 76 N. E. 722, a policy containing a provision that it should be void if other insurance was taken without the insurer's written consent, and also having attached a provision that the insured should maintain insurance to at least 80 per cent of the value of the property, was held to be avoided where it was assigned to a purchaser of the insured property, who had other insurance on the property to which the company issuing such policy had not consented in writing, and the combined insurance, including the policy of such company, exceeded the value of the property. J. T. W.

NORTH DAKOTA SUPREME COURT.

UNION STATE BANK OF MINNEAPOLIS, MINNESOTA, Appt.,

v.

ALBERT BENSON, Respt.

(38 N. D. 396, 165 N. W. 509.)

Bills and notes — partial payment — failure to make.

1. The following note is held not to have been dishonored by nonpayment at the expiration of the time mentioned in the marginal memoranda for partial payments before maturity:

"\$100. Hampden, N. D., Sept. 2, 1909.
"On or before Sept. 2, 1910, after date,
I promise to pay to the order of the Sageng

Threshing Machine Company, of Minneapolis, Minn., one hundred . . . dollars.

"Value received, with interest at 6 per cent.

"[Signed] Albert Benson.

"\$25 will be pd. Nov. 1, 1909.

"\$25 " " " Jan. 1, 1910."

For other cases, see *Bills and Notes, I. a*, in *Dig. 1-52 N. S.*

Same — due course.

2. The purchaser of the above note before maturity is entitled to show that he is a holder in due course.

For other cases, see *Bills and Notes, V. a, 1*, in *Dig. 1-52 N. S.*

(Robinson and Grace, JJ., dissent.)

(November 27, 1917.)

Headnotes by BIRDZELL, J.

Note. — As to effect and construction of marginal notation upon a bill or note relating to the time of payment, see annotation following this case, post, 347. L.R.A.1918C.

APPEAL by plaintiff from a judgment of the District Court for Ramsey County in favor of defendant in an action on a promissory note. Reversed.

The facts are stated in the opinion.

Messrs. Brennan & Brennan, for appellant:

The marginal memoranda as to payments were no part of the note.

Fisk v. McNeal, 23 Neb. 726, 8 Am. St. Rep. 162, 37 N. W. 616; Dan. Neg. Inst. § 86; Smith v. Smith, 1 R. I. 398, 53 Am. Dec. 632; Danforth v. Sterman, 165 Iowa, 323, 145 N. W. 485; Benedict v. Cowden, 49 N. Y. 396, 10 Am. Rep. 382; Chestnut v. Chestnut, 104 Va. 539, 2 L.R.A. (N.S.) 879, 52 S. E. 348, 7 Ann. Cas. 802; Haywood v. Perrin, 10 Pick. 228, 20 Am. Dec. 518; Branning v. Markham, 12 Allen, 454; Way v. Batchelder, 129 Mass. 361; Payne v. Clark, 59 Am. Dec. 333 and note, 19 Mo. 152; Nugent v. Roland, 12 Mart. (La.) 659, 13 Am. Dec. 381; National Bank v. Second Nat. Bank, 69 Ind. 485, 35 Am. Rep. 236; Siegel, C. & Co. v. Chicago Trust & Sav. Bank, 131 Ill. 569, 7 L.R.A. 537, 19 Am. St. Rep. 51, 23 N. E. 417; Prim v. Hammel, 134 Ala. 652, 92 Am. St. Rep. 52, 32 So. 1006.

Part payment by defendant amounted to an admission of liability.

St. Louis, Ft. S. & W. R. Co. v. Tiernan, 37 Kan. 606, 15 Pac. 544; Button v. Russell, 55 Mich. 478, 21 N. W. 899; Smith v. O'Brien, 146 Mass. 294, 15 N. E. 645; Shoemaker v. Benedict, 11 N. Y. 176, 62 Am. Dec. 95.

The burden was upon defendant to prove that plaintiff was not an indorsee in due course.

Commercial Secur. Co. v. Jack, 29 N. D. 67, 150 N. W. 460.

Messrs. Cowan & Adamson, H. S. Blood, and T. W. Morrissey for respondent.

Birdzell, J., delivered the opinion of the court:

This is an action to recover \$70 and interest on a promissory note made by the defendant to the Sageng Threshing Machine Company, and by it transferred to the plaintiff. The judgment was entered in favor of the defendant upon a verdict of the jury, and the plaintiff appeals.

The defense is that the note was given for stock in a threshing machine company, which turned out to be worthless, and that the plaintiff is not a holder in due course, nor one who has derived title from a holder in due course. The note is as follows:

\$100. Hampden, N. D., Sept. 2, 1909.

On or before Sept. 2, 1910, after date, I promise to pay to the order of the Sageng Threshing Machine Company, of Minneapolis, Minn., one hundred . . . dollars.

Value received, with interest at 6 per cent.

[Signed] Albert Benson.

\$25 will be pd. Nov. 1, 1909.

\$25 " " " Jan. 1, 1910.

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On the back of the note is the following indorsement of payment: "April 15, 1910. Pd. \$30." The plaintiff received the note in June, 1910. The trial court excluded evidence offered to prove that the plaintiff was a holder in due course, and instructed the jury that, inasmuch as the payments referred to in the marginal notations had not been made in full, the plaintiff was the purchaser of overdue paper, and as such could not be a holder in due course.

The note in suit is what is frequently termed an "on or before note." On its face, in the body of the instrument, the promise is to pay \$100 on or before September 2, 1910. There is no ambiguity as to the time of payment, except such as might be thought to arise from marginal notations in the lower left-hand corner of the note. Unless these marginal memoranda amount to unqualified promises to pay instalments at the times designated, they cannot be said to qualify the promise to pay \$100, which matures on September 2, 1910. While the court is not free to disregard the plain meaning of a portion of the language appearing upon the face of the instrument in so far as it forms a part of the contract of the parties, it is nevertheless true that where, as here, the body of the instrument speaks in plain terms, and sets forth a contract wholly different in its obligations and legal effect from that which would result were the marginal notations considered as binding, it should not be prone to alter a plain meaning, in order to give effect to words and figures of doubtful legal import. There can be no doubt whatever that it was the intention of the parties to make the note in suit absolutely payable on September 2, 1910; neither can there be any doubt that, under the terms of the note, separate and apart from the memoranda, the maker reserved the right to pay in advance of his legal liability to pay. The marginal notations are such as to convey neither a promise, an agreement, nor a condition in any way changing the legal effect of the words in the body of the instrument, and are in terms which merely express a likelihood that certain amounts will be paid before maturity, giving the dates of such prospective payments. The court is not warranted in giving to the words used a meaning and legal significance entirely contrary to that expressed in the body of the instrument. The language embraced in the marginal memoranda is not sufficiently strong to warrant the bringing of actions for the nonpayment of the sums named, and does not, in our judgment, accelerate the obligation to pay any portion of the note. In these notations, as we view them, it only appears what the expectations of the parties were

with reference to advance payments, rather than what the obligation of the maker was to be in that respect.

In determining whether or not an instrument is overdue, for the purpose of fixing the status and rights of the parties thereto, it is proper to inquire whether, under its terms, a cause of action has accrued to the holder. The case of *Fisk v. McNeal*, 23 Neb. 726, 8 Am. St. Rep. 162, 37 N. W. 616, applies the controlling principle of this decision to notes somewhat similar to that in the instant case. The action in that case was upon two promissory notes, dated July 1, 1878, the bodies of which contained promises to pay ten days after date. Upon one there was a marginal notation as follows: "Due September 30, 1878"—and upon the other, "Due October 30, 1878." The action was commenced on the 18th day of September, 1883, which was within the period of the Statute of Limitations if the accrual of the action was governed by the marginal notations, but which was barred by the statute if the accrual of the action was governed by the maturity as fixed by the language appearing in the bodies of the notes. The court held that the marginal notes or memoranda could not control the body of the notes, and that consequently the action was barred by the Statute of Limitations. The case would clearly be different here, if the marginal notations contained words strong enough to obligate the debtor to pay before September 2, 1910.

The judgment of the trial court is reversed, and the cause remanded for further proceedings according to law.

Robinson, J., dissenting:

In this case our judges seem to break even. In the first decision three judges were against the bank and two in its favor. Now, on rehearing, one judge has changed his mind, three judges voting in favor of the bank and two against it. So that makes an even break. However, the result is to reverse the judgment of the district court and the verdict of twelve jurors in favor of the defendant.

As stated in the original opinion, the promissory note in question was given without any consideration, only a promise of some worthless stock, and the plaintiff is not a purchaser in good faith and for value. It took the note after it was dishonored by the nonpayment of \$20 which was past due, and it took the note with a good bunch of similar notes, and with knowledge of facts and circumstances sufficient to put it upon inquiry. Bankers are not justified in shutting their eyes and remaining wilfully ignorant when purchasing a note or taking it as collateral security. It is time to put a stop to the gross and prevalent abuse of the rule which gives protection to a real, honest, and prudent purchaser of negotiable paper. The rules should never protect a person taking paper without making any inquiry concerning the consideration and with perfect indifference as to whether or not it was given for any consideration. The rules should no longer be extended to give encouragement to fraud and sharp practice.

The judgment should be affirmed.

Grace, J., concurs in the dissent, but not in all the reasoning thereof.

Annotation—Effect and construction of marginal notations upon a bill or note relating to the time of payment.

This note does not, in general, deal with notations limiting the entire liability, that is, that the note is not to be paid except upon certain conditions. While these in a sense may be regarded as modifying the time stipulated in the note to the extent that it is not to be paid until the stated conditions are fulfilled, yet the entire obligation may be defeated by a failure to fulfil the conditions.

The making of a memorandum on a negotiable instrument as an alteration is discussed in the note to *Eaton v. Delay*, L.R.A.1916D, 533.

As to circumstances sufficient to put a purchaser of negotiable paper on inquiry, see notes to *Mee v. Carlson*, 29 L.R.A. (N.S.) 351, and *McPherrin v. Tittle*, 44 L.R.A. (N.S.) 395; and see later cases, *Security Trust & Sav. Bank v. Gleich*, L.R.A.1918C.

mann, L.R.A.1915F, 1203, and *First Nat. Bank v. Stover*, L.R.A.1916D, 1280.

As to provision accelerating maturity of a bill or note affecting negotiability, see note to *Holladay State Bank v. Hoffman*, 35 L.R.A. (N.S.) 390, and supplementary note to *Kennedy v. Broderick*, L.R.A.1915B, 472. See also subsequent cases of *Finley v. Smith*, L.R.A. 1915F, 777, and *First Nat. Bank v. Stover*, L.R.A.1916D, 1280.

The effect that marginal notations have upon the contract evidenced in the body of a bill or note depends upon the circumstances under which they were placed thereon. Marginal notations placed on an instrument at the time of the execution thereof, with the intention of making them a part of the contract, are held to constitute a part of the con-

tract, and must be construed with the body of the instrument to arrive at the true agreement existing between the parties. While the general question of the admissibility of parol evidence to show when and under what circumstances the notation was placed on the instrument is not within the scope of this discussion, it may be stated that parol evidence has been held competent to show when marginal notations were made. Thus, it has been held, where it appears by the face of the note itself that the memorandum was not embraced in the body of the note, but was written at the bottom, after the attestation of the subscribing witness, that it is competent for either party to prove by parol evidence the time when, the person by whom, and the circumstances under which, the memorandum was affixed to the note. Such evidence, it is held, has no tendency to vary, control, or in any way affect the meaning of the contract. *Haywood v. Perrin* (1830) 10 Pick. (Mass.) 228, 20 Am. Dec. 518. It may be shown by parol that an indorsement that a note was not to be paid until certain property should be sold by the maker for a fair price was on the note at the time it was signed. *Blake v. Coleman* (1868) 22 Wis. 415, 99 Am. Dec. 53.

The marginal notation involved in *UNION STATE BANK v. BENSON*, ante, 345, is treated by the court as a part of the contract. The holding in that case is to the effect that the notation does not so clearly evidence an obligation to pay the sums therein specified at the time stated in the notation as to modify the time of maturity fixed in the body of the writing. A default, therefore, in the payment according to the notation, did not render the paper overdue or deprive one who took thereafter of the rights of a bona fide holder. The question, in other words, was one of construction of the instrument. No case has been found in which an exactly similar instrument was construed. There are a number of cases, however, in which marginal notations modifying the time of payment of the obligation have been before the courts.

Some such notations have been construed as not modifying the contract as evidenced in the body of the instrument.

In *Fisk v. McNeal* (1888) 23 Neb. 726, 8 Am. St. Rep. 162, 37 N. W. 616, notes containing promises in words in the body thereof to pay ten days after date, upon one of which there was a marginal notation to the effect that it was "due Sept. 30, 1878," and upon the other a marginal notation to the effect that it was "due

Oct. 30, 1878," the marginal notations being placed there by the maker at the time of signing the notes, with the intention of making them payable at the time indicated in the notation, were held to become due ten days after the date thereof, as stated in the body of the notes, so as to start the Statute of Limitations running. In coming to this conclusion the court relies upon the rule that where there is a difference between the words in the body of a negotiable instrument and marginal figures, the words control.

In *Way v. Batchelder* (1880) 129 Mass. 361, a note dated September 13, and payable in four weeks, contained a memorandum in ink at the bottom thereof, at the left of the signature, as follows: "Due Oct. 12, Oct. 11." The court held that such a memorandum was repugnant and self-contradictory, and for that reason was not to be considered a part of the contract, or sufficient to contradict the terms used in the body of the note, parol evidence as to what the parties meant by the memorandum being inadmissible.

An indorsement on the back of a note, to the effect that "this note is to be extended if desired by makers," is too indefinite to constitute a binding agreement; and the addition of the words, "on payment of the interest as expressed until January 1, 1879," does not make of the indorsement a binding agreement; the addition of such words still leaves the indorsement indefinite, and therefore their addition is not a material alteration of the note. *Krouskop v. Shontz* (1881) 51 Wis. 204, 37 Am. Rep. 817, 8 N. W. 241.

A marginal notation that a note is "due July 7, 1837," being the date on which the note fell due, without grace, according to the terms in the body of the note, was held not to deprive the makers of days of grace under a statute providing that on all promissory, negotiable notes payable at a future day certain, "in which there is not an express stipulation to the contrary," grace shall be allowed, the marginal notation not being such a stipulation in the opinion of the court. *Perkins v. Franklin Bank* (1839) 21 Pick. (Mass.) 483; *Mechanics Bank v. Merchants Bank* (1843) 6 Met. (Mass.) 13.

Other notations have been construed to modify the time fixed in the body of the instrument for the payment thereof.

A draft drawn in the usual form for a sight draft, directing the drawee to "pay to . . . or order \$250, and charge to my account," but containing immediately

after the word "account" the words "due Oct. 1," was held, in *Torpey v. Tebo* (1903) 184 *Mass.* 307, 68 N. E. 223, to be a time draft, due October 1, and as so construed, the order was held an unconditional order to pay a sum certain in money at a fixed future time, and therefore to be a bill of exchange.

A memorandum in the margin of a note due one day after date, that it is "payable in merchantable fulled cloth 1 year from the month of October next," made as a part of the contract evidenced by the note before signing, governs the contract; it is not a contract for the payment of the note one day after date, as stipulated in the body thereof. *Fletcher v. Blodgett* (1844) 16 *Vt.* 26, 42 *Am. Dec.* 457.

A memorandum at the bottom of a demand note to the effect that "it is understood and agreed that the said . . . (principal maker) is not to be compelled to pay said note before April 1st, 1881," made before the delivery of the note to the original payee, is a part of the contract, and by its manifest intention neither the principal maker nor one who appeared as surety on the face of the note is bound to pay the note until April 1st, 1881. *Franklin Sav. Inst. v. Reed* (1878) 125 *Mass.* 365.

An indorsement upon the back of a promissory note due according to its terms on January 1, 1872, that one half the amount is to be paid on January 1, 1872, and the remaining half on January 1, 1873, made before the note was signed, to evidence the agreement of the parties, operates to divide the note into two payments, and changes the body of the paper in respect of maturity. *Bay v. Shrader* (1874) 50 *Miss.* 326.

A note payable according to the body thereof in nineteen months after May 1, 1899, the date thereof, but containing an indorsement at the foot, below the signatures, that the amount thereof shall be paid in three payments with interest included, viz., "January 1, 1900; July 1, 1900; and January 1, 1901," was held in *Black v. Epstein* (1902) 93 *Mo. App.* 459, 67 *S. W.* 736, to be due according to the indorsement. Accordingly there was held to be no variance between the note when introduced in evidence and a petition which described a note payable in three instalments.

A draft dated January 31, 1878, payable ten days after date, is not rendered non-negotiable by being "accepted payable March 1, 1878." *Green v. Raymond Bros.* (1879) 9 *Neb.* 295, 2 *N. W.* 881. It is stated that the holders of the draft

might have refused to receive any other than a general acceptance to pay strictly according to its terms; but, having taken this qualified one, they were bound by its terms and must submit to the legal consequences; that with this sort of acceptance acquiesced in, the draft was in legal effect precisely the same as if it had been drawn originally payable on the 1st of March, 1878, and accepted generally. The draft, being held a negotiable instrument, was further held to be entitled to days of grace. Accordingly, an action brought on the draft March 2, 1878, was held to have been prematurely commenced.

A memorandum to the effect that "one half to be paid in twelve months, the balance in twenty-four months," placed at the bottom of a demand note, following the signature of the maker, after the note was written and signed, but before its delivery, the maker having objected to it as a note payable on demand, constitutes a part of the contract the same as if it had been included in the body of the note or placed over the defendant's signature, and is to be construed accordingly. *Heywood v. Perrin* (1830) 10 *Pick. (Mass.)* 228, 20 *Am. Dec.* 518. Construing the entire contract, the court held that the memorandum limited and controlled the generality of the words "on demand," so that the holder was not entitled to make demand for payment of the note as to the one half until twelve months, and as to the other until twenty-four months, from date.

In *Wheelock v. Freeman* (1832) 13 *Pick. (Mass.)* 165, 23 *Am. Dec.* 674, a bargain was made between the plaintiff and the defendant for the purchase of a parcel of land for which the defendant was to pay a stated price as follows, viz.: one half in stock at the end of one year if the plaintiff should choose then to take the stock, otherwise, the whole in cash at the end of two years; accordingly, two notes, each for one half the purchase price, were prepared by the plaintiff for the defendant to sign, and made payable to the plaintiff on demand, with interest; the notes were both on one piece of paper, and the defendant objected to signing them as not being made according to the agreement; whereupon a memorandum was added at the bottom of the paper, substantially according to the terms of the agreement, and the notes were then signed; before the expiration of two years the plaintiff cut the memorandum from the notes and commenced action upon them and was

nonsuited; after the expiration of two years he commenced the action at bar. The court held that the cutting off of the memorandum amounted to a material alteration, as the memorandum was a part of the notes, and denied the plaintiff the right to recover on the notes, as well as on the original promise, because that was merged in the writing.

An indorsement upon a note that it is not to be paid until property of the maker is sold at a fair price, made at the time the note was signed, becomes a part of the agreement and qualifies the note, and no action can be sustained upon the note without showing that the condition has been fulfilled. *Blake v. Coleman* (1868) 22 *Wis.* 415, 99 *Am. Dec.* 53.

A memorandum at the bottom of a demand note, made at the time of signing the same, "This note not to be collected until . . . Treat takes it up himself, or sees about (something like that) as Mr. . . . has paid said Treat for the same," was held to be a part of the original contract, so that the removal thereof rendered the note void in the hands of the party removing it. *Johnson v. Heagan* (1843) 23 *Me.* 329.

A note in the form of a duebill, containing an indorsement thereon to the effect that it is not to be paid until a dividend is declared upon a certain named estate, is to be construed as though the note and indorsement constituted one instrument, the same as if the terms of the indorsement had been inserted in the body of the note itself. Accordingly the money was held not to be payable until a dividend was declared. *Effinger v. Richards* (1858) 35 *Miss.* 540.

An indorsement on a demand note to the effect that "we agree not to compel payment for the amount of this note, but to receive the same when convenient for the promisors to pay it," signed by the payee, both the note and the indorsement having been signed at the same time and as a part of the same transaction, was held in *Barnard v. Cushing* (1842) 4 *Met. (Mass.)* 230, 38 *Am. Dec.* 362, to constitute a part of the contract between the parties, and the contract, as thus construed, was held to be unenforceable.

A note due in five years from date, containing an indorsement thereon that it might be repaid at the end of three years from date, was construed in *Goodnight v. Texas Land & Mortg. Co.* (1896) — *Tex. Civ. App.* —, 34 *S. W.* 974, as authorizing payment before maturity only upon the lapse of three years from 1.L.R.A.1918C.

the date of the indorsement, and not as authorizing payment at any time after three years from such date, and before maturity, time being held of the essence of the indorsement.

A memorandum at the foot of a note, viz.: "With privilege of paying all or any portion any time before maturity," signed by the makers and made contemporaneously with the note, was held in *Bowie v. Hume* (1898) 13 *App. D. C.* 286, to constitute a part of the note and give the makers of the note the privilege of paying the same before its maturity.

A privilege reserved on the face of the note, of "making payment on account until maturity," was held to destroy the negotiability of the note, in *Ezell v. Edwards* (1885) 2 *Tex. App. Civ. Cas. (Willson)* 672.

A note given in January, 1855, due two months after date, but by mistake bearing the date January 1, 1854, was held to be corrected as to the date by a memorandum on the note, made before the note was issued, that it was "due the 4 March, 1855." *Fitch v. Jones* (1855) 5 *El. & Bl.* 238, 119 *Eng. Reprint*, 470, 24 *L. J. Q. B. N. S.* 293, 1 *Jur. N. S.* 854, 3 *Week. Rep.* 507.

An indorsement appearing upon a note, viz.: "The giver of this note, if he desires, may use the principal after due by paying the interest annually," made as a part of the original contract, must be given effect in construing the instrument. *Oskaloosa College v. Hickok* (1877) 46 *Iowa*, 237.

A marginal notation may be a mere memorandum, not made as a part of the original contract evidenced by the body of the note. In such a case it has no effect upon the maturity as fixed in the instrument. Thus, a note which, by its terms, was due June 1, 1911, but which contained in the lower left-hand corner in the margin, after a printed word "due," the words and figures in writing, "May 15, 1911," making the sentence read: "Due May 15, 1911," was held in *Danforth v. Sterman* (1914) 165 *Iowa*, 323, 145 *N. W.* 485, to be due June 1, 1911, the only testimony as to how the memorandum came to be made having been given by the payee, and being to the effect that May 15, 1911, was the date when a deed was to be delivered, and had no reference to the due date of the note. Accordingly, one who took the note before June 1st, 1911, was held entitled to show that he was a bona fide holder. A memorandum indorsed on an accommodation note, payable in one year, upon its negotiation by the accommodation

payee the day after its date, that "this note runs one year and one day from date," the writing not being intended to constitute any part of the note, but merely a memorandum of the agreement made between the accommodation payee and the purchaser, constituted no part of the note and did not extend the time of payment beyond the days of grace. *Tufts v. Shepherd* (1860) 49 *Me.* 312.

A notation at the foot of a note dated June 30, 1894, and payable six months after date, that it is "due Dec. 3d, 1892," was held not to be a part of the note, and therefore of noneffect so far as varying the date given in the note was concerned, in *Dark v. Middlebrook* (1898) — *Tex. Civ. App.* —, 45 *S. W.* 963.

W. A. E.

OKLAHOMA SUPREME COURT.

L. A. KING, Plff. in Err.,

v.

T. N. LANE.

(— *Okla.* —, 169 *Pac.* 901.)

Trial — direction on opening statement.

1. Where the plaintiff's petition states facts sufficient to constitute a cause of action, and plaintiff's reply to the defendant's answer is sufficient in law, it is error for the court to peremptorily instruct the jury to return a verdict for the defendant upon the opening statement by counsel for the plaintiff and the pleadings, unless the opening statement contains distinct and unequivocal admissions which would bar recovery.

For other cases, see *Trial*, 11. d, 3, in *Dig.* 1-52 *N. S.*

Usury — payment of usurious debt.

2. Where the lender neither charges nor receives any more than legal interest, the fact that the money is used to pay usurious debts due from the borrower to a third person does not render the loan usurious, though the lender knows at the time of the loan that the money is borrowed for the purpose of paying such usurious debts.

For other cases, see *Usury*, 1. in *Dig.* 1-52 *N. S.*

(December 11, 1917.)

ERROR to the Lincoln County Court to review a judgment in favor of defendant in an action brought to recover possession of certain chattels. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. Erwin & Erwin, for plaintiff in error:

It was error to sustain defendant's motion for direction of a verdict in his favor upon the pleadings and the opening statement of counsel for the plaintiff, and to direct a verdict accordingly.

Sullivan v. Williamson, 21 *Okla.* 844, 98

Headnotes by PRYOR, C.

Note. — As to loan to pay usurious debt, see annotation following this case, post, 354.

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Pac. 1001; *First State Bank v. Bridges*, 39 *Okla.* 355, 135 *Pac.* 378.

The rule of law as to imputed notice is subject to the exception that notice to the agent is not notice to his principal, where the agent is interested adversely to the principal.

31 *Cyc.* 1595; *First State Bank v. Bridges*, supra; *United States Fidelity & G. Co. v. Shirk*, 20 *Okla.* 576, 95 *Pac.* 218.

Where a third person, at the request of the debtor in a usurious contract, pays or lends him money to pay such indebtedness, the defense of usury cannot be set up against the liability of the debtor to reimburse such third person.

29 *Am. & Eng. Enc. Law*, 512; *McFarland v. State Bank*, 7 *Kan. App.* 722, 52 *Pac.* 110; *Lowe v. Walker*, 77 *Ark.* 103, 91 *S. W.* 22.

There was an issue of fact raised by the pleadings as to the execution of the instruments forming the basis of plaintiff's claim and action; and an issue of fact as to the bona fide nature of the transaction at the time of the execution of the note and mortgage to her. In either instance the case should have gone to the jury.

Richardson v. Fellner, 9 *Okla.* 513, 60 *Pac.* 270; *Farmers' State Bank v. Spencer*, 12 *Okla.* 597, 73 *Pac.* 297; *Sovereign Camp, W. W. v. Welch*, 16 *Okla.* 188, 83 *Pac.* 547; *Lane v. Choctaw, O. & G. R. Co.* 19 *Okla.* 324, 91 *Pac.* 883; *Stephenson v. Shirley*, 22 *Ky. L. Rep.* 1159, 60 *S. W.* 387; 39 *Cyc.* 1077; *Robbins v. Muldrow*, 39 *Kan.* 112, 18 *Pac.* 64.

Fraud, as a defense to an action on a contract, cannot be pleaded in general terms, and the specific acts constituting the fraud must be set forth.

20 *Cyc.* 96 et seq.; *Fire Extinguisher Mfg. Co. v. Perry*, 8 *Okla.* 429, 58 *Pac.* 636; *T. C. Power & Bro. v. Turner*, 37 *Mont.* 521, 97 *Pac.* 950; *Woodson v. Winchester*, 16 *Cal. App.* 472, 117 *Pac.* 565.

Messrs. Burford & Burford for defendant in error.

Pryor, C., filed the following opinion:

This is a replevin action commenced on the 23d day of October, 1913, by L. A. King,

plaintiff in error, against T. N. Lane, defendant in error, for the recovery of the possession of certain chattels under and by virtue of a chattel mortgage given to secure the payment of a certain promissory note. The petition sets forth the execution of the note and the default in the payment thereof, and the execution of the mortgage and the breach of the terms of the mortgage by reason of the failure to pay when due the amount secured, and there is a copy of the note and mortgage attached thereto; and asks judgment for the possession of the property included in said mortgage.

The defendant in error interposes as a defense that he does not know the plaintiff, and never had any business transaction with her, was never indebted to her in any sum, and never, with his knowledge, executed any mortgage or note in her favor; that he is unable to read and write, although he can write his name; that he borrowed the amount of money named in the note set out in plaintiff's petition from L. P. King, who, he is informed, is the husband of L. A. King; that all the transactions in regard to said note were with the said L. P. King; and that he did not knowingly execute a note and mortgage to the plaintiff in error, L. A. King. And for a further defense to said action he alleges various transactions wherein the defendant borrowed money from the said L. P. King, and charges that the said L. P. King charged and collected usurious interest on all the prior loans, which amounted to enough, taken together with the amounts credited on the note in question, to pay said note in full; that the said L. P. King fraudulently and wrongfully made said note and mortgage sued upon payable to the said L. A. King without the knowledge and consent of the defendant.

The plaintiff in error in reply alleges that the money advanced to the defendant on the note and mortgage in controversy was advanced by her and out of her own separate fund, and that she knew nothing whatever about prior transactions between the defendant in error and L. P. King, and that she had no knowledge or notice, if such were the fact, that L. P. King had charged the said usurious interest on any loans that he might have made to the defendant, and that at the time of the execution of said note and mortgage the said L. P. King, who was acting as the agent of the plaintiff in error, refused to loan the defendant in error the money or give him an extension of time for the payment of the amounts due, but informed him that he had money to loan belonging to another party that he would loan him, with the proper security, to discharge the indebtedness due the said L. P. King, L.R.A.1918C.

that the defendant agreed to and executed the note and mortgage and examined them before signing them, and that the plaintiff in error is not informed whether or not the defendant in error is able to read and write.

The cause was regularly called for trial, and a jury was selected and impaneled to try the issues joined by the pleadings above referred to. Upon the conclusion of the opening statement by counsel for the plaintiff in error, the defendant in error moved the court to instruct the jury to return a verdict for defendant upon the pleadings and opening statement of counsel. The court thereupon instructed the jury as follows: "Gentlemen of the jury, motion has been made by counsel for defendant for a peremptory instruction to the jury to return a verdict for the defendant upon the pleadings of plaintiff and statement of counsel to the jury, and the court has sustained that motion upon the grounds that the allegations in plaintiff's petition have not been denied as to the usury charge and statement as admitted on the statement of counsel and the pleadings in said cause, and the jury are therefore directed to return a verdict for the defendant,"—to which the plaintiff in error excepted. The jury returned a verdict in accordance with the peremptory instruction of the court, upon which the court rendered judgment for the defendant for costs expended, and the plaintiff in error prosecutes her appeal in this court for reversal.

The only question involved on appeal and necessary for consideration is whether or not the court erred in peremptorily instructing the jury to return a verdict in favor of the defendant upon the pleadings and opening statement of counsel for the plaintiff in error. There is no contention made here or in the trial court by the defendant that the petition does not state facts sufficient to constitute a cause of action. The sufficiency of the reply of plaintiff to the defendant's answer is challenged by the defendant's motion for judgment on the pleadings and opening statement of plaintiff.

The supreme court of this state, in the case of Sullivan v. Williamson, 21 Okla. 844, 98 Pac. 1001, held: "Where the petition states a cause of action, it is error to sustain a motion to dismiss the cause and render judgment against the plaintiff upon the opening statement of his counsel."

And in discussing the proposition the court uses the following language: "The petition stating a good cause of action, it was error for the court below to sustain a motion to dismiss the cause and render judgment against the plaintiff upon the opening statement of his counsel. 'Such a

motion will not be granted merely because counsel failed to state in his opening statement facts sufficient to constitute a cause of action.' *Stewart v. Hamilton*, 3 Robt. 672. A dismissal at the opening on the strength of the insufficiency of the statements of counsel for plaintiff is erroneous, as the evidence might, notwithstanding the opening statement, warrant a recovery. *Fisher v. Fisher*, 5 Wis. 472; *Haley v. Western Transit Co.* 76 Wis. 344, 45 N. W. 18. Counsel for defendants in error cite no authorities sanctioning a nonsuit upon the opening statement of counsel. None of the Code states, so far as we are aware, have adopted such practice. The almost universal rule is that motions for dismissal or nonsuit must be predicated upon matter apparent in the record. The opening statement of counsel is never part of the record, unless made so by bill of exceptions or some other appropriate proceeding, and it is rare indeed that the opening statement is ever preserved for the purpose of predicated error upon it. In this case it was not preserved, so we have no means of knowing upon what facts the court granted a nonsuit. As the petition states a cause of action, the court below should have permitted the cause to proceed to trial upon the issues joined by the pleadings. Not to do so was error, for which the cause must be reversed, and remanded for a new trial."

The above case meets squarely every contention made by the defendant in error in his answer to the contention of the plaintiff in error that the court erred in peremptorily instructing the jury to return a verdict for the defendant upon the pleadings and opening statement of counsel for plaintiff in error. Certainly it was error for the court to so instruct the jury upon the grounds that the counsel for plaintiff in error, in his opening statement, had failed to deny matters contained in the answer of the defendant in error, as this more properly would be done in reply to the opening statement of the defendant.

In the reply of the plaintiff to the answer of the defendant, replying to that portion of the defendant's answer wherein he charges that, in various transactions between the defendant and L. P. King, L. P. King had charged the defendant usurious interest which is equal to the amount of the notes involved in this action, the plaintiff admits that L. P. King acted as her agent; that the money advanced on said note was out of her separate funds, and that the defendant understood that he was borrowing money other than that belonging to the said L. P. King, and funds belonging to another person; that the transaction was open, fair, and the defendant under-

stood fully the particulars and nature of said transaction; that the plaintiff knew nothing of any prior transaction between the defendant and the said L. P. King; and that she had no interest whatever in the alleged loans made to the defendant by the said L. P. King. While the legal sufficiency of this reply was not raised directly by motion or demurrer by the defendant, it is the contention of the defendant that the motion for judgment on the pleadings and opening statement sufficiently raised this question, and that the defendant is entitled to have this question passed on. This presents the question for determination whether or not, where one has borrowed money from another with which to pay a usurious indebtedness, and executed his note for the payment of the loan, the borrower can set up as a defense against an action on said note that the proceeds thereof were used to pay a usurious indebtedness, when the lender has knowledge that such loan is being made for the purpose of paying the usurious indebtedness.

It is contended by the defendant that knowledge of the plaintiff's agent, L. P. King, that the money borrowed from the plaintiff was used in the settlement of a usurious indebtedness, is to be imputed to the plaintiff. If it is true, as contended by the defendant, that the proceeds of the loan were to be used by the agent to pay himself an unlawful claim, such as would render the plaintiff's loan illegal and the payment unenforceable, and this with the understanding and consent of the defendant, the agent's position is adverse to that of the plaintiff, and such knowledge would not be imputable to the plaintiff. But for the purpose of determination of the question raised, it may be assumed that the plaintiff had knowledge of the application of the proceeds of the loan.

Section 1005, Revised Laws 1910, provides: "The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section shall be deemed a forfeiture of twice the amount of interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case a greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover from the person, firm or corporation taking or receiving same, in an action in the nature of an action of debt, twice the amount of the interest so paid. . . ."

There is no charge by the defendant that the plaintiff has been paid or has taken, received, reserved, or charged any interest greater than allowed by law, or that the

note and mortgage involved in this controversy are usurious.

The above section forfeits twice the amount of usurious interest taken, received, reserved, or charged, and, where the party has paid usurious interest, gives him a right of action in the nature of debt against the one to whom it is paid to recover twice the amount so paid. The remedy provided for by the statute is in the nature of a penalty, and it has been held by our court that the remedy is personal, and that the person who has paid the usurious interest may waive the same. The purpose of the law is to penalize the person, firm, or corporation who has charged or received the usurious interest. This court has never passed on the question involved here, but all the courts have held, so far as a diligent search of the law reports discloses that, where a person borrows money for the purpose of paying off a usurious note or indebtedness, he cannot set up the fact that the loan was for the purpose of paying off such usurious indebtedness against the lender, and thereby defeat his recovery, and that notwithstanding the lender had knowledge that the loan was being made to enable the borrower to pay to another person a usurious debt; and there seems to be no holding to the contrary.

"Where the lender of money neither charges nor receives any more than legal interest, the fact that the money is used to pay usurious debts due from the borrower to a third person does not render the loan usurious, though the lender knows at the time of the loan that the money is borrowed for the purpose of paying such usurious debts." 29 Am. & Eng. Enc. Law, 512.

This text is fully supported by the following cases: 39 Cyc. 999; Call v. Palmer, 116 U. S. 98, 29 L. ed. 559, 6 Sup. Ct. Rep. 301; Trimble v. Thorson, 80 Iowa, 246, 45 N. W. 742; Yeiser v. Fulton, 36 Neb. 518, 54 N. W. 824; Thompson v. First State Bank, 99 Ga. 651, 26 S. E. 79; Vaught v. Rider, 83 Va. 659, 5 Am. St. Rep. 305, 3 S. E. 293; Jenkins v. Levis, 25 Kan. 479; Lowe v. Walker, 77 Ark. 103, 91 S. W. 22.

The facts in the foregoing cases are, if not identical with the instant case, so simi-

lar that the principles announced in those cases are decisive of this case; especially the facts in the case of Trimble v. Thorson seem to be identical with the facts in this case.

Under the above authorities it seems that the principle of law is well settled that the matter of usury is a question exclusively between the person paying the same and the person charging or receiving the same. If the defendant used the money for the purpose of paying off a usurious debt, this was his own privilege, and it did not concern the plaintiff. And if he paid a usurious indebtedness to L. P. King, his cause of action for the recovery of the same is against L. P. King, and not against the plaintiff.

The defendant relies on the case of First State Bank v. Bridges, 39 Okla. 355, 135 Pac. 378, as an authority in this case. In that case Bridges sued the bank to recover usurious interest paid. The bank admitted the taking and receiving of usurious interest, but denied that it "knowingly and corruptly" received the same, but admitted that its cashier, who consummated the usurious loan and accepted the usurious notes as cashier of the First National Bank, which was later merged with the First State Bank, and who collected the notes for the First State Bank as its cashier, the notes having been assigned to the First State Bank, had knowledge of the usury and the receiving of the same by the bank. Under these facts the court held the bank liable. The facts in this case are entirely different.

It must therefore be held that the reply of the plaintiff to the answer of the defendant states facts sufficient to constitute a defense to the new matters alleged in defendant's answer.

Therefore this cause should be reversed and remanded, with directions to grant a new trial.

Per Curiam:

Adopted in whole.

Petition for rehearing denied.

Annotation—Loan to pay usurious debt.

It is not usury to advance innocently money to pay off a usurious loan. Yeiser v. Fulton (1893) 36 Neb. 518, 54 N. W. 824; Steen v. Stetch (1897) 50 Neb. 572, 70 N. W. 48. So there is no usury in a new note given to an innocent holder of a usurious note. McFarland v. State Bank (1898) 7 Kan. App. 422, 52 Pac. L.R.A.1918C.

110; Kent v. Walton (1831) 7 Wend. (N. Y.) 256.

Taking innocently, at the maker's request, an assignment of a usurious debt and a substituted security for it, is not usurious in New York. Houghton v. Payne (1857) 26 Conn. 396.

So taking, at the maker's request, an

assignment of a usurious mortgage, is not usurious, the assignee not being shown to have notice of the usury. *Perdue v. Brooks* (1888) 85 Ala. 459, 5 So. 126. And a general principle that lending money to pay off a usurious debt without notice of the usury is not usurious seems to be recognized in *May v. Folsom* (1896) 113 Ala. 198, 20 So. 984.

A loan by a third person to pay a usurious debt, which is not a contrivance to evade the usury law, is not usurious. *Call v. Palmer* (1885) 116 U. S. 98, 29 L. ed. 559, 6 Sup. Ct. Rep. 301.

It was similarly held in *Lanier v. Union Mortg. Bkg. & T. Co.* (1897) 64 Ark. 39, 40 S. W. 466; *Cottrell v. Southwick* (1887) 71 Iowa, 50, 32 N. W. 22; *Deatly v. Ralls* (1881) 3 Ky. L. Rep. 386; *Stephenson v. Shirley* (1901) 22 Ky. L. Rep. 1159, 60 S. W. 387; *Wilson v. Harvey* (1871) 4 Lans. (N. Y.) 507 (obiter).

Thus, where one, at the request of a mortgagor who promised to have a new mortgage executed by himself and wife, paid for and took an assignment of a usurious mortgage, and the wife did not execute the new mortgage, there was no usury as to the husband, but the usury as to the wife was not eliminated. *Lowe v. Walker* (1905) 77 Ark. 103, 91 S. W. 22.

Other cases clearly dispose of the matter of notice, and hold that, where the lender of money neither charges nor receives any more than the legal rate of interest, the fact that the money was, with his knowledge, borrowed for the purpose of paying a debt infected with usury, due from the borrower to a third person, does not make the loan usurious.

Thompson v. First State Bank (1896) 99 Ga. 651, 26 S. E. 79; *Carter v. Brooks* (1916) 144 Ga. 852, 88 S. E. 209; *Pence v. Christman* (1860) 15 Ind. 257; *Switz v. Platts* (1863) 15 Iowa, 298; *Wendlebone v. Parks* (1865) 18 Iowa, 547 (where the old securities were transferred to the new creditor); *Mason v. Searles* (1881) 56 Iowa, 532, 9 N. W. 370; *Trimble v. Thorson* (1890) 80 Iowa, 246, 45 N. W. 742; *Brown v. Cass County Bank* (1892) 86 Iowa, 527, 53 N. W. 410; *France v. Smith* (1893) 87 Iowa, 552, 54 N. W. 366; *Jenkins v. Lewis* (1881) 25 Kan. 479; *Ratcliffe v. Buckler* (1901) 22 Ky. L. Rep. 1790, 61 S. W. 472; *Gathercole v. Young* (1881) 61 N. H. 121; *KING v. LANE*, ante, 351; *Vaught v. Rider* (1887) 83 Va. 659, 5 Am. St. Rep. 305, 3 S. E. 293, reversed on another ground.

Thus, in *Bearce v. Barstow* (1812) 9 Mass. 48, 6 Am. Dec. 25, A, being indebted to B on a usurious contract, sold land to C, who agreed for part of the price to become answerable to B for A's debt, and gave a note to B therefor, and B discharged A. It was held that C's note was not usurious.

The payment of a third person's debt, if ratified, constitutes a good claim, though the payor knew the debt included usurious charges. *Mills v. Johnston* (1859) 23 Tex. 328.

It may be noted that, where a surety on usurious paper receives the amount from the maker and gives a new note to the creditor for the amount, the new note is not usurious. *Scott v. Lewis* (1816) 2 Conn. 132; *Botsford v. Sanford* (1817) 2 Conn. 276.

B. B. B.

UNITED STATES SUPREME COURT.

EDWARD BATES, Plff. in Err.,

v.

LUCIE BODIE.

(245 U. S. 520, 62 L. ed. —, 38 Sup. Ct. Rep. 182.)

Appeal — Federal question — necessity that decision below be erroneous.

1. The Federal Supreme Court is not

Note. — The right to maintain an independent suit for alimony in one state after a valid divorce granted in another is the subject of notes to *Toneray v. Toneray*, 34 L.R.A.(N.S.) 1106, and *Bodie v. Bates*, L.R.A.1915E, 421. The latter is the report on the first appeal of the decision of the state court, the decision on second appeal of which was reversed by the United L.R.A.1918C.

without jurisdiction of a writ of error to a state court because the latter court may have committed no error in deciding the Federal question involved respecting the full faith and credit to be given to a decree of a court of another state.

For other cases, see *Appeal and Error*, II, a, 2, in *Dig. 1-52 N. B.*

Judgment — full faith and credit — alimony — consent.

2. The refusal of a state court to treat a decree of a court of another state, grant-

States Supreme Court in *BATES v. BODIE*. It will be observed that the decision of the latter court is upon the ground that the judgment of the Arkansas court was res judicata and an estoppel, the question of alimony having been presented to that court. In this respect the case is distinguishable from many of the cases cited in the notes referred to.

ing a divorce with alimony, as a bar to an independent suit by the wife in the former state to recover alimony out of the real property of the husband, situated in that state, denies to such decree the full faith and credit required by the Federal Constitution, where, in the divorce proceedings there were charges of cruelty and counter charges, a display of property, prayers for divorce, and a prayer by the wife in her cross bill that the husband be required to restore a sum borrowed from her, "and that the court award her such alimony as the facts and law warrant, and all other proper and necessary relief," and where the decree, responding to the issues thus made and the relief thus prayed, adjudged the husband to be guilty of cruelty, granted the wife a divorce, and awarded her a lump sum "in full of alimony and all other demands set forth in the cross bill," and recited that it was rendered "by the consent" of the husband, on condition that no appeal be taken, and where the evidence in the second suit confirms the face of the decree, and that it was rendered by consent of the parties. *For other cases, see Judgment, IV. b, 2, in Dig. 1-52 N. S.*

(January 21, 1918.)

ERROR to the Supreme Court of the State of Nebraska to review a judgment which, on second appeal, affirmed a judgment of the District Court for York County in favor of plaintiff in a suit by her for additional alimony. Reversed.

Statement by Mr. Justice McKenna:

Plaintiff in error, Bates, filed a complaint in divorce against defendant in error in the chancery court of Benton county, state of Arkansas, alleging cruelty and praying for an absolute divorce.

Defendant in error filed an answer denying the charge against her and a cross complaint accusing him of cruelty.

In the cross complaint she alleged that Bates was the owner of real and personal property of the fair value of \$75,000, consisting of 320 acres of land in York county, Nebraska, which she described, and alleged further that she was the owner in her own right of \$3,000, \$2,500 of which she loaned to Bates, taking his note therefor, bearing interest at 8 per cent per annum.

She prayed for an absolute divorce, for the restoration of the money borrowed from her, and "that the court award her such alimony as the facts and law warrant, and all other proper and necessary relief." The court, after hearing, dismissed Bates's complaint for want of equity and granted her a divorce; and alimony was decreed her as follows:

"It is ordered, adjudged, and decreed by the court that the defendant Lucie Bates L.R.A.1918C.

have and recover of and from the defendant [plaintiff] Edward Bates the sum of \$5,111 in full of alimony and all other demands set forth in cross bill which judgment is rendered by the consent of the plaintiff on condition that no appeal be taken by the defendant from the judgment and decree herein rendered."

Certain personal property, consisting of silverware and household furniture, was adjudged to her and a lien was declared on a lot in the city of Siloam Springs, state of Arkansas, and certain notes and mortgages amounting to the sum of \$2,801.06 were required to be deposited with the clerk of the court as additional security. He, however, was given the power to sell the same, but required to deposit the proceeds of the sale with the clerk until the sum awarded her be paid, for which no execution was to issue for six months. It was also decreed "that she be restored to her maiden name . . . and that the bonds of matrimony entered into" between her and Bates "be dissolved, set aside, and held for naught."

She subsequently brought this suit against him in a Nebraska state court, repeating the charges of cruelty against him and the proceedings in Arkansas resulting in a decree for divorce and alimony, as stated above, and "that the court of chancery did not have any jurisdiction of or over the property of complainant which was situated outside of the state of Arkansas, and that, in consequence of that fact, in determining the amount of alimony to be granted the defendant in that suit, he was limited and prohibited from taking into account the above-mentioned property situated in York county, Nebraska. Said court was limited by the laws of Arkansas from taking into consideration said property lying in York county, Nebraska, in determining the amount of alimony that should be granted to defendant in that suit, who is plaintiff herein."

The laws of the state of Arkansas further provided, she alleged, that "where the divorce is granted to the wife each party is restored to all property not disposed of at the commencement of the action, which either party obtains from or through the other during the marriage, and in consideration or by reason thereof; and the wife so granted a divorce from her husband shall be entitled to one third of all lands of which her husband is seised of an estate of inheritance, at any time during the marriage, for her life, unless the same shall have been released by her in legal form."

She further alleged that the land in Nebraska was worth the sum of \$48,000, that the amount of alimony allowed her by the Arkansas decree was largely inadequate for

her support and was not such a fair proportion of the property of Bates, owned by him at the date of the decree, as she then was and is entitled to in view of the circumstances. She prayed that a reasonable sum be adjudged her out of the York county property in addition to the amount allowed her by the Arkansas decree. A copy of the decree was attached to the complaint.

Bates demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and, she declining to plead further, the cause was dismissed for want of equity. The judgment was reversed by the supreme court.

On the return of the case to the trial court Bates answered. He set up the proceedings in Arkansas and pleaded the decree, and alleged that it was made upon full consideration of the evidence and the issues, and that the court took into consideration the value of the land in York county, Nebraska, in determining the amount of alimony to be awarded to plaintiff. That the decree remained "in full force and effect, except that the amount of alimony awarded therein has been fully paid" by him. That the Arkansas court in awarding the alimony "took into consideration all of the property owned by" him, "which decree, so far as it relates to alimony, having been fully satisfied, has become a full and complete bar to further proceedings on the part of the plaintiff in this suit, defendant in that, to recover additional alimony under the laws of Arkansas." And that, further, under the Constitution of the United States, the findings and decree are entitled to full faith and credit in the courts of Nebraska, and constitute a full and complete bar to plaintiff's right to recover additional alimony under the laws of the state of Nebraska.

It was adjudged and decreed that plaintiff (defendant in error here) have and recover from the defendant (plaintiff in error here) the "the sum of \$10,000, being the amount found due her as alimony." The judgment was affirmed by the supreme court, to review which this writ of error was prosecuted.

Messrs. A. C. Rickets, A. W. Field, and W. L. Kirkpatrick, for plaintiff in error.

Although Bates answered on remand and tried the case on its merits, he did not waive the error of the supreme court of Nebraska in holding that Bodie's amended petition stated a good cause of action (1) because the demurrer went to the jurisdiction and authority of the Nebraska court to entertain the suit, and (2) because a good cause of action in the complaint is necessary to recovery.
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Re Atlantic City R. Co. 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct. Rep. 208; Teal v. Walker, 111 U. S. 242, 28 L. ed. 415, 4 Sup. Ct. Rep. 420.

Bodie was not the wife of Bates, and he was under no obligation to support her.

Atherton v. Atherton, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544; Barrett v. Failing, 111 U. S. 523, 28 L. ed. 505, 4 Sup. Ct. Rep. 508; Bauman v. Bauman, 18 Ark. 320, 68 Am. Dec. 171; Eldred v. Eldred, 62 Neb. 613, 87 N. W. 340; Fischli v. Fischli, 1 Blackf. 360, 12 Am. Dec. 251; Ober v. Ober, 5 Silv. Sup. Ct. 37, 7 N. Y. Supp. 843; Tatro v. Tatro, 18 Neb. 395, 53 Am. Rep. 820, 25 N. W. 571; 1 R. C. L. Alimony, § 84; 2 Nelson, Div. & Sep. § 903.

As a court of chancery, the divorce court had jurisdiction of the subject-matter of divorce and alimony and of the parties, and was bound to retain that jurisdiction to do complete justice.

Bank of Stockham v. Aker, 61 Neb. 359, 85 N. W. 300; Bonner v. Little, 38 Ark. 397; Buchanan v. Griggs, 20 Neb. 165, 29 N. W. 297; Clarke v. White, 12 Pet. 178, 9 L. ed. 1046; Conger v. Cotton, 37 Ark. 286; Dewing v. Perdicaries, 96 U. S. 193, 24 L. ed. 654; Estes v. Martin, 34 Ark. 410; Jarratt v. Langston, 99 Ark. 438, 138 S. W. 1003; Gormley v. Clark, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; Norman v. Pugh, 75 Ark. 32, 86 S. W. 833; Ober v. Gallagher, 93 U. S. 199, 23 L. ed. 829; Swift v. Dewey, 20 Neb. 107, 29 N. W. 254; Tulleys v. Keller, 45 Neb. 220, 63 N. W. 888; Nelson, Div. & Sep. § 903; Bishop, Marr. & Div.; Sanford v. Sanford, 5 Day, 353.

The divorce court had power to compel Bates to transfer to Bodie an interest in the Nebraska lands.

Fall v. Eastin, 215 U. S. 1, 54 L. ed. 65, 23 L.R.A.(N.S.) 924, 30 Sup. Ct. Rep. 3, 17 Ann. Cas. 853; Carpenter v. Strange, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; Fall v. Fall, 75 Neb. 104, 121 Am. St. Rep. 767, 106 N. W. 412, 113 N. W. 175; 4 Pom. Eq. Jur. 3d ed. § 1218.

The divorce court had power to consider Nebraska lands under § 2681 of Kirby's Digest of Statutes of Arkansas.

McConnell v. McConnell, 98 Ark. 193, 33 L.R.A.(N.S.) 1074, 136 S. W. 931; Pryor v. Pryor, 88 Ark. 302, 129 Am. St. Rep. 162, 114 S. W. 700.

The divorce decree was conclusive on its face and was without reservation.

Barrett v. Failing, 111 U. S. 523, 28 L. ed. 505, 4 Sup. Ct. Rep. 598; Ex parte Ambrose, 72 Cal. 398, 14 Pac. 33; Galusha v. Galusha, 138 N. Y. 272, 33 N. E. 1062; 2 Nelson, Div. & Sep. 903; Woods v. Wadde, 44 Ohio St. 449, 8 N. E. 297; 14 Cyc. 794.

Whether the divorce decree has received the same credit in Nebraska that it has in Arkansas is a question for this court.

Carpenter v. Strange, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Dupasseur v. Rochereau*, 21 Wall. 130, 22 L. ed. 588.

Mr. Samuel P. Davidson, for defendant in error:

The holding of the supreme court of Nebraska, that the court of chancery of Arkansas was without jurisdiction to take the Nebraska lands into consideration in fixing the allotment to this defendant in error, certainly gave the judgment of the court of chancery the same faith and credit it had by law and usage in the courts of Arkansas. This is all that is required.

Roller v. Murray, 234 U. S. 745, 58 L. ed. 1573, 34 Sup. Ct. Rep. 902; *Western Life Indemnity Co. v. Rupp*, 235 U. S. 202, 275, 59 L. ed. 220, 225, 35 Sup. Ct. Rep. 37; *Holden Land & Live Stock Co. v. Inter State Trading Co.* 233 U. S. 536, 58 L. ed. 1083, 34 Sup. Ct. Rep. 661; *Haddock v. Haddock*, 201 U. S. 573, 50 L. ed. 871, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1; *Glenn v. Garth*, 147 U. S. 360, 37 L. ed. 203, 13 Sup. Ct. Rep. 350.

Where the decision of the state court rests upon a non-Federal ground, broad enough to sustain the judgment, this court will not entertain jurisdiction of the case, and the petition or writ of error should be dismissed, or the judgment of the state court should be affirmed.

Dayton Coal & I. Co. v. Cincinnati, N. O. & T. P. R. Co. 239 U. S. 446, 450, 60 L. ed. 375, 378, 36 Sup. Ct. Rep. 137; *Wood v. Chesborough*, 228 U. S. 672, 676, 57 L. ed. 1018, 1020, 33 Sup. Ct. Rep. 706; *Gaar, S. & Co. v. Shannon*, 223 U. S. 468, 56 L. ed. 510, 32 Sup. Ct. Rep. 236; *Hammond v. Johnston*, 142 U. S. 78, 35 L. ed. 942, 12 Sup. Ct. Rep. 141; *Mellon Co. v. McCafferty*, 230 U. S. 134, 60 L. ed. 181, 36 Sup. Ct. Rep. 94.

Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.—especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

Davis v. Wakelee, 156 U. S. 689, 39 L. ed. 585, 15 Sup. Ct. Rep. 556; *Cross v. Levy*, 57 Miss. 634; *Long v. Lockman*, 135 Fed. 197.
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The highest court of a state is the ultimate judge of the extent of its jurisdiction. *Dayton Coal & I. Co. v. Cincinnati, N. O. & T. P. R. Co.* 239 U. S. 446, 60 L. ed. 375, 36 Sup. Ct. Rep. 137.

In divorce and alimony cases, the chancery court of Arkansas cannot exercise ordinary inherent chancery powers, and can only exercise the powers expressly conferred by statute.

Ex parte Helmert, 103 Ark. 571, 147 S. W. 1143; *Bowman v. Worthington*, 24 Ark. 522.

Section 2684 of the Arkansas statute of its own force vests in the wife, in case the divorce be granted to her and against the husband, a definite share of the husband's property.

Hix v. Sun Ins. Co. 94 Ark. 487, 140 Am. St. Rep. 138, 127 S. W. 737.

The full faith and credit provision does not extend the jurisdiction of the courts of one state to the property situated in another, but only makes the judgment rendered conclusive on the merits of the claim or subject-matter of the suit. It does not carry with it into another state the efficacy of a judgment upon property or persons, to be enforced by execution.

Fall v. Eastin, 215 U. S. 11, 12, 54 L. ed. 70, 71, 23 L.R.A.(N.S.) 924, 30 Sup. Ct. Rep. 3, 17 Ann. Cas. 853; *M'Elmoyle v. Cohen*, 13 Pet. 312, 10 L. ed. 177.

The trial court not possessing jurisdiction to entertain the question of the disposition of this property in the divorce proceeding, the same did not become res adjudicata by reason of that action, and hence is left open for adjudication in this action.

Thomas v. Thomas, 27 Okla. 784, 35 L.R.A.(N.S.) 124, 109 Pac. 825, 113 Pac. 1058, Ann. Cas. 1912C, 713; *Bowman v. Worthington*, supra.

In suits for alimony alone, the statute requiring residence of the plaintiff in the county in which the suit is brought in divorce cases does not apply, and a nonresident plaintiff may maintain a suit for alimony alone.

Hoon v. Hoon, 82 Neb. 688, 118 N. W. 563; *Cochran v. Cochran*, 42 Neb. 612, 60 N. W. 942; *Earle v. Earle*, 27 Neb. 277, 20 Am. St. Rep. 667, 43 N. W. 118.

A suit for alimony and maintenance may be maintained in the district courts of the state after divorce has been granted and the actual relation of husband and wife has ceased to exist.

Cochran v. Cochran, 42 Neb. 612, 60 N. W. 942; *Rhoades v. Rhoades*, 78 Neb. 495, 126 Am. St. Rep. 611, 111 N. W. 122; *Cox v. Cox*, 19 Ohio St. 512, 2 Am. Rep. 415; *Woods v. Waddle*, 44 Ohio St. 449, 8 N. E. 297; *Van Orsadal v. Van Orsadal*, 67 Iowa,

35, 24 N. W. 579; Rogers v. Rogers, 15 B. Mon. 375.

Mr. Justice McKenna delivered the opinion of the court:

A motion is made to dismiss on the ground, as contended, that the decision of the supreme court of Nebraska was based upon a construction of the statutes of Arkansas, and concluded therefrom that the district court of Arkansas "had no jurisdiction to take the Nebraska lands of this plaintiff in error into consideration in fixing the amount of allowance to this defendant in error, and as a matter of fact did not do so." That this conclusion was reached "by reason of the peculiar statute of Arkansas which governs and controls the courts of that state in fixing the allowance of alimony to a wife, in all cases in which the divorce is granted on her petition" (italics counsel's), and the court "was limited and controlled by that statute." It is hence contended that the full faith and credit which the Constitution of the United States requires to be given to the judicial proceedings of another state was not denied to the Arkansas decree, but that the supreme court of Nebraska, considering the statutes of Arkansas, gave to the decree the value those statutes gave to it.

But this is the question in controversy. The decision of the supreme court of Nebraska is challenged for not according to the decree the credit it is entitled to, and it is no answer to the challenge to say that the supreme court committed no error in responding to it, and that therefore there is no Federal question for review. *Andrews v. Andrews*, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237. The motion to dismiss is denied.

The decision of the supreme court, affirming the subsequent judgment of the district court on the merits, was by a divided court and the opinion and dissenting opinion were well reasoned and elaborate. The ultimate propositions decided were that the courts of Nebraska would entertain a suit for alimony out of real estate situated in that state after a decree for absolute divorce in another state, the latter state having no jurisdiction of the land, notwithstanding the decree awarding alimony, the decree not appearing to have been rendered by consent, or not having taken such land into account; and that, besides, the Arkansas court had no jurisdiction to render a money judgment for alimony.

The propositions were supported and opposed by able discussion, some of which was occupied in reconciling a conflict of decision in Nebraska, a later decision made to L.R.A.1918C.

give way to an earlier one. We are not called upon to trace or consider the reasoning of the opinion further than to determine the correctness of its elements, and this determination can be made by reference to the divorce proceedings in Arkansas and the decree of the court rendered therein.

The case is not in broad compass and depends upon the application of the quite familiar principle that determines the estoppel of judgments, and the principle would seem to have special application to a judgment for divorce and alimony. They are usually concomitants in the same suit,—some cases say must be,—or, rather, that as alimony is an incident of divorce, it must be awarded by the same decree that grants the separation. And it is the practice to unite them, as alimony necessarily depends upon a variety of circumstances more adequately determined in the suit for divorce; not only the right to it, but the measure of it,—all circumstances upon which it depends then naturally brought under the view and judgment of the court. Whether, however, the right to it should be litigated in the suit for divorce, or may be sought subsequently in another, the principle is applicable that what is once adjudged cannot be tried again. And this court has established a test of the thing adjudged and the extent of its estoppel. It is: If the second action is upon the same claim or demand as that in which the judgment pleaded was rendered, the judgment is an absolute bar not only of what was decided, but of what might have been decided. If the second action was upon a different claim or demand, then the judgment is an estoppel "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Cromwell v. Sac County*, 94 U. S. 351, 353, 24 L. ed. 195, 198; *Virginia-Carolina Chemical Co. v. Kirven*, 215 U. S. 252, 54 L. ed. 179, 30 Sup. Ct. Rep. 78; *Troxell v. Delaware, L. & W. R. Co.* 227 U. S. 434, 57 L. ed. 586, 33 Sup. Ct. Rep. 274; *Radford v. Myers*, 231 U. S. 725, 58 L. ed. 454, 34 Sup. Ct. Rep. 249; *Hart Steel Co. v. Railroad Supply Co.* 244 U. S. 294, 61 L. ed. 1148, 37 Sup. Ct. Rep. 506.

But how find the matters in issue or the points controverted upon the determination of which the judgment was rendered? The obvious answer would seem to be that for the issues we must go to the pleadings; for the response to them and their determination, to the judgment; and each may furnish a definition of the other. *National Foundry & Pipe Works v. Oconto Water Supply Co.* 183 U. S. 216, 234, 46 L. ed. 157, 169, 22 Sup. Ct. Rep. 111. If there be generality and uncertainty, to what extent there may

be specification and limitation by evidence aliunde there is some conflict in the cases. But we are not called upon to review or reconcile them. Our rule is that an estoppel by judgment is "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell v. Sac County*, 94 U. S. 352, 24 L. ed. 197. Is the rule applicable to the instant case?

We have set forth the proceedings in divorce in which, we have seen, there were charges of cruelty, and counter charges. There was display of property, prayers for divorce, and a prayer in addition, on the part of defendant in error, that her husband, Bates, be required to restore a sum borrowed from her, "and that the court award her such alimony as the facts and law warrant, and all other proper and necessary relief."

Responding to the issues thus made and the relief thus prayed, the court adjudged plaintiff in error guilty of cruelty, granted defendant in error a divorce, and awarded her the sum of \$5,111 in full of alimony and all other items set forth in the cross bill."

There were then presented the issues of divorce and alimony: the first was made absolute, the second in a specified sum "in full," and the sum adjudged to her was made a lien on his property in the state (Arkansas). We may remark that she was awarded other property. It would seem, therefore, that there is no uncertainty upon the face of the record, and that it is clear as to the issues submitted and clear as to the decision upon them.

But it is answered that—(1) the court had no jurisdiction of the Nebraska lands, and (2) that, besides, it did not take them into account in its judgment.

(1) Counsel make too much of this point. It may be that the Arkansas court had no jurisdiction of the Nebraska lands so as to deal with them specifically, but it had jurisdiction over plaintiff in error, to require him to perform any order it might make. But even this power need not be urged. The court had jurisdiction of the controversy between the parties and all that pertained to it,—jurisdiction to determine the extent of the property resources of plaintiff in error and what part of them should be awarded to defendant in error. It was not limited to any particular sum if it had jurisdiction to render a money judgment at all.

But such jurisdiction does not exist, the supreme court of Nebraska decides and counsel urges. The argument to sustain L.R.A.1918C.

this is that the Arkansas statute¹ (Kirby's Dig. § 2684) provides that when a divorce is granted to the wife, the only power the court possesses is to restore to the parties respectively the property one may have obtained from the other during the marriage, and adjudge to the wife one third of her husband's personal property absolutely and one third of all the lands whereof he was seised of an estate of inheritance at any time during the marriage for her life, unless she shall have relinquished the same in legal form. In other words, against a guilty husband the courts of Arkansas were without power to render a money judgment for alimony, but were confined to an allotment of his personal property and real estate in the proportions stated. But the court was confronted with the question of the relation of that section to § 2681 of the Digest, which provides that "when a decree shall be entered, the court shall make such order touching the alimony of the wife and the care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable." In answer to the question, the court decided that the latter section is applicable only when a divorce is granted for the fault of the wife.

Plaintiff in error contests the conclusion and strong argument may be made against it to show that the sections are reconcilable and each applicable to particular conditions. And such was the view of the dissenting members of the court. However, we are not called upon for a definitive decision, on account of the view we entertain of proposition 2, and the reason which, we think, induced the court to render a money judgment.

(2) This proposition is based on the record, which, the supreme court said, "shows that the court [Arkansas court] did not in fact make any allowance on account of the Nebraska lands," and resort is had to parol testimony for the purpose of limiting the decree. But we cannot give the testimony

¹ "And where the divorce is granted to the wife, the court shall make an order that each party be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage and in consideration or by reason thereof: and the wife so granted a divorce against the husband shall be entitled to one third of the husband's personal property absolutely, and one third of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage for her life, unless the same shall have been relinquished by her in legal form." Kirby's Dig. § 2684.

such strength. It is conflicting. It consists of the impressions of opposing counsel and of the parties of the opinion of the court, orally delivered in direction for the decree.

The Bodie version is supported by the clerk of the court, whose recollection was that the court did not take into consideration "the land outside of Benton county." But he further testified that there was testimony of the rental value of the Nebraska lands, and that "the chancellor announced that while he did not have jurisdiction over the lands in Nebraska, he did have jurisdiction over the person of Bates, as he was personally present in court. The court required Bates to deposit security for payment of the alimony awarded. . . . As I recollect it, the decree rendered was on the consent of Bates on condition that Bodie would not appeal."

On the Bates side is the evidence of the chancellor, whose opinion was the subject of the testimony of the others. He was specific and direct, and the following, in summary, is his testimony: Depositions were introduced showing the value of and rental income from the Nebraska lands, which were supposed to be in the name of Bates's children or in his name as trustee for his children. The decree for alimony was a lump sum of \$5,111 "in lieu of any interest that she might have or claim she might have for any sum." (It does not appear from what this is a quotation—probably from the witness's opinion.) He, the witness, intimated what he would do in the way of a property finding, and the parties agreed upon a lump sum as a final settlement, from which no appeal was to be taken. His view was that the court had jurisdiction of the parties, and held it had not of the land in Nebraska, but it did have jurisdiction to consider its value in determining the amount of alimony. Knowing, as he testified, the law, he did not think he stated that there was no law justifying the court to take into consideration the Nebraska lands. It was not the first time the proposition had been raised before him.

He remembered that Bodie claimed \$2,500 as borrowed money, but the money had merged in Bates's estate. He did not understand that it entered in the decree. It was a lump-sum agreement, provided cash could be got to end the controversy both as to divorce and as to property rights. Counsel adjusted it on the outside, for he was quite sure that it was not the amount the court indicated it would allow. The court understood that counsel on both sides agreed to the amount; that the judgment was a complete and amicable settlement between the parties of all property rights involved.

We must ascribe to the representation of the decree the same judicial impartiality that induced its rendition, and the representation was circumstantial, without material qualification, doubt, or hesitation. It accords, besides, with the issues in the case and the decree. As we have seen, the amount it awarded was "in full of alimony and all other demands set forth in the cross bill." It also recited that it was "rendered by consent of plaintiff, on condition that no appeal be taken by defendant from the judgment and decree." The amount was secured as the chancellor declared he would secure it; it was paid as it was required to be paid.

The evidence, therefore, confirms the face of the decree and that it was rendered by consent of the parties. It is admitted that consent would give jurisdiction to the court to render a money judgment for alimony.

We think, therefore, that due faith and credit required by the Constitution of the United States was not given to the decree. The judgment of the Supreme Court is reversed and the cause remanded for further proceedings, not inconsistent with this opinion.

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The judgment of the Supreme Court is reversed and the cause remanded for further proceedings, not inconsistent with this opinion.

UNITED STATES SUPREME COURT.

JOSEPH F. ARVER, Plff. in Err.,

v.

UNITED STATES OF AMERICA.

(No. 663.)

ALFRED F. GRAHL, Plff. in Err.,

v.

SAME. (No. 664.)

OTTO WANGERIN, Plff. in Err.,

v.

SAME. (No. 665.)

WALTER WANGERIN, Plff. in Err.,

v.

SAME. (No. 666.)

LOUIS KRAMER, Plff. in Err.,

v.

SAME. (No. 681.)

MEYER GRAUBARD, Plff. in Err.,

v.

SAME. (No. 769.)

(245 U. S. 366, 62 L. ed. —, 38 Sup. Ct. Rep. 159.)

Army — compulsory military duty — Selective Draft Act.

1. The power to exact enforced military

duty at home or abroad by citizens of the United States was conferred upon Congress by the provisions of U. S. Const. art. 1, § 8, empowering Congress to declare war and to raise and support armies, and authorizing it to make all laws which shall be necessary and proper for carrying into execution the powers expressly given to Congress.

For other cases, see Army and Navy, in Dig. 1-52 N. S.

Same — congressional authority — militia.

2. Congressional authority under U. S. Const. art. 1, § 8, to raise armies, is not narrowed by the further provisions of that section concerning the militia, the army and militia powers being different, and operating in distinct and separate fields.

For other cases, see Army and Navy, in Dig. 1-52 N. S.

Constitutional law — privileges and immunities — due process of law.

3. The national scope of the government under the Federal Constitution was completely broadened by U. S. Const. 14th Amend., by causing citizenship of the United States to be paramount and dominant, instead of being subordinate and derivative, the Amendment operating upon all the powers conferred by the Constitution.

For other cases, see Constitutional Law, II. a, 1, in Dig. 1-52 N. S.

Same — delegation of power — Selective Draft Law.

4. The administrative features of the selective draft provisions of the Act of May 18, 1917, do not render the act void as a delegation of Federal power to state officials. *For other cases, see Constitutional Law, I. d, 1, in Dig. 1-52 N. S.*

Same — encroachment on judicial power — Selective Draft Act.

5. The selective draft provisions of the Act of May 18, 1917, are not void as vesting legislative discretion or judicial powers in administrative officers.

For other cases, see Constitutional Law, I. e, 2, in Dig. 1-52 N. S.

Same — religious freedom — Selective Draft Act.

6. The exemptions from military service in the strict sense made by the selective draft provisions of the Act of May 18, 1917, in favor of the members of religious sects as enumerated, whose tenets exclude the moral right to engage in war, does not violate the prohibition of U. S. Const. 1st Amend., against the establishment of a religion or an interference with the free exercise thereof.

For other cases, see Constitutional Law, II. d, in Dig. 1-52 N. S.

Same — involuntary servitude — Selective Draft Act.

7. The exaction by Congress of enforced military duty from citizens of the United States, as is done by the Act of May 18, 1917, does not render that statute repugnant L.R.A.1918C.

to U. S. Const. 13th Amend., as imposing involuntary servitude.

For other cases, see Involuntary Servitude, in Dig. 1-52 N. S.

(January 7, 1918.)

WRITS OF ERROR to the District Court of the United States for the District of Minnesota, and to the District Court of the United States for the Southern District of New York, to review judgments convicting defendants of violating the Selective Draft Act. **Affirmed.**

The facts are stated in the opinion.

Messrs. T. E. Latimer, Herbert L. Dunn, and Frank Healy, for plaintiffs in error in Nos. 863, 864, 665, and 666.

The Selective Draft Act and the regulations prescribed thereunder are in conflict with the terms and provisions of art. 1, § 8, of the Constitution of the United States.

Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. ed. 1233; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97; 3 Annals of 13th Congress, 807; Kneedler v. Lane, 45 Pa. 238.

Also with the terms and provisions of the 13th Amendment to the Constitution of the United States, which prohibits involuntary servitude.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18; Ex parte Wilson, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935, 4 Am. Crim. Rep. 283; Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; Robertson v. Baldwin, 165 U. S. 276, 41 L. ed. 715, 17 Sup. Ct. Rep. 328; Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429; Hodges v. United States, 203 U. S. 1, 51 L. ed. 65, 27 Sup. Ct. Rep. 6; Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145; Butler v. Perry, 240 U. S. 328, 60 L. ed. 672, 36 Sup. Ct. Rep. 258; United States v. Sanges, 48 Fed. 78; State ex rel. Erickson v. West, 42 Minn. 147, 43 N. W. 845.

Also with the terms and provisions of art. 1, § 1, and art. 1, § 8, of the Constitution of the United States, in that Congress attempts to delegate legislative power to the President of the United States and other United States or state officials.

Stoutenburgh v. Hennick, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; Marshall Field & Co. v. Clark, 143 U. S. 649, 692, 36 L. ed. 294, 309, 12 Sup. Ct. Rep. 495; United States v. Blasingame, 116 Fed. 654; United States v. Keokuk & H. Bridge Co. 45 Fed. 178; Cooley, Const. Lim. chap. 5, p. 137; Cooley, Const. Law, p. 87; 6 Ops. Atty. Gen. 10; 10 Ops. Atty. Gen. 413; Bryce, Am. Com.

p. 165; Wilson, Const. Government, pp. 57-59; Webster's Works; The Federalist, chap. 69, p. 515.

Also with the terms and provisions of art. 4, § 4, of the Constitution of the United States, and the 10th Amendment to the Constitution of the United States, in that Congress attempts to require state officials to do that which is prohibited to the states themselves.

The Collector v. Day (Buffington v. Day) 11 Wall. 124, 126, 20 L. ed. 125, 126; M'Culloch v. Maryland, 4 Wheat. 405, 4 L. ed. 601; Scott v. Sanford, 19 How. 401, 15 L. ed. 609; Worcester v. Georgia, 6 Pet. 570, 8 L. ed. 504; Kohl v. United States, 91 U. S. 372, 23 L. ed. 451; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; Martin v. Wadell, 16 Pet. 410, 416, 10 L. ed. 1012, 1015.

Also with the terms and provisions of the 5th Amendment to the Constitution of the United States providing that "nor shall any person be deprived of his life, liberty, or property without due process of law."

Re Debs, 158 U. S. 594, 39 L. ed. 1106, 15 Sup. Ct. Rep. 900; Boyd v. United States, 116 U. S. 635, 29 L. ed. 752, 6 Sup. Ct. Rep. 524; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 255; Fairbank v. United States, 181 U. S. 301, 45 L. ed. 870, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135.

Messrs. Edwin T. Taliaferro and I. M. Sackin, for plaintiff in error in No. 769:

No power is expressly granted by the Constitution of the United States to Congress to pass a selective draft act or other conscription or forcible service act. Such an act is in violation of the Constitution of the United States and of the sovereign right of the citizen.

Kneedler v. Lane, 45 Pa. 255.

The act is unconstitutional because it authorizes the President of the United States to "raise an army," while this power is alone conferred on Congress.

M'Culloch v. Maryland, 4 Wheat. 415, 4 L. ed. 603.

Mr. Harry Weinberger for plaintiff in error in No. 681.

Messrs. Hannis Taylor and Joseph E. Black, as amici curiæ:

This court has recognized two distinct systems of militia, one state, one national.

Houston v. Moore, 5 Wheat. 7, 5 L. ed. 20.

State militia in the service of the United States, as well as national militia, are exempt from service abroad.

Martin v. Mott, 12 Wheat. 19, 6 L. ed. 537.

Every part of the Constitution which is taken directly from the English is interpreted in the light of its history in the mother country.

preted in the light of its history in the mother country.

Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. ed. 1233; Income Tax Cases, 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; United States v. Wong Kim Ark, 169 U. S. 679, 42 L. ed. 001, 18 Sup. Ct. Rep. 456; Gompers v. United States, 233 U. S. 604, 58 L. ed. 1115, 34 Sup. Ct. Rep. 693, Ann. Cas. 1915D, 1044.

Mr. Walter Nellie, also as amicus curiæ:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of the government. Such a doctrine leads directly to anarchy or despotism.

Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281.

Messrs. John W. Davis and Robert Swoold, for defendant in error:

Congress may compel citizens to serve in the land forces under the power "to raise and support armies."

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579.

The draft of a citizen into the armed forces of the United States infringes no reserved right of the states over the militia.

Burrongs v. Peyton, 16 Gratt. 470; Kneedler v. Lane, 45 Pa. 238.

Members of the National Guard are called not as militiamen, but as citizens of the United States.

United States v. Sugar, 243 Fed. 423.

Assuming arguendo that plaintiffs in error are called as militiamen and are ordered abroad, they cannot obtain relief in the courts.

Martin v. Mott, 12 Wheat. 19, 31, 32, 6 L. ed. 537, 541.

The Selective Draft Law imposes neither slavery nor involuntary servitude.

Butler v. Perry, 240 U. S. 328, 60 L. ed. 672, 36 Sup. Ct. Rep. 258; Claudius v. Davie, — Cal. —, 185 Pac. 689.

The act is not unconstitutional on the ground that state officials aid in its enforcement.

Claudius v. Davie, supra; Dallemagne v. Moisan, 197 U. S. 169, 49 L. ed. 709, 25 Sup. Ct. Rep. 422.

The act does not delegate legislative authority to administrative officials.

First Nat. Bank v. Fellows, 244 U. S. 416, 61 L. ed. 1233, 37 Sup. Ct. Rep. 734.

The act does not infringe the provisions of the Constitution concerning the judicial power.

Zakonaite v. Wolf, 226 U. S. 272, 57 L. ed. 218, 33 Sup. Ct. Rep. 31.

Mr. Chief Justice White delivered the opinion of the court:

We are here concerned with some of the provisions of the Act of May 18, 1917 (Public No. 12, 65th Congress, chap. —, — Stat. at L. —), entitled, "An Act to Authorize the President to Increase Temporarily the Military Establishment of the United States." The law, as its opening sentence declares, was intended to supply temporarily the increased military force which was required by the existing emergency, the war then and now flagrant. The clauses we must pass upon and those which will throw light on their significance are briefly summarized.

The act proposed to raise a national army, first, by increasing the regular force to its maximum strength and there maintaining it; second, by incorporating into such army the members of the National Guard and National Guard Reserve already in the service of the United States (Act of Congress of June 3, 1916, chap. 134, 39 Stat. at L. 211), and maintaining their organizations to their full strength; third, by giving the President power, in his discretion, to organize by volunteer enlistment four divisions of infantry; fourth, by subjecting all male citizens between the ages of twenty-one and thirty to duty in the national army for the period of the existing emergency after the proclamation of the President announcing the necessity for their service; and fifth, by providing for selecting from the body so called, on the further proclamation of the President, 500,000 enlisted men, and a second body of the same number should the President, in his discretion, deem it necessary. To carry out its purposes the act made it the duty of those liable to the call to present themselves for registration on the proclamation of the President so as to subject themselves to the terms of the act, and provided full Federal means for carrying out the selective draft. It gave the President, in his discretion, power to create local boards to consider claims for exemption for physical disability or otherwise made by those called. The act exempted from subjection to the draft designated United States and state officials as well as those already in the military or naval service of the United States, regular or duly ordained ministers of religion and theological students under the conditions provided for, and while relieving from military service in the strict sense the members of religious sects as enumerated whose tenets excluded the moral right to engage in war, nevertheless sub-

jected such persons to the performance of service of a noncombatant character, to be defined by the President.

The proclamation of the President calling the persons designated within the ages described in the statute was made, and the plaintiffs in error, who were in the class, and, under the statute, were obliged to present themselves for registration and subject themselves to the law, failed to do so, and were prosecuted under the statute for the penalties for which it provided. They all defended by denying that there had been conferred by the Constitution upon Congress the power to compel military service by a selective draft, and if such power had been given by the Constitution to Congress, the terms of the particular act, for various reasons, caused it to be beyond the power and repugnant to the Constitution. The cases are here for review because of the constitutional questions thus raised, convictions having resulted from instructions of the courts that the legal defenses were without merit and that the statute was constitutional.

The possession of authority to enact the statute must be found in the clauses of the Constitution giving Congress power "to declare war: . . . to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years: . . . to make rules for the government and regulation of the land and naval forces." Article 1, § 8. And of course the powers conferred by these provisions, like all other powers given, carry with them, as provided by the Constitution, the authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Article 1, § 8.

As the mind cannot conceive an army without the men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice. It is said, however, that since under the Constitution as originally framed state citizenship was primary and United States citizenship but derivative and dependent thereon, therefore the power conferred upon Congress to raise armies was only coterminous with United States citizenship, and could not be exerted so as to cause that citizenship to lose its dependent character and dominate state citizenship. But the proposition simply denies to Congress the power to raise armies which the Constitution gives. That power, by the very terms of the Constitution, being delegated, is supreme. Article 6. In truth, the contention simply assails the wisdom of the framers of the Constitution in con-

ferred authority on Congress, and in not retaining it, as it was under the Confederation, in the several states. Further, it is said, the right to provide is not denied by calling for volunteer enlistments, but it does not and cannot include the power to exact enforced military duty by the citizen. This, however, but challenges the existence of all power, for a governmental power which has no sanction to it and which therefore can only be exercised provided the citizen consents to its exertion is in no substantial sense a power. It is argued, however, that although this is abstractly true, it is not concretely so because, as compelled military service is repugnant to a free government and in conflict with all the great guaranties of the Constitution as to individual liberty, it must be assumed that the authority to raise armies was intended to be limited to the right to call an army into existence counting alone upon the willingness of the citizen to do his duty in time of public need; that is, in time of war. But the premise of this proposition is so devoid of foundation that it leaves not even a shadow of ground upon which to base the conclusion. Let us see if this is not at once demonstrable. It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it. Vattel, *Law of Nations*, bk. 3, chaps. 1 and 2. To do more than state the proposition is absolutely unnecessary in view of the practical illustration afforded by the almost universal legislation to that effect now in force.¹ In England it is certain that before the Norman Conquest the duty of the great militant body of the citizens was recognized and enforceable. Bl. Com. bk. 1, chap. 13. It is

unnecessary to follow the long controversy between Crown and Parliament as to the branch of the government in which the power resided, since there never was any doubt that it somewhere resided. So, also, it is wholly unnecessary to explore the situation for the purpose of fixing the sources whence, in England, it came to be understood that the citizen or the force organized from the militia, as such, could not, without their consent, be compelled to render service in a foreign country, since there is no room to contend that such principle ever rested upon any challenge of the right of Parliament to impose compulsory duty upon the citizen to perform military duty wherever the public exigency exacted, whether at home or abroad. This is exemplified by the present English Service Act.²

In the Colonies before the separation from England there cannot be the slightest doubt that the right to enforce military service was unquestioned and that practical effect was given to the power in many cases. Indeed, the brief of the government contains a list of Colonial acts manifesting the power and its enforcement in more than two hundred cases. And this exact situation existed also after the separation. Under the Articles of Confederation, it is true, Congress had no such power, as its authority was absolutely limited to making calls upon the states for the military forces needed to create and maintain the army, each state being bound for its quota as called. But it is indisputable that the states, in response to the calls made upon them, met the situation when they deemed it necessary by directing enforced military service on the part of the citizens. In fact, the duty of the citizen to render military service and the power to compel him against his consent to do so was expressly sanc-

¹ In the argument of the government it is stated: "The Statesmen's Year-Book for 1917 cites the following governments as enforcing military service: Argentine Republic, p. 656; Austria-Hungary, p. 667; Belgium, p. 712; Brazil, p. 738; Bulgaria, p. 747; Bolivia, p. 728; Columbia, p. 790; Chili, p. 754; China, p. 770; Denmark, p. 811; Ecuador, p. 820; France, p. 841; Greece, p. 1001; Germany, p. 914; Guatemala, p. 1009; Honduras, p. 1018; Italy, p. 1036; Japan, p. 1064; Mexico, p. 1090; Montenegro, p. 1098; Netherlands, p. 1191; Nicaragua, p. 1142; Norway, p. 1152; Peru, p. 1191; Portugal, p. 1201; Roumania, p. 1220; Russia, p. 1240; Serbia, p. 1281; Siam, p. 1288; Spain, p. 1300; Switzerland, p. 1337; Salvador, p. 1270; Turkey, p. 1353." See also the recent Canadian conscription act, entitled, "Military Service Act" of August 27, 1917, expressly providing for service abroad (printed in the Congressional Record of September 20, 1917, L.R.A.1918C.

55th Cong. Rec. p. 7950); the Conscription Law of the Orange Free State, Law No. 10, 1899; Military Service and Commando Law, §§ 10 and 28; Laws of Orange River Colony, 1901, p. 855; of the South African Republic, "De Locale Wetten en Volksraadsbesluiten der Zuid Afr. Republik," 1898, Law No. 20, pp. 230, 233, articles 6, 28; Constitution, German Empire, April 16, 1871, arts. 57, 59; 1 Dodd, *Modern Constitutions*, p. 344; Gesetz, betreffend Aenderungen der Wehrpflicht, vom. 11 Feb. 1888, No. 1767, Reichs-Gesetzblatt, p. 11, amended by law of July 22, 1913, No. 4264, RGBl., p. 593; Loi sur le Recrutement de l'Armee of 15 July, 1889 (Duvergier, vol. 89, p. 440), modified by Act of 21 March, 1905 (Duvergier, vol. 105, p. 133).

² Military Service Act, January 27, 1916, 5 and 6 Geo. V. chap. 104, p. 367, amended by the Military Service Act of May 25, 1916, 2d sess. 6 and 7, Geo. V. chap. 15, p. 33.

tioned by the Constitutions of at least nine of the states, an illustration being afforded by the following provision of the Pennsylvania Constitution of 1776: "That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion toward the expense of that protection, and yield his personal service when necessary, or, an equivalent thereto." Art. 8 (5 Thorpe, *American Charters, Constitutions, and Organic Laws*, pp. 3081, 3083).³ While it is true that the states were sometimes slow in exerting the power in order to fill their quotas,—a condition shown by resolutions of Congress calling upon them to comply by exerting their compulsory power to draft, and by earnest requests by Washington to Congress that a demand be made upon the states to resort to drafts to fill their quotas,⁴—that fact serves to demonstrate instead of to challenge the existence of the authority. A default in exercising a duty may not be resorted to as a reason for denying its existence.

When the Constitution came to be formed it may not be disputed that one of the recognized necessities for its adoption was the want of power in Congress to raise an army and the dependence upon the states for their quotas. In supplying the power it was manifestly intended to give it all and leave none to the states, since, besides the delegation to Congress of authority to raise armies, the Constitution prohibited the states, without the consent of Congress, from keeping troops in time of peace or engaging in war. Article 1, § 10.

To argue that, as the state authority over the militia prior to the Constitution embraced every citizen, the right of Congress to raise an army should not be considered as granting authority to compel the citizen's service in the army, is but to express in a different form the denial of the right to call any citizen to the army. Nor is this met by saying that it does not exclude the right of Congress to organize an

army by voluntary enlistments, that is, by the consent of the citizens, for if the proposition be true, the right of the citizen to give consent would be controlled by the same prohibition which would deprive Congress of the right to compel unless it can be said that although Congress had not the right to call, because of state authority, the citizen had a right to obey the call and set aside state authority if he pleased to do so. And a like conclusion demonstrates the want of foundation for the contention that although it be within the power to call the citizen into the army without his consent, the army into which he enters after the call is to be limited in some respects to services for which the militia, it is assumed, may only be used, since this admits the appropriateness of the call to military service in the army and the power to make it, and yet destroys the purpose for which the call is authorized,—the raising of armies to be under the control of the United States.

The fallacy of the argument results from confounding the constitutional provisions concerning the militia with that conferring upon Congress the power to raise armies. It treats them as one while they are different. This is the militia clause:

"The Congress shall have power . . . To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions; to provide for organizing, arming and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." Article 1, § 8.

The line which separates it from the army power is not only inherently plainly marked by the text of the two clauses, but will stand out in bolder relief by considering the condition before the Constitution was adopted and the remedy which it provided for the military situation with which it dealt. The right, on the one hand, of Congress under the Confederation to call on the states for forces, and the duty, on the other, of the states to furnish when called, embraced the complete power of government over the subject. When the two were combined and were delegated to Congress, all governmental power on that subject was conferred: a result manifested not only by the grant made but by the limitation expressly put upon the states on the subject. The army sphere, therefore, embraces such complete authority. But the duty of exerting the power thus conferred in all its plenitude was not made at once

³ See also Constitution of Vermont, 1777, chap. 1, art. 9 (Thorpe, vol. 6, pp. 4747, 3740); New York, 1777, art. 40 (id. vol. 5, p. 2637); Massachusetts Bill of Rights, 1780, art. 10 (id. vol. 3, p. 1891); New Hampshire, 1784, pt. 1, Bill of Rights, art. 12 (id. vol. 4, p. 2455); Delaware, 1776, art. 9 (id. vol. 1, pp. 563, 564); Maryland, 1776, art. 33 (id. vol. 3, pp. 1686, 1696); Virginia, 1776, Militia (id. vol. 7, p. 3817); Georgia, 1777, art. 33, 35 (id. vol. 2, pp. 777, 782).

⁴ Journals of Congress, Ford's ed. Library of Congress, vol. 7, pp. 262, 263; vol. 10, pp. 199, 200; vol. 13, p. 299. 7 Sparks, Writings of Washington, pp. 162, 167, 442, 444.

obligatory, but was wisely left to depend upon the discretion of Congress as to the arising of the exigencies which would call it in part or in whole into play. There was left, therefore, under the sway of the states, undelegated, the control of the militia, to the extent that such control was not taken away by the exercise by Congress of its power to raise armies. This did not diminish the military power or curb the full potentiality of the right to exert it, but left an area of authority requiring to be provided for (the militia area) unless and until, by the exertion of the military power of Congress, that area had been circumscribed or totally disappeared. This, therefore, is what was dealt with by the militia provision. It diminished the occasion for the exertion by Congress of its military power beyond the strict necessities for its exercise by giving the power to Congress to direct the organization and training of the militia (evidently to prepare such militia in the event of the exercise of the army power), although leaving the carrying out of such command to the states. It further conduced to the same result by delegating to Congress the right to call on occasions which were specified for the militia force, thus again obviating the necessity for exercising the army power to the extent of being ready for every conceivable contingency. This purpose is made manifest by the provision preserving the organization of the militia so far as formed, when called for such special purposes, although subjecting the militia, when so called, to the paramount authority of the United States. *Tarble's Case*, 13 Wall. 397, 408, 20 L. ed. 597, 600. But because, under the express regulations, the power was given to call for specified purposes without exerting the army power, it cannot follow that the latter power, when exerted, was not complete to the extent of its exertion, and dominant. Because the power of Congress to raise armies was not required to be exerted to its full limit, but only as, in the discretion of Congress, it was deemed the public interest required, furnishes no ground for supposing that the complete power was lost by its partial exertion. Because, moreover, the power granted to Congress to raise armies, in its potentiality, was susceptible of narrowing the area over which the militia clause operated, affords no ground for confounding the two areas, which were distinct and separate, to the end of confusing both the powers and thus weakening or destroying both.

And upon this understanding of the two powers the legislative and executive authority has been exerted from the beginning. From the act of the first session of L.R.A.1918C.

Congress carrying over the army of the government under the Confederation to the United States under the Constitution (Act of September 29, 1789, chap. 25, 1 Stat. at L. 95) down to 1812, the authority to raise armies was regularly exerted as a distinct and substantive power, the force being raised and recruited by enlistment. Except for one act formulating a plan by which the entire body of citizens (the militia) subject to military duty was to be organized in every state (Act of May 8, 1792, chap. 33, 1 Stat. at L. 271), which was never carried into effect, Congress confined itself to providing for the organization of a specified number distributed among the states according to their quota, to be trained as directed by Congress and to be called by the President as need might require.⁵ When the War of 1812 came, the result of these two forces composed the army to be relied upon by Congress to carry on the war. Either because it proved to be weak in numbers or because of insubordination developed among the forces called, and manifested by their refusal to cross the border,⁶ the government determined that the exercise of the power to organize an army by compulsory draft was necessary and Mr. Monroe, the Secretary of War (Mr. Madison being President), in a letter to Congress, recommended several plans of legislation on that subject. It suffices to say that by each of them it was proposed that the United States deal directly with the body of citizens subject to military duty, and call a designated number out of the population between the ages of eighteen and forty-five for service in the army. The power which it was recommended be exerted was clearly an unmixed Federal power, dealing with the subject from the sphere of the authority given to Congress to raise armies, and not from the sphere of the right to deal with the militia as such, whether organized or unorganized. A bill was introduced giving effect to the plan. Opposition developed, but we need not stop to consider it, because it substantially rested upon the incompatibility of compulsory military service with free government,—a subject which, from what we have said, has been disposed of. Peace came before the bill was enacted.

⁵ Act of May 9, 1794, chap. 27, 1 Stat. at L. 367; Act of February 28, 1795, chap. 36, 1 Stat. at L. 424; Act of June 24, 1797, chap. 4, 1 Stat. at L. 522; Act of March 3, 1803, chap. 32, 2 Stat. at L. 241; Act of April 18, 1806, chap. 32, 2 Stat. at L. 383; Act of March 30, 1808, chap. 39, 2 Stat. at L. 478; Act of April 10, 1812, chap. 55, 2 Stat. at L. 705.

⁶ Upton, *Military Policy of the United States*, pp. 99 et seq.

Down to the Mexican War the legislation exactly portrayed the same condition of mind which we have previously stated. In that war, however, no draft was suggested, because the army created by the United States immediately resulting from the exercise by Congress of its power to raise armies, that organized under its direction from the militia and the volunteer commands which were furnished, proved adequate to carry the war to a successful conclusion.

So, the course of legislation from that date to 1861 affords no ground for any other than the same conception of legislative power which we have already stated. In that year when the mutterings of the dread conflict which was to come began to be heard and the proclamation of the President calling a force into existence was issued, it was addressed to the body organized out of the militia and trained by the states in accordance with the previous acts of Congress. Proclamation of April 15, 1861, 12 Stat. at L. 1258. That force being inadequate to meet the situation, an act was passed authorizing the acceptance of 500,000 volunteers by the President to be by him organized into a national army. Act of July 22, 1861, chap. 9, 12 Stat. at L. 268. This was soon followed by another act increasing the force of the militia to be organized by the states for the purpose of being drawn upon when trained under the direction of Congress (Act of July 29, 1861, chap. 25, 12 Stat. at L. 281), the two acts, when considered together, presenting in the clearest possible form the distinction between the power of Congress to raise armies and its authority under the militia clause. But it soon became manifest that more men were required. As a result the Act of March 3, 1863 (chap. 75, 12 Stat. at L. 731, Comp. Stat. 1916, § 2308a (55)), was adopted, entitled, "An Act for Enrolling and Calling out the National Forces and for Other Purposes." By that act, which was clearly intended to directly exert upon all the citizens of the United States the national power which it had been proposed to exert in 1814, on the recommendation of the then Secretary of War, Mr. Monroe, every male citizen of the United States between the ages of twenty and forty-five was made subject by the direct action of Congress to be called by compulsory draft to service in a national army at such time and in such numbers as the President, in his discretion, might find necessary. In that act, as in the one of 1814, and in this one, the means by which the act was to be enforced were directly Federal, and the

force to be raised as a result of the draft was therefore typically national, as distinct from the call into active service of the militia as such. And under the power thus exerted four separate calls for draft were made by the President and enforced,—that of July, 1863, of February and March, 1864, of July and December, 1864, producing a force of about a quarter of a million men.⁷ It is undoubted that the men thus raised by draft were treated as subject to direct national authority and were used either in filling the gaps occasioned by the vicissitudes of war in the ranks of the existing national forces or for the purpose of organizing such new units as were deemed to be required. It would be childish to deny the value of the added strength which was thus afforded. Indeed, in the official report of the Provost Marshal General, just previously referred to in the margin, reviewing the whole subject it was stated that it was the efficient aid resulting from the forces created by the draft at a very critical moment of the civil strife which obviated a disaster which seemed impending and carried that struggle to a complete and successful conclusion.

Brevity prevents doing more than to call attention to the fact that the organized body of militia within the states, as trained by the states under the direction of Congress, became known as the National Guard (Act of January 21, 1903, chap. 196, 32 Stat. at L. 775; National Defense Act of June 3, 1916, chap. 134, 39 Stat. at L. 211). And to make further preparation from among the great body of the citizens, an additional number, to be determined by the President, was directed to be organized and trained by the states as the National Guard Reserve. National Defense Act, *supra*.

Thus, sanctioned as is the act before us by the text of the Constitution, and by its significance as read in the light of the fundamental principles with which the subject is concerned, by the power recognized and carried into effect in many civilized countries, by the authority and practice of the Colonies before the Revolution, of the states under the Confederation, and of the government since the formation of the Constitution, the want of merit in the contentions that the act, in the particulars which we have been previously called upon to consider, was beyond the constitutional power of Congress, is manifest. Cogency, however, if possible, is added to the demonstration

⁷ Historical Report, Enrolment Branch, Provost Marshall General's Bureau, March 17, 1866.

by pointing out that in the only case to which we have been referred where the constitutionality of the Act of 1863 was contemporaneously challenged on grounds akin to, if not absolutely identical with, those here urged, the validity of the act was maintained for reasons not different from those which control our judgment. *Kneeder v. Lane*, 45 Pa. 238. And as further evidence that the conclusion we reach is but the inevitable consequence of the provisions of the Constitution as effect follows cause, we briefly recur to events in another environment. The seceding states wrote into the Constitution which was adopted to regulate the government which they sought to establish, in identical words, the provisions of the Constitution of the United States which we here have under consideration. And when the right to enforce under that instrument a selective draft law which was enacted, not differing in principle from the one here in question, was challenged, its validity was upheld, evidently after great consideration, by the courts of Virginia, of Georgia, of Texas, of Alabama, of Mississippi, and of North Carolina, the opinions in some of the cases copiously and critically reviewing the whole grounds which we have stated. *Burroughs v. Peyton*, 16 Gratt. 470; *Jeffers v. Fair*, 33 Ga. 347; *Daly v. Harris*, 33 Ga. Supp. 38, 54; *Barber v. Irwin*, 34 Ga. 27; *Parker v. haughman*, 34 Ga. 136; *Ex parte Coupland*, 26 Tex. 386; *Ex parte Hill*, 38 Ala. 429; *State ex rel. Graham*, 39 Ala. 437; *State ex rel. Graham*, 39 Ala. 459; *Simmons v. Miller*, 40 Miss. 19; *Gatlin v. Walton*, 60 N. C. (1 Winst. L.) 333, 408.

In reviewing the subject we have hitherto considered it as it has been argued from the point of view of the Constitution as it stood prior to the adoption of the 14th Amendment. But, to avoid all misapprehension, we briefly direct attention to that Amendment for the purpose of pointing out, as has been frequently done in the past,⁸ how completely it broadened the national scope of the government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative, and therefore operating, as

it does upon all the powers conferred by the Constitution, leaves no possible support for the contentions made, if their want of merit was otherwise not so clearly made manifest.

It remains only to consider contentions which, while not disputing power, challenge the act because of the repugnancy to the Constitution supposed to result from some of its provisions. First, we are of opinion that the contention that the act is void as a delegation of Federal power to state officials because of some of its administrative features is too wanting in merit to require further notice. Second, we think that the contention that the statute is void because vesting administrative officers with legislative discretion has been so completely adversely settled as to require reference only to some of the decided cases: *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; *Intermountain Rate Cases (United States v. Atchison, T. & S. F. R. Co.)* 234 U. S. 476, 58 L. ed. 1408, 34 Sup. Ct. Rep. 986; *First Nat. Bank v. Fellows*, 244 U. S. 416, 61 L. ed. 1233, 37 Sup. Ct. Rep. 734. A like conclusion also adversely disposes of a similar claim concerning the conferring of judicial power. *Buttfield v. Stranahan*, 192 U. S. 470, 497, 48 L. ed. 525, 536, 24 Sup. Ct. Rep. 349; *United States ex rel. West v. Hitchcock*, 205 U. S. 80, 51 L. ed. 718, 27 Sup. Ct. Rep. 423; *Oceanic Steam Nav. Co. v. Stranahan*, 214 U. S. 320, 338-340, 53 L. ed. 1013, 1021, 1022, 29 Sup. Ct. Rep. 671; *Zakonaite v. Wolf*, 226 U. S. 272, 275, 57 L. ed. 218, 220, 33 Sup. Ct. Rep. 31. And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof, repugnant to the 1st Amendment, resulted from the exemption clauses of the act to which we at the outset referred because we think its unsoundness is too apparent to require us to do more.

Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation as the result of a war declared by the great representative body of the people can be said to be the imposition of involuntary servitude, in violation of the prohibitions of the 13th Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.

Affirmed.

⁸ *Slaughter-House Cases*, 16 Wall. 36, 72-74, 94, 95, 112, 113, 21 L. ed. 394, 407, 408, 414, 415, 420; *United States v. Cruikshank*, 92 U. S. 542, 549, 23 L. ed. 588, 590; *Boyd v. Nebraska*, 143 U. S. 135, 140, 36 L. ed. 103, 104, 12 Sup. Ct. Rep. 375; *McPherson v. Blacker*, 146 U. S. 1, 37, 36 L. ed. 869, 878, 13 Sup. Ct. Rep. 3.

ILLINOIS SUPREME COURT.

PEOPLE OF THE STATE OF ILLINOIS
EX REL. FRANZ SARTISON

v.

WALTER E. SCHMIDT, Chief Inspector of
Grain, et al., Appts.

(281 Ill. 211, 117 N. E. 1037.)

Officer — wrongful dismissal — right to salary.

An employee under the civil service who is wrongfully dismissed from the service and subsequently reinstated under a court order cannot hold the public liable for his salary during his absence where it was paid to one who performed the duties of the office under a regular appointment to that position.

For other cases, see Officers, II. b, in Dig. 1-52 N. S.

(December 19, 1917.)

APPEAL by respondents from a judgment of the Circuit Court for Sangamon County granting a writ of mandamus to compel them to place relator's name on the pay roll and pay him for the time he was illegally laid off as a grain helper. Reversed.

The facts are stated in the opinion.

Messrs. Edward J. Brundage, Attorney General, and Clarence N. Boord, Assistant Attorney General, for appellants:

The payment of the salary provided for an office, or position in the nature of an office, to a de facto incumbent is a defense to a claim against the public corporation or officer making such payment, in an action against such corporation or officer by the de jure officer to recover such salary.

29 Cyc. 269; 8 Am. & Eng. Enc. Law, 2d ed. 813; Mechem, Pub. Off. § 332; McQuillin, Mun. Corp. § 518; Dolan v. New York, 68 N. Y. 274, 23 Am. Rep. 168; Stearns v. Sims, 24 Okla. 623, 24 L.R.A. (N.S.) 475, 104 Pac. 44; Nall v. Coulter, 117 Ky. 747, 78 S. W. 1110, 4 Ann. Cas. 671; Terhune v. New York, 88 N. Y. 247, 42 Am. Rep. 248; Coughlin v. McElroy, 74 Conn. 397, 92 Am. St. Rep. 224, 50 Atl. 1025; El Paso County v. Rohde, 41 Colo. 258, 16 L.R.A. (N.S.) 794, 124 Am. St. Rep. 134, 95 Pac. 551; Brown v. Tama County, 122 Iowa, 745, 101 Am. St. Rep. 296, 98 N. W. 562; Saline County v. Anderson, 20 Kan. 208, 27 Am. Rep. 171; State ex rel. McDonald v. Newark, 58 N. J. L. 12, 32 Atl. 384; Chandler v. Hughes County, 9 S. D. 24, 67 N. W. 946; Samuels v. Har-

ington, 43 Wash. 603, 117 Am. St. Rep. 1075, 86 Pac. 1071; Bradley v. Georgetown, 118 Ky. 735, 82 S. W. 303; Chicago v. Luthardt, 191 Ill. 522, 61 N. E. 410; Chicago v. People, 210 Ill. 84, 71 N. E. 816; Bullis v. Chicago, 235 Ill. 472, 85 N. E. 614; People ex rel. Blachly v. Coffin, 279 Ill. 401, 117 N. E. 85.

Messrs. P. K. Johnson and Stevens & Herndon for appellee.

Carter, Ch. J., delivered the opinion of the court:

Franz Sartison, the relator, filed his petition for a writ of mandamus in the circuit court of Sangamon county in November, 1916. A demurrer being sustained, the relator thereafter filed an amended petition. Answers were filed by appellants, and the relator filed a general demurrer to said answer. This demurrer was sustained by the court, and, the appellants having elected to abide by their answer, the court ordered the writ of mandamus to issue. From that decretal order this appeal has been taken to this court.

The amended petition sets up, among other things, that on and prior to July 1, 1911, the relator held a place or position as grain helper in the East St. Louis grain inspection office of the state, and continued to hold that position until September 1, 1915, under the classified civil service of the state; that during said time he performed his duties in said position in a satisfactory and efficient manner; that on August 25, 1915, he received a letter from the deputy chief inspector informing him that he was discharged from the service, and that charges had been filed against him by the state Civil Service Commission; that thereafter he reported daily for work, but from and after September 1, 1915, he was not allowed to work as grain helper; that on September 15, 1915, he received from the state Civil Service Commission a copy of the charges against him, charging that he had failed to obey the orders of superior officers and submit to certain examinations held by the state Civil Service Commission; that on October 23, 1915, he received a notice that he was discharged from said position; that on January 28, 1916, he received from the state Civil Service Commission a copy of an order stating that, on account of the decision of the superior court in People ex rel. Estelle S. Baird v. Stevenson, he had been reinstated and would be allowed to resume his work as grain helper on February 1, 1916. The relator prayed that the respondents be required to place his name upon the pay roll and pay him for the time he was illegally laid off as grain helper.

Note. — For payment to de facto officer as defense to an action for salary by de jure officer, see annotation following this case, post, 373.
L.R.A.1918C.

The respondents in their answer admitted the facts as to the discharge and restoration of the relator as grain helper, and also averred that, from September 1, 1915, until February 5, 1916, James A. Routh, who was eligible under the state Civil Service Law (Hurd's Rev. Stat. 1915-16, chap. 24a) for grain helper in the state grain inspection department at East St. Louis, was appointed to that position by the proper officials of the state, and worked and received pay for his work in said position from September 1, 1915, to February 6, 1916. Respondents further alleged in their answer that there was no money appropriated in the appropriation bill for the year 1915 other than the money paid to Routh for service in said office that could be used for the payment of relator.

It is clear from the allegations of the petition and answer that the salary provided to be paid to the relator as grain helper in the East St. Louis grain inspection office was paid to James A. Routh during the time for which relator is now seeking to recover pay, and the principal question to be decided here is whether the payment of a salary provided for an office or position to a de facto employee or officer in said position is a good defense to a claim against the public corporation making such payment, in an action against such corporation by a de jure officer or employee to recover such salary. This court in *People ex rel. Phillips v. Lieb*, 85 Ill. 484, cited with approval *Brown v. Lunt*, 37 Me. 428, where a de facto officer is described as one who actually performs the duties of the office with apparent right, under claim or color of appointment or election. This court also in the same case quoted from *Ex parte Strang*, 21 Ohio St. 610, where it is said: "The true doctrine seems to be that it is sufficient if the officer holds the office under some power having color of authority to appoint; and that a statute, though it should be found repugnant to the Constitution, will give such color."

See also, as to a definition of de facto officer, *Lavin v. Cook County*, 245 Ill. 496, 92 N. E. 291. We think, under these decisions, there can be no question that Routh was holding the office or position in question de facto. The general rule is that, if the payment of the salary or other compensation to be made by the government is made in good faith to the officer de facto while he is still in possession of the office the government cannot be compelled to pay a second time to the officer de jure when he has recovered the office,—at least where the officer de facto held the position by color of title. *Mechem, Pub. Off.* § 332; L.R.A.1918C.

McQuillin, Mun. Corp. § 518. This rule, however, is not followed in all jurisdictions. 1 *Dill. Mun. Corp.* 5th ed. § 429. This author also says in this last cited section: "For reasons of public policy, and recognizing payment to a de facto officer while he is holding the office and discharging its duties as a defense to an action brought by the de jure officer to recover the same salary, it is held in many jurisdictions that an officer or employee who has been wrongfully removed or otherwise wrongfully excluded from office cannot recover against the city for salary during the period when his office was filled and his salary paid to another appointee. In some jurisdictions, too, this rule is applied to payments made to de facto occupants of positions which are mere employments and do not rise to the dignity of offices."

In our judgment the rule governing payments to a de facto officer is founded on public policy, and applies with the same force to payments made to a de facto occupant of a position of public employment although not an officer, and this is the rule laid down in *Martin v. New York*, 176 N. Y. 371, 68 N. E. 640.

The authorities are in hopeless conflict on the question whether the de jure officer can recover from the public authorities the salary that has been paid in good faith to the de facto officer. The leading case, perhaps, holding that no such recovery can be had, is *Dolan v. New York*, 68 N. Y. 274, 279, 28 Am. Rep. 168, where it was said: "It is the settled doctrine in this state that the right to the salary and emoluments of a public office attach to the true and not to the mere colorable title, and in an action brought by a person claiming to be a public officer for the fees or compensation given by law his title to the office is in issue, and if that is defective and another has the real right, although not in possession, the plaintiff cannot recover."

. . . But it does not follow, from the conclusion that the defendant could have successfully defended an action brought by Keating to recover the salary of assistant clerk, that it was not justified in treating him as an officer de jure when claiming it, and paying it upon that assumption. It is clear that, if the city could rightfully pay the salary to Keating during his actual incumbency, and has paid it, it cannot be required to pay it again to the plaintiff. We are of opinion that payment to a de facto public officer of the salary of the office, made while he is in possession, is a good defense to an action brought by the de jure officer to recover the same salary after he has acquired or regained possession. . . . Public policy

accords with this view. Public offices are created in the interest and for the benefit of the public. . . . It is important that the public offices should be filled, and that at all times persons may be found ready and competent to exercise official powers and duties. If, on a controversy arising as to the right of an officer in possession, and upon notice that another claims the office, the public authorities could not pay the salary and compensation of the office to the de facto officer except at the peril of paying it a second time if the title of the contestant should subsequently be established, it is easy to see that the public service would be greatly embarrassed and its efficiency impaired. Disbursing officers would not pay the salary until the contest was determined, and this, in many cases, would interfere with the discharge of official functions."

See also *Terre Haute v. Burns*, — Ind. App. —, 116 N. E. 604.

Many of the various authorities on this question pro and con are referred to and commented on in a note to *Nall v. Coulter*, 4 Ann. Cas. 673. See also *El Paso County v. Rohde*, 16 L.R.A.(N.S.) 794, and note (41 Colo. 258, 124 Am. St. Rep. 134, 95 Pac. 551); *Stearns v. Sims*, 24 L.R.A.(N.S.) 475, and note (24 Okla. 623, 104 Pac. 44); 8 Am. & Eng. Enc. Law, 812; 29 Cyc. 1430.

A discussion of the different views on this question is found in the majority and minority opinions of the supreme court of Michigan on this subject in *Board of Auditors v. Benoit*, 20 Mich. 176, 182, 4 Am. Rep. 382. It was there said in the majority opinion: "If courts themselves, when called on for affirmative action in aid of an officer, cannot inquire into his title, it cannot be reasonable to allow or to expect other bodies or persons to do so. No case is to be found in which such an inquiry has been sanctioned, and nothing could be more unsafe."

Again, on page 184: "There may be cases where the redress of the aggrieved party will be difficult, but the public convenience is not on that account to be sacrificed. It is important to have the right man in office, but it is more important to be able to deal safely with those who are actually in place, and there would be great hardship in allowing the whole public interests to be thrown into confusion whenever a contest arises for office. It would invite rather than prevent litigation, if every claimant understood that by setting up a claim to office he could stop the salary of the incumbent."

Judge Cooley in a very vigorous dissenting opinion argued in favor of a contrary rule, insisting that it was the duty L.R.A.1918C.

of public officials, if they had any doubt about the question, to compel the de facto officer to sue for his pay, and thus there would be no obstacle in the way of inquiring legally as to whether he was entitled to hold the office or not.

This court has never been called upon to pass on this precise question. See reasoning in *Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 52. In *Chicago v. Luthardt*, 191 Ill. 516, 522, 61 N. E. 410, the plaintiff brought suit to recover his salary while wrongfully excluded from his position of chief clerk of the detective bureau, which had been held to be in the classified civil service of the city. The court, in discussing this question, after holding that Luthardt was entitled to the position under the Civil Service Law, said: "The duties of the office during the time for which recovery is sought, it is true, were performed, and the office held, by one Joyce, who was a sergeant of detectives in the department of police, for which latter position a salary of \$125 per month was appropriated. It does not appear that Joyce received the salary pertaining to appellee's office, and we regard it as immaterial that the appropriation for the police department of the city for the year 1898 is exhausted. If exhausted, it was without authority of law, so far as concerns appellee's salary, as it does not appear to have been paid to Joyce, who, without warrant of law, held appellee's office and performed its duties."

In *Bullis v. Chicago*, 235 Ill. 472, 460, 85 N. E. 614, the court, in discussing a somewhat similar question, said: If appellee was wrongfully prevented from performing the duties of his office he may recover his salary for the time during which he was so prevented, where it has not been paid to anyone performing the duties of the office."

It is clear that the court in these two cases did not intend to hold, contrary to the general rule, that payment made in good faith to a de facto officer constitutes a bar against the city to a claim for the same salary made by the officer de jure; and nothing was said by this court to the contrary in *People ex rel. Blachly v. Coffin*, 279 Ill. 401, 117 N. E. 85; *People ex rel. Baird v. Stevenson*, 270 Ill. 569, 110 N. E. 814; *People ex rel. Mosby v. Stevenson*, 272 Ill. 215, 111 N. E. 595; or *People ex rel. Sellers v. Brady*, 262 Ill. 578, 105 N. E. 1. In those cases the question at issue was not whether the relator was entitled to the salary after it had been paid to another, but whether or not he was entitled to the office, and incidentally to the salary. The question has never been passed upon by this

court, where the salary has been paid, whether it could be recovered again from the city by the de jure officer. If the salary or compensation has been paid in good faith to a de facto employee during the time the position was in his possession, it cannot, on principle, and by the weight of authority, be recovered again from the city,

county, state, or other governmental subdivision by the de jure officer.

Our conclusion on this question renders it unnecessary for us to consider or pass on the subsidiary questions raised in the briefs.

The judgment of the Circuit Court must be reversed.

Annotation—Payment made to de facto officer as defense to an action for salary by de jure officer.

Earlier cases on this question are collected and discussed in notes to State ex rel. Greeley County v. Milne, 19 L.R.A. 689; El Paso County v. Rhode, 16 L.R.A.(N.S.) 794; and Stearns v. Sims, 24 L.R.A.(N.S.) 475.

PEOPLE EX REL. SARTISON v. SCHMIDT, ante, 370, is in accord with the weight of authority as shown by the cases cited in the earlier notes above referred to.

The following cases also, decided since the preparation of the earlier notes, support the majority rule that payment in good faith of the salary to a de facto officer is a good defense to a claim for salary during the same period by the de jure officer against a municipality or other public corporation: Walden v. Headland (1908) 156 Ala. 562, 47 So. 79; Thompson v. Denver (1916) 61 Colo. 470, 158 Pac. 309; People ex rel. Durante v. Burdett (1918) — Ill. —, 118 N. E. 1009; Terre Haute v. Burns (1917) — Ind. App. —, 116 N. E. 604, rehearing denied in (1917) — Ind. App. —, 117 N. E. 519; Walters v. Paducah (1909) — Ky. —, 123 S. W. 287; Dolan v. Louisville (1911) 142 Ky. 813, 135 S. W. 272; Patterson v. State (1913) 92 Neb. 729, 139 N. W. 643 (holding that state officer deprived of the office by an injunction wrongfully issued could not compel state to pay salary to him for time during which he performed none of the duties of the office, where it had paid the salary to the de facto officer); Hallowell v. Buffalo County (1917) — Neb. —, 162 N. W. 650; New York v. Voorhis (1911) 129 N. Y. Supp. 832; State ex rel. Powell v. Fassett (1912) 69 Wash. 555, 125 Pac. 963.

The case of People ex rel. Blachly v. Coffin (1917) 279 Ill. 401, 117 N. E. 85, in so far as it conflicts with the above rule, was overruled in People ex rel. Durante v. Burdett (Ill.) supra.

The rule is recognized also in Dinneen v. Bradford (1914) 190 Ill. App. 289, which is affirmed in (1916) 267 Ill. 486, 108 N. E. 732, and in North v. Battle Creek (1915) 185 Mich. 592, 152 N. W. L.R.A.1918C.

194. But in the latter case it was held to have no application, because the one to whom the salary had been paid did not perform the duties of the office with apparent right thereto, so as to make him a de facto officer; the appointment under which he assumed to act having been made by one whose authority to make the appointment had been devested by a new city charter.

And in Ardmore v. Sayre (1916) — Okla. —, 154 Pac. 356, it was held that the rule that payment of the salary of an office to a de facto officer defeats the right of the de jure officer to recover the salary of such office does not apply to a mere usurper of the office, or one pretending to hold the office without any color of title thereto. The court distinguished the case of Stearns v. Sims (1909) 24 Okla. 623, 24 L.R.A.(N.S.) 475, 104 Pac. 44, holding in accord with the general rule, as follows: "In the instant case the pretended appointment, being absolutely void, made without even a color of power or right, was simply a nullity. . . . The case of Stearns v. Sims (Okla.) supra, is distinguished from the instant case in this: That in the case cited, holding that the de jure officer could not recover from the city where the salary had been paid to the de facto officer, the de jure officer had been suspended by the district court as provided by law, and the de facto officer appointed by the legal appointing power. There was no question of jurisdiction either in the power of the court to suspend or the power to fill the vacancy during suspension. The temporary officer was clearly a de facto officer. It would certainly be extending the doctrine to a dangerous point to say that an officer could be displaced by a power or body without any colorable right or jurisdiction, and another person placed in the position, and the salary paid to the pretended officer, and thereby defeat the regular officer of his right to recover his salary from the paying body, especially where the pretended, wrongful re-

moval is made by the same power that is responsible for the payment."

The rule above indicated was applied in *Hallowell v. Buffalo County* (1917) — *Neb.* —, 162 N. W. 650, in holding that one removed from the office of county judge by a judgment of the district court declaring the office vacant was not entitled to his salary during the time of removal, on reinstatement to the office by the decision of the supreme court to the effect that the district court was without jurisdiction in the matter and its judgment void, where the salary had been paid to one who was appointed by the county board to fill the vacancy, and who duly qualified and performed the duties of the office.

And the rule was held to apply in *Thompson v. Denver* (1916) 61 *Colo.* 470, 158 Pac. 309, to a police operator, an appointive officer. The court stated that the city charter in effect declared police operators to be officers, and it followed that they were, at least in some respects, public officers, their duties being intimately connected with and a part of the police system; that no distinction could safely be made on the basis of comparative dignity between officers, or on the fact that some were appointive and others elective; and that logically the rule should apply alike to all public officers.

The rule is based on public policy, to the effect that the people cannot be compelled to pay twice for the same service. *Ibid.*

And the reasons for the majority rule are well stated in *Terre Haute v. Burns* (1917) — *Ind. App.* —, 116 N. E. 604, rehearing in which is denied in (1917) — *Ind. App.* —, 117 N. E. 519, as follows: "Where a de facto officer has received from the proper officers the salary attached to the office for the time he occupied the office and discharged the duties thereof, the decided weight of authority is to the effect that the municipality is not liable to the de jure officer for such salary, though he may obtain possession of the office and show that he has been wrongfully kept out of the same. . . . The prevailing rule above announced is based upon the rights and convenience of the public who have dealings with the office so held by such officer. The rule as generally announced does not deny the de jure officer the right to recover from the de facto officer who has kept him out of the office to which he was legally entitled the salary or emoluments accruing during the time he was so excluded, but it ex-

tends the rule which validates the acts of de facto officers, and protects third parties dealing with them, to the municipality under which the office is held, and protects it in the payment of the salary or the emoluments of the office to the de facto officer, without requiring it to first determine, at its peril, the title or right to the office in question. The prevailing rule above announced is generally held to be supported by public policy. That disbursing officers and third persons dealing with reputed public officers in actual possession of the office and discharging the duties thereof can neither be expected to know, nor be required at their peril to inquire into, the validity of the title to such office or the qualifications of such officer; that as to such persons the occupant of the office so discharging its duties must be held to be what he appears, and assumes to be, viz., a duly authorized and qualified public official; that any other rule would impede the discharge of public business and tend to uncertainty and inefficiency in discharging the duties of the office, and in some instances occasion unnecessary loss or hardships. Another consideration amply supports the prevailing rule, viz., that it is for the best interests of the community that public offices shall be filled and the duties pertaining thereto be promptly and efficiently discharged; that to secure ends it is generally necessary to pay the officer who discharges the duties of the office with reasonable promptness; that payment in good faith to the de facto officer by the municipality or person liable for the salary or emoluments due the officer is deemed to be both expedient and justifiable. To the public, or the municipality, the important thing is the discharge of the duties of the office by some competent official. The questions of who is entitled to hold the office and receive the payment of the salary are secondary in importance, and may well be left to the parties directly concerned, except as above indicated."

The minority view, that payment by a city to the de facto officer of the salary is not a defense to an action against the city by the de jure officer, is supported by the case of *Cleveland v. Luttner* (1915) 92 *Ohio St.* 493, 111 N. E. 280, *Ann. Cas.* 1917D, 1134, in which it was held that policemen wrongfully discharged could recover salary for the time they were excluded from the office, after they had been reinstated, although other policemen had been appointed in their stead and had drawn the salary

of the office during such time. The court said: "A public officer is a public servant, whether he be a policeman of a municipality or the President of the United States. His candidacy for appointment or election, his commission, his oath in connection with the law under which he serves, and the emoluments of his office, constitute the contract between him and the public he serves. The Constitution of Ohio guarantees to everyone redress for any injury done him in his land, goods, person, reputation, etc., and assures him remedy by due course of law, and that justice shall be administered without denial or delay. If the public servant, a policeman in this case, be wrongfully dismissed from public office, he should have the same remedy for such wrong as a private servant for any wrong done him in his employment. The theory in both cases should be to make the wronged party whole; that is, to reimburse him for his loss. The mere fact that the wronging party employs or appoints someone else during the period of wrongful ouster should not excuse him for the full measure of his duty and liability."

So the view was taken in *San Antonio v. Steingruber* (1915) — *Tex. Civ. App.* —, 177 S. W. 1023, that where the de jure officer is wrongfully ousted the mere fact that the salary is paid to a de facto officer does not deprive the de jure officer of his right to recover the same during the period of removal. The court said that to so hold, regardless of whether the payment was made over the protest of the de jure officer, and despite reasonable efforts on his part to prevent it, would be unjust. It should be observed, however, that in this case the evidence was held to show such an abandonment of the office by the one removed therefrom as precluded him from recovering the salary,—it appearing that after removal he ceased to demand the salary, which was payable monthly, and did not seek to prevent the payment thereof to the de facto officer, or to protest against such payment; that he never notified the mayor or city council that he did not consider himself discharged; and that he took no steps to recover the office or the salary until after the term of office had expired.

And the fact that the city might be unable to recover the salary paid to the de facto officer, because of the latter's insolvency, was held in *San Antonio v. Steingruber* (*Tex.*) supra, immaterial as regards the rights of the de jure officer to recover from the city the salary during

the time he was wrongfully deprived of the office.

The doctrine that payment of the salary to the de facto officer is not a defense in a claim by the de jure officer against a county for the same salary is approved (obiter) in *Hogan v. Hamilton County* (1915) 132 *Tenn.* 554, 179 S. W. 128, on the authority of *Memphis v. Woodward*, 12 *Heisk. (Tenn.)* 499, 27 *Am. Rep.* 750, which is cited in the note on this question in 19 *L.R.A.* 689.

Importance does not seem to be attributed in most of the above cases to the fact that when the salary was paid to the de facto officer the right to the office was being contested and that the public corporation may have had notice of the contest. Thus, in *Thompson v. Denver* (1916) 61 *Colo.* 470, 158 *Pac.* 309, the de jure officer was held not entitled to recover from the municipality salary for a period during which he had been wrongfully excluded from the office where the salary had been paid to the de facto officer, although the exclusion covered a period of over two years, while an appeal was pending from the decision of the police board discharging him from the service.

And it was held in *Walters v. Paducah* (1909) — *Ky.* —, 123 S. W. 287, that the question whether a municipality was liable for salary to a de jure officer during the time he was wrongfully deprived of the office, where it had paid the salary to a de facto officer, did not depend on the question whether the payment was made with notice of a contest or claim by another party to the office, but depended on whether the payment was made before or after judgment of ouster. The court said that in every case there is necessarily a contest between the de facto and de jure officers, that the duties of the office must be performed, and the city through its officers must recognize one or the other; and that the municipality could not be held responsible for the mistake of its officers in recognizing the wrong claimant.

It was accordingly held in *Walters v. Paducah* (*Ky.*) supra, that the fact that the municipality knew that the right to the office of city treasurer was contested, and that a third party, who was afterwards adjudged the de jure officer, was assuming to perform certain duties of the office, although without recognition of his right to do so by the municipal authorities, did not render it liable to the latter for the salary which it had paid to the de facto officer, who was in possession of the office and of its records.

and who paid out the money of the city to settle claims against it, and was recognized as the acting officer.

The intimation in *Walters v. Paducah* (Ky.) *supra*, that voluntary payment of the salary to the de facto officer will not be a defense if made after notice of adjudication of the rights of the de jure officer is supported by the cases of *Markus v. Duluth* (1917) — *Minn.* —, 164 N. W. 906, and *New York v. Voorhis* (1911) 129 N. Y. Supp. 832. In the former case, in the syllabus by the court, the rule is laid down that payment of the compensation to a de facto officer, who is installed in the office, with notice of the right of the de jure officer, who was wrongfully excluded from the office, is no defense to an action by the de jure officer to recover the compensation for the period of wrongful exclusion. This rule was applied where the city paid the salary to the de facto officer, with knowledge that the de jure officer had previously, in an action in court, established his right to the office.

And in *New York v. Voorhis* (N. Y.) *supra*, it was held not a defense to a claim against a city, by one wrongfully removed from office, for salary during the period of removal, that the salary has been paid to the de facto officer, if such payment was made pending an unsuccessful appeal from an adjudication that the one removed was the de jure officer; the remedy of the city being against the de facto officer for reimbursement.

Under a statute providing that when the title to office is contested by proceedings instituted in any court for that purpose no warrant can thereafter be drawn or paid for any part of the salary until

the proceeding has been finally determined, it was held in *Wynne v. Butte* (1912) 45 Mont. 417, 123 Pac. 531, that it was not a defense to an action by a chief of police, for his salary for a period during which he was wrongfully prevented from discharging the duties of the office, that after he had instituted quo warranto proceedings the salary had been paid to a de facto officer.

And it was held also in *Wynne v. Butte* (Mont.) *supra*, that the city could not avoid the subsequent payment on the ground that it did not receive notice of the pendency of the quo warranto proceedings, owing to the failure of the clerk of the district court to certify to the disbursing officer, as required by statute, the fact that the title to the office was contested.

Payment to the de facto officer is matter of defense, to be pleaded by the defendant in an action by the de jure officer against a municipality for the salary during the time he was wrongfully deprived of the office, and it is not necessary that plaintiff allege that payment of the salary was not made to a de facto officer. *San Antonio v. Steingruber* (1915) — *Tex. Civ. App.* —, 177 S. W. 1023.

The question of liability of a de facto officer to the rightful incumbent for compensation and fees is treated in a note to *Albright v. Sandoval*, 54 L. ed. (U. S.) 502, in which it is said that "the authorities are well-nigh unanimous that the rightful incumbent of a public office may recover from the de facto officer the salary, fees, and emoluments of the office received by the latter during his possession of the office." R. E. H.

KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, Appt.,
v.

N. B. BOWLING, Admr., etc., of J. T.
Payne, Deceased.

(177 Ky. 462, 197 S. W. 928.)

Evidence — sufficiency — cause of death.

1. Backing cars against others standing on a switch, without warning or lookout, may be found to be the proximate cause

Note. — As to negligence in going without previous notice under or between cars liable to be moved at any time, see annotation following this case, post, 380.

Generally, as to disobedience of master's rules as contributory negligence, see L.R.A. L.R.A.1918C

of death of an inspector at work about the standing cars in performance of his duty, whose body is found wedged under the car in such a way as to indicate that his death was caused by their movement.

For other cases, see *Evidence*, XII. b, in *Dig. 1-52 N. S.*

Master and servant — car inspector — violation of blue flag rule — duty of company.

2. Failure of a car inspector to place a blue flag as required by the company's rule, when going beneath a standing car, does not relieve the company from the duty of main-

Indexes under the title, "Master and Servant," subtitles, "Contributory negligence" — "Disobedience of master's rules as."

The duty to reduce to present value the pecuniary loss to the statutory beneficiaries from death is considered in the annotation

taining a lookout and giving timely warning when propelling other cars against it in yards where much switching is done, and numerous cars must be inspected by persons going between cars for only short periods, and the flag rule is habitually disregarded.

For other cases, see *Master and Servant*, II. d, in *Dig. 1-52 N. S.*

Same — assumption of risk — failure to put out flag.

3. A car inspector does not, by failing to protect himself with a blue flag as required by an habitually disregarded rule, when going between standing cars, assume the risk of injury by the propelling of other cars against the standing cars without lookout or warning.

For other cases, see *Master and Servant*, II. b, 3, b, in *Dig. 1-52 N. S.*

Appeal — inadmissible evidence — non-prejudicial error.

4. The admission of evidence in an action to hold a railroad company liable for injury to a car inspector, of the use of the yard by nonemployees, is not prejudicial error where the instructions make the company's duty depend on the extent of such use by employees.

For other cases, see *Appeal and Error*, VII. m, 3, a, (5), in *Dig. 1-52 N. S.*

Same — failure to give instruction — absence of request.

5. An instruction in an action for wrongful death, which does not preclude the fixing of the damages awarded at the present worth of future benefit, is not erroneous for failure to require such limitation, if the defendant offers no instruction upon the subject.

For other cases, see *Trial*, III. b, in *Dig. 1-52 N. S.*

(October 30, 1917.)

A PPEAL by defendant from a judgment of the Circuit Court for Bullitt County in favor of plaintiff in an action brought under the Federal Employers' Liability Act to recover damages for the alleged wrongful death of plaintiff's intestate. Affirmed.

The facts are stated in the Commissioners' opinion.

Mr. Benjamin D. Warfield, for appellant:

The evidence fails to show the time, cause, or manner of decedent's death, or where he was or what he was doing, and it was error for the court to submit the case to the jury to guess away defendant's rights.

Louisville Gas Co. v. Kaufman, S. & Co.

following Chesapeake & O. R. Co. v. Kelly, L.R.A.1917F, 373.

The general subject of excessive or inadequate damages for personal injuries resulting in death is considered in the annotation to St. Louis, I. M. & S. R. Co. v. Craft, L.R.A.1918C.

165 Ky. 131, 48 S. W. 434; *Hollon v. Camp-ton Fuel & Light Co.* 127 Ky. 275, 105 S. W. 426; *Louisville & N. R. Co. v. Long*, 139 Ky. 304, 117 S. W. 359; *McDonald v. Louisville Car Wheel & R. Supply Co.* 149 Ky. 801, 149 S. W. 1142; *Stuart v. Nashville, C. & St. L. R. Co.* 146 Ky. 127, 142 S. W. 232.

In failing to protect himself with a blue flag while about the cars, under one of which he was found dead, decedent violated positive rules of defendant promulgated for his benefit, and he assumed the risk, as matter of law, of the consequences of such violation.

Kentucky & T. R. Co. v. Minton, 167 Ky. 516, 180 S. W. 831; *Russell v. Louisville & N. R. Co.* — Ky. —, 124 S. W. 841; *Alexander v. Louisville & N. R. Co.* 83 Ky. 589; *Louisville & N. R. Co. v. Scanlon*, 22 Ky. L. Rep. 1400, 60 S. W. 643; *Louisville & N. R. Co. v. Lumpkin*, 136 Ky. 290, 124 S. W. 318, 144 Ky. 621, 139 S. W. 800; *Louisville & N. R. Co. v. Moran*, 148 Ky. 418, 146 S. W. 1131; *Sinclair v. Illinois C. R. Co.* 30 Ky. L. Rep. 1040, 100 S. W. 236; *Louisville & Interurban R. Co. v. Kraft*, 156 Ky. 71, L.R.A.1916E, 263, 160 S. W. 803; *Chesapeake & O. R. Co. v. Barnes*, 132 Ky. 728, 117 S. W. 261; *Thomas v. Houston, S. & G. Co.* 146 Ky. 156, 37 L.R.A.(N.S.) 950, 142 S. W. 214, Ann. Cas. 1913C, 185; *Louisville & N. R. Co. v. Heinig*, 162 Ky. 14, 171 S. W. 853; *Cincinnati, N. O. & T. P. R. Co. v. Gold-ston*, 158 Ky. 410, 161 S. W. 246; *Helm v. Cincinnati, N. O. & T. P. R. Co.* 156 Ky. 240, 160 S. W. 945; *Long v. Southern R. Co.* 155 Ky. 280, 159 S. W. 779; *Seaboard Air Line R. Co. v. Horton*, 238 U. S. 492, 58 L. ed. 1082, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834.

The court erred in admitting evidence, and submitting it to the jury, as to whether or not defendant was negligent in not discovering decedent's peril and protecting him from its consequences, for the reason that whatever defendant's duty in the premises might have been as to others than decedent, it did not owe such duty to him, and there can be no negligence where there is no duty.

Cincinnati, N. O. & T. P. R. Co. v. Har-rod, 132 Ky. 445, 115 S. W. 699; *Helm v. Cincinnati, N. O. & T. P. R. Co.* 156 Ky. 240, 160 S. W. 945; *Kentucky & T. R. Co. v. Minton*, 167 Ky. 516, 180 S. W.

L.R.A.1916C, 820. A similar question with respect to personal injuries not resulting in death is considered in the annotation to *Padrick v. Great Northern R. Co.* L.R.A. 1915F, 30.

831: *Coleman v. Pittsburg, C. C. & St. L. R. Co.* 139 Ky. 559, 63 S. W. 39; *Louisville & N. R. Co. v. Hunt*, 142 Ky. 780, 135 S. W. 288; *Conniff v. Louisville, H. & St. L. R. Co.* 124 Ky. 766, 99 S. W. 1154; *Lexington & E. R. Co. v. Smith*, 172 Ky. 117, 188 S. W. 1091; *Wickham v. Louisville & N. R. Co.* (*Crume v. Louisville & N. R. Co.*) 135 Ky. 288, 48 L.R.A.(N.S.) 150, 122 S. W. 154; *Ellis v. Louisville, H. & St. L. R. Co.* 155 Ky. 745, 160 S. W. 512; *Chesapeake & O. R. Co. v. Lang*, 135 Ky. 76, 121 S. W. 993; *Blankenship v. Norfolk & W. R. Co.* 147 Ky. 260, 143 S. W. 995; *Cincinnati, N. O. & T. P. R. Co. v. Swan*, 149 Ky. 141, 147 S. W. 889; *McCalley v. Chesapeake & O. R. Co.* (*Sanders v. Chesapeake & O. R. Co.*) 169 Ky. 47, L.R.A.1916F, 551, 183 S. W. 234.

It was improper to admit evidence as to the amount of use made by pedestrians of defendant's yard at the point of accident.

Willis v. Louisville & N. R. Co. 164 Ky. 124, 175 S. W. 18.

Messrs. **Daugherty & Fulton, C. P. Bradbury, and Ernest N. Fulton** for appellee.

Clay, C., filed the following opinion:

N. B. Bowling, as administrator of **J. T. Payne**, deceased, brought this suit under the Federal Employers' Liability Act (Act April 22, 1908, chap. 149, 35 Stat. at L. 465, Comp. Stat. 1916, §§ 8657-8665) against the *Louisville & Nashville Railroad Company*, to recover damages for his death. The jury returned a verdict in his favor for \$5,050, of which sum they apportioned \$3,000 to the decedent's widow, and \$50 to his daughter. Judgment was entered accordingly, and the railroad company appeals.

According to appellee's evidence, appellant is an interstate carrier, and at the time of his death decedent was in its employ as car inspector and repairer. At about 6 o'clock on the morning of the accident, which occurred on October 25, 1915, **J. R. Carpenter**, the company's chief car inspector, met decedent and said, "53 is called." This was an order to the decedent to inspect the cars and see that they were ready to go out. These cars were assembled on track No. 1, in the Lebanon Junction yards, and 53 was an interstate train. About 8 o'clock that morning train No. 18 arrived at Lebanon Junction from Bowling Green. At that time there were eight empty cars on track No. 1. After doing some other switching, the engine on train No. 18 pushed a cut of four cars onto the north end of track No. 1. Two attempts were made to couple this cut of cars to the eight cars al-

ready on that track, but because of some defect in the apparatus the coupling was not made. During this movement the eight cars were shoved for a distance of about three or four car lengths. After this movement, decedent was found dead under the south trucks of the sixth car from the north end and the third car from the south end, with one of his legs wedged between the arch bars and the wheel. While the cut of four cars was being shoved on track No. 1, no employee was on the front car. There was also evidence to the effect that no signal of the approach of the four cars was given. It was further shown that the tracks in the yards of the company at Lebanon Junction were used by a large number of employees. Though the rules of the company require that a workman going under or between cars should protect himself with a blue flag, **Bates**, the yardmaster, testified that the inspectors were not in the habit of placing blue flags when inspecting trains, and that this custom had prevailed for a number of years. It was also shown that it was the custom in the yards, when coupling an engine and cars to a cut of dead cars, to send a brakeman ahead to inspect the cut of cars.

According to the evidence for the company, the chief car inspector gave the decedent no order with reference to train 53, and decedent had no duties to perform in connection with the cut of cars on track No. 1. As a matter of fact, they had been inspected the night before by an employee charged with that duty. It was further shown that the eight cars in question did not go out on train 53 that day, but constituted a part of another train. It was not customary for the whistle to be blown under such circumstances, but the bell on the engine was ringing as the engine backed into the cars. If decedent was under or between the cars, he could not have been seen; otherwise, he could have been seen. The head brakeman looked down both sides of the eight cars, but did not see anybody. If the decedent was under or between the cars, it was his duty to protect himself with a blue flag. The company had no rule requiring trainmen or switchmen to look out for car repairers who did not protect themselves in this manner.

1. The first ground urged for a reversal is that the case should not have gone to the jury, because appellee failed to prove that the decedent's death was due to any negligence on the part of the company. In this connection it is argued that the evidence utterly fails to show for what purpose, or under what circumstances, or at what time, the decedent went under or between the cars, and that the case therefore falls

within the well-recognized rule that, where the decedent's death may as well be attributed to a cause for which the company was not responsible as to a cause for which it was responsible, the company's liability should not be made a matter of mere conjecture on the part of the jury. *Louisville & N. R. Co. v. Long*, 139 Ky. 304, 117 S. W. 359; *Louisville Gas Co. v. Kaufman, S. & Co.* 105 Ky. 181, 48 S. W. 434. With this contention we cannot agree. There was positive evidence that the decedent was notified that No. 53 had been called, and that this notice was equivalent to an order to inspect the cars which were to compose that train and see that they were in condition to go out. The cars which went out on that train were usually assembled on track No. 1. Decedent's body was found wedged between the arch bars and the wheels of one of the cars assembled on that track. Having been directed to work there, it is a fair and reasonable inference that at the time of the accident he was engaged in the performance of his duties. The theory of suicide is not to be entertained. The peculiar position of decedent's body is sufficient to justify the conclusion that his injuries did not take place while the cars were standing still, but were due to the admitted movement of the cars, and as there was evidence tending to show that this movement was caused by their contact with the cut of cars which the company had backed on the track in question without keeping a proper lookout or giving timely warning of their approach, it was for the jury to say whether the company's negligence was the proximate cause of decedent's death.

It is further insisted that the company did not owe decedent any duty because of his failure to apprise its employees of his presence under or between the cars by means of a blue flag, as required by the company's rules. There may be cases where no duty arises until the employee places the warning signal, but these are cases where the company is under no obligation to anticipate the presence of such employee. *Kentucky & T. R. Co. v. Minton*, 167 Ky. 516, 180 S. W. 831. We are not prepared, however, to hold that in every instance the railroad company has discharged its full duty to its car inspectors and repairers whose work is of a peculiarly hazardous character, by merely promulgating a rule requiring them to protect themselves by placing a certain flag. In yards like those at Lebanon Junction, where many men are employed, and several trains come and go each day, and a great deal of switching is done, and numerous cars must necessarily be inspected and repaired by men who fre-

quently go under and between the cars for but a short period of time, we conclude that the company is under the humane duty to anticipate the presence of such employees under or between the cars, and to take such precautions for their safety as a proper lookout and timely warning of approaching cars will afford; and this duty is owing whether the injured employee protects himself by means of a blue flag or not, and particularly so where, as in this case, there was substantial evidence that the rule requiring such action on his part was habitually disregarded with the acquiescence of those employees of the company superior in authority to the injured employee. *Cincinnati, N. O. & T. P. R. Co. v. Lovell*, 141 Ky. 249, 47 L.R.A.(N.S.) 909, 132 S. W. 569; *Louisville & N. R. Co. v. Johnson*, 161 Ky. 824, 171 S. W. 847; *Norfolk & W. R. Co. v. Short*, 171 Ky. 647, 188 S. W. 786.

But it is suggested that decedent assumed the risk of injury because of his failure to put out a blue flag, and is therefore not entitled to recover. Of course, it might be said that decedent's failure to put out a blue flag was the sole cause of his injuries, if the company owed him no lookout or warning duty in the absence of the flag, and the rule requiring him to protect himself in that manner had not been habitually disregarded with the acquiescence of the company. In view, however, of our conclusion that the company owed him a lookout and warning duty, notwithstanding his failure to observe the rule, it is clear that such failure cannot be regarded as the sole cause of his death, but might constitute contributory negligence going to the diminution of damages. This view of the law is well presented by the given instructions. Instructions Nos. A-2 and A-3 submitted the question whether the company owed decedent a lookout and warning duty, and whether or not its failure to perform either of these duties was the proximate cause of decedent's death. Instruction A-4 submitted the issue of contributory negligence. By instruction No. B-1, the jury were told that, if they believed from the evidence that decedent was concealed from view at the time of his injuries, and that he placed no blue flag on the ends of the cars, they should find for the defendant, unless they believed that the rule with reference to the placing of the blue flag was habitually disregarded with the acquiescence of the company, and should further believe as in instruction A-3. These instructions are assailed on the ground that the company was entitled to a peremptory, and there was no evidence to support them. This contention cannot be sustained for the reasons heretofore pointed out.

Complaint is made of the introduction of evidence of the use of the company's yards by persons other than its employees. This was not prejudicial, because in the instructions the lookout and warning duty was made solely to depend on the extent of the use of the yards by the company's employees.

Lastly, it is insisted that the instruction on the measure of damages is erroneous and that the verdict is excessive. The instruction on the measure of damages is attacked on the ground that it fails to limit the recovery to the present cash value of the future benefits of which the beneficiaries were deprived by the death of the decedent. By the given instruction the jury were told to fix the damages "in such an amount in money as will fairly and reasonably compensate the widow, Mrs. Mattie E. Payne, and the daughter, Miss Carrie Payne, of the said J. T. Payne, deceased, for the loss of pecuniary benefits they might have reasonably received if the deceased had not been killed." There is nothing in this instruction that limits the right of the jury

to fix the damages at the present worth of future benefits. That being true, and the company having failed to offer an instruction to that effect, it cannot complain of the instruction given. *Illinois C. R. Co. v. Skinner*, 177 Ky. 62, 197 S. W. 552; *Chesapeake & O. R. Co. v. Kelly*, 241 U. S. 485, 60 L. ed. 1117, L.R.A.1917F, 367, 36 Sup. Ct. Rep. 630; *Chesapeake & O. R. Co. v. Shaw*, 168 Ky. 537, 182 S. W. 653; *Nashville, C. & St. L. R. Co. v. Henry*, 168 Ky. 453, 182 S. W. 651; *Phoenix R. Co. v. Landis*, 231 U. S. 578, 58 L. ed. 377, 34 Sup. Ct. Rep. 170; *Greenway v. Taylor County*, 144 Iowa, 332, 122 N. W. 943; *Clark v. Cedar Rapids*, 129 Iowa, 358, 105 N. W. 651; *Louisville & N. R. Co. v. Morris*, 179 Ala. 239, 60 So. 933; *Fedorawicz v. Citizens' Electric Illuminating Co.* 246 Pa. 141, 92 Atl. 124.

Nor can we say that the verdict is so excessive as to strike us at first blush as being the result of prejudice or passion.

Judgment affirmed.

Petition for rehearing denied.

Annotation—Negligence in going without previous notice under or between cars liable to be moved at any time.

This note is supplementary to the note to *Carey v. Chicago, R. I. & P. R. Co.* 46 L.R.A.(N.S.) 877.

Generally, as to the constitutionality, application, and effect of the Federal Employer's Liability Act, see notes to *Lamphere v. Oregon R. & Nav. Co.* 47 L.R.A.(N.S.) 38, and *Seaboard Air Line R. Co. v. Horton*, L.R.A.1915C, 47.

As to contributory negligence as affected by illegal or negligent custom of servants, see the note to *Cincinnati, N. O. & T. P. R. Co. v. Lovell*, 47 L.R.A.(N.S.) 909.

In the following cases an employee who had sought shelter from the rain under a car was held guilty of contributory negligence precluding recovery for injury sustained when the car was suddenly moved: *Barrage v. Philadelphia & R. R. Co.* (1915) 60 Pa. Super. Ct. 66; *Cunningham v. Philadelphia & R. R. Co.* (1915) 249 Pa. 134, 94 Atl. 467; *Rega v. New York C. & H. R. R. Co.* (1914) 164 App. Div. 433, 149 N. Y. Supp. 843. Similar cases may be found on page 877 of note 46 L.R.A.(N.S.).

As stated in the note in 46 L.R.A.(N.S.) 877, it is generally held that a railroad employee, when about to put himself in such a position with respect to a stationary car that, if it should be

moved unexpectedly, he would in all probability be injured, is bound to notify all other employees whose work may, in its progress, produce a movement of the car, or put out a flag or other signal which will show them where he is.

Thus, the violation of such a rule by a repair man or inspector injured while at work under or between cars was, in the following cases, held to render him guilty of contributory negligence precluding a recovery: *Roux v. Morgan's Louisiana & T. R. & S. S. Co.* (1910) 127 La. 240, 53 So. 550; *Abshire v. Louisiana R. & Nav. Co.* (1917) 141 La. 194, 74 So. 901; *Hart v. Bangor & A. R. Co.* (1913) 110 Me. 540, 87 Atl. 221 (repair man injured while a fellow servant stood at each end of the car under which he was working); *Gates v. Maine C. R. Co.* (1914) 111 Me. 589, 90 Atl. 703; *Norfolk & W. R. Co. v. Cofer* (1913) 114 Va. 434, 76 S. E. 909. See also *Pinckney v. Atlantic Coast Line R. Co.* (1911) 89 S. C. 525, 72 S. E. 394, where it is stated that, if it was proved that the injured repair man did disregard such a rule of the company, known to him to be in force and so essential to his own safety, as well as the safety of other employees and the general public, when he could have complied with it with reasonable effort on his part, and

thus prevented the injury, then the non-suit was proper.

But when a railroad company has adopted rules for the protection of its employees, it is its duty to make known to them such rules; and there is no affirmative duty on the part of the employee to ascertain what these rules are. *St. Louis, I. M. & S. R. Co. v. Blaylock* (1915) 117 Ark. 504, 175 S. W. 1170, Ann. Cas. 1917A, 563; *Anderson v. Great Northern R. Co.* (1907) 102 Minn. 355, 113 N. W. 913.

So it is held in *Campbell v. New York, N. H. & H. R. Co.* (1917) — Conn. —, 102 Atl. 597, in order to render an employee guilty of negligence in failing to observe a rule requiring employees to put out a protecting flag before going under a car to work, he must have been instructed to so protect himself. In this case, however, the court, in view of the absence of the flag and the other circumstances, held that the employees of the railroad company were not chargeable with negligence in moving the cars as they did toward the deceased, who was an employee of an oil company, within whose yards the accident occurred.

In some cases the question is presented whether an employee is guilty of contributory negligence in going under or between cars to work, relying upon another employee to put out a protecting flag or give warning of danger.

Thus, whether a car repairer was guilty of contributory negligence in going under a car relying upon a foreman to put out a flag was held a question for the jury in *St. Louis, I. M. & S. R. Co. v. Blaylock* (Ark.) supra, it being a disputed question whether it was the duty of each workman when going under a car to put out the blue flag, or the duty of the foreman to do so, under the rule requiring that "workman will display the blue signals and the same workman remove them."

It was stated in *St. Louis, I. M. & S. R. Co. v. Steel* (1917) — Ark. —, 197 S. W. 288, that a foreman had no right to suspend or abrogate a blue flag rule promulgated for the protection of employees, but that, when he assured a car repairer that he would protect or watch out for him while working under a car, it was a question for the jury to say whether the repairer, in the exercise of ordinary care, had the right to rely upon this promise as meaning that the foreman would give him that protection that the rules of the company required; that the foreman was the

repairman's fellow servant in the matter of promising to protect him in such a case, and the jury were warranted in finding that the failure of the foreman, after promising to protect and watch out for him, was negligence on his part for which the carrier would be liable under the comparative negligence rule of the Federal Employers' Liability Act.

In *Anderson v. Great Northern R. Co.* (Minn.) supra, plaintiff was injured by the action of a switching crew in pushing other cars against the car which he was engaged in repairing on a "rip" track; the printed rules required repair men to post a blue flag as a protecting signal; plaintiff's testimony tended to show that the foreman instructed him that it was the duty of the first man who went to work to post the flag; that this was the practice, and that in this case a particular collaborer was the first man to begin the work. The court charged the jury that plaintiff could not recover if he knew of the printed rule, and submitted the question of whether he was guilty of contributory negligence in believing that his collaborer was the first man to begin work, and that he had posted the flag. The jury returned a verdict for the plaintiff. The action of the trial court in refusing to disturb the verdict is sustained.

In *Central R. & Bkg. Co. v. Kitchens* (1889) 83 Ga. 83, 9 S. E. 827, it was held no excuse on the part of a servant working under a car that his superior failed to obey a rule requiring the putting up of a danger signal which was applicable equally to both servants concerned in the violation of the rule, the court stating that a rule of a railroad company, applicable alike to all persons of a given class, is not to be evaded by the failure of one person of the class to observe the rule when another person of the same class is injured.

In *Illinois C. R. Co. v. Winslow* (1904) 56 Ill. App. 462, the rule required employees, when going to work under a car in a train, to put blue signals on both ends of the train; plaintiff, a car repairer, placed a blue flag at one end of the train and relied upon an inspector to put a flag at the other end, but the inspector failed to do so and plaintiff was injured when an engine moved the car under which he was working. In holding plaintiff guilty of contributory negligence, the court stated that plaintiff's injury was due to his failure to see that the flag was put up as required by the well-known rule, and his reliance

upon the promise of the car inspector, combined with the negligence of another, who was not a servant or defendant, in failing to protect him.

So a car repairer was, in *Johnson v. Cleveland, L. & W. R. Co.* (1896) 11 Ohio C. C. 553, 5 Ohio C. D. 290, held guilty of contributory negligence in going under a car to work in violation of the blue flag rule, relying upon the promise of a conductor to protect him, the car repairer occupying no inferior position to the conductor and the latter having no control over him. The court said that the fact that the injured employee set aside the rules of the company and relied upon something he himself had devised would be a very good reason why he should not hold the company responsible.

In *Pinckney v. Atlantic Coast Line R. Co.* (1911) 89 S. C. 525, 72 S. E. 394, where a car repairer went under a car relying upon the statement of the conductor of the train that he was through with his work in that vicinity, the court said: "The act of the conductor in running his train back and striking the cars standing on the siding under these circumstances furnished some evidence of negligence on the part of the defendant. It may be that the plaintiff's fellow laborer, Freeman, who, at plaintiff's request, was on watch against the approach of a train, was negligent in not signaling the train to stop, and in not warning plaintiff of its approach, and that his negligence was a proximate cause of the accident. If the negligence of Freeman, the fellow servant, was the sole proximate cause, or one of the proximate causes, the negligence of the plaintiff being the other, then the plaintiff could not recover. But if the proximate cause of the injury was the negligence of the defendant combined with the negligence of Freeman, the fellow servant, the plaintiff would not be precluded from recovery. We think the evidence required that these issues, and the issue of contributory negligence growing out of the rule requiring the use of a blue flag, should be submitted to the jury."

Where an inspector employed by one company went under a car to work from three to five minutes after the conductor of another company had told him that no more cars would be switched onto the track in question, the court, in *Lake Erie & W. R. Co. v. Hennessey* (1912) 177 Ind. 64, 97 N. E. 331, was of the opinion that an instruction "that he had a right, in going under the cars, to rely upon the statement of the conductor, and L.R.A.1918C.

to believe that he would not push or throw any other car on the track within so short a time as three to five minutes," should not have been given, but thought that the jury could not have been misled in view of the other instructions, which fully covered the question of the requirement of the use of the senses, the use of ordinary care, and freedom from contributory negligence. A judgment for plaintiff, however, was reversed on other grounds.

Where a car inspector in the employ of a railroad company went underneath a car, depending upon a helper to protect him against moving cars in accordance with a rule adopted between them, and the helper failed to warn the inspector of a car let down the track by a grain company, whereby the inspector was injured, the court, in *J. Rosenbaum Grain Co. v. Mitchell* (1912) — Tex. Civ. App. —, 142 S. W. 121, stated that, if the helper was negligent in failing to perform a duty he owed to the car inspector, and if the grain company also was negligent, their negligence was concurrent, and the helper's negligence was no answer to the inspector's suit against the grain company, unless, as is further contended, the helper's negligence should be imputed to the inspector. The theory upon which it is claimed that negligence of the helper should be imputed to the inspector is that they were engaged in a joint enterprise and occupied towards each other the relation of principal and agent. The court held, however, that recovery for injury resulting from the negligence of the grain company in sending the car down the track in the manner it did could not be defeated on the aforesaid theory.

So in *International & G. N. R. Co. v. Schubert* (1912) — Tex. Civ. App. —, 146 S. W. 1083, a case similar to the *J. Rosenbaum Grain Co. Case*, the evidence showed that the railroad company had adopted a rule, custom, or usage requiring its employees, before undertaking to do any work underneath its cars on a certain track, to display a red flag in the drawhead at each end of the car or string of cars, but the court found that the repairer, while realizing that the flags afforded such protection, was not apprised of this rule, and was not furnished by the company with any such flags for the purpose, and that, so far as he knew, the company had no such flags in use at the time; that the repairs in question could have been performed in ten or fifteen minutes; that before beginning the work, appreciating

the danger incident to it, the repairer directed a helper to watch out for approaching cars; but that while he was engaged in work underneath the car, without any warning, a switch engine backed several cars against the one under which he was working, causing the injury complained of, it appearing that the helper had failed in his promise to keep a lookout for approaching cars or to notify the repairer of the danger. The court held that the plaintiff was entitled to recover, the negligence of the helper, at best, being regarded as only a concurrent cause of the injury, and not as the proximate cause within the rule of an intervening efficient cause; that such failure on his part did not and could not break the causal connection between the negligent failure on the part of the railroad company to furnish the flags and the injury. The court also observed that the rule contended for in *J. Rosenbaum Grain Co. v. Mitchell* was not applicable, because there was no joint enterprise or undertaking between the car repairer and the helper that could establish such agency between the two that the act of one could bind the other; and that the negligence of the helper could be imputed to the car repairer.

The court in *J. Rosenbaum Grain Co. v. Mitchell* (Tex.) supra, cites as a similar case *Abbitt v. Lake Erie & W. R. Co.* (1898) 150 Ind. 498, 50 N. E. 729, 4 Am. Neg. Rep. 478, stating that "there it appeared that Abbitt and one Lichstein worked together as car inspectors, and that it was the duty of one, while the other was under a car, to keep a lookout for other cars which might be moved on the track, and to warn him of danger from a threatened collision between the car he was under and such other cars. Abbitt, while under a car inspecting it, was killed as the result of such a collision. There was testimony tending to show that Lichstein had failed to perform his duty to keep a lookout for and warn Abbitt of the approach of the colliding cars. The court said: 'It may be affirmed as a correct doctrine under the authorities that, if Abbitt and Lichstein were associated together in their work of car inspection at the time of the accident, and if, by any arrangement, understanding, or agreement between them, either express or implied, it became Lichstein's duty, when Abbitt was under a car upon the railroad track during the inspection of work performed by them, to look out for approaching trains or cars, and either signal them to stop or warn Abbitt

of their approach, then, in this respect and to this extent, at least, Lichstein might be said to have been serving the former, and under such circumstances the relation of principal and agent in this regard could be said to exist between them; and if Lichstein neglected to discharge the duty so imposed upon him, and thereby contributed to the accident in question, such negligence in legal contemplation would be the negligence of Abbitt, and justly imputable to him. Or, in other words, if, under the circumstances, at the time of the fatal accident, Abbitt attempted or undertook to exercise the care which the law exacted of him through the agency of Lichstein, then it would be incumbent upon the plaintiff in this action to show, at the time of the accident, freedom from contributory negligence on the part of Lichstein.' The value of the decision as authority is weakened by the fact that two of the five judges composing the court dissented, and in a strong opinion combated the conclusion reached by the majority, that the principle in question was applicable to the case." It may also be observed that the car in the Abbitt case contained a green and a red light known as markers, used to indicate the rear end of a train when en route. It was left for the jury in that case to determine the duty of the railroad company with respect to these lights, and whether they could be considered as giving warning of the presence of a worker under the car.

In *Yoakum v. Lusk* (1917) — Mo. App. —, 198 S. W. 635, a servant, while procuring repair materials from a bad order car on an "old rip track," was killed between the cars when other cars were shunted onto the track without warning; a foreman had charge of this track, and it was his duty, when men were engaged to work on cars, to lock the switch and place in position a blue flag to notify switch crews that the track was closed, and thus prevent cars being shoved in while men were at work on cars standing thereon; there was in force at the time what is known as the blue flag rule, which provided that employees were not to work under or about a car unless the blue flag was up. It was contended that, if deceased had not violated that rule, he would not have been struck, and for that reason his death was chargeable solely to his own negligence. The court observes that, while the rule says that the presence of the blue flag denotes that workmen are at work under or about the car, engine, or train, and

employees must not work at such places unless such blue signal is so placed, yet it nowhere states whose duty it is to put up the blue flag. To require the workman to see at all times that the blue flag was up before going between or under cars to work on either track would result in relieving the foreman of any duty to see to that at all, unless asked to do so by a workman. This certainly was not the intention of the rule, and the evidence is to the effect that primarily it was the duty of the foreman to know when workmen were engaged in work on the tracks and lock the switch and put up the blue flag without being asked to do so by anyone. The rule was intended for the safety of the workmen, and was not intended to be used as an avenue of escape by the master in case an injury should occur. Rules are only necessary when there are different workmen so engaged that unless rules are provided and obeyed one may injure another. If the workman is required to look out altogether for his own safety, and is solely responsible for it, then no rule is necessary, and the master cannot be charged with negligence if he does nothing to secure the safety of the servant. The court does not think this is what the rule above set out means. The master cannot escape responsibility or avoid his legal duty to use ordinary care to furnish his servants a reasonably safe place to work by promulgating a rule which places that responsibility on the servant. The duty of the master in this regard is a primary duty, and he cannot shift or avoid it, and the blue flag rule invoked in this case was not intended to accomplish that result. The primary purpose of this rule was to prevent switch crews from running cars in on these tracks while men were at work there, and the primary duty to see that the switch was locked and the blue flag up whenever there was necessity for it rested on the foreman, and not the workman. Should a workman discover that a track was open when it should be closed, he could not close it because Olson (foreman) had the key. All the workman could do would be to hunt up Olson and ask him to close and lock the switch. Further the court states that the ground of negligence which would authorize the submission to the jury at all was the failure of the rip track foreman to lock the switch and put up the blue flag when he knew, or had good reason to believe, that deceased was likely to be required to go to cars on the old rip track for L.R.A.1918C.

material with which to make the necessary repairs on the car on which he was working at the time, and this issue should have been submitted by an instruction couched in plain language, and on a retrial that may be done. With respect to the Employers' Liability Act, the court states that it may be conceded that deceased was negligent in going between the cars as he did; yet if appellants were also chargeable with negligence, they cannot, in this case, it being brought under the Federal law, escape liability in toto, but can only take advantage of his negligence for the purpose of reducing the damages; hence it is unnecessary in this connection to discuss the question of the negligence of deceased.

In *McKee v. Cincinnati, F. & S. E. R. Co.* (1914) 161 Ky. 711, 171 S. W. 425, where a judgment for defendant was affirmed, a laborer was injured while coupling air brakes between cars as directed by the superintendent. The question in issue was whether the superintendent, who was supervising the shifting of certain cars from the main track to a sidetrack upon which the injured employee was working, directed the cars to be sent upon that track without giving such employee a sufficient opportunity to get from between the cars. The jury were told that, if sufficient time had elapsed after the superintendent directed the coupling for the employee to reasonably obey the order, and if the superintendent saw the employee in a place of safety before the car was backed against the two cars between which he was injured, the superintendent had the right to presume that the employee had obeyed his order and was in a place of safety. The court stated this instruction was not prejudicial to any of plaintiff's substantial rights.

In connection with the above cases, as to reliance upon another employee to give the warning, see cases in the note in 46 L.R.A.(N.S.) at page 878.

As suggested in *LOUISVILLE & N. R. Co. v. BOWLING*, ante, 376, in yards where trains are frequent, and numerous cars must necessarily be inspected and repaired by men who frequently go under and between them for but a short time, the company is under the humane duty to anticipate the presence of such employees under or between the cars, and to take such precautions for their safety as a proper lookout and timely warning of approaching cars will afford; and this duty is owing whether the injured employee protects himself by

means of a blue flag or not, and particularly is this so when the rule requiring such action on his part has been abrogated. So in the following cases, where such a rule had been abandoned or disregarded for such a time by the railroad company, or those whose duty it was to enforce it, as to amount to an abrogation of it, a car repairer or inspector injured while working under a car in disregard of the rule was held entitled to recover damages, the railroad being negligent in shunting cars upon him without warning: *St. Louis, I. M. & S. R. Co. v. Sharp* (1914) 115 Ark. 308, 171 S. W. 95 (under Federal Employers' Liability Act); *Pullin v. Missouri, K. & T. R. Co.* (1915) 96 Kan. 165, 150 Pac. 604; *Young v. Lusk* (1914) 268 Mo. 625, 187 S. W. 349; *Missouri, K. & T. R. Co. v. Perryman* (1913) — *Tex. Civ. App.* —, 160 S. W. 406; *Texarkana & Ft. S. R. Co. v. Casey* (1915) — *Tex. Civ. App.* —, 172 S. W. 729; *Atchison, T. & S. F. R. Co. v. Ayers* (1917) — *Tex. Civ. App.* —, 192 S. W. 310; *Texas & P. R. Co. v. Elliott* (1916) — *Tex. Civ. App.* —, 189 S. W. 737. In the last case the railroad company was held liable for injury to an employee caught between cars while repairing a hand hold; the question whether the "blue flag" rule had been abandoned by nonobservance being a question for the jury.

So a judgment for defendant was reversed in *Luebke v. Chicago, M. & St. P. R. Co.* (1883) 59 Wis. 127, 48 Am. Rep. 483, 17 N. W. 870, where an employee, while repairing a detached car on a sidetrack at the command of a foreman, was injured when a train struck the car under which he was working. The court said that it was not a dangerous service to go under a car for the purpose of making repairs when it was standing still and disconnected from any power which could move it, and was in a place where there was not the remotest reasonable suspicion or apprehension that it would be moved or at all disturbed; that the company had not provided a watchman or any other precaution which it admitted it was its duty to do; and this admission sufficiently disposed of the claim, most unworthily made, that it was the duty of the repairer himself, who was compelled to go under the cars to repair them, to provide his own watchman and look out for himself.

So, where a track foreman was charged with the duty of looking out for the safety of car repairers while at work, it was held, in *Louisville & N. R. Co. v. Mahoney* (1913) 153 Ky. 761, 156 S. W. 1.R.A.1918C.

388, that the car repairer had a right to assume that such foreman would protect him from moving cars while he was engaged in inspecting and repairing the car in question.

And where a trackman was killed while standing between cars when others were switched against them, the court, in *Louisville & N. R. Co. v. Johnson* (1914) 161 Ky. 824, 171 S. W. 847, favored an instruction in substance that, if from the evidence the jury believed that the section crew with which the trackman was working had been directed or requested by the foreman to go behind or in front of or between cars for the purpose of urinating, or that it was usual and customary for section men to do this, and this usage or custom was known to the foreman of the trackman's crew, and the foreman knew that the trackman had gone in front of or between cars for the aforesaid purpose, and he saw, or in the exercise of ordinary care could have seen, the approaching car or cut of cars in time to have given warning, it was his duty to exercise ordinary care to warn the trackman of the danger he was in, and if he failed to give such warning, the jury should find for the plaintiff.

Where a repair man, while passing between the cars of a long freight train, was injured when the train was suddenly moved without warning, it was held, in *Missouri, O. & G. R. Co. v. Dereberry* (1914) — *Tex. Civ. App.* —, 167 S. W. 30, that he did not assume the risk in view of the custom of repair men generally to pass between such trains, and the custom of the crew to sound a warning when such trains were about to be moved.

A yard conductor was held not guilty of negligence in *Murphy v. Atlanta & C. Air Line R. Co.* (1917) 102 S. C. 509, 87 S. E. 310, in passing between apparently dead cars, whereby he was injured when a coemployee, by mistake and contrary to the instructions of the yard conductor caused the cars to be kicked onto the wrong track; and the fact that the wrongful act was done by a fellow servant did not preclude a recovery by the conductor.

A car painter injured between cars while procuring a bucket of paint that he had deposited on a bumper was, in *Chesapeake & O. R. Co. v. Parker* (1914) 116 Va. 368, 82 S. E. 183, held not guilty of contributory negligence; the railroad company being negligent in suffering him to work on the shifting track without protecting with a blue flag the

cut of cars upon which he was ordered to work, he having a right to rely upon that protection.

In *Kettlehake v. American Car & Foundry Co.* (1913) 171 Mo. App. 528, 153 S. W. 552, affirmed in (1915) 236 U. S. 311, 59 L. ed. 594, 35 Sup. Ct. Rep. 355, the car company was held liable for the death of an employee killed when a car under which he was working was moved by other cars switched onto the track; the court stating that the employee had a right to presume, in the absence of knowledge to the contrary, that the defendant would furnish him a reasonably safe place to work; that the employer would not imperil his safety by sending its other employees in to move the car upon which he was working without notifying him.

The above case bases its ruling on *Koerner v. St. Louis Car Co.* (1908) 209 Mo. 141, 17 L.R.A.(N.S.) 292, 107 S. W. 481, holding that a car manufacturer who sends a painter to work on a car owes him the duty of seeing that other cars are not run against it, and that cars pulled out are not attached to it, without giving him warning of intention to move the car; and that he is responsible for the negligence of his servant, of whatever grade, to whom he delegates performance of the duty; that one sent to paint a car is not negligent, as matter of law, in failing to place his scaffold so that it will clear the car steps in case the car moves, where he has a right to rely on the car not being moved without warning.

In *Degitz v. Missouri, K. & T. R. Co.* (1916) 97 Kan. 654, 156 Pac. 743, the negligence of an employee killed while inspecting a car was held a question for the jury; the blue flag rule being applicable to persons going under cars to make repairs, and not to persons merely making an inspection.

So, in *Gjorvad v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1911) 116 Minn. 233, 133 N. W. 609, a rule of defendant providing that car inspectors and repairers must not go between or beneath cars while cars are being switched in or out of trains was construed as applying only where such inspectors and repairers are actually engaged in the work of inspecting or repairing cars.

In *Norfolk & W. R. Co. v. Short* (1916) 171 Ky. 647, 188 S. W. 786, the servant injured between cars was passing through them to get materials, and not for the purpose of making repairs, and the rule requiring employees, when going between cars in the nighttime to

make repairs, to put lights on the car, was held to have no application.

A car repairer who was killed while repairing a defective coupling, when other cars moved by gravity against the car on which he was working, was, in *Illinois C. R. Co. v. Stewart* (1915) 138 C. C. A. 444, 223 Fed. 30, held not guilty of contributory negligence in failing to observe a blue flag rule, it being apparent in such a case that an observance of the rule would have been of no avail.

In *Offner v. Chicago & E. R. Co.* (1912) 174 Ill. App. 82, a blue flag had been put up, but, without the knowledge of the repair man working under the car, another car had been shoved in which obscured the flag from view. The court stated that there was nothing in the rules of the yard that required the repair man to keep watch of the flag after he had placed it in position, to see that no one else took it down, or to watch the track to see that no cars were pushed in on it, so as to obscure the flag from view in violation of the rules of the yard. He had a right to assume that others working there would obey the rule, and the fact that, when the switching crew pushed in on track 8 the car that caused the injury, there was another car there besides the one the repair man was working on, on which other car no flag was exposed, instead of being evidence of negligence on the part of such repair man, strongly tends to show that such other car had been improperly placed there after he went to work and in violation of the rules referred to. There is nothing in the record to warrant the court in holding that the repair man was guilty of contributory negligence.

In *Atchison, T. & S. F. R. Co. v. Clasin* (1911) — Tex. Civ. App. —, 134 S. W. 358, two railroad companies used the same yard; the plaintiff, a car inspector of one railroad, whose duty it was to inspect all the cars of the yard, saw a blue flag on the car and, supposing the work was being done thereunder by other employees, went under the car to work and was injured when an engine backed into the car, defendant's employees in the meantime having removed the flag. It was held a question for the jury under the circumstances whether plaintiff was guilty of negligence in going under the car. The court stated: "Our conclusion of law from the above facts is that they do not present a case which precluded the plaintiff from recovery for the reason that he ignored or violated a

rule. A similar rule was in force in regard to both railway companies. The flag was put out, and it was the duty of the defendant and its employees to keep it there, and to refrain from moving it until the work was finished, including the work necessary and proper to be done by plaintiff. No one else than defendant's employees had authority to move it. Plaintiff had seen it posted, and had the right to, and naturally would, assume that it would not be prematurely moved. He did not know that it had been taken away. He was not bound to anticipate that it would or might be moved, and keep his eye upon it, and it was in fact moved by direction of defendant's foreman. The most that can be claimed of plaintiff's action was that he was guilty of negligence; that is to say that, in going under the car, he failed to act under the surrounding conditions as an ordinarily prudent person would have done, and this issue was submitted. Defendant's employees having moved the flag prematurely without plaintiff's knowledge, it was defendant's duty to plaintiff to inform plaintiff of the fact, or to operate its engines and cars upon that track in such manner as to exercise care to injure no one whose presence might have been expected in and about the car in question while the work of repair was in progress."

Where plaintiff's evidence tended to show that the defendant railroad company used the yard of plaintiff's employer to deliver coal to it in cars, removing them when empty, and that it was the custom of the defendant to give notice or warning to the workmen employed in the yard of the movement of cars, and the plaintiff, being directed by his employer to go from one part of the yard to another for the purpose of unloading cars, undertook to pass between the end of a standing car and a bumper, and while doing this, no notice of the movement of the car being given, it was suddenly started by the defendant, and the plaintiff was caught between the car and the bumper and injured, it was held not error, in *McNally v. Pennsylvania R. Co.* (1915) 88 N. J. L. 277, 95 Atl. 975, to refuse a nonsuit upon the ground of absence of negligence on the part of the railroad company; nor was it error to refuse a direction of verdict for defendant upon the ground of plaintiff's contributory negligence. The denial by the defendant company, of the existence of the custom to give notice or warning, presented a jury question.

In *Firth v. Pennsylvania R. Co.* (1912) L.R.A.1918C.

83 N. J. L. 467, 83 Atl. 896, the place of work of a servant was a pit under a locomotive tender, which was a reasonably safe place unless the tender was moved without warning. There was a custom of giving such a warning, but whether it was given as an incident of the work of the master, or as the duty of the master to warn the servant, was a disputed question. It was held that, where the testimony was conflicting and varying inferences could be drawn from it, this question was for the jury.

Whether a hostler who went under an engine to clean out an ash can, and was injured when the engine suddenly started, was guilty of contributory negligence, was held a question for the jury in *St. Louis & S. F. R. Co. v. Arms* (1911) — *Tex. Civ. App.* —, 136 S. W. 1164. The rule prohibiting the use of a chain in pulling ash cans, claimed to have been violated by the servant, was held to have been abrogated.

In *Wells v. Grand Rapids & I. R. Co.* (1915) 184 Mich. 289, 151 N. W. 630, an employee of a paper company, while attempting to open a coal pocket under a gondola car, was injured when cars were switched against the one under which he was working; a switchman standing on a wall 8 feet west of the track, seeing no one around the cars on the pit track, signaled the engineer to back up; the switchman gave as a reason for not discovering deceased that the latter was on the east side; that the work of opening the pockets was usually done on the west side, and that he could not see him on the east side without stooping down and looking under the car; these statements were disputed by the plaintiff; it was asserted that deceased was negligent in going under the car and sitting on the east rail while opening the pocket; it was also asserted, and apparently uncontradicted, that deceased was doing the work of opening the pocket in the customary way, and the only way in which it could be done, considering the nature of the structure; it was further contended that, before going under the car, he should have notified the switching crew, who were then working in the vicinity; it was contended on the part of plaintiff that the switching crew had not been switching in that vicinity. In affirming a judgment for plaintiff, the court said that, whatever the record might show about this dispute, if it was the custom to inspect and notify the men around the cars before moving them, and the deceased knew of this custom, he had a right to rely upon its being

done in this instance. The trial court left the question with the jury; and that was as favorable a view as the defendant had the right to demand.

In *Mitchell v. Toledo, St. L. & W. R. Co.* (1912) 117 C. C. A. 24, 197 Fed. 528, an employee who had been ordered by a foreman to assist an inspector in replacing a heavy door on a car was killed when the end car of a cut of cars moved by an engine shoving other cars against them struck the door, and he was hurled under the car; to reach the car on which the door belonged, the men had to carry it over a path 2 feet wide between two strings of cars; the accident happened when they set the door on edge to take a rest before carrying it in between the cars. The court said that it could not be safely assumed as a matter of law that the company was not, through the foreman, chargeable with notice of the order, or with any concern as to the place where it was to be executed, or with the dangers attending the removal of the door to such place, through sudden movement of the cars; that, while it was not clear whether it was meant in the amended petition in the present case to allege that the company had not adopted any rule or means to protect employees engaged in repairing cars, and while rules and regulations in this behalf were alluded to in the amended answer in setting up the defense of alleged contributory negligence (denied in the replication), yet the proof offered as stated was not admitted, and no rule or regulation appeared on the record; but that this state of pleading did not relieve the company of the duty to adopt some means for protecting its car repairers; indeed, for protecting these men when about to enter the passage leading to the side of the car on which they were to restore the door; that it could not be said as a matter of law that the assistant assumed any risk of danger resulting from defendant's negligence, or that the facts touching the assistant's conduct would not admit of any reasonable inference except that of contributory negligence.

The decision in *Southern R. Co. v. Smith* (1913) 123 C. C. A. 488, 205 Fed. 360, is not within the scope of this note, as it involves injury to a switchman while walking along a track; here the court observed that it could not say that there was no duty whatever to keep a lookout for such switchman; that doubtless it was primarily his duty to keep out of the way, but this did not absolve the engine crew from all obligation; the L.R.A. 1918C.

care required and the duty imposed with reference to the yard employees seen upon the tracks are much less in degree than with reference to strangers; but defendant's theory of no duty would extend to a case where an employee was obviously helpless on the track, and might have been seen for some time from the coming engine; it would permit the engine crew to run through the yard with their eyes shut, and it is too broad; under such facts as here exist, there must be a concurrent or secondary duty, independent of statute or rule, to keep such lookout as is reasonably necessary to avoid injury to the employee who may neglect his primary duty to protect himself.

It is ordinarily negligence for an employee to pass under or between cars likely to be moved at any moment. See cases in the note in 46 L.R.A. (N.S.) 879.

And recovery has been denied where an employee was injured by a sudden movement of cars when he was attempting to pass between them. *Koke v. Andrews Steel Co.* (1912) 149 Ky. 627, 149 S. W. 968; *Hinson v. Atlanta & C. Air Line R. Co.* (1916) 172 N. C. 646, 90 S. E. 772 (under Employers' Liability Act); *Hall v. Houston & T. C. R. Co.* (1910) — Tex. Civ. App. —, 125 S. W. 946; *Plachetko v. Chicago, B. & Q. R. Co.* (1918) — Minn. —, 166 N. W. 338 (repair man injured while working between cars); *Louisville & N. R. Co. v. Cook* (1912) 150 Ky. 689, 150 S. W. 802 (engine inspector injured by hot water from blowpipe while in pit under engine inspecting chafing iron); *Doucette v. Boston & M. R. Co.* (1914) 77 N. H. 419, 92 Atl. 738 (employee going between cars to relieve himself when he might have seen an engine approaching had he looked).

In *Gignac v. Studebaker Corp.* (1915) 186 Mich. 574, 152 N. W. 1037, an employee of the defendant corporation, without stopping to see where the trainmen were, and without knowing but that they were signaling the train to back up or go ahead, placed his foot on a coupling in attempting to cross between a water tank and the end car, whereby his foot was crushed as the engine backed up. The court stated that, while it was clear that the claimant's injury was brought about by his own gross negligence, it was of the opinion that it could not be said as a matter of law that he was guilty of such intentional and wilful misconduct as would defeat recovery under the Workman's Compensation Act.

Whether a car inspector was guilty

of negligence in passing between cars was held a question for the jury in *Gjorvad v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1911) 116 Minn. 233, 133 N. W. 609, the court stating that, assuming that the evidence warranted the jury in finding that the head end of the train had come to a standstill with a space of 3 or 4 feet between the rear car and the stationary cars, the inspector would have a right to assume, in the absence of a signal from the engineer, that the head end would not back, and therefore that it would be safe to pass between the cars; and that it was not prepared to say that it was conclusively a reckless or dangerous act.

Generally, where an opening has been left between standing cars for persons to pass through, it is incumbent upon those moving the cars to give timely notice of their intention so to do before backing against the cars and closing up the space; in such a case an employee is not guilty of negligence as matter of law in passing between the cars. See the note in 46 L.R.A.(N.S.) 880.

So, in *Le Gwin v. Atlantic Coast Line R. Co.* (1915) 170 W. O. 359, 87 S. E. 99, an employee was held not guilty of contributory negligence in attempting to pass through cars intentionally separated for the benefit of employees, although by going about 100 feet he could have passed around the car in safety.

In *Janitus v. International Paper Co.* (1914) 112 Me. 519, 92 Atl. 653, a laborer returning to other employment after finishing his work of unloading a car was injured when cars between which he was passing, which had been separated to let the men through, were forced together by an engine. The court stated that plaintiff had the right to assume in the absence of knowledge to the contrary, that he could work in safety. He had been working but three days, and it cannot be said as matter of law that he assumed the risk. He had the further right to rely upon the belief that defendant had performed the duty of furnishing him a reasonably safe place in which to perform his work.

Where a servant in the course of his employment attempted to pass between cars instead of taking a safe way through a tunnel, whereby he was crushed when the cars were brought together, the court, in *Arnold v. Douglas & Co.* (1916) 176 Iowa, 405, 155 N. W. 845, said that he was, of course, bound to know that a crossing over a railroad track where cars are frequently moving is a place

of danger, and to adjust his conduct with reference thereto. But in crossing the yard he was in pursuit of his employer's business, and if he took the course generally taken by the great body of the employees with the knowledge and consent of the defendant, and the course taken by the officers, foremen, and others immediately representing the defendant, then he was not a trespasser, and the question whether he exercised reasonable care in choosing the route over the tracks instead of through the tunnel was for the jury, even though he chose the more dangerous one. In this case the employer was held liable in view of the custom known and acquiesced in by it, the court stating that the opening was apparently in the direct line of the way from the feed mill across to the office or shop which the servant was trying to reach in performance of the duties with which he was charged, and that it could not say that he was not justified in assuming that the passage had been opened to enable him and others to make their way across, and that it would not be suddenly closed upon him without warning.

So, where for convenience, as was customary with other employees, a servant went from the "heavy side" of a yard to the "light side" to get material, and was killed while passing between cars, the court, in *Norfolk & W. R. Co. v. Short* (1916) 171 Ky. 647, 188 S. W. 786, in holding the railroad company liable, said that the servant was not prohibited by any rule of the company from going to the light side of the yard; that it was customary for repair men to go any place in the yard where they could find the repair parts needed; that the servant came to his death while he was in the course of his employment, and that therefore the company owed him the same duty or care that it would have owed him if he had been working as a repair man on the light side of the yard. And, this being so, the fact that he went to the light side of the yard to get the material was not such negligence on his part as would preclude a recovery by his administrator upon the theory that his conduct was the sole cause of his death. He may have been guilty of contributory negligence in going between the cars without first satisfying himself that the place was free from danger, but the failure on his part to exercise this degree of care would not under the Employers' Liability Act prevent a recovery.

ery; it would only go to diminish the amount of the recovery. The court quotes as follows from *Illinois C. R. Co. v. Skaggs* (1915) 240 U. S. 66, 60 L. ed. 528, 36 Sup. Ct. Rep. 249, involving, however, injury to a brakeman by being knocked off the tender of an engine: "It cannot be said that there can be no recovery simply because the injured employee participated in the act which caused the injury. The inquiry must be whether there is neglect on the part of the employing carrier, and, if the injury to one employee resulted 'in whole or in part' from the negligence of any of its other employees, it is liable under the express terms of the act; that is, the statute abolished the fellow servant rule. If the injury was due to the neglect of a coemployee in the performance of his duty, that neglect must be attributed to the employer; and if the injured employee was himself guilty of negligence contributing to the injury, the statute expressly provides that it 'shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.'"

The failure of one who goes under or between cars to warn others of his presence not only bears upon the question of his own contributory negligence, when that is a defense, but may also tend to relieve the defendant of the charge of negligence, and thus negative any ground of action even under a statute like the Federal Employers' Liability Act, under which contributory negligence is not a defense. That phase of the subject, however, is not within the scope of the note, but a few cases are cited to illustrate the point.

Thus, where a car repairer went under a car to work in violation of a rule requiring the posting of signals, and was injured when other cars were moved against the one under which he was working, it was held, in *Kentucky & T. R. Co. v. Minton* (1915) 167 Ky. 516, 180 S. W. 831, that he could not recover either under the Federal Employers' Liability Act or the Federal Safety Appliance Act, having failed to show negligence of defendant toward him,—a prerequisite to recovery under either of the aforesaid acts. And another reason suggested by the court why a recovery should not be allowed against defendant under the Federal Employers' Liability Act was that plaintiff was not an employee of defendant, but of another railroad company, defendant's codefendant, L.R.A.1918C.

and by the express terms of the Employers' Liability Act, the carrier is liable to its employees only, for negligence resulting in their injury.

In *Helm v. Cincinnati, N. O. & T. P. R. Co.* (1913) 156 Ky. 240, 160 S. W. 945, an action brought under the Federal Employers' Liability Act, it is pointed out that the decision upon the appeal in (1912) 149 Ky. 340, 148 S. W. 25, which was brought under the state law, was not upon the ground that the plaintiff, who was a detective in the employ of defendant, engaged in examining car seals, was guilty of contributory negligence because he had concealed himself between the cars, but upon the ground that, he being concealed, there was no negligence on the part of the company's employees in moving the cars; and the same position was adhered to upon the appeal in the subsequent action, the court being of the opinion that there was no material change in the facts.

So, where a servant was injured while passing between cars to get material, there was a like ruling on similar facts in *Chicago & E. R. Co. v. Mitchell* (1915) 184 Ind. 588, 110 N. E. 680, under the Employers' Liability Act making an employer, with five or more persons employed, liable to an employee for negligent injury by a fellow servant, the effect of the act being to abrogate the assumed risk rule in so far as it applied to the particular risk of injury by a fellow servant. The court said that, if the danger was inherent or apparent in the employment, it might be appropriate to consider the question of the application of so much of the Employers' Liability Act as reads as follows: "In actions brought against any employer, . . . it shall not be a defense that the dangers or hazards inherent or apparent in the employment in which such injured employee was engaged contributed to such injury." However, the application of the statute was not discussed in the brief of either party, and in view of the conclusion reached the court did not consider the question. An instruction was erroneous under the common-law rule, which sought a direction of nonliability regardless of the element of knowledge, actual or constructive, on the part of the servant, of the danger in the way chosen. It is only where the servant has actual or constructive knowledge of the danger that recovery is precluded.

J. D. C.

MINNESOTA SUPREME COURT.

E. P. MOORHEAD, Resp't.,

v.

MINNEAPOLIS SEED COMPANY, Appt.

JOSEPHINE MATHEWS, Resp't.,

v.

SAME, Appt.

(— Minn.—, 165 N. W. 484.)

Evidence — sufficiency.

1. The evidence sustains a finding of the jury that in the course of negotiations with the plaintiffs the vice president and general manager of the defendant corporation made an oral warranty of the germinating power of seed wheat sold them; and the effect of such warranty was not as a matter of law annulled by printed disclaimers of warranty in the letter of confirmation, invoice, and shipping tags, though the contract was oral and within the Statute of Frauds.

For other cases, see *Evidence*, XII. i; *Sale*, II. c, in *Dig.* 1-52 N. S.

Corporation — warranty — authority of officers.

2. The vice president and general manager of the defendant, who had general charge of its office and plant, had authority to bind it by a warranty, though the making of warranties on the sale of seed grain was contrary to the custom of the trade.

For other cases, see *Corporations*, IV. g, 2, in *Dig.* 1-52 N. S.

Damages — failure of seed.

3. Where there is an entire failure of germination and therefore no crop, the measure of damages for the breach of warranty of germination is the amount paid for the seed, plus the cost of planting, plus the value of the use of the land for the cropping season, less the value of its use for a proper purpose to which it might reasonably have been put upon the ascertainment of a failure of germination, and not the value of the crop which would have been raised if the seed had been true to warranty, less the cost of planting and producing.

For other cases, see *Damages*, III. a, 4, c, in *Dig.* 1-52 N. S.

Evidence — sufficiency.

4. Whether the evidence sustains a finding that there was a breach of warranty in respect of the germinating power of the seed is questioned, but not decided.

For other cases, see *Evidence*, XII. i, in *Dig.* 1-52 N. S.

(December 14, 1917.)

Headnotes by DIBELL, C.

Note. — The liability of a vendor of seeds is treated in the notes to *Leonard Seed Co. v. Cray Canning Co.* 37 L.R.A.(N.S.) 79, and *Buckbee v. P. Hohenadel, Jr. Co.* L.R.A. 1916C, 1011; and see later cases, *Ford v. Farmers' Exch.* L.R.A.1917B, 1106, and *Slinger v. Totten*, L.R.A.1917C, 539. L.R.A.1918C.

APPEAL by defendant from an order of the District Court for Hennepin County denying its alternative motion for judgment or for a new trial in consolidated actions brought to recover damages for breach of an express warranty of the germinating power of seed wheat. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. Koon, Whelan, & Hempstead for appellant:

The evidence fails to establish the alleged contract of warranty of the quality and germination of the seed wheat in question, as a matter of law.

Sergeant v. Dwyer, 44 Minn. 309, 46 N. W. 444; *Waite v. McKelvy*, 71 Minn. 187, 78 N. W. 727; *Hanson v. Marsh*, 40 Minn. 1, 40 N. W. 841; *Scott v. T. W. Stevenson Co.* 130 Minn. 161, 153 N. W. 316; *McCarthy v. Nash*, 14 Minn. 127, Gil. 95; *Sprague v. Blake*, 20 Wend. 61; *Gaslin v. Pinney*, 24 Minn. 322; *Kileen v. Kennedy*, 90 Minn. 414, 97 N. W. 126; *Minneapolis & St. L. R. Co. v. Columbus Rolling Mills*, 119 U. S. 151, 30 L. ed. 377, 7 Sup. Ct. Rep. 168; *Ross v. Northrup, K. & Co.* 156 Wis. 327, 144 N. W. 1124; *Blizzard Bros. v. Growers' Canning Co.* 152 Iowa, 257, 132 N. W. 66; *Seattle Seed Co. v. Fujimori*, 79 Wash. 123, 139 Pac. 866; *Thompson v. Libby*, 34 Minn. 874, 26 N. W. 1; *R. M. Davis Photo Stock Co. v. Photo Jewelry Mfg. Co.* 47 Colo. 68, 104 Pac. 389, 19 Ann. Cas. 540.

Whatever warranty of said seed wheat defendant's manager may have given to plaintiffs, it was given without the authority, express or implied, of defendant, and did not bind it contractually.

Williston, Sales, § 445, pp. 765-767; *Benjamin, Sales*, 6th ed. pp. 580-621; 2 *Mechem, Sales*, § 1281; 31 *Cyc.* 1353; 2 *C. J.* 601; 30 *Am. & Eng. Enc. Law*, 2d ed. 165, 166; *Upton v. Suffolk County Mills*, 11 Cush. 586, 59 Am. Dec. 163; *Wait v. Borne*, 123 N. Y. 592, 25 N. E. 1053; *Bierman v. City Mills Co.* 151 N. E. 482, 37 L.R.A. 799, 56 Am. St. Rep. 635, 45 N. E. 856; *Reese v. Bates*, 94 Va. 321, 26 S. E. 865; *Pickert v. Marston*, 68 Wis. 465, 60 Am. Rep. 876, 32 N. W. 550; *Waupaca Electric Light & R. Co. v. Milwaukee Electric R. & Light Co.* 112 Wis. 469, 88 N. W. 308; *McCormick v. Kelly*, 28 Minn. 135, 9 N. W. 675.

The true rule for the measure of damages in cases of total loss of crop arising from failure of seeds to germinate and grow is the amount of money paid by plaintiffs for the seed wheat in question, the amount expended in cultivating and preparing the lands in question for planting and sowing said wheat, and the reasonable rent to compensate for the loss of the use of said lands

resulting from the total loss of crop, subject to be reduced by the amount for which the lands could have been rented for some other crop after discovery that said seed wheat would not germinate and grow.

1 Sedgw. Damages, 9th ed. 1912, § 191, pp. 364-366; 30 Am. & Eng. Enc. Law, 2d ed. pp. 219, 220; 35 Cyc. 479; Reiger v. Worth, 127 N. C. 230, 52 L.R.A. 362, 80 Am. St. Rep. 798, 37 S. E. 217; Ferris v. Comstock, 33 Conn. 513; Butler v. Moore, 68 Ga. 780, 45 Am. Rep. 508; Vaughan's Seed Store v. Stringfellow, 56 Fla. 708, 48 So. 410; Ford v. Farmer's Exch. 136 Tenn. 287, L.R.A.1917B, 1106, 189 S. W. 368.

Messrs. Stiles & Devaney, George C. Stiles, and D. C. Edwards for respondents.

Dibell, C., filed the following opinion:

These two actions to recover for the breach of an express warranty of the germinating power of seed wheat were tried together and there were verdicts for the plaintiffs. The defendant appeals from the order denying its alternative motion for judgment or a new trial.

The questions are these:

(1) Whether the evidence sustains a finding that an express warranty on the sale of seed wheat was made on behalf of the defendant by its vice president and general manager; and in connection with this, the effect of disclaimers of warranty printed on the letterhead confirming the sale, on the invoice, and on the shipping tags.

(2) Whether, in view of the custom not to warrant the germinating power of seed sold, the vice president and general manager had authority to bind the defendant by a warranty.

(3) Whether the measure of damages, there being an entire failure of germination and a consequent total loss of crop, is the value of the crop which would have been raised had the seed been true to warranty, less the cost of planting and producing, or the cost of the seed, plus the value of the use of the land, plus expenses incurred, less the value of the use of the land after the failure of germination.

(4) Whether the evidence sustains a finding that the seed was lacking in germinating power.

(1) About April 1, 1915, the plaintiffs entered into negotiations with the defendant through R. M. Johnston, its vice president and general manager, for the purchase of blue stem seed wheat for the seeding of their farms near Anamoose, North Dakota. Their testimony is that they told him that they had had trouble with germination, and inquired whether he would guarantee the seed which he proposed selling, and that he

then warranted it to be of 99 per cent germinating power. By common understanding the question of purchase was left open and was shortly afterwards closed over the telephone by an acceptance by the plaintiffs. By letter of April 6, the sale was confirmed in the usual way. At the top of the letter of confirmation was printed the following: "We give no warranty, express or implied, as to description, quality, productiveness, or any other matter, of any seeds we send out, and we will not in any way be responsible for the crop. If purchaser does not accept the seeds on these terms, they are to be returned at once. No complaints received after ten days from receipt of goods."

The wheat was sold f. o. b. and was delivered to the plaintiffs on April 6, on board a Soo car, the invoice was dated on that day, the bill of lading was issued to one of the plaintiffs on April 7, they prepaid the freight, the price was paid the defendant probably on April 8, and the wheat reached Anamoose on April 13, and was accepted by the tenants of the plaintiffs, and used in seeding. The invoice contained a printed disclaimer of warranty similar to that on the letter of confirmation, and a like disclaimer was on the shipping tags, on the reverse side of the address.

Johnston denies that a guaranty was asked or given, but says that there was some talk about germinating tests. No warranty was given in the letter of confirmation, but the results of germination tests were stated, and, so far as appears, were truthful. It is the contention of the defendant that, taking the evidence as a whole, it is insufficient to sustain a finding of a warranty; and it relies considerably upon the disclaimers of warranty. The contract of sale was oral and within the Statute of Frauds, and invalid until acceptance of the wheat or payment. Payment and acceptance pursuant to the contract satisfied the statute. Scott v. T. W. Stevenson Co. 130 Minn. 151, 153 N. W. 316; Perkins v. Thorson, 50 Minn. 85, 52 N. W. 272. Until payment or acceptance the contract was not complete or binding, a new term might be imported into it, or a term important in the negotiations might be eliminated at the will of either. The defendant cites on the question of disclaimers of warranty a line of cases of which Ross v. Northrup, K. & Co. 156 Wis. 327, 144 N. W. 1124; Blizzard Bros. v. Growers' Canning Co. 152 Iowa, 257, 132 N. W. 66; and Seattle Seed Co. v. Fujimori, 79 Wash. 123, 139 Pac. 866, may be taken as typical. Some of the cases of this character bear upon the question of an implied warranty that what is sold is true to variety or tradename. Here there is no

question of implied warranty. The cases do not go so far as to hold that if an express warranty is made its effect is obviated by the use of letters or invoices or shipping tags on which disclaimers are printed. We would not expect such a holding. These disclaimers are evidentiary in support of the defendant's contention. That far they should have effect. They are not conclusive. If a warranty was actually made during the negotiations, and not withdrawn or modified, it should be given effect irrespective of the printed disclaimers. See *Edgar v. Joseph Breck & Sons Corp.* 172 Mass. 581, 52 N. E. 1083.

The evidence in support of the warranty is not particularly convincing. There is much to indicate that the parties were talking about germinating tests, and not of a warranty of germinating power. However, there is evidence that the plaintiffs wanted to buy a warranty as well as seed, and that Johnston undertook to promise germinating results. The jury might well enough have found that there was no such promise, but instead they found that there was. We are dealing with a finding of the jury approved by the trial judge, who was in much better position than we are for judging testimony, and not with what we may think from a reading of the evidence might as well or better have been found. We hold that the evidence sustains the finding.

(2) The next question is upon the authority of Johnston to make a guaranty binding upon his corporation.

The argument of defendant is that when a custom of the trade not to warrant is shown, and here there was evidence of such a custom which for the purposes of this appeal we assume to be conclusive, authority to warrant cannot be implied. The theory is that implied authority in a selling agent to warrant comes from the fact that sales in the particular trade are commonly made with warranty, and when such is not the custom authority cannot be implied. *Upton v. Suffolk County Mills*, 11 Cush. 586, 59 Am. Dec. 163; *Wait v. Borne*, 123 N. Y. 592, 25 N. E. 1053; *Bierman v. City Villa Co.* 151 N. Y. 482, 37 L.R.A. 799, 56 Am. St. Rep. 635, 45 N. E. 856; *Waupaca Electric Light & R. Co. v. Milwaukee Electric R. & Light Co.* 112 Wis. 460, 88 N. W. 308; 2 C. J. 601; 31 Cyc. 1353; 30 Am. & Eng. Enc. Law, 165; *Williston, Sales*, § 445; 2 *Mechem, Sales*, §§ 1281 et seq.

Johnston was the vice president of the corporation and its general manager. He was in charge of its offices and plant. It does not appear that any other executive officer was about. So far as can be seen, one dealing with him was as near the

corporate entity as he could get. Unless a purchaser could take a warranty from him he could get none from anyone. There was, somewhere, corporate power to warrant. Conceding the rule of law claimed, and that a custom not to warrant was conclusively proved, we are of the opinion that a vice president and general manager having such charge of the company's operations and such general authority as is shown has implied authority to make a warranty binding the corporation.

(3) There was no germination and the failure of crop was total. The court held that the measure of damages was the value of the crop which would have been raised had the seed been true to warranty, less the expense of planting and producing. The defendant contends that the measure where the loss is total should be based upon the value of the use of the land of which the owner is deprived, plus the value of seed grain used and expenses incurred, and less any value in the use of the land after the failure of the seed to germinate. Where there is a partial crop, or crop of different variety than that promised by the warranty, the proper measure is the difference in value between the crop raised and the crop which would have been raised had the seed responded to the warranty. *Randall v. Raper*, El. Bl. & El. 84, 120 Eng. Reprint, 438, 27 L. J. Q. B. N. S. 266, 4 Jur. N. S. 662, 6 Week. Rep. 445; *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438; *Passinger v. Thorburn*, 34 N. Y. 634, 90 Am. Dec. 753; *Landreth v. Wyckoff*, 67 App. Div. 145, 73 N. Y. Supp. 388; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Edgar v. Joseph Breck & Sons Corp.* 172 Mass. 581, 52 N. E. 1083; *Dunn v. Bushnell*, 63 Neb. 568, 93 Am. St. Rep. 474, 88 N. W. 603; *Moody v. Peirano*, 4 Cal. App. 411, 88 Pac. 380; *Buckbee v. P. Hohenadel, Jr. Co.* L.R.A.1916C, 1001, 139 C. C. A. 478, 224 Fed. 14; *Grafton-Stamps Drug Co. v. Williams*, 105 Miss. 296, 62 So. 273; *Cline v. Mock*, 150 Mo. App. 431, 131 S. W. 710; *American Warehouse Co. v. Ray*, — Tex. Civ. App. —, 50 S. W. 763. Where there has been no germination it has been held that the damages should be measured by the cost of the seed, plus the cost of planting, plus the value of the use of the land, less any value in the use remaining at the time the seed failed to germinate. *Reiger v. Worth*, 127 N. C. 230, 52 L.R.A. 362, 80 Am. St. Rep. 798, 37 S. E. 217. It is manifest that where there is a partial crop, and that is the usual case, the first measure is the true one. There is no other. Some of the cases involving partial failures and applying the first measure distinctly state that the second measure is the true one when the loss is total. *Vaughan's Seed*

Store v. Stringfellow, 56 Fla. 708, 48 So. 410; Ford v. Farmers' Exch. 136 Tenn. 287, L.R.A.1917B, 1106, 189 S. W. 368. Still there are cases applying rather as a matter of course and without discussion the first measure when the failure is total. Shaw v. Smith, 45 Kan. 334, 11 L.R.A. 681, 25 Pac. 886; Crutcher v. Elliott, 13 Ky. L. Rep. 592; Van Wyck v. Allen, 69 N. Y. 61, 25 Am. Rep. 136; Depew v. Peck Hardware Co. 121 App. Div. 28, 105 N. Y. Supp. 390. The question does not often arise and is hardly considered in the cases cited. It is considered in treatises with scant recognition of the distinction, and there are few cases illustrating it. Williston, Sales, § 614; 2 Mechem, Sales, §§ 1827 et seq.; 1 Sutherland, Damages, § 61; 2 Sedgw. Damages, §§ 191, 768; 3 Joyce, Damages, § 1707; 35 Cyc. 479; 30 Am. & Eng. Enc. Law, 219; 43 Century Dig. Sales, § 1294; 17 Decen. Dig. id. § 442 (11). Writers, so far as they meet the question at all, join in approval of the second measure stated when the failure is entire. 2 Sedgw. Damages, §§ 191, 768; 30 Am. & Eng. Enc. Law, 219; 35 Cyc. 479.

The object of the law is to furnish a measure which will give, as near as may be, actual compensation for the breach, and which is free of uncertain, contingent, conjectural, or speculative elements. When damages are based upon the value of the use of the land the uncertainty of amount because of uncertainty of crop results is eliminated, and they may be assessed forthwith. We are of the opinion that when the failure of crop is entire, because of failure of germination, the damages should be based on the value of the use, with additions and deductions suiting the conditions of the particular case. The objection suggested by the plaintiffs that there was no fixed rental value in North Dakota is without substantial merit. There need be no market rental value. It is enough if the use value is determined, and that may be found without the aid of a market value. Farmers and others qualified to testify may furnish proof of value. In Nelson v. Minneapolis & St. L. R. Co. 41 Minn. 131, 42 N. W. 786, Justice Mitchell, in a case involving a question of at least as great difficulty, said: "What the law aims at is compensation; and the matter of ascertaining the rental value, or how much it has been depreciated, is a practical question, to be treated in a practical way, and to the consideration of which it is necessary to bring a little of the farmer as well as the lawyer."

(4) The defendant contends that the finding of the jury that the seed lacked ger-

minating power is unsustained by the evidence. The situation presented is peculiar. The seed was bought for three farms, the Moorhead farm, the Mathews farm, and the Roberts farm. It was put into separate sacks and those intended for each of the farms were separately designated by the shipping tags. It was shipped in one car to Anamoose. One Okert, who was the tenant for Moorhead and Mathews, hauled the seed for their farms. One Budeau, who was the tenant of Roberts, hauled the seed for the Roberts farm. Okert planted the Moorhead and Mathews farms and the seed failed to germinate. Before planting he submitted it to a formaldehyde treatment. Budeau planted his without treatment and it grew well. Altogether 475 bushels went to the Moorhead, Mathews, and Roberts farms. It came, as the evidence tends to show, and perhaps shows conclusively, from a mass of 752 bushels in the defendant's warehouse. This left 277 bushels. Of this amount 273 bushels were delivered at Madison Lake, Minnesota, and planted by twelve different farmers. All of it grew well. The remaining four bushels are not accounted for. Budeau had 5 bushels left. He let Okert have this, and he planted it on the Mathews land after submitting it to the formaldehyde treatment. It grew well. The growing season and soil conditions were good. Other wheat planted by Okert and submitted to the formaldehyde treatment grew. The seed furnished was good in appearance. It is claimed by the defendant that the formaldehyde treatment destroyed the germination. There is evidence that this treatment should be applied with some caution and that there is some danger attendant upon its use. It is difficult to understand how seed wheat of almost any kind, and especially that having the appearance of this, would fail to germinate to the extent claimed; that is, not a few per cent of it, but more than 95 per cent. The formaldehyde treatment may be attended with some danger, but it is difficult to understand how its ordinary use could destroy not a small percentage of it but 95 per cent. There is some difficulty in saying that the evidence sustains a finding that the wheat was without germinating power. There must be a new trial for the reasons stated in paragraph 3, and we leave the question of the sufficiency of the evidence to show lack of germinating power undecided. Additional evidence may be produced at another trial. It is not at this time a case for judgment notwithstanding.

Order reversed.

MISSISSIPPI SUPREME COURT.
(Division A.)

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY, Appt.,

YAZOO CITY.

(— Miss. —, 77 So. 152.)

Bond — official — liability of surety.

The sureties on the bond of a city clerk whose authority is limited to the collection of the taxes for privilege licenses are not liable to the city for money misappropriated by him after he had collected it from the superintendent of the city street car line, when it should have been placed in the city depository by the superintendent.

For other cases, see *Bonds*, II. c, 1, in *Dig.* 1-52 N. S.

(January 2, 1918.)

APPEAL by defendant from a decree of the Chancery Court for Yazoo County in favor of plaintiff in a suit to hold defendant liable as surety on the official bond of the city clerk. *Reversed.*

The facts are stated in the opinion.

Messrs. Barbour & Henry, for appellant:

There is no liability on the part of defendant as surety of the city clerk.

People v. Pennoek; 60 N. Y. 421; Lewis v. Johnson, Walk. (Miss.) 260; Brooks Oil Co. v. Weatherford, 91 Miss. 501, 44 So. 928; State ex rel. Brennan v. Dierker, 101 Mo. App. 636, 74 S. W. 153; Wilson v. Unselt, 12 Bush. 218; Luther v. Banks, 111 Ga. 374, 36 S. E. 826; Hawkins v. Thomas, 3 Ind. App. 399, 29 N. E. 157; 25 Am. & Eng. Enc. Law, 728; Ahorn v. State, 57 Miss. 273; Denio v. State, 60 Miss. 949; State use of Lafayette County v. Hall, 68 Miss. 719, 10 So. 54; San Luis Obispo County v. Farnum, 108 Cal. 562, 41 Pac. 445.

Messrs. Holmes & Holmes, for appellee:

Defendant is liable as surety on the bond of the city clerk.

George A. Hormel & Co. v. American Bonding Co. 112 Minn. 288, 33 L.R.A. (N.S.) 513, 128 N. W. 12; State use of McLaurin v. McDaniel, 78 Miss. 1, 50 L.R.A. 118, 84 Am. St. Rep. 618, 27 So. 994; Lizana v. State, 109 Miss. 464, 69 So. 292; People ex rel. Kellogg v. Schnyler, 4 N. Y. 187; People v. Van Ness, 79 Cal. 64, 12 Am. St. Rep. 134, 21 Pac. 554.

Note. — As to liability of public officer's bondsmen to public corporation for money received or collected by him without authority, see annotation following this case, post, 397.
L.R.A.1918C.

Sykes, J., delivered the opinion of the court:

The appellee, Yazoo City, filed suit in the chancery court of Yazoo county against Hugh W. McCormick and the appellant company, surety on the official bond of McCormick as city clerk of Yazoo City. A decree was rendered in favor of the city for the sum of \$942.59, and the surety company alone prosecutes this appeal to this court.

The bond made by the appellant company is in the usual form of surety bonds. The condition of the bond alleged to have been breached is that portion reading as follows: "That if the said Hugh W. McCormick shall, from the 5th day of December, 1910, well and faithfully perform all the duties of the said office."

The bill alleges that the said McCormick failed and neglected and refused to account for and pay over to the complainant the sum of \$942.59. The testimony in the lower court was conflicting as to whether or not the city clerk, as a matter of fact, received this money; but the chancellor decided this fact in favor of the appellee. We will therefore state the facts as found by the chancellor.

During the life of the bond in suit, and while McCormick was the city clerk, a Mr. Rivers, the superintendent of the street car line in Yazoo City, which line belongs to the city, from time to time, paid over to McCormick, city clerk, the amount of \$942.59. This amount McCormick failed to turn over to the city, but appropriated it to his own use. The testimony in the case shows that the only moneys which could be collected by the city clerk were those due as city tax privilege licenses. At the time of the alleged defalcation there was an ordinance of the city, duly and legally adopted, and in full force and effect, § 3 of which is as follows: "All moneys collected by the said Rivers shall be paid into the city depository, to the credit of the street railway fund, and no moneys shall be paid out except upon warrant of this board."

One of the banks had been regularly selected as a city depository. Despite the above ordinance, the testimony shows that Mr. Rivers had ignored the same with the knowledge of the city officials, and had made a practice of turning over to the city clerk the street railway money.

It is the contention of the appellant surety company that, since the payment of this money by the superintendent of the street car line to the city clerk was in direct violation of the city ordinance in effect when these payments were made, and since the only moneys which could be collected by the city clerk were those for privilege

tax licenses, then this money was not paid to the clerk either *virtute officii* or *colore officii*, and therefore it was not in the contemplation of the surety on this bond, and that it could not be held liable for this money.

After a most careful consideration of the case and all of the authorities cited in the briefs of learned counsel, and also of other authorities not cited, we are of the opinion that the surety company cannot be held liable. We do not think there was any real or apparent authority vested in McCormick, the city clerk, to receive these moneys, and this fact was well known to Mr. Rivers when he paid the same to the clerk. It is the contention of appellee that the money was paid to the city clerk under color of his office. A careful examination of all the authorities in Mississippi, and those which have fallen under our observation in other states, however, leads us to the conclusion that before the bondsmen can be held in a case of this character there must at least have been some apparent authority for the receipt of the money by the official whose bond is in suit. In *Adams v. Williams*, 97 Miss. 113, 30 L.R.A. (N.S.) 855, 52 So. 865, Ann. Cas. 1912C, 1129, the moneys came into possession of Williams by virtue of his being the treasurer of the levee board. In the case of *Lewis v. State*, 65 Miss. 468, 4 So. 429, it was the duty of the circuit clerk to issue witness certificates under certain circumstances. He had the real authority to issue these certificates in proper cases; he therefore had apparent authority to issue any witness certificates, and the forged certificates in that case were therefore issued under his apparent authority, or *colore officii*. In the case of *Adams v. Saunders*, 89 Miss. 799, 110 Am. St. Rep. 720, 42 So. 602, 11 Ann. Cas. 327, Saunders was the tax collector of Oktibbeha county, and had the apparent authority to collect the taxes therein collected by him. These taxes were therefore collected by him *colore officii*. In the case of *State use of McLaurin v. McDaniel*, 78 Miss. 1, 50 L.R.A. 118, 84 Am. St. Rep. 618, 27 So. 994, the mayor was acting within the apparent scope of the authority of his office, in the line of his official duty. His action was merely in excess of his jurisdiction, and, for that reason, what he did was done *colore officii*. The same rule was reannounced and affirmed in the case of *Lizana v. State*, 109 Miss. 464, 69 So. 292.

Under the above ordinance it is perfectly clear that the city clerk had no more apparent authority to receive this money from Rivers than did the city marshal or any other city official. He had no more right to receive it than a circuit or chancery clerk

would have to go out and collect taxes. In the case of *Matthews v. Montgomery*, 25 Miss. 150, a suit against the sureties on the official bond of the clerk of Madison county, wherein it was alleged that the clerk had collected certain fees belonging to the sheriff, the court, in part, said: "The only question made is whether the action can be maintained on the bond. The bond is conditioned that the clerk shall faithfully perform those duties required of him by law. It is no part of his duties to collect or receive the fees due other officers of the court. He is not in such case the officer of the law to receive the fees, or the agent of the officer for that purpose, but only the agent of the party paying."

See also *Lewis v. Johnson*, Walk. (Miss.) 260; *Furlong v. State*, 58 Miss. 717; *Brown v. Phipps*, 6 Smedes & M. 51; *Brown v. Mosely*, 11 Smedes & M. 354.

It was held in the case of *Brooks Oil Co. v. Weatherford*, 91 Miss. 501, 44 So. 928, that, where a judgment debtor pays money to the sheriff in order to satisfy a judgment, but before any execution has been placed in the hands of the sheriff, this constituted no payment of the judgment. The court, in part, said: "When the payment was made to the sheriff, he was simply the agent of Weatherford, and, if he did not pay it over, Weatherford must look to him for it."

In the case of *Alcorn v. State*, 57 Miss. 273, it was held that the sureties on the bond of a chancery clerk are not liable for money received by him as a commissioner, though his appointment as such commissioner was by virtue of his office as chancery clerk. See also *Denio v. State*, 69 Miss. 949. The case of *San Luis Obispo County v. Farnum*, 108 Cal. 562, 41 Pac. 445, is similar in principle to the case under consideration: "A cause of action is stated against Farnum independently of the allegations relating to the bond, which may be treated as surplusage. That the money in question, having been collected by the tax collector for licenses, belonged to the county, is not questioned; but that it came to the hands of defendant Farnum as auditor is a conclusion of law wholly unsupported by the facts found. There is no provision of law authorizing the auditor to receive it, nor any authorizing the tax collector to pay over such moneys to him, or to anyone except the county treasurer. Having received the money, it was Farnum's duty to pay it over to the treasurer; but such duty did not arise out of his office, nor was it at all different from the duty which would have rested upon him to pay it over had he been a plain citizen, not holding any county office. Farnum did not

even receive the money *colore officii*, for under on circumstances was he authorized or required by law to receive it. The condition of the bond sued upon is not that Farnum should be personally honest, or pay his personal debts, or discharge those private duties and obligations which he may have assumed; but the condition is that he 'shall well and faithfully perform all official duties required of him by law.' The 'official duties' here specified are the duties required by law of the county auditor, and none other."

The overwhelming weight of authority is in line with the decision above quoted. Before an act is done under color of office, there must be an appearance of right given under the law to do the act; or, in other words, there must be at least apparent authority for the doing of the act. When the city ordinance provides the only way for the handling of the street car fund, then there certainly can be no apparent author-

ity for the payment of this fund to the city clerk. Rivers directly violated the ordinance when he did so. The city clerk violated the ordinance when he received the money. It was the duty of Rivers to have paid this money into the city depository. He failed so to do, but, by paying it over to the city clerk, he thereby merely made the clerk his agent to pay the money into the proper depository.

The money was not paid to McCormick either by virtue of his office or under color of his office. Before the surety can be held liable on this bond, it is necessary for the city to prove that the money came into the hands of the city clerk either *virtute officii* or *colore officii*, and this the proof fails to show. The decree of the lower court is reversed, and a decree will be entered here in favor of the appellant.

Suggestion of error overruled.

Annotation—Liability of public officer's bondsmen to public corporation for money received or collected by him without authority.

On right of public to fees unlawfully collected by officer for his own benefit, see note to *State ex rel. McNary v. Dunbar*, 20 L.R.A.(N.S.) 1015.

On recovery of fees exacted by public officer for performing act for which he was not authorized to demand compensation, see note to *Trower v. San Francisco*, 15 L.R.A.(N.S.) 183.

And on liability of public officer or his bond for interest received on public money, see notes to *Adams v. Williams*, 30 L.R.A.(N.S.) 855, and *State v. Schamber*, L.R.A.1918B, 803.

The position taken by the court in *UNITED STATES FIDELITY & G. Co. v. YAZOO CITY*, ante, 395, that the bond of a public officer does not ordinarily cover money received or collected by him without at least "some apparent authority," is supported by practically all the cases cited in this annotation; but the question whether "apparent authority," without real authority, is sufficient to bind the sureties, is not so well settled, assuming, as the court apparently holds, that "apparent authority" constitutes *color officii*.

Thus, the court in *State use of Board of Education v. Griffith* (1906) 74 Ohio St. 80, 77 N. E. 686, 6 Ann. Cas. 917, said: "But it is insisted that the receipt of these moneys by the clerk was *colore officii*, if not *virtute officii*, and that for acts *colore officii* sureties are held responsible in this state. While there has

been confusion of terms in some cases, and possibly a confusion of classification in some instances, yet this conclusion results from the cases in this state and elsewhere, that there are three classes of cases against sureties on official bonds: One class in which the officer acts, *virtute officii*, within his official authority, but unfaithfully or improperly exercised his official duties; and another class, in which the officer, while acting *colore officii*, with pretense of official authority, is guilty of trespass upon person or property. Of this class illustrations are found in *State use of Story v. Jennings* (1854) 4 Ohio St. 418, and *Drolesbaugh v. Hill* (1901) 64 Ohio St. 257, 60 N. E. 202. In both of the classes already named, the sureties are generally held to be liable. The third class is of those cases in which the officer has been guilty of misconduct which is wholly outside of the line of his official duty as defined by law. In this class of cases the sureties have generally, and we believe upon the soundest of reasoning, been held not to be liable."

Some courts have held that the sureties on the bond of a public officer are not liable to the public corporation for money received or collected not *colore officii*, raising a strong implication that they would be liable if the money had been so received or collected. *State v. Cottle* (1904) 29 Ohio C. C. 32; *State use of Board of Education v. Griffith* (1906) 74 Ohio St. 80, 77 N. E. 686, 6 Ann. Cas.

1917; *Saner v. Madisonville* (1908) 30 Ohio C. C. 681. If the cases holding official sureties liable to the individuals from whom they received the money can be regarded as analogous, many cases could be cited directly supporting this implication. See quotation from *State use of Board of Education v. Griffith* (Ohio) supra. See also cases cited in the note to *McLendon v. State*, 21 L.R.A. 738.

In *State v. Cottle* (Ohio) supra, it was held that the bondsmen for a school official who had received money that should have been paid to the treasurer, under an illegal order of the board of education, and had failed to account for it, were not liable, the court remarking that the money was not received *colore officii*, "because there were no other similar acts pertaining to his office prescribed by law."

In *San Luis Obispo County v. Farnum* (1895) 108 Cal. 563, 41 Pac. 455 (see quotation from this case by the court in *UNITED STATES FIDELITY & G. Co. v. YAZOO CITY*, ante, 395), it was alleged that the county auditor had received money from the license tax collector due to the county, but under the law the duty of the collector was to pay the money to the county treasurer, and the county auditor had no authority to receive it. The court held that the money could not have been received *colore officii*; hence the auditor's official sureties were not liable to the county, even though it never received the money from the auditor.

Where a county assessor collected taxes that should have been collected by other officials, according to statute, and failed to account to the county for the same, the county cannot hold his official sureties liable, since the collection was not made *colore officii*. *Bute v. Bennetts* (1915) 51 Mont. 27, 149 Pac. 92.

"Color of his office," as used in a statute providing that "every official bond is obligatory on the principal and sureties thereon . . . for the use and benefit of every person who is injured as well by any wrongful act committed under color of his office as by his failure to perform, or the improper or neglectful performance of those duties imposed by law," means that whenever a public officer claims that a fee is due him for services which he claims he rendered as a public officer, the claim is made under "color of his office," and if he receives that fee, he receives it under color of his office, and his bondsmen are liable if he receives such fee illegally. *Mobile L.R.A.* 1918C.

County v. Williams (1913) 180 Ala. 639, 61 So. 963.

Other courts have held that money collected *colore officii*, but not by virtue of office, is not within the rule that the sureties on the officer's bond are liable for money lost or misappropriated. *State v. Porter* (1903) 69 Neb. 203, 95 N. W. 769; *People v. Pennock* (1875) 60 N. Y. 421; *Lowe v. Guthrie* (1896) 4 Okla. 287, 44 Pac. 198; *McCrory v. Woods County* (1915) 48 Okla. 684, 150 Pac. 683; *Hughes v. Oklahoma County* (1915) 50 Okla. 410, 150 Pac. 1029; *Creek County v. Vaughn* (1915) — Okla. —, 152 Pac. 115; *Shelton v. State* (1917) — Okla. —, 162 Pac. 224.

So, in *Hughes v. Oklahoma County* (1915) 50 Okla. 410, 150 Pac. 1029, supra, where the officer had presented excessive claims for fees and emoluments, and the county had paid more than was allowed by law, the court said: "But it is said that the clerk received these sums by virtue of his office, because he had the lawful right to present his claims for compensation. It is granted that he had such right, but it by no means follows that, because he had the right to claim lawful compensation, this right would embrace a claim for sums to which he was not entitled, and the payment of which to him would be in violation of law. Therefore we are fully convinced that in claiming and receiving from Oklahoma county these sums to which he was not entitled, he was a mere trespasser, if such a term may properly be applied to this kind of conduct; in other words, these sums came into his hands in no sense *virtute officii*, and the most that can be said would be that they came into his hands *colore officii*. An officer's bond was not intended to, and does not, cover all the things he may do or fail to do while in office. Its purpose is to guarantee the officer's conduct and good faith in performing his official duties; and its obligation, as has been seen, extends only to such officer's sins of commission and omission in the performance of, or failure to perform, some duty of his office. It was not the duty of his office to get money illegally from the treasury of Oklahoma county under the claim and guise of compensation. Besides, the board of county commissioners are in a sense managers and administrative agents of the county; they have charge of the expenditures of the county funds; it was their business to safeguard those funds and see to it that they were not paid out improperly to officers or anybody else who might see fit to make a

claim. This loss has occurred, primarily, through their dereliction: it was their error. While the clerk participated to the extent of making the claims, the grievous fault was with the board of county commissioners in erroneously paying them. To extend the obligation of this bond to cover sums so paid seems to us too much like holding it for the default of other officers, for which they had no intention to become surety. Therefore it seems quite clear to us that the items under discussion are not covered by the obligation of the bond."

So, where the secretary of state collected money under a statute which purported to authorize the collection, but which was held unconstitutional by the court, it was held that the collection was under color of the office, but not by virtue thereof; hence the sureties were not liable. *State v. Porter (Neb.) supra*.

And where the statute directs that taxes levied by the board of supervisors for the relief of the poor to be paid to the overseers of the poor, and those levied for highway purposes be paid to the commissioners of highways, the official bondsmen of a supervisor are not liable for money collected for these purposes, paid by the collector to the supervisor and misappropriated by him, for the reason that the money was not received by virtue of the office, but merely *colore officii*, even though the warrant issued to the collector directed him to pay the money to the supervisor, the condition of the bond being that the official should account for all moneys coming into his hands "as supervisor." *People v. Pennock (1875) 60 N. Y. 421, supra*.

Sureties on the bond of a justice of the peace are not liable to the county for money received by the officer through the illegal action of the county commissioners, since such money is not received by virtue of the office. *Creek County v. Vaughn (1915) — Okla. —, 152 Pac. 115*.

Where the county, after the expiration of the term of its county clerk, and after his successor has taken charge of the office, pays him money to which he is not entitled, but which is supposed to be due him for fees earned while in office, and he fails to return the money, the sureties on his official bond are not liable for the amount, since he does not receive the money by virtue of his office. *People use of Logan County v. Toomey (1887) 122 Ill. 308, 13 N. E. 521*.

The sureties on the official bond of a county attorney are not liable to the state for money collected by him on notes

given by farmers for seed furnished by the state, which the law requires to be collected by the county commissioners, it not being the official duty of the county attorney to collect the money. *Wilson v. State (1903) 67 Kan. 44, 72 Pac. 517*.

In view of the difference of opinion among the courts not only as to what constitutes *colore officii*, but as to the effect of receiving or collecting money under color of office to make the officer's bondsmen liable, the more practical way would seem to be to decide each case upon the particular facts, having regard to the wording of the bond in connection with the statute under which it was given, and applying the well-settled rule that sureties are entitled to a strict, although perhaps not a technical, construction of the instrument. This method of dealing with the question necessarily involves the question, not treated in the present annotation, of what constitutes authority. A few cases are set out below for the purpose of illustration, but the list is not intended to be exhaustive.

The sureties of the auditor of the District of Columbia are not liable for moneys received by the clerk in the auditor's office as money for street improvement under the rules promulgated by the commissioners of the District, for the reason that the commissioners had no authority to make rules on the subject; hence the taxes were not public money, and the auditor's office had no authority to receive the money as a public fund. *District of Columbia v. Petty (1913) 229 U. S. 593, 57 L. ed. 1343, 33 Sup. Ct. Rep. 881*.

The official bond of a county judge does not cover money that he received over and above his salary for work which he had no legal right to perform, and for which the county had no right to pay him. *Clark v. Logan County (1910) 138 Ky. 676, 128 S. W. 1079*. The same is true of fees received by a county clerk under orders that the court had no legal authority to make. *Elliott v. Com. (1911) 144 Ky. 335, 138 S. W. 800*. But the official bond covers the amount that such clerk received from the county on forged warrants drawn upon the treasurer. *Title Guaranty & S. Co. v. Com. (1912) 146 Ky. 702, 143 S. W. 401*.

Likewise, it was held in *Furlong v. State (1881) 58 Miss. 717*, that the bondsmen of a sheriff are not liable for money received by him from the state for boarding prisoners, even though his statement of claim upon which he obtained the money was false and the

money thus fraudulently secured. The decision is based upon the finding that the claim was that of the individual, and not of the officer.

And where the duty of collecting insurance fees is, by the Constitution, imposed upon the state treasurer, the sureties of the state auditor are not liable to the state if the auditor collects such fees and fails to account to the state for them. *State v. Moore* (1898) 56 Neb. 82, 76 N. W. 474.

"The sureties on the bond of a county clerk are not liable for the proceeds arising from the sale of vacant lands, where there is no order of court authorizing him to receive such funds." *Hoover v. Wortham* (1880) 1 Ky. L. Rep. 59. It is not clear from the abstract report of this case whether or not the effort to collect was made on behalf of an individual.

In *State use of Baltimore v. Norwood* (1858) 12 Md. 177, it was held that, since it was no part of the duties of the clerk of the court of common pleas to collect the license fees of taverns, his official sureties were not liable for money which he collected for such licenses, for which he failed to account to the public authorities.

Likewise, it was held in *State v. Moeller* (1871) 48 Mo. 331, that the sureties on the bond of the clerk of the county court were not liable for money collected and appropriated by him, as moneys arising from the sale of swamp lands and as moneys received under the Stray Act, it not being the legal duty of the clerk to receive such moneys.

But it has been held that, although there was no law authorizing a county

auditor to receive the fees for issuing marriage licenses, his sureties are liable on his official bond if he receives such fees and embezzles them, since the fees were paid to him by reason of his official position. *Skagit County v. American Bonding Co.* (1910) 59 Wash. 8, 103 Pac. 199.

The proceeds of bonds and fines in criminal prosecutions, payable to the county treasurer upon receipt of them by the state's attorney for the county, are "moneys belonging to the state," within the meaning of the bond given by the state's attorney conditioned that such officer shall "annually account for, and pay over according to law, all moneys belonging to the state which he may receive as attorney for the state," so that the sureties on such bond are liable in an action by the state treasurer for all such money collected by the state's attorney, even though he has accounted for all money that is by law payable to the state treasurer. *Gilbert v. Isham* (1844) 16 Conn. 525.

Where a city treasurer reported to the council, as required by statute, the amount of money he had collected as treasurer, including some collected illegally,—some that neither he nor any other official had a legal right to collect,—it was held, in *Philipsburg v. Degenhart* (1904) 30 Mont. 299, 76 Pac. 694, that his official bondsmen were liable for the money at the suit of the city, it alleging a failure to account, for the reason that the report was an acknowledgment that he had collected the money "as city treasurer," and all such money is covered by the bonds. J. W. M.

NEW YORK COURT OF APPEALS.

WILLIAM G. BARRETT et al., Respts.,
v.

STATE OF NEW YORK, Appt.

(220 N. Y. 423, 116 N. E. 99.)

Game — protection of beavers — destruction of property.

1. The state may protect wild beavers although they are destructive to private property.

For other cases, see Game and Game Laws, in Dig. 1-52 N. S.

Note.—For constitutionality of game laws as affected by the fact that the game protected is destructive of private property, see annotation following this case, post, 404.

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Same — police power — protection of beaver dams.

2. Forbidding the destruction of beaver dams is a proper exercise of the police power, although the beavers will destroy trees on neighboring land for food, if the owner of the trees is not prohibited from protecting them by fencing or driving the beavers away from them.

For other cases, see Constitutional Law, 11, c, in Dig. 1-52 N. S.

State — liability for injury by animals.

3. The state is not liable for injury to private property by beavers which it imports and attempts to protect by statute, whether the statute is constitutional or not. *For other cases, see State, in Dig. 1-52 N. S.*

(April 17, 1917.)

A PPEAL by the State from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a determination of the Board of Claims in favor of plaintiffs in an action brought to recover damages for losses alleged to have been due to negligence of the State in not properly protecting trees on their lands from destruction by wild beaver. Reversed.

The facts are stated in the opinion.

Mr. Edmund H. Lewis, with Mr. Egbert E. Woodbury, Attorney General, for the State:

The statutes enacted for the protection and preservation of beaver were within the proper exercise of police power.

Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; *People v. Bootman*, 180 N. Y. 1, 72 N. E. 505, 2 Ann. Cas. 226; *Phelps v. Racey*, 60 N. Y. 10, 10 Am. Rep. 140; *People ex rel. Hill v. Hesterberg*, 184 N. Y. 126, 3 L.R.A. (N.S.) 103, 128 Am. St. Rep. 528, 76 N. E. 1032, 6 Ann. Cas. 353, affirmed in 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; *Lawton v. Steele*, 119 N. Y. 228, 7 L.R.A. 134, 16 Am. St. Rep. 813, 23 N. E. 878, affirmed in 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *People v. Griswold*, 213 N. Y. 92, L.R.A. 1916D, 538, 106 N. E. 929; *People v. C. Klinck Packing Co.* 214 N. Y. 121, 108 N. E. 278, Ann. Cas. 1916D, 1051; *People ex rel. Knoblauch v. Warden*, 216 N. Y. 154, 110 N. E. 451.

The protection of beaver being a valid exercise of police power, the injury for which claimants seek relief herein is *damnum absque injuria*.

Phelps v. Racey, 60 N. Y. 10, 19 Am. Rep. 140; *Atwater v. Canandaigua*, 124 N. Y. 602, 27 N. E. 386; *Uppington v. New York*, 165 N. Y. 222, 53 L.R.A. 550, 59 N. E. 91, 9 Am. Neg. Rep. 115; *Fries v. New York & H. R. Co.* 169 N. Y. 270, 62 N. E. 358; *Muhler v. New York & H. R. Co.* 173 N. Y. 549, 66 N. E. 558; *Chase-Hibbard Mill. Co. v. Elmira*, 207 N. Y. 460, 47 L.R.A. (N.S.) 470, 101 N. E. 158.

Where an injured party has it within his power to take reasonable measures by which his loss may be prevented, his omission to avail himself of such means defeats his recovery.

8 R. C. L. p. 442; *Milton v. Hudson River S. B. Co.* 37 N. Y. 214; *Beattie v. New York & L. I. Constr. Co.* 196 N. Y. 346, 89 N. E. 831; *Rexter v. Starin*, 73 N. Y. 601; *Hogle v. New York C. & H. R. R. Co.* 28 Hun, 363.

Messrs. Burns & Fenno, for respondents:

The state owned and was in actual physical possession of the beaver liberated on Eagle creek. The act of the state in liberating the beaver, knowing of their natural

propensity to destroy trees, makes the state liable for the damage done to claimants' property by the beaver.

Cooley, Torts, p. 122; *State v. House*, 65 N. C. 315, 6 Am. Rep. 744; *Keshan v. Gates*, 2 Thorp. & C. 288; *Worth v. Gilling*, L. R. 2 C. P. 3; *Van Leuven v. Lyke*, 1 N. Y. 516, 49 Am. Dec. 346, 1 Am. Neg. Cas. 428; *Earl v. Van Alstyne*, 8 Barb. 633; *Congress & E. Spring Co. v. Edgar*, 99 U. S. 645, 25 L. ed. 487, 1 Am. Neg. Cas. 375.

The legislature has the authority to make reasonable regulations as to the preservation of game. It has not the right, however, under the guise of police power, to protect an animal such as the beaver which is known to be destructive to property. This is an unreasonable exercise of the police power, and the acts protecting the beaver are unconstitutional.

People v. Bootman, 180 N. Y. 1, 72 N. E. 505, 2 Ann. Cas. 226; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Forster v. Scott*, 136 N. Y. 577, 18 L.R.A. 543, 32 N. E. 976; *Geer v. Connecticut*, 161 U. S. 533, 40 L. ed. 798, 16 Sup. Ct. Rep. 600.

Andrews, J., delivered the opinion of the court:

At one time beaver were very numerous in this state. So important were they commercially that they were represented upon the seal of the New Netherlands and upon that of the colony as well as upon the seals of New Amsterdam and of New York. Because of their value, they were relentlessly killed, and by the year 1900 they were practically exterminated. But some fifteen animals were left scattered through the southern portion of Franklin county. In that year the legislature undertook to afford them complete protection, and there has been no open season for beaver since the enactment of chapter 20 of the Laws of 1900.

In 1904 it was further provided that "no person shall molest or disturb any wild beaver or the dams, houses, homes or abiding places of same." Laws 1904, chap. 674, § 1.

This is still the law, although in 1912 the Forest, Fish, and Game Commission was authorized to permit protected animals which had become destructive to public or private property to be taken and disposed of. Laws 1912, chap. 318.

By the Act of 1904, \$500 was appropriated for the purchase of wild beaver to restock the Adirondacks, and in 1906 \$1,000 more was appropriated for the same purpose. The Commission, after purchasing the animals, was authorized to liberate them. Under this authority twenty-one beaver have

been purchased and freed by the Commission. Of these four were placed upon Eagle creek, an inlet of the Fourth lake of the Fulton chain. There they seem to have remained and increased.

Beaver are naturally destructive to certain kinds of forest trees. During the fall and winter they live upon the bark of the twigs and smaller branches of poplar, birch, and alder. To obtain a supply they fell even trees of large size, cut the smaller branches into suitable lengths, and pull or float them to their houses. All this, it must be assumed, was known by the legislature as early as 1900.

The claimants own a valuable tract of woodland upon Fourth lake bounded in the rear by Eagle creek. Their land was held by them for building sites and was suitable for that purpose. Much of its attractiveness depended upon the forest grown upon it. In this forest were a number of poplar trees. In 1912 and during two or three years prior thereto 198 of these poplars were felled by beaver. Others were girdled and destroyed. The Board of Claims has found, upon evidence that fairly justifies the inference, that this destruction was caused by the four beaver liberated on Eagle creek and their descendants, and that by reason thereof the claimants have been damaged in the sum of \$1,900. An award was made to them for that sum, and this award has been affirmed by the appellate division. To sustain it the respondents rely upon three propositions. It is said: First, that the state may not protect such an animal as the beaver which is known to be destructive; second, that the provision of the Law of 1904 with regard to the molestation of beaver prohibits the claimants from protecting their property, and is therefore an unreasonable exercise of the police power; and, third, that the state was in actual physical possession of the beaver placed on Eagle creek, and that its act in freeing them, knowing their natural propensity to destroy trees, makes the state liable for the damage done by them.

We cannot agree with either of these propositions.

As to the first, the general right of the government to protect wild animals is too well established to be now called in question. Their ownership is in the state in its sovereign capacity, for the benefit of all the people. Their preservation is a matter of public interest. They are a species of natural wealth which without special protection would be destroyed. Everywhere and at all times governments have assumed the right to prescribe how and when they may be taken or killed. As early as 1705, New York passed such an act as to deer. *Colonial R.A. 1918C.*

al Laws, vol. 1, p. 585. A series of statutes has followed protecting more or less completely game, birds, and fish. "The protection and preservation of game has been secured by law in all civilized countries, and may be justified on many grounds. . . . The measures best adapted to this end are for the legislature to determine, and courts cannot review its discretion. If the regulations operate, in any respect, unjustly or oppressively, the proper remedy must be applied by that body." *Phelps v. Racey*, 60 N. Y. 10, 14, 19 Am. Rep. 140.

Wherever protection is accorded, harm may be done to the individual. Deer or moose may browse on his crops; mink or skunks kill his chickens; robins eat his cherries. In certain cases the legislature may be mistaken in its belief that more good than harm is occasioned. But this is clearly a matter which is confided to its discretion. It exercises a governmental function for the benefit of the public at large, and no one can complain of the incidental injuries that may result.

It is sought to draw a distinction between such animals and birds as have ordinarily received protection and beaver, on the ground that the latter are unusually destructive and that to preserve them is an unreasonable exercise of the power of the state.

The state may exercise the police power "wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. . . . To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." *Lawton v. Steele*, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499, 501.

The police power is not to be limited to guarding merely the physical or material interests of the citizen. His moral, intellectual, and spiritual needs may also be considered. The eagle is preserved, not for its use, but for its beauty.

The same thing may be said of the beaver. They are one of the most valuable of the fur-bearing animals of the state. They may be used for food. But apart from these considerations, their habits and customs, their curious instincts and intelligence, place them in a class by themselves. Observation of the animals at work or play is a source

of never-failing interest and instruction. If they are to be preserved experience has taught us that protection is required. If they cause more damage than deer or moose, the degree of the mischief done by them is not so much greater or so different as to require the application of a special rule. If the preservation of the former does not unduly oppress individuals, neither does the latter.

In the determination of what is a reasonable exercise of the powers of the government, the acts of other governments under similar circumstances have some bearing. In Wyoming, Utah, North Dakota, Wisconsin, Maine, Colorado, and Vermont, beaver are absolutely protected. In Michigan, they are protected except between November 1st and May 15th of each year. In South Dakota, except between November 15th and April 2d. In Quebec, for a number of years there was no open season. Lately there has been an open season for a short time in the autumn.

We therefore reach the conclusion that in protecting beaver the legislature did not exceed its powers. Nor did it so do in prohibiting their molestation. It is possible that were the interpretation given by the respondents to this section right a different result might follow. If the claimants, finding beaver destroying their property, might not drive them away, then possibly their rights would be infringed. In *Aldrich v. Wright*, 53 N. H. 398, 16 Am. Rep. 339, it was said in an elaborate opinion, although this question we do not decide, that a farmer might shoot mink, even in the closed season, should he find them threatening his geese.

But such an interpretation is too rigid and narrow. The claimants might have fenced their land without violation of the statute. They might have driven the beaver away, were they injuring their property. The prohibition against disturbing dams or houses built on or adjoining watercourses is no greater or different exercise of power from that assumed by the legislature when it prohibits the destruction of the nests and eggs of wild birds even when the latter are found upon private property.

The object is to protect the beaver. That object, as we decide, is within the power of the state. The destruction of dams and houses will result in driving away the beaver. The prohibition of such acts, being an apt means to the end desired, is not so unreasonable as to be beyond the legislative power.

We hold, therefore, that the acts referred to are constitutional. But had we reached a different conclusion the respondents would not be aided. We know of no principle of

law under which the state becomes liable because of the adoption of an unconstitutional statute. Such a statute is no protection to officers assuming to proceed under its authority. The state itself, if it permits such a claim to be enforced against it, may become liable for what they do. But the statute itself is void. No one need obey it. If no affirmative act is done under its supposed authority, neither the state nor its officers are liable, because the citizen chooses to obey where he need not have done so.

Somewhat different considerations apply to the act of the state in purchasing and liberating beaver. The attempt to introduce life into a new environment does not always result happily. The rabbit in Australia, the mongoose in the West Indies, have become pests. The English sparrow is no longer welcome. Certain of our most troublesome weeds are foreign flowers.

Yet governments have made such experiments in the belief that the public good would be promoted. Sometimes they have been mistaken. Again, the attempt has succeeded. The English pheasant is a valuable addition to our stock of birds. But whether a success or failure, the attempt is well within governmental powers.

If this is so with regard to foreign life, still more is it true with regard to animals native to the state, still existing here, when the intent is to increase the stock upon what the Constitution declares shall remain forever wild forest lands. If the state may provide for the increase of beaver by prohibiting their destruction, it is difficult to see why it may not attain the same result by removing colonies to a more favorable locality or by replacing those destroyed by fresh importations.

Nor are the cases cited by the respondents controlling. It is true that one who keeps wild animals in captivity must see to it at his peril that they do no damage to others. But it is not true that whenever an individual is liable for a certain act the state is liable for the same act. In liberating these beaver the state was acting as a government. As a trustee for the people and as their representative, it was doing what it thought best for the interests of the public at large. Under such circumstances, we cannot hold that the rule of such cases as those cited is applicable.

We reach the conclusion that no recovery can be had under this claim. It is assumed, both by the respondents and by the appellant, that the Board of Claims had jurisdiction to determine the questions involved. That we do not discuss.

The judgment of the Appellate Division and the determination of the Board of

Claims must be reversed, and the claim dismissed, with costs in Appellate Division and in this court.

Hiscock, Ch. J., and Chase, Hogan, Pound, McLaughlin, and Crame, JJ., concur.

Annotation—Constitutionality of game laws as affected by the fact that game protected is destructive of private property.

While there are many cases on the question of the constitutionality of game laws, and the power generally of the state to restrict or prohibit the killing of game is well established, the cases have not ordinarily considered the question from the standpoint taken in *BARRETT v. NEW YORK*, ante, 400. And a search has disclosed little authority on the question indicated in the title to the note. The cases involving the question have discussed it from the point of view of the property owner's right, notwithstanding the statute, to kill game found injuring his property.

Thus, it was held in *State v. Ward* (1915) 170 Iowa, 185, 152 N. W. 501, Ann. Cas. 1917B, 978, that in a prosecution for the killing of a deer in violation of a statute making it unlawful for anyone other than the owner, or person authorized by him, to kill any deer, elk, or goat, the defendant should be permitted to show in justification of the killing that, at the time thereof, the deer was on his premises engaged in destroying his crops. It appeared that in the neighborhood of defendant's farm were a large number of deer, which for years had destroyed and greatly damaged his crops; that he had many times driven them away; and that no ordinary, lawful fence would serve as a protection. The court said: "It will be noted that the prohibition of this statute is absolute and unqualified in its terms. The one question in the case is whether a person who kills a deer, elk, or goat is necessarily guilty of violating the statute regardless of the reasons for such killing. To put it another way: Is it open to the defendant to justify an admitted killing by showing a reasonable necessity in defense of person or property? . . . It will be noted that the deer was killed not only while upon the defendant's premises, but while he was actually engaged in the destruction of the defendant's property. Giving the testimony the fullest credence, the deer was one of great voracity. He was capable of doing and was threatening to do great injury to defendant's property. By way of analogy, we may note that the plea of reasonable self-defense may always be interposed in justification of the killing of

a human being. We see no fair reason for holding that the same plea may not be interposed in justification of the killing of a goat or a deer. The right of defense of person and property is a constitutional right . . . and is recognized in the construction of all statutes. If in this case it was reasonably necessary for the defendant to kill the deer in question in order to prevent substantial injury to this property, such fact, we have no doubt, would afford justification for the killing. . . . It will be noted that the act of killing, as contended by defendant, was wholly defensive and preventive. Whether a deer may be lawfully killed to-day by way of retaliation for the damage wrought by it yesterday, or whether it may be so killed by way of reprisal for damage wrought or threatened by other deer, are questions not involved herein, and we do not purport to pass on them."

And the above conclusion was held not affected by a statute declaring that the title of all wild game was in the state, and that the killing of wild game by any person should be deemed a consent of such person that the title should remain in the state, where the defendant did not attempt to appropriate the carcass of the deer which he had killed, but tendered it to the proper officer, as the purpose of the statute was merely to establish title in the state to all wild game, whether dead or alive.

In *Aldrich v. Wright* (1873) 53 N. H. 398, 16 Am. Rep. 339, which is cited in *BARRETT v. NEW YORK*, a statute providing, under penalty, that between certain dates no person should destroy any mink, was construed as inapplicable to a case where one killed mink which were pursuing his geese. The court said: "The plaintiff's construction of this statute . . . admits the defendant's right of defending his geese, notwithstanding there is no clause in the statute expressly excepting and saving the right. As the legislature could not abolish the right, they are not presumed to have attempted an impossibility, or to have intended to pass a void act; and the statute is held valid by giving it a construction compatible with the Constitution, making it applicable only to

those cases to which it can be constitutionally applied. . . . If they had consumed his entire stock of poultry he could not have justified his shot for obtaining their skins as the only available redress for their depredations; but while one of his birds remained he could lawfully defend it. He could have no indemnity for the past; but he was entitled to security for the future. Much as the

statute had abridged his rights of hunting and reprisal, it had put him under no obligation to suffer the minks to eat, injure, or annoy his domestic fowls. His natural, common-law, and constitutional right of defense existed in full force and vigor, not repealed, nor in the slightest degree impaired or modified, by the statute." R. E. H.

OKLAHOMA SUPREME COURT.

AARON FRETZ, Plff. in Err.,
v.
CITY OF EDMOND et al.
(— Okla. —, 168 Pac. 800.)

Pleading — construction.

1. In construing a pleading challenged by demurrer before trial the allegations thereon will ordinarily be construed against the pleader, and if material allegations are omitted, in the absence of an application to amend, it will be assumed that the facts to justify them do not exist.

For other cases, see Pleading, VII. in Dig. 1-52 N. S.

Municipal corporation — operation of water plant.

2. Municipal corporations in operating a water plant exercise business and administrative functions rather than those strictly governmental in their nature, and in the exercise of such functions are governed largely by the same rules applicable to individuals or private corporations engaged in the same business.

For other cases, see Waters, III. b, 2, in Dig. 1-52 N. S.

Same — equality of rates.

3. Municipal corporations operating water plants are not required to give absolute equality of service or rates, but are only required not to act arbitrarily in exercising the discretion vested in them in such matters, and not to maintain a discrimination between patrons which is essentially unjust.

For other cases, see Waters, III. b, 3, in Dig. 1-52 N. S.

Headnotes by BURFORD, C.

Note. — The power of a municipality operating a public utility to make a special rate to a particular person or institution is considered in the annotation following *Eastern Illinois State Normal School v. Charleston*, L.R.A.1916D, 996. It will be observed that the case referred to reaches a conclusion opposite to that in *FRETZ v. EDMOND* upon a very similar state of facts.

The general subject of the establishment and regulation of municipal water supply is treated in the note to *State ex rel. Hallauer v. Gosnell*, 61 L.R.A. 33. Some phases of that note have been supplemented L.R.A.1918C.

Same — state institution — discrimination.

4. The law against unjust discriminations rests in public policy, and it is not in violation of the public policy of the state, in the absence of specific legislation on the subject, to permit discriminations by a municipality in favor of a state institution which re-ounds to the intellectual, moral, and commercial benefit of the general public resident in such municipality.

For other cases, see Waters, III. b, 3, in Dig. 1-52 N. S.

Same — donation of water.

5. Under the facts alleged in the instant case, held that the donation of water by the city of Edmond to the Central State Normal School does not constitute an unjust discrimination against a citizen, taxpayer, and water consumer of the city who is required to pay a fixed rate for water used by him.

For other cases, see Waters, III. b, 3, in Dig. 1-52 N. S.

(May 2, 1916.)

ERROR to the District Court for Oklahoma County to review an order sustaining a demurrer to the petition filed to enjoin defendants from furnishing to the State Normal School water free of charge. Affirmed.

The facts are stated in the Commissioner's opinion.

Mr. Sam Hooker for plaintiff in error.

Messrs. Wright & Blinn and John Roaten for defendants in error.

Burford, C., filed the following opinion: The original petition in this cause contained three separate causes of action. In

in notes in the present series, which may be found by consulting the L.R.A. Indexes under the title, "Waters," subtitle, "Public water supply."

The question whether a municipality in respect of its waterworks system acts in a private and corporate or in a public and governmental capacity is treated in its bearing on municipal liability for tort in connection therewith at page 58 of the note in 61 L.R.A. 33, and supplementary notes to *Piper v. Madison*, 25 L.R.A.(N.S.) 239, and *Wigal v. Parkersburg*, 52 L.R.A.(N.S.) 465.

this court it is conceded that the matters contained in the second and third causes of action have become moot, and have been therefore abandoned by the plaintiff in error, leaving for our consideration only the ruling upon the first cause of action alleged. This part of the petition sets out that the plaintiff is and has been for a number of years last past a citizen, property owner, and resident taxpayer of the city of Edmond, Oklahoma; that the city of Edmond is a city of the first class; that the various defendants are its officers; that the city of Edmond owns and operates its own water plant or system in said city, and the revenue necessary for conducting said water plant is derived partially from payments by the various consumers of water and partially by general taxation; that at the time of the commencement of the action there were in force in said city ordinances fixing the water rates to consumers upon a sliding scale based upon the amount of water consumed, beginning at 25 cents per thousand gallons for the first 5,000 gallons used by the consumer in any month, and providing further that the minimum charge for water service to each consumer should be 50 cents per month. The petition further alleged that, by action of the council prior to the institution of the suit, it was proposed to donate to the Central State Normal School, an institution owned and maintained by the state in the city of Edmond, 2,400,000 gallons of water per annum free of charge, and that the resolution authorizing such action had been duly passed by the council. The petition then alleges that said action "is in violation of the law and contrary to the law of the state of Oklahoma, and contrary to the ordinances of the city of Edmond, and is an unjust discrimination against this plaintiff and the other taxpayers of the city of Edmond, and is a discrimination against this plaintiff and the other users of water of the city of Edmond, and does this plaintiff and the other taxpayers of the city of Edmond an irreparable injury, for which they have no adequate remedy at law."

The petition then prays for an order enjoining the defendants from making any physical connection between the said water plant and the Central State Normal School, and from furnishing said Central State Normal School any amount of water free of charge. To this petition a demurrer was interposed which was sustained by the trial court, and the plaintiff, electing to stand upon his petition, brings the cause here for review.

It will be noted, in the first instance, that the petition contains no allegation that either the water rate which the plaintiff is

compelled to pay, or the taxes upon his property, will be increased by reason of the contemplated acts; nor is it alleged that if said acts be restrained either the water rents or his taxes will be reduced by reason thereof.

It is urged in the brief that the court must necessarily conclude from the allegations of the petition that in delivering free water to the Normal School there would be a cost to the city which the plaintiff, along with the other taxpayers and water consumers, would be compelled to pay; but this is not necessarily true, and if not necessarily true ought not to be presumed. Whatever may be the personal knowledge of either the trial or appellate tribunals in regard to the situation of the city of Edmond, so far as appears from this record there may be a surplus of water in the city which may be disposed of without involving any extra expenditure in the operation of the water plant. It may be true that the city of Edmond was and is supplied by gravity from the reservoir, such as a number of cities of this state, and that the capacity of the reservoir was such that the water donated to the Central State Normal School might be furnished without any cost whatever.

It is the settled rule of this court that "where a pleading is challenged before trial by demurrer, its language, where doubtful, will be construed against the pleader, upon the ground that, as he selects the language, he should make his meaning clear; and where in such a case a demurrer is sustained on account of the insufficiency of a pleading and no application for amendment is made, it will be presumed that the facts to justify it do not exist." *Emmerson v. Botkin*, 26 Okla. 218, 29 L.R.A.(N.S.) 786, 138 Am. St. Rep. 953, 109 Pac. 531; *Atwood v. Rose*, 32 Okla. 355, 122 Pac. 929; *Schilling v. Moore*, 34 Okla. 155, 125 Pac. 487.

And that "the rule of construction in such cases is that a material fact not alleged in a pleading is presumed not to exist." *Lusk v. Porter*, — Okla. —, 156 Pac. 224.

The question raised by the petition and demurrer, therefore, must be determined, not upon the ground of any unlawful disposition of the public moneys or funds which the plaintiff, under proper circumstances and allegations, would be entitled to enjoin, but upon the averment of the plaintiff's petition that the donation of such water constitutes an unjust discrimination against him and his fellow citizens similarly situated. Section 472, Rev. Laws 1910, provides in part as follows: "All incorporated towns and cities in this state are hereby author-

ized and empowered to purchase, erect, lease, rent, manage, and maintain any system or part of system of waterworks, hydrants, and supply of water, telegraphing fire signals or fire apparatus that may be of use in the prevention and extinguishment of fires and for domestic purposes; and to pass all ordinances, penal or otherwise, that shall be necessary for the full protection, maintenance, management, and control of the property so leased, purchased, or erected."

Section 475 provides: "The city council of such city and the board of trustees of such town in connection with the mayor or president of said board shall have the power and authority, and it shall be their duty, to fix the rate of water rents or taxes to be paid by the consumer, and to ordain such rules and regulations, with appropriate penalties for the violation thereof, as such council or board of trustees may deem proper for the regulation and protection of said waterworks."

In exercising the authority conferred upon them by statute in relation to the conducting and maintenance of waterworks, it is clear that the officers of the city are not exercising, in any strict sense, the governmental or legislative powers by which the sovereignty of the city is maintained and its people governed, but that they are acting in a quasi public and quasi private capacity, exercising as the agent of the people mere business powers of the conduct of an enterprise for the benefit of the inhabitants of the municipality.

In *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271, the circuit court of appeals of the eighth circuit, in defining the powers of a city in relation to the waterworks, said: "A city has two classes of powers: The one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other, proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class it is governed by the rule here invoked. In their exercise it is ruling its people, and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants; and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern

a private individual or corporation. *Dill. Mun. Corp.* 3d ed. § 66, and cases cited in the note; *Safety Insulated Wire & Cable Co. v. Baltimore*, 13 C. C. A. 375, 377, 378, 25 U. S. App. 166, 66 Fed. 143; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453, 469, 469; *Com. ex rel. Roman Catholic High School v. Philadelphia*, 122 Pa. 283, 10 Atl. 136; *New Orleans Gaslight Co. v. New Orleans*, 42 La. Ann. 188, 192, 7 So. 560; *Tacoma Hotel Co. v. Tacoma Light & Water Co.* 3 Wash. 316, 325, 14 L.R.A. 669, 28 Am. St. Rep. 35, 28 Pac. 519; *Wagner v. Rock Island*, 146 Ill. 130, 154, 155, 21 L.R.A. 519, 34 N. E. 548; *Vincennes v. Citizens' Gaslight Co.* 132 Ind. 114, 126, 16 L.R.A. 485, 31 N. E. 577; *Indianapolis v. Indianapolis Gaslight & Coke Co.* 66 Ind. 396, 403; *State, Read, Prosecutor, v. Atlantic City*, 49 N. J. L. 558, 582, 9 Atl. 759. In contracting for water works to supply itself and its inhabitants with water the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its citizens. 1 *Dill. Mun. Corp.* § 27; *Cincinnati v. Cameron*, 33 Ohio St. 336, 367; *Safety Insulated Wire & Cable Co. v. Baltimore*, *supra*, and cases cited under it."

The language of this opinion has been approved by the same court in *Pike's Peak Power Co. v. Colorado Springs*, 44 C. C. A. 333, 106 Fed. 1; *Omaha Water Co. v. Omaha*, 12 L.R.A. (N.S.) 736, 77 C. C. A. 267, 147 Fed. 1, 8 Ann. Cas. 614; and by the supreme court of Colorado in *Colorado Springs v. Colorado City*, 42 Colo. 75, 94 Pac. 316.

In *Henderson v. Young*, 119 Ky. 224, 83 S. W. 583, it is said:

"A statute conferring sovereign and governmental powers upon a city must be strictly construed, but powers given for the private advantage of it and its inhabitants are to be construed in accordance with the general rules that apply to private individuals or corporations.

"In the management and operation of an electric [light] plant a city is not exercising governmental or legislative powers, but mere business powers, and it may conduct such plant in the manner which in the judgment of the city council promises the greatest benefit to the city and its inhabitants, and courts will not interfere with the reasonable discretion of the council in such matters."

See, to the same effect, *McQuillin, Mun. Corp.* § 1801; *South Pasadena v. Pasadena Land & Water Co.* 152 Cal. 579, 93 Pac. 490; *Dill. Mun. Corp.* 5th ed. § 1203, and cases cited.

Acting, therefore, in such capacity, the rights of the city are to be determined largely upon the same principles which govern the acts of individuals or corporations in transacting the same quasi public services. *McQuillin, Mun. Corp.* §§ 3591, 3841, 3880; *Feil v. Coeur D'Alene*, 23 Idaho, 32, 43 L.R.A. (N.S.) 1095, 129 Pac. 643, and cases cited; *Henderson v. Young*, supra. As to each the rule is not that there must not be any discrimination of any kind, but that there must be no unjust discrimination. *McQuillin, Mun. Corp.* § 5389; *Western U. Teleg. Co. v. Call Pub. Co.* 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. Rep. 561; *Wagner v. Rock Island*, 146 Ill. 139, 21 L.R.A. 519, 34 N. E. 545.

In exercising the discretion vested in them to fix rates to the various consumers the city council are not bound, therefore, to give absolute equality of service and to fix an absolute equality of rate, but only to act so that there may be no arbitrary exercise of power, or substantial injustice done. Mr. Dillon, in his *Work on Municipal Corporations* (5th ed. p. 2212), says: "The rate is compensation for the service rendered, and an equitable determination of the price to be paid does not look alone to the quantity used by each consumer. The nature of the use and the benefit obtained from it, the number of persons who want it for such use, and, in the case of a city, the effect of a certain method of determining prices upon the revenues to be obtained by the city and upon the interests of property holders, are all to be considered."

It has often been held that a municipality may exact of a private corporation, as a condition of a franchise, free service to itself, or even to charitable or religious institutions within its borders. *Dill. Mun. Corp.* 5th ed. 2237; *Independent School Dist. v. Le Mars City Water & Light Co.* 131 Iowa, 14, 10 L.R.A. (N.S.) 859, 107 N. W. 944; *Methodist Episcopal Church v. Ashtabula Water Co.* 20 Ohio C. C. 578, 10 Ohio C. D. 648; *Superior v. Douglas County* *Teleph. Co.* 141 Wis. 383, 122 N. W. 1023; *New York Teleph. Co. v. Siegel-Cooper Co.* 202 N. Y. 502, 36 L.R.A. (N.S.) 560, 96 N. E. 109.

If a city, having the power to engage in the same business, may lawfully exact of a private corporation certain conditions in conducting that business, certainly it must be true that the city itself may perform the same condition.

In *Oklahoma City v. Oklahoma R. Co.* 20 Okla. 1, 16 L.R.A. (N.S.) 651, 93 Pac. 48, this court, in considering the provision of our Constitution forbidding free transportation by certain carriers, said: "It could not be successfully contended that, if the

relator [the city] were directly engaged in the business of operating said street railway line, it could not carry said school children at the rates and under the terms designated in said franchise, or its policemen and firemen, the mail carriers, and children under five years of age when accompanied by a parent or guardian, without charge, on account of the provisions of § 13, art. 9, supra."

And this court further in that case distinctly held that the exaction by the city of free transportation for policemen, firemen, and carriers of the United States mail as a condition of the franchise granted the railway company was valid.

Upon these considerations, was the trial court justified in determining from the allegations of the petition that the discrimination between the State Normal School and the plaintiff was not unjust, or should he have held that, taking the allegations of the petition as true, the officers of the town abused the discretion vested in them by statute, and had acted otherwise than for the public in making this donation? It is not to be doubted that the presence of a great institution such as the Central State Normal School in the city of Edmond was of great public benefit both to the city of Edmond and its inhabitants. This court, in *Sharp v. Guthrie*, 49 Okla. 213, 152 Pac. 403-408, speaking through Mr. Justice Hardy on the location and maintenance of a university as the consideration for the transfer of lands owned by the city, said: "It will not be gainsaid that the maintenance of a high class institution of learning, such as is contemplated by the agreement, will be of much value and profit, both present and prospective, to the defendant city, and to the inhabitants thereof."

The contention that the city has the power in proper case to give from the resources of its public service plants to public institutions or public uses without unjustly discriminating against the rights of its inhabitants seems to be supported by reason, logic, and abstract justice. A fire originates within the borders of a city upon the property owned by some person who has never been a user of the city water. The fire is extinguished by water furnished by the city plant. Can it be said that the city is required to install a meter at some place upon the hose line in order to determine the number of thousand gallons for which the owner of the property must pay, or that, by failing so to do, and giving the water, not only for the benefit of the private individual, but for the benefit of the public, it unjustly discriminated against some person who has paid for all the water that he used? The statement of the proposition, of

course, reveals its absurdity, and shows that the conduct of the city must be based, not upon absolute equality of service, but upon discrimination which is not essentially unjust. The public lavatories, rest rooms, public fountains, and public parks maintained by cities, are all places where water is donated for the public good. So it must seem that water might be given for use in the city hall, or the city's public buildings. Does the rule extend to those institutions which are owned and controlled, not by the city, but by the state? We can see no good reason for the distinction between them, where the state institution of learning is located within the city and redounds, as it must, both to the benefit of the business activities of the city and to the intellectual and moral life of its inhabitants. The support of the institution must be for the public good.

Speaking of the duties of private corporations engaged in public service duties, in *Wyman on Public Service Corporations*, § 1304, it is said: "It is generally said that special reductions or even free service may be given a government, of whatever grade it may be, without its being considered undue preference or illegal discrimination."

In *McQuillin on Mun. Corp.* p. 3594, it is said: "Discriminations in favor of the government or charitable institutions, however, are upheld. Discriminations in favor of the public at large are not opposed to public policy, inasmuch as they benefit the people generally by relieving them of part of their burdens, and such discrimination cannot be held illegal in the absence of legislation upon the subject."

And it might be said with equal force that discriminations to institutions which must vastly benefit not only the intellectual but the business life of the public must be upheld upon the same ground.

In *Interstate Commerce Commission v. Baltimore & O. R. Co.* 145 U. S. 263, 36 L. ed. 699, 4 *Inters. Com. Rep.* 92, 12 *Sup. Ct. Rep.* 844, the Supreme Court of the United States held that under the common-law rule the property of the United States, state, county, or municipal corporations might be transported by the carrier on more favorable terms than for other parties without its being illegal discrimination.

Again, in *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 53 L. ed. 382, 48 L.R.A. (N.S.) 1134, 29 *Sup. Ct. Rep.* 192, 15 *Ann. Cas.* 1034, the Supreme Court of the United States, passing upon an act of the state of New York which required the Consolidated Gas Company to furnish gas to the city of New York at a lower rate than it furnished to its general consumers, held that the act was not void by reason thereof, saying: L.R.A.1918C.

"We see no discrimination which is illegal, or for which good reasons could not be given."

In *Twitchell v. Spokane*, 55 *Wash.* 86, 24 L.R.A. 290, 133 *Am. St. Rep.* 1021, 104 *Pac.* 150, the supreme court of Washington, speaking of the control of the city over its waterworks, said: "A city owning its own waterworks may furnish water for city and charitable purposes free." And again: "The right of the city to furnish water for municipal and charitable purposes free can hardly be doubted."

In *Preston v. Water Comrs.* 117 *Mich.* 589, 76 *N. W.* 92, it was urged that the city "has no right to discriminate between consumers, or to exempt any user. It has no right to furnish water free to the public, to the board of education, or to charitable institutions." The trial court in its findings said: "The following use large quantities of water, and pay either no water rates, or nominal rates, entirely disproportionate to the amount of water used: Public institutions, or those in which the entire public is interested. Board of education pays \$1,071, about one seventh of what it would have to pay if charged at the [same] rate as that charged consumers who have meters. Board of public works pays nothing for water used by it. Municipal buildings pay a nominal rate. Park boards pay no rates. All public fountains are furnished water free. Police department is charged nothing. Fire department pays no water rates. Markets pay nothing. All private charities . . . are furnished by the board on the city paying the nominal sum of \$1,000. Cemeteries pay nothing. The question now presents itself whether the board of commissioners, under the power given them to assess water rates upon such basis as they shall deem equitable, have the right to give water away to a certain class of consumers, and make another class of consumers pay for it. This is not my idea of what is equitable."

But the supreme court of Michigan in passing upon the question took a directly contrary view, saying (117 *Mich.* 589): "The record also shows, as will appear more fully later, [that] the rates fixed are equitable and reasonable. It has already appeared that the free use of water given is only to institutions in which the city and all its citizens are interested, and where a partial rate is charged the recipient is a charitable institution or an educational institution in the maintenance of which the public is more or less interested. . . . The board is very properly given wide discretion in the management of the water plant. . . . There is nothing in the record

to show it has abused this discretion in fixing rates."

It is urged that the authority of this case is weakened by the decision in *Detroit v. Water Comrs.* 108 Mich. 494, 91 L.R.A. 463, 66 N. W. 377, and *Water Comrs. v. Board of Education*, 137 Mich. 245, 100 N. W. 455; but an examination of these cases will reveal that the principle discussed in the case of *Preston v. Water Comrs.* was not there involved, inasmuch as the two cases last above referred to involved an effort to compel the delivery of free water to some institutions, instead of the right of the city to give such water if it chose, which was the question decided in the *Preston Case*, *supra*.

In *New York Telephone Co. v. Siegel-Cooper Co.* 202 N. Y. 502, 36 L.R.A. (N.S.) 560, 96 N. E. 109, it is said:

"A telephone company with an exclusive right to use the streets of the city of New York in order to carry on its business may make a discount from its usual charges for telephone service in favor of the city itself, regularly incorporated charitable institutions, and regularly ordained clergymen, without entitling all its other patrons to a like discount for service of the same kind."

"The law against unreasonable discrimination rests on public policy. It is forbid-

den because it is opposed to the interest of the public, which requires that all shall be treated alike under like circumstances. Discriminations, however, in favor of the public are not opposed to public policy, because they benefit the people generally by relieving them of part of their burdens. In the absence of legislation upon the subject, such discriminations cannot be held illegal as matter of law."

Upon both reason and authority, therefore, we are of the opinion that the donation of this water to the Central State Normal School, under the facts as alleged, was not an unjust discrimination against the plaintiff, and that the trial court was justified in so determining.

It is finally urged that the action of the board is in contravention of § 15 of article 10 of the Constitution. That section, however, is an inhibition upon the state, and not upon a municipality, such as the defendant in the case at bar.

The judgment of the trial court is affirmed.

Per Curiam:
Adopted in whole.

Petition for rehearing denied November 20, 1917.

OKLAHOMA SUPREME COURT.

COMMERCIAL NATIONAL BANK, Plff. in
Err.,
v.
JAMES W. ROBISON et al., Mayor, etc.,
of Stillwater.

R. A. LOWRY et al., Interveners.

(— Okla. —, 168 Pac. 810.)

Mandamus — to compel delivery of bonds.

1. Where, pursuant to statute specifically authorizing the same, municipal officers have entered into a contract for street improvements to be paid for by delivery of improvement bonds at par value, to the amount due the contractor, and such improvements are completed according to contract and accepted, delivery of bonds regularly issued for such purpose may be compelled by mandamus.

For other cases, see Mandamus, I. d. 2, in Dig. 1-52 N. S.

Headnotes by BLEAKMORE, C.

Note. — As to mandamus to compel issuance of bonds of municipality or other public corporation, see annotation following this case, *post*, 414.
L.R.A. 1918C.

Same — pleadings.

2. The only pleadings or written allegations permitted in a mandamus proceeding are the writ and answer.

For other cases, see Mandamus, II. c, in Dig. 1-52 N. S.

(November 6, 1917.)

ERROR to the District Court for Payne County to review a judgment denying a writ of mandamus to compel defendants to deliver certain improvement bonds to plaintiff. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. T. H. Stanford and G. T. Stanford, for plaintiff in error:

Failure of the contractor to pay certain claims for labor and material does not deprive the plaintiff bank of its right to demand and receive the bonds from the defendants.

American Surety Co. v. Waseca County. 77 Minn. 92, 79 N. W. 649; *Wilson v. Nelson*, — Okla. —, 153 Pac. 1179.

The bond given by the Dudley Construction Company is one for the protection of laborers and materialmen.

Wilson v. Nelson, supra.

The plaintiff bank was a bona fide pur-

chaser for value of the street improvement bonds.

El Reno v. Cleveland-Trinidad Paving Co. 25 Okla. 648, 107 Pac. 163; *Hutchinson v. Krueger*, 34 Okla. 23, 41 L.R.A.(N.S.) 315, 124 Pac. 591, Ann. Cas. 1914C, 98; *Griffith v. Stucker*, 91 Kan. 47, 136 Pac. 937; *C. T. Willard Co. v. New York*, 81 Misc. 48, 142 N. Y. Supp. 11; *Contractors' Supply Co. v. New York*, 153 App. Div. 60, 138 N. Y. Supp. 242; 5 *McQuillin, Mun. Corp.* § 2313; *Moran v. Miami County*, 2 Black, 722, 17 L. ed. 342; *Eminence v. Grasser*, 81 Ky. 52; *Smith v. New Orleans*, 27 La. Ann. 286; *Grattan Twp. v. Chilton*, 38 C. C. A. 84, 97 Fed. 145; *Quinlan v. Green County*, 19 I.R.A.(N.S.) 857, 84 C. C. A. 537, 157 Fed. 33.

Plaintiff was entitled to a writ of mandamus to compel the delivery of the bonds.

State ex rel. *Edwards v. Millar*, 21 Okla. 448, 96 Pac. 747; *Pawhuska v. Pawhuska Oil & Gas Co.* 28 Okla. 563, 115 Pac. 353; *El Reno v. Cleveland Trinidad-Paving Co.* 25 Okla. 648, 27 L.R.A.(N.S.) 650, 107 Pac. 163.

Mr. Chester H. Lowry, for defendants in error:

The action of mandamus lies only to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station, and not to enforce a contractual obligation.

26 Cyc. 293, § 4 (b); *Wilson v. Nelson*, — Okla. —, 153 Pac. 1179; *Knight & J. Co. v. Castle*, 172 Ind. 97, 27 L.R.A.(N.S.) 573, 87 N. E. 976; 2 *Dill. Mun. Corp.* 5th ed. 1266.

The plaintiff bank, under the law and the evidence, took no greater rights than the contractor, and, the contractor not being entitled to a delivery of the bonds until the full performance of his contract, the plaintiff bank as assignee is not entitled to their delivery.

28 Cyc. 1616.

Bleakmore, C., filed the following opinion:

This case presents error from the district court of Payne county, wherein the plaintiff in error, as assignee of the Dudley Construction Company, sought by mandamus to compel the mayor and commissioners of the city of Stillwater to deliver to it certain improvement bonds issued conformably to the provisions of article 12, chap. 10, Revised Laws 1910. In answer to the alternative writ, the city officials attempted to justify refusal to deliver the bonds solely on the ground that the contract or had failed to perform the contract by refusal to pay certain claims for labor and material. Numerous persons asserting de-

mand against the Dudley Construction Company for labor and materials, and one who declared upon a subcontract for the paving of a street upon which his property abutted, were permitted to intervene. On trial the court below made the following, among other, findings of fact: "(1) That said Dudley Construction Company has failed to perform its contract in the matter of paying the claims of laborers and materialmen arising out of the prosecution of the work involving said contract, and would not be entitled to a delivery of the bonds by reason of such failure; (2) that the assignee of said Dudley Construction Company, the plaintiff herein, stands in the place of said Dudley Construction Company, and is therefore not entitled to a delivery of said bonds." The writ was denied.

The undisputed facts necessary to a determination of the case are that the mayor and commissioners of the city of Stillwater, having determined to improve certain streets by regular proceedings, issued improvement bonds, and entered into a contract with the Dudley Construction Company by the terms of which such bonds were to be delivered to the contractor at par value in payment of the amount due it on such contract; that the improvements were made according to contract and accepted by the city, and a portion of such bonds delivered; that the remainder of the bonds, of the par value of \$15,000, was retained by the mayor and commissioners, who, after proper demand therefor, refused to turn the same over to the plaintiff.

We are of opinion that the judgment of the trial court, denying a peremptory writ of mandamus, constituted prejudicial error. It is contended by defendant in error that the writ should not go for the reason that the plaintiff in error had a plain, speedy, and adequate remedy in the ordinary course of law. Obviously, no action for debt or breach of contract would lie against the city or its mayor and commissioners, for the reason that the contract price of the improvements in question was payable alone in the specific bonds, delivery of which is sought to be compelled, and neither these bonds nor the obligation to pay for such improvements is or could become a charge against the city payable out of its general fund. The bonds were issued pursuant to § 636, Rev. Laws 1910, which provides: "Said bonds, or such portion thereof as may be necessary to provide for the payment of the assessments, interest, and costs remaining unpaid, shall be sold at not less than par, and the proceeds thereof applied to the payment of the contract price of said improvement and the other expense incurred by the city in connection with such improve-

ment or issuance of such bonds; or such bonds, in the amount that may be necessary for such purpose, may be turned over and delivered to the contractor at par value in payment of the amount due him on his contract. . . ."

By § 635 it is provided: ". . . Which bonds shall in no event become a liability of the city issuing the same."

Under the terms of the statute, the municipal officers were empowered either to sell the bonds and pay for the improvements out of the proceeds, or to deliver such bonds to the contractor at par in satisfaction of the amount due him on his contract. By entering into the contract in suit such officers chose the alternative of paying the contractor by delivery of the bonds. The specific bonds provided for by the contract to be delivered had been duly issued, and delivery thereof as provided by the statute was refused solely for the purpose of coercing payment by the contractor of certain claims of laborers and materialmen, for which the municipality was not bound and about which it was not legally concerned. *Wilson v. Nelson*, — Okla. —, 153 Pac. 1179. We recognize the rule that mandamus does not lie to enforce mere contractual duties; that its proper function is to compel the performance of duties incumbent by law upon the parties against whom the writ is sought, but, under the circumstances of this case, are of opinion that the municipal officers in declining to deliver the bonds in question not only defaulted as to the terms of the contract, but arbitrarily refused to perform a plain ministerial duty imposed upon them by law, and plaintiff rightfully invoked the coercive power of the court to compel the performance of such duty. A remedy at law which will operate as a bar to mandamus must ordinarily be such as will enforce the right or compel the performance of the duty; and the remedy is not plain and adequate unless it is commensurate with the necessities and rights of the complaining party under all the circumstances of the case. In the instant case we do not regard replevin as a plain and adequate remedy. Although it is an action designed for the recovery of specific personal property, yet in replevin the defendants might, if they saw fit, by execution of an undertaking, retain the bonds in question, and thus evade the performance of their official duty to deliver them under the terms of the statute.

"A ministerial act is one which a public officer or agent is required to perform upon a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or

impropriety of the act to be performed." *Merrill on Mandamus*, p. 30.

In *El Reno v. Cleveland-Trinidad Paving Co.* 25 Okla. 648, 27 L.R.A. (N.S.) 660, 107 Pac. 163, an action by the paving company seeking to enjoin the city authorities from publishing and putting into effect an ordinance repealing a certain assessing ordinance passed for the purpose of providing means to pay for paving a portion of the city streets, for the performance of which work the company and the city had entered into a contract, this court, speaking through Mr. Justice Kane, said: "It being settled that all of the proceedings of the city authorities up to the time of letting said contract were regular, after the letting of the contract no discretion of any kind is vested in the city or its municipal council. Whether its action in declaring a necessity to pave, etc., or in ascertaining that no sufficient protests had been made and determining to proceed with the improvement, is legislative or administrative, does not concern us in this connection. After the contract has been let, the statute is mandatory in its terms that the council shall appoint appraisers, shall levy an assessment, shall provide for the issuance of bonds, that the mayor and clerk shall sign and attest the bonds, that the clerk shall publish notice of the time when the first assessment becomes due and payable, and shall certify to the county treasurer such assessments as are not paid within the time specified. All of these duties are ministerial, and the council, mayor, or clerk are left without any discretion as to whether they shall or shall not perform them."

"That mandamus will lie to compel a public officer to perform a ministerial duty, one that involves no exercise of judgment or discretion, is too well settled to require the citation of authorities." *Smock v. Farmers' Union State Bank*, 22 Okla. 825, 98 Pac. 945.

In *Noble County v. Hunt*, 33 Ohio St. 169, it is held: "The county commissioners having accepted, as completed according to contract, a road improvement ordered by them to be made in pursuance of statutes authorizing payment therefor to be made in bonds of the county to be issued to the contractor on completion of the improvement and the acceptance thereof, and the commissioners having refused to deliver to the contractor the bonds to which he is entitled, mandamus, and not appeal, is the proper remedy for redress."

And in the body of the opinion it is said: "Where, as in this case, the contract specifies that the improvement is to be paid for in bonds of the county, upon estimates rendered or the completion of the work, and it is accepted by the board of county com-

missioners, it is the duty of the commissioners to deliver them. This duty is ministerial, and in no way involves judicial discretion. Hence mandamus, upon refusal, is the appropriate means to enforce the performance of the duty."

In *Smalley v. Yates*, 36 Kan. 519, 13 Pac. 845, it is held:

"1. Mandamus lies in all cases where the plaintiff has a clear legal right to the performance of some official or corporate act by a public officer or corporation, and no other adequate specific remedy exists.

"2. When a person desires to be placed in the possession of a right illegally and unjustly withheld from him, the writ of mandamus is a proper remedy to give the thing itself, the withholding of which constitutes the injury complained of.

"3. Where a city of the second class, through its mayor and council, enters into an agreement to execute and deliver to a lawful purchaser thereof certain waterworks bonds of the city, . . . and the purchaser of such bonds fully complies with all of the terms of the agreement upon his part, and the mayor and council refuse to comply with their official duty in that respect, held, mandamus will lie to compel the mayor and council to execute and deliver the bonds to the purchaser of the same according to the terms of the agreement of the parties."

In *Chicago, K. & W. R. Co. v. Chase County*, 49 Kan. 399, 30 Pac. 456, "a proceeding brought . . . to compel the defendants to issue and deliver to plaintiff the bonds of Chase county in accordance with the vote of the people and the contract of the parties," it was said: "It appears, therefore, that the plaintiff has earned the bonds of the county, and was entitled to the delivery of the same after June 1, 1887, upon demand,"—and, the writ issued.

In *Atchison, T. & S. F. R. Co. v. Jefferson County*, 12 Kan. 127, an alternative writ of mandamus was issued, directed to the defendants, commanding them to receive from the railroad company its certificates of paid-up stock to its capital stock to the amount of \$150,000, as had been tendered by the company, and that upon receipt thereof the defendants duly issued and deliver to the railroad company, in payment for said capital stock, the bonds of the county, in accordance with the terms and conditions of a subscription to such capital stock made pursuant to a vote of the people. In the opinion, Mr. Justice Brewer, speaking for the court, said: "But it is insisted that whatever rights the plaintiff may have must be enforced in a different action; that no mandamus will ever issue to command the doing of an act which is forbidden to be done by a valid injunction order of a competent court, L.R.A.1918C.

because thus the party would be placed between two fires, and liable to punishment for contempt in either event. It is said that the writ of mandamus lies within the discretion of the court, and that the mere fact that a party has rights will not necessarily entitle him to the writ; that no court will exercise this discretion in such manner as to place the defendant in jeopardy of punishment. That this writ, originally a prerogative writ, and solely a matter of discretion, still partakes of its original nature so far that it yet remains largely within the discretion of the court, cannot be doubted. *State ex rel. Wells v. Marston*, 6 Kan. 525. But in the exercise of that discretion regard must be had to the rights of the plaintiff as well as to the dangers of the defendant. If those rights can be secured only through this writ, it would be simply an abuse of discretion to refuse it. If the plaintiff has any rights, the law guarantees to it a time and place and tribunal to enforce them. Those rights cannot be destroyed by a decree to which it is neither party nor privy. It becomes necessary, therefore, to inquire into the matter of the plaintiff's claim, and how rights like those it asserts can be enforced. This is an extraordinary remedy it is pursuing. The statute declares that 'this writ may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law' (Code, § 689), and to the same effect are all the authorities. Equity will not interfere when the law is potent to give relief; and in an equally emphatic sense is it true that mandamus will not lie when relief can be obtained in the ordinary proceedings. The plaintiff asserts a subscription by the county of Jefferson to its capital stock, and a compliance by it with the terms of the subscription, and demands the bonds of the county as promised by its subscription. Now, the remedy usually pursued in such cases is the one pursued by plaintiff; that is, to apply for a mandamus. And the right to this remedy has been uniformly sustained. *Moses, Mandamus*, 102; *Cincinnati, W. & Z. R. Co. v. Clinton County*, 1 Ohio St. 77; *People ex rel. Albany & S. R. Co. v. Mitchell*, 35 N. Y. 551; *Com. ex rel. Thomas v. Allegheny County*, 32 Pa. 223. And as mandamus will not lie where there is a plain and adequate remedy in the ordinary proceeding of the law, it follows that in the judgment of these tribunals, at least, the ordinary remedies of law are insufficient for a proper enforcement of the rights claimed. And indeed it is difficult to see by what proceeding other than mandamus the bonds themselves could be obtained."

In *High. Extraordinary Legal Remedies*, § 357, it is said: "So, too, when services are

rendered to a county, to be paid for in bonds of the county, and the work is accepted by the proper county officers, whose duty it is to deliver the bonds in payment, such duty may be enforced by mandamus; it being of a ministerial nature and involving the exercise of no discretion."

And again it is said by the same author (§ 389): "The propriety of the writ of mandamus, as a means of compelling delinquent municipalities to discharge liabilities which they have incurred under stock subscriptions in aid of railways, is thus shown to be fully established. Nor is the interference of the courts for this purpose confined to cases where the bonds or obligations of the municipal corporation have already been issued, but the relief may also be granted to enforce the subscription and to compel the issuing of the municipal securities pledged in aid thereof. . . . In such case, a clear legal right is shown on the part of the

railway company, involving a corresponding official duty on the part of the municipal authorities, for the performance of which mandamus affords the only adequate and specific remedy."

See also *School Dist. v. School Dist.* 3 Wis. 333; *Baker v. Johnson*, 41 Me. 15; *People ex rel. Stuart v. Edmonds*, 19 Barb. 468; *Hall v. Somersworth*, 39 N. H. 511.

The trial court erroneously permitted claim holders against the Dudley Construction Company to intervene in the cause.

The only pleadings or written allegations permitted in a mandamus proceeding are the writ and answer. *Rev. Laws 1910*, § 4915.

It follows that the judgment of the trial court should be reversed and the cause remanded, with directions to the trial court to issue the peremptory writ of mandamus requiring the delivery of the bonds to plaintiff in error.

Annotation—Mandamus to compel issuance of bonds of municipality or other public corporation.

Other notes discuss the questions of mandamus to compel the issuance of municipal warrants to pay indebtedness;¹ mandamus to compel public officer to execute a contract;² and mandamus to compel municipal or other public officer or board to perform duty resting in contract alone.³

The present note is concerned only with the question of mandamus as a remedy to compel the issuance of bonds of a public corporation. This is, in many of the cases, confused with the ultimate question whether the relator is entitled to the bonds or whether there is a clear legal duty on the part of the defendant to issue them. The cases cited in the note are for the most part those in which the point is made that mandamus is or is not a proper remedy. A few cases are, however, included in which the point was apparently assumed, or was not clearly distinguished from the ultimate question of the right to the issuance of the bonds. But it should be

clearly understood that the note does not attempt to collect all the cases in which it was sought to compel the issuance of bonds by mandamus, but only, in general, those cases which discuss the question of remedy. And cases included herein in which a writ of mandamus was denied for the reason that a clear legal duty to issue the bonds was not shown should be regarded as illustrative only, there being possible many other cases of a similar nature decided on grounds beyond the scope of the note, viz., the ultimate right to the bonds and the duty to issue them.

The decision in *COMMERCIAL NAT. BANK v. ROBISON*, ante, 410, is in accord with many other authorities supporting the proposition that mandamus will lie to compel the issuance of bonds of a municipality or other public corporation, to which the relator shows himself entitled, where there is no other adequate remedy and a clear ministerial duty exists to issue the bonds.⁴

¹ See note to *George S. Chatfield Co. v. Reeves*, L.R.A.1916D, 324.

² See note to *McClendon v. Hot Springs* L.R.A.1917F, 538.

³ See note to *State ex rel. Fire & Rust Proof Constr. Co. v. Icke*, 20 L.R.A.(N.S.) 800.

⁴ *Smith v. Bourbon County* (1887) 127 U. S. 105, 32 L. ed. 73, 8 Sup. Ct. Rep. 104, (recognizing rule); *Ex parte Selma & G. R. Co.* (1871) 45 Ala. 696 (to compel county commissioners to issue bonds for railroad stock, authorized by election; in subsequent L.R.A.1918C.

proceedings, however, in (1871) 46 Ala. 230, a peremptory writ of mandamus was denied on the ground of illegality in the proposal submitted at the election); *California Northern R. Co. v. Butte County* (1861) 18 Cal. 671 (to compel county supervisors to issue railroad aid bonds, a statute making it their duty to issue the bonds when the company had performed certain conditions); *People ex rel. Central P. R. Co. v. Coon* (1864) 25 Cal. 635 (to compel municipal officers to execute and deliver bonds to railroad); *People ex rel. Central P. R. Co.*

These cases fall within well-recognized principles governing the question of the remedy of mandamus. Generally, it seems, the statute in question was construed as expressly imposing the duty sought to be enforced. And where the

statutory duty exists, as was the case, for instance, in *COMMERCIAL NAT. BANK v. ROBISON*, ante, 410, it seems clear that the writ should not be denied on the ground that it will not generally be granted to enforce a mere contract right,

v. San Francisco (1865) 27 Cal. 655 (to compel board of supervisors to execute and deliver railroad aid bonds); *Napa Valley R. Co. v. Napa County* (1866) 30 Cal. 435 (to compel county supervisors to subscribe to railway stock, under a statute which "authorized and empowered" them to make the subscription and issue bonds therefor, and provided that the subscription "shall" be made within a certain time); *Santa Cruz R. Co. v. Santa Cruz County* (1882) 62 Cal. 239 (to compel county supervisors to issue railroad aid bonds); *Turlock Irrig. Dist. v. Williams* (1888) 76 Cal. 360, 18 Pac. 379 (to compel the secretary of an irrigation district to sign bonds which the applicant, the district, proposed to issue under statute); *Summit County v. People* (1887) 10 Colo. 14, 14 Pac. 47 (holder of county warrants held entitled to mandamus to compel county commissioners to issue bonds pursuant to election in favor of funding the county indebtedness); *People ex rel. Gilman, C. & S. R. Co. v. Harp* (1873) 67 Ill. 62 (mandamus held to lie to compel town supervisor and clerk to issue bonds for railway stock, authorized by an election, where all the statutory requirements were fulfilled and the company had complied with the conditions imposed); *Piatt v. People* (1862) 29 Ill. 54 (duty of a township supervisor to issue railroad aid bonds duly authorized by an election held ministerial and enforceable by mandamus, where the statute provided that on a favorable vote "it shall be the duty of the supervisor" to make subscription to the stock of the railroad, and that he "shall" execute and deliver the bonds); *People ex rel. American C. R. Co. v. Ohio Grove Twp.* (1869) 51 Ill. 191 (to similar effect); *People ex rel. Pekin, L. & D. R. Co. v. Logan County* (1872) 63 Ill. 374 (same); *Illinois Midland R. Co. v. Barnett* (1877) 85 Ill. 318, subsequent proceedings in (1879) 91 Ill. 422 (for contempt for failure to obey writ); and *People ex rel. Illinois M. R. Co. v. Barnett Twp.* (1881) 100 Ill. 332 (an alias writ of mandamus was granted to compel successor in office of town supervisor to execute bonds to the railway company); *Kokomo v. State* (1877) 57 Ind. 152 (to compel municipal authorities to issue railroad aid bonds, a statute requiring the city council to issue the bonds on petition of a majority of the resident freeholders); *Templeton v. Newton County* (1909) 173 Ind. 226, 89 N. E. 880 (to compel the issuance of bonds by county commissioners to pay for the construction of a drainage ditch); *Temple v. State* (1916) — Ind. —, 113 N. E. 293 (holding that mandamus would lie by contractor of school building partly completed, to compel township authorities to sell bonds authorized

for the purpose of procuring funds for its erection); *Atchison, T. & S. F. R. Co. v. Jefferson County* (1873) 12 Kan. 127 (holding that mandamus would lie to compel county officers to issue bonds in payment of a subscription made to a railway company, although a decree in the Federal court, to which the railway company was not a party, enjoined the issuance of the bonds); *Smalley v. Yates* (1887) 36 Kan. 519, 13 Pac. 845 (holding that, where a city, through its mayor and council, entered into an agreement to execute and deliver to a lawful purchaser thereof waterworks bonds of the city, which had been authorized by an election, and the purchaser fully complied with all the terms of the contract, but the city officers refused to perform their official duty in that respect, mandamus would lie to compel the mayor and council to execute and deliver the bonds to the purchaser); *Chicago, K. & W. R. Co. v. Chase County* (1892) 49 Kan. 399, 30 Pac. 456 (to compel county officers to issue and deliver railroad aid bonds); *State ex rel. Amick v. Francisco* (1916) 98 Kan. 808, 160 Pac. 217 (holding that the state could compel by mandamus the issuance by municipal authorities of bonds which had been voted for the purchase of a waterworks plant); *Shelby County Ct. v. Cumberland & O. R. Co.* (1871) 8 Bush (Ky.) 209 (to compel the judge of the county court to issue and deliver bonds in payment of subscription made to the stock of a railway company); *Houston v. Boltz* (1916) 169 Ky. 640, 185 S. W. 76 (to compel a county fiscal court to issue bonds authorized by an election to pay for the construction of public roads); *Pearsons v. Raullett* (1872) 110 Mass. 118 (to compel the town treasurer to sign and deliver water bonds prepared by the board of water commissioners under statutory authority); *Edward C. Jones Co. v. Guttenberg* (1902) 66 N. J. L. 659, 51 Atl. 274 (to compel municipal authorities to issue bonds duly authorized, the petitioner being entitled thereto as purchaser by the city's accepting his bid); *Halsey v. Nowrey* (1904) 71 N. J. L. 481, 59 Atl. 449 (to compel the mayor to sign bonds duly authorized by the common council); *Christie v. Bergen County* (1907) 75 N. J. L. 49, 66 Atl. 1073, affirmed in (1909) 76 N. J. L. 818, 72 Atl. 46 (to compel a board of freeholders of a county to issue bonds to raise funds for obligations incurred by a county building committee appointed under statute); *People ex rel. Albany & S. R. Co. v. Mitchell* (1866) 35 N. Y. 551 (to compel town commissioners to make subscription to railroad stock and issue bonds therefor); *People ex rel. Dady v. Gravesend* (1897) 154 N. Y. 381, 48 N. E. 813 (to compel town super-

even though the writ is sought by one in the relation of a contractor with the municipality or other public corporation. On this point the court in the *ROBISON CASE* well said: "We recognize the rule that mandamus does not lie to enforce mere contractual duties; that its proper function is to compel the performance of duties incumbent by law upon the parties against whom the writ is sought, but, under the circumstances of this case,

are of opinion that the municipal officers in declining to deliver the bonds in question not only defaulted as to the terms of the contract, but arbitrarily refused to perform a plain ministerial duty imposed upon them by law, and plaintiff rightfully invoked the coercive power of the court to compel the performance of such duty."

The rule supported by many cases,⁵ that mandamus will not lie to enforce a

visors to issue bonds pursuant to statute, to pay for street improvements made by relator under contract with the town); *People ex rel. Ready v. Syracuse* (1894) 144 N. Y. 63, 38 N. E. 1006, affirming (1892) 65 Hun, 321, 20 N. Y. Supp. 236 (to compel municipal authorities to collect the balance of the tax assessed, or to issue bonds in payment of a sewer constructed by the relator under contract with the city and accepted by it); *Holroyd v. Indian Lake* (1905) 180 N. Y. 318, 73 N. E. 36 (to compel a town board to issue bonds to a contractor to pay for waterworks, under a statute making it the duty of the board to raise the money therefor by the issuance and sale of bonds); *Sheehan v. Long Island City* (1895) 11 Misc. 487, 33 N. Y. Supp. 428 (holding that a contractor for public improvements who, as a creditor of a city, was entitled to bonds which the city treasurer refused to attest, could compel performance of this duty by mandamus); *People ex rel. Sherrill v. Guggenheimer* (1899) 28 Misc. 735, 59 N. Y. Supp. 913, affirmed in (1900) 47 App. Div. 9, 62 N. Y. Supp. 11 (to compel the city council to issue bonds to pay an award in condemnation proceedings for property of a water company which a statute authorized the city to acquire, the statute directing the issuance of bonds to pay therefor); *People ex rel. Oneida County v. Oneida County* (1901) 36 Misc. 597, 73 N. Y. Supp. 1098, affirmed without opinion in (1902) 68 App. Div. 650, 74 N. Y. Supp. 1142 (to compel county supervisors to issue bonds for a courthouse, under a statute making it their duty to do so); *Re Atty. Gen.* (1890) 58 Hun, 218, 12 N. Y. Supp. 754 (to compel comptroller of New York city to issue and negotiate revenue bonds); *People ex rel. Keteltas v. Fitch* (1894) 78 Hun, 321, 29 N. Y. Supp. 163 (to compel comptroller of New York city to issue bonds authorized by the board of estimate and apportionment, for payment of land taken for park purposes); *People ex rel. Myer v. Board of Assessors* (1875) 53 How. Pr. (N. Y.) 280, affirmed without opinion in (1876) 64 N. Y. 635 (to compel city comptroller to issue bonds, as directed by statute, to pay for damages due to change of street grade); *People ex rel. Taylor v. Brennan* (1863) 39 Barb. (N. Y.) 522 (to compel city comptroller to issue bonds directed to be issued by the city council for the purchase price of land); *People ex rel. Hathorn v. White* L.R.A.1918C.

(1869) 54 Barb. (N. Y.) 622 (to compel village president to sign bonds prepared by the village trustees under a statute authorizing and directing them to issue bonds of the village signed by the president for public water supply); see also *People ex rel. Comrs. for Erection of Public Market v. New York* (1866) 45 Barb. (N. Y.) 473, affirmed in (1866) 3 Abb. App. Dec. 502 (holding that mandamus would lie to compel the city council to create a public fund for the erection of a public market, under a statute by which they were "authorized and directed" to do so); *Northwestern N. C. R. Co. v. Jenkins* (1871) 65 N. C. 173 (to compel the state treasurer to issue bonds to a railroad as required by statute); *Cincinnati, W. & Z. R. Co. v. Clinton County* (1852) 1 Ohio St. 77 (to compel county commissioners to issue bonds in payment of subscription to railroad stock pursuant to an election under statute); *Noble County v. Hunt* (1877) 33 Ohio St. 169 (to compel county commissioners to issue bonds in compliance with a contract with relator for a road improvement to be paid for upon completion in bonds of the county, where the work was completed and accepted by the commissioners); *State ex rel. Edwards v. Millar* (1908) 21 Okla. 448, 96 Pac. 747 (to compel municipal officers to execute and deliver to the relator, as purchaser, waterworks and sewer bonds, pursuant to an election and ordinances enacted by the city council providing for such issuance); *Portland v. Albee* (1913) 67 Or. 227, 135 Pac. 516, 897 (to compel municipal authorities to execute dock bonds to purchaser); *Robinson v. Rogers* (1874) 24 Gratt. (Va.) 319 (to compel state auditor to transfer and fund under statute state bonds assigned to petitioner); *State ex rel. Green Bay & M. R. Co. v. Jennings* (1879) 48 Wis. 549, 4 N. W. 641 (to compel town officers to issue bonds for railway stock pursuant to an election in favor of the proposition, under a statute making it their duty, under such circumstances, on receiving the stock, to issue and deliver the bonds, although the statute gave them a discretion as to submitting the proposition).

⁵ See note to *State ex rel. Fire & Rust Proof Constr. Co. v. Icke*, 20 L.R.A.(N.S.) 800, on mandamus to compel municipal or other public officer or board to perform duty resting in contract alone.

duty on the part of a municipal or other public officer or board which rests wholly in contract, has been applied so as to deny the writ of mandamus to compel county commissioners to perform a contract whereby they agreed to issue and deliver to a banking corporation county bonds to fund the existing warrant indebtedness of the county.⁶ But in this case the relator did not claim any right

to the bonds under statute, his claim being based merely on the contract.

No clear legal duty to issue bonds; illegality.

A writ of mandamus has been denied in many cases within well-recognized principles, on the ground that there was no clear legal duty shown to issue the bonds, or that their issuance would be illegal.⁷ This is true in many cases, il-

⁶ *Morris & Whitehead v. Williams* (1900) 22 Wash. 459, 63 Pac. 236. In this case mandamus was denied because the contract was executory, and also because the commissioners had a discretion as to issuing the bonds.

⁷ It should be observed, as before stated, that in many other cases possibly, without discussion of the question of remedy, a writ of mandamus to compel the issuance of bonds has been denied on the ground that no clear legal duty to issue the bonds was shown, or that illegality affirmatively appeared; and that the cases cited at this point are only intended as illustrative of the principle involved, and not as a complete collection of the cases on the ultimate question whether the writ should issue.

Mandamus will not lie to compel officers to execute bonds not in accordance with law. *State ex rel. Henderson Bkg. Co. v. McBride* (1909) 31 Nev. 57, 99 Pac. 705. In *State ex rel. Henderson Bkg. Co. v. McBride* (Nev.) *supra*, it was held that mandamus would not lie to compel the issuance of school bonds authorized by an election, but not redeemable according to law.

Mandamus to compel a board of liquidation of a municipal corporation to issue bonds to pay the relator's judgment against the board of school directors of the municipality was denied in *United States ex rel. Fisher v. Board of Liquidation* (1894) 9 C. C. A. 37, 23 U. S. App. 29, 60 Fed. 387, for the reason that the judgment was not one against the city for the payment of which the board was authorized to issue bonds.

And under a statute authorizing the issuance of bonds of a township to pay certain indebtedness, it was held, in *State ex rel. Rader v. Union Twp.* (1881) 43 N. J. L. 518, that mandamus would not lie to compel township officers to issue bonds to pay the relator's judgment, in the absence of allegations showing that the judgment was of a class for the payment of which the issuance of bonds was authorized.

And it was held in *United States ex rel. Siegel v. Board of Liquidation* (1896) 20 C. C. A. 662, 41 U. S. App. 414, 74 Fed. 489, that mandamus would not lie to compel a board of liquidation of a municipality to issue bonds to pay the relator's judgment against the city, where the judgment was of a class which the statute authorizing the board to issue bonds expressly excluded from its provisions, even if the L.R.A.1918C.

exclusion was unconstitutional, since, even in that event, there was no statutory provision upon which to base the duty sought to be enforced.

So a writ of mandamus was refused in *Re Guthrie* (1913) 35 Okla. 494, 130 Pac. 265, to compel a bond commissioner to approve municipal bonds, where the proposed structure for which the money was to be raised was a street improvement, and not a public utility within the meaning of the constitutional provision authorizing the issuance of the bonds.

And where the statute gave the state debt board no power to issue new bonds in lieu of bonds wrongfully destroyed, but only to issue and exchange new bonds on presentation of outstanding valid bonds, it was held, in *Farmers' Nat. Bank v. Jones* (1900) 105 Fed. 459, that, even if the complainant's bonds had been wrongfully destroyed by the state burning board, a suit in equity to compel the issuance of new bonds therefor was in effect an application for a writ of mandamus, and the relief sought would not be granted.

So mandamus to compel a township supervisor to subscribe to the stock of a railway company, under a statute requiring such subscription and the issuance of bonds in case of the favorable result of an election on the proposition, was denied in *People ex rel. Chicago & R. River R. Co. v. Dutcher* (1870) 56 Ill. 144, because the proceeding was to compel an unconditional subscription, and the supervisor had power only to make a subscription on the condition on which it was voted; viz., that none of the bonds should be delivered until the road was completed into the township and cars running thereon.

The rule that, where substantial doubt exists as to the duty the performance of which it is sought to coerce, a writ of mandamus will not be issued, was applied in *Ex parte Barnwell* (1876) 8 S. C. 264, in denying the writ to compel a state treasurer to issue a bond for interest which it was alleged a petitioner's debt against the state bore after maturity.

In *State ex rel. Doremus v. Passaic County* (1914) 86 N. J. L. 108, 90 Atl. 1020, a writ of mandamus was denied to compel a board of freeholders to issue bonds for the purchase of an armory site, for the reason that a legal obligation to issue bonds for this purpose did not clearly appear from the statute. The judgment was affirmed in (1916) 89 N. J. L. 197, 98 Atl. 300, on

illustrations of which will be found in the footnotes, where the debt represented by the bonds would be in excess of the legal debt limit;⁸ where the question of

incurring the indebtedness or issuing the bonds was not properly submitted to the electors or did not receive the required number of votes, or where irregularities

the ground, however, that the petitioner did not have such interest as entitled him to maintain the proceeding, either as owner of the proposed site, or as one of a class of persons directly affected by the erection of the armory.

Where the Constitution directed the payment of public school certificates that might thereafter be issued by the city council, out of the proceeds of the sale of constitutional bonds of a certain issue, previously authorized for the liquidation of the city debt, and all the bonds thus authorized had been disposed of by the board of liquidation, it was held, in *State ex rel. Wilder v. Board of Liquidation* (1905) 115 La. 471, 39 So. 448, that mandamus would not lie to compel the issuing and sale of additional bonds to pay belated certificates issued by the city council after the exhausting of the bond issue.

And a writ of mandamus to compel a town supervisor to issue bonds under the Drainage Law authorizing commissioners to borrow money to pay for the construction of ditches and for damages to land, and requiring the supervisor to issue bonds for the amount so borrowed, was denied, in *People ex rel. Dumphy v. Wiggins* (1911) 143 App. Div. 760, 128 N. Y. Supp. 344, for the reason that items for compensation and personal expenses of the commissioners were improperly included in the amount for which issuance of the bonds was sought, and the discretionary power of mandamus should not be exercised to compel issuance of bonds except in payment of expenses legally audited as provided in the Drainage Law.

In *Edward C. Jones Co. v. Guttenberg* (1901) 66 N. J. L. 58, 48 Atl. 537, it was held that municipal officers would not be compelled by mandamus to issue bonds which had been authorized by a board of councilmen, but which the municipality was without power to issue under the statute because in excess of the amount of the municipal indebtedness, although a prior decision of the court had affirmed the validity of the action of the board. It was said: "The power of this court to issue its writ of mandamus is a discretionary one, and will never be exercised for the purpose of compelling the officers of a municipal corporation to perform an act which, on the hearing of the application for the writ, is conclusively shown to be illegal, notwithstanding the existence of a prior adjudication affirming the validity of such act." In subsequent proceedings in this case, in (1902) 66 N. J. L. 659, 51 Atl. 274, a writ of mandamus was granted to compel issuance of the bonds after trial of the issue of the amount of indebtedness and a finding that it exceeded the amount of the bonds.

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In many other cases, without particular discussion of the question of remedy, mandamus to compel the issuance of bonds has been refused on the ground that there was no legal duty to issue them. See, for example, *People ex rel. Park Comrs. v. Detroit* (1874) 29 Mich. 343 (to compel mayor to sign park bonds); *State ex rel. Minnesota M. R. Co. v. Highland* (1879) 25 Minn. 355 (to compel town to issue railroad aid bonds); *State ex rel. Minnesota Midland R. Co. v. Roscoe* (1879) 25 Minn. 445 (same); *People v. Parmerter* (1899) 158 N. Y. 385, 53 N. E. 40 (to compel village clerk to attest and seal water bonds); *Essex County R. Co. v. Lunenburg* (1876) 49 Vt. 143 (to compel town officers to issue bonds for subscription to railroad, the instrument of assent to the proposition by the majority of the taxpayers not having been recorded prior to the making of the subscription, as required by statute); *Lamoille Valley R. Co. v. Fairfield* (1878) 51 Vt. 257 (same).

And, although the question of remedy was not discussed, attention is called to the case of *Brazoria County v. Youngstown Bridge Co.* (1897) 25 C. C. A. 306, 52 U. S. App. 6, 80 Fed. 10, holding that a contract by a county to pay for the construction of bridges in bonds of the county was void, and therefore not enforceable by mandamus, although the bridges had been constructed and were in use by the county, for the reason that at the time of incurring the debt provision was not made by the county for levying and collecting a sufficient tax to pay it, as required by the Constitution.

Illegality, of bonds authorized by an ordinance passed over the mayor's veto, on account of their being in excess of the debt limit, is a good defense to an application for mandamus to compel him to sign the bonds. *Chalk v. White* (1892) 4 Wash. 156, 29 Pac. 979.

In *Portland v. Albee* (1913) 67 Or. 221, 135 Pac. 516, the court sustained a demurrer to an alternative writ of mandamus to compel the issuance by a municipality of dock bonds, on the ground that the writ did not state that by executing the bonds in question the debt of the city would not be increased beyond the limit prescribed by the city charter. On subsequent proceedings, however, in (1913) 67 Or. 227, 135 Pac. 897, after amendment of the alternative writ so as to allege that the issuance of the bonds would not increase the city's indebtedness beyond the statutory limit, it was held that the obligation to execute the bond was ministerial and would be enforced by mandamus.

See also *Edward C. Jones Co. v. Guttenberg*, in note 7, *supra*.

or fraud occurred in the election;⁹ or where the statute pursuant to which it was sought to compel the issuance of the bonds was unconstitutional.¹⁰

The contention has been expressly overruled that, in a mandamus proceeding to compel the issuance of municipal bonds, the defendant cannot try the question of the legality of the election and canvass at which the proposition to issue the bonds was submitted to popular vote.¹¹

But while fraud and illegality in an election on the proposition whether a town should subscribe to the stock of a railway company and issue bonds therefor have been held a good defense to a proceeding by mandamus against the town supervisor to compel the issuance

of the bonds,¹² yet it has been held in the same state that a town clerk cannot defend a mandamus proceeding to compel him to countersign township bonds executed by the town supervisor for subscription to railway stock, on the ground that proper steps have not been taken to authorize the issuance of the bonds.¹³

Discretion.

The well-recognized rule that mandamus will not lie to compel the performance of acts which are discretionary, or, in other words, to control the exercise of discretion, has been applied in a few cases so as to deny the writ of mandamus to compel the issuance of bonds, or the performance of acts connected there-

⁹ In *Daniels v. Long* (1897) 111 Mich. 562, 69 N. W. 1112, it was held that it was a good defense to an action for mandamus to compel a municipal officer to sign light and water bonds, that the proposition to issue the bonds had not received the required number of votes.

Mandamus to compel a city clerk to countersign bonds for public improvements was denied in *Los Angeles v. Hance* (1900) 130 Cal. 278, 62 Pac. 485, for the reason that the question of incurring the indebtedness was not properly submitted to the voters at the election called to determine the matter, and there was no authority for issuing the bonds.

And it was held in *McMahon v. San Mateo County* (1873) 46 Cal. 214, that mandamus would not lie to compel a board of supervisors to issue bonds for the improvement of highways, for the reason that the proclamation for the election at which the bonds were authorized did not comply with the statute, in that it failed to state the specific object for which the money was to be expended.

So illegality in the proposal of a railroad company made to a county under a statute authorizing counties to subscribe for stock of the company was held ground for the denial of a peremptory writ of mandamus, in *Ex parte Selma & G. R. Co.* (1871) 46 Ala. 230, to compel the county commissioners to issue bonds pursuant to the result of an election in favor of the proposition.

As illustrative of other cases not particularly discussing the question of remedy, but denying the writ of mandamus to compel the issuance of railroad aid bonds, because of fraud or illegality in the election, see *People ex rel. Cairo & St. L. R. Co. v. Jackson County* (1879) 92 Ill. 441; *Atchison, T. & S. F. R. Co. v. Jefferson County* (1876) 17 Kan. 29; *People ex rel. Hetfield v. Ft. Edwards* (1877) 70 N. Y. 28.

¹⁰ Mandamus to compel municipal officers to issue bonds for park improvements was denied in *People ex rel. McCagg v. Chicago* L.R.A.1918C.

(1869) 51 Ill. 17, 2 Am. Rep. 278, and *People ex rel. South Park v. Chicago* (1869) 51 Ill. 58, for the reason that a statute upon which the duty to issue the bonds was based constituted an unlawful attempt by the legislature to compel the city to incur a debt for park purposes against its will. In this connection, see notes in 47 L.R.A. 512; 24 L.R.A.(N.S.) 1260; and 34 L.R.A.(N.S.) 1060, on unconstitutionality of statute as a defense against mandamus to compel its enforcement.

¹¹ *Daniels v. Long* (1897) 111 Mich. 562, 69 N. W. 1112.

¹² *People ex rel. Peoria & R. I. R. Co. v. Cline* (1872) 63 Ill. 394.

¹³ *Houston v. People* (1870) 55 Ill. 398.

Distinguishing between the last two cases, the court in *People ex rel. Peoria & R. I. R. Co. v. Cline* (Ill.) supra, said: "When the bonds are issued by the supervisor and delivered to the relator, the clerk is required to attest them and make a record of the issuing of the same. . . . This was a mere ministerial act, the only preliminary to the performance of which was that the supervisor had executed the bonds which the clerk was required to attest, and of which to make a record. The clerk is in no sense the chief representative of the town, nor were his functions prescribed as a check upon such chief officer. He had no more discretion to refuse to attest and make a record of the issuing of these bonds than he would have to refuse to administer the oath to a town officer on the ground that he was not eligible, or to record proceedings because, in his judgment, they were not regular. The supervisor occupies an entirely different position. It is that of a qualified chief executive officer of the town, but whose duties are prescribed by law. While he is clothed with no power to bind the town by the exercise of his discretion in respect to the issuing of bonds to railroad companies, yet it is not his duty to issue them if the statute authorizing their issuance has not been complied with."

with.¹⁴ But the fact that the officers whose duty it is to issue bonds author-

ized by an election have a discretion as to certain details with respect to such is-

¹⁴ A writ of mandamus to compel county commissioners to issue railroad aid bonds pursuant to an election in favor of the proposition was denied in *Land Grant R. & Trust Co. v. Davis County* (1870) 6 Kan. 256, on the ground that the commissioners were merely authorized by the election to subscribe for stock of the railway company and issue the bonds, and that no contract was made with the railway company. But the court did not discuss the question whether under such conditions the commissioners owed a statutory duty to issue the bonds.

It was held in *Lanford v. Drummond* (1908) 81 S. C. 174, 62 S. E. 10, that whether trustees of a school district which had voted bonds should lithograph the bonds, which the statute provided should be sold at par, before procuring a purchaser therefor, was a matter of detail upon which they might exercise discretion, and that mandamus would not lie to compel them to furnish their signatures for lithographing on the bonds where they had been unable to negotiate a sale of the bonds.

And it was held in *Bledsoe v. International R. Co.* (1874) 40 Tex. 537, that mandamus would not lie to compel the state comptroller to countersign and register state bonds which a statute provided should be issued and delivered to a railroad company on fulfillment of certain conditions as to the amount and character of construction of the road, because the comptroller was a high executive officer of the state whose official action should not be controlled by mandamus, and because he, as well as the governor and treasurer, who under the statute participated in the issuance and delivery of the bonds, was invested with the exercise of judgment and discretion in that regard.

Mandamus will not lie to compel township officers to issue bonds to pay a judgment, if they have an option to pay either by issuing the bonds or by levying an assessment. *State ex rel. Rader v. Union Twp.* (1881) 43 N. J. L. 518.

It was held in *Robinson v. Itawamba County* (1913) 105 Miss. 90, 62 So. 3, that county supervisors had a discretion as to the issuance of road bonds, which could not be controlled by mandamus sought by the road commissioners to compel the issuance of the bonds.

And it was held in *Clarke v. San Jacinto County* (1898) 18 Tex. Civ. App. 204, 45 S. W. 315, that mandamus would not lie on application by the holder of county warrants, to compel county commissioners to fund the indebtedness of the county, for the reason that this was an act the performance of which rested entirely in their discretion.

Also, in *Morris & Whitehead v. Williams* (1900) 23 Wash. 459, 63 Pac. 236, denial of a writ of mandamus to compel county commissioners to perform a contract with a banking corporation to issue bonds to I. R. A. 1918C.

fund the warrant indebtedness of the county was placed in part on the ground that the commissioners had a discretion as to the issuing of the bonds.

On the ground that they were given a discretion in the matter, which they exercised when they refused to issue the bonds, a writ of mandamus was denied in *Bote-tourt County v. Cahoon* (1917) — Va. —, 94 S. E. 340, to compel county supervisors to issue bonds under a statute which "authorized and empowered" them to borrow money for permanent improvement of certain highways, the board having refused to issue the bonds because it appeared to them that none of the roads could be improved in the manner provided in the statute for the sum allowed for that purpose.

Mandamus to compel a board of liquidation to exchange state bonds for warrants was denied in *State ex rel. Burnett v. Warmoth* (1871) 23 La. Ann. 76, under a statute providing that if, at the expiration of thirty days after the passage of the act, the board of liquidation had not sold the bonds, they were "authorized and empowered" to exchange the bonds at a certain rate for outstanding indebtedness against the state, since the statute gave the board a discretion as to the time for selling the bonds, and did not require them to make the exchange at the end of the thirty-day period.

It was held in *Fisher v. Cherokee* (1914) 166 N. C. 233, 81 S. E. 1061, that, in the absence of proof of an arbitrary or fraudulent refusal to exercise discretion, mandamus would not lie to compel the issuance of bonds in a township in a certain sum to pay for railroad stock subscription of like amount, where the statute under which the defendants were appointed township representatives to make the subscription and issue bonds provided for such issuance "as conditions may require and as they may determine."

But in *California Northern R. Co. v. Butte County* (1861) 18 Cal. 671, it was held that the board of supervisors acted ministerially in the issuance of the bonds, and that mandamus was a proper remedy to compel such issuance, where a statute made it their duty to issue bonds to a railroad whenever an estimate of expenditures was presented to the board and it should appear to their satisfaction that an amount not less than a stated sum had been paid for construction or materials.

And it was held in *Christie v. Bergen County* (1907) 75 N. J. L. 49, 66 Atl. 1073, affirmed in (1909) 76 N. J. L. 818, 72 Atl. 45, that, where a county building committee had been appointed as authorized by statute, and had incurred obligations for land or the construction of buildings, it was the duty of the board of freeholders to provide the necessary funds to cover such expenses by the issuance of bonds; that the stat-

issuance does not constitute an objection to starting performance of the duty itself by mandamus.¹⁵

Conditions precedent.

A writ of mandamus to compel the issuance of bonds will not, of course, be granted if the relator has failed to

comply substantially with the conditions on the performance of which only he is entitled to the bonds;¹⁶ or if he has not taken the required preliminary steps, so as to entitle him to the bonds and place the defendant in default for failing to issue them;¹⁷ or generally if he does

uturo provision that "it shall be lawful" for the freeholders to issue bonds did not make their action discretionary, so as to prevent the granting of mandamus to compel the issuance of the bonds.

¹⁵ *Houston v. Boltz* (1916) 169 Ky. 640, 185 S. W. 76.

¹⁶ For example, it was held in *People ex rel. Chicago & I. R. Co. v. Glann* (1873) 70 Ill. 232, that mandamus would not lie to compel town officers to execute and deliver bonds for subscription to a railway, for the reason that the petitioner did not allege and prove that it had complied with the condition on which the authorities were authorized to issue the bonds, as to the location of a depot in the town.

And a writ of mandamus sought by a railway company to compel town officers to issue and deliver bonds of the town to pay for a subscription voted to the company was denied in *People ex rel. Illinois M. R. Co. v. Waynesville* (1878) 88 Ill. 469, for the reason that the evidence failed to show compliance with the statutory condition on which the bonds were authorized; viz., that they should not be delivered until work of value equal to the amount of the bonds had been done on the road.

These cases are illustrative only, because there are doubtless many cases, such as *People ex rel. Paris & D. R. Co. v. Holden* (1879) 91 Ill. 446, in which, without discussing particularly the question of remedy, the court denied the writ of mandamus because of the failure of the railway company to comply with conditions precedent on performance of which issuance and delivery of the bonds were authorized.

¹⁷ The question of demand and notice is not treated, because not peculiar to the subject-matter of the note. And other cases cited in this connection are of an illustrative nature, because for the most part they are not apparently distinctive to the class of cases under consideration.

It was held in *Templeton v. Newton County* (1909) 173 Ind. 226, 89 N. E. 880, that the remedy of a contractor to secure payment for constructing a public drain was by application to the engineer for a certificate showing completion of the work and the amount due, which, when presented to the county auditor, authorized the latter to draw a warrant for the payment thereof, and that, where it did not appear that the contractor had applied for and obtained such a certificate, mandamus would not lie to compel county commissioners to issue bonds to pay for the improvement.

It was held in *Ackerman v. Buchman* (1885) — Pa. —, 6 Atl. 218, that a writ of L.R.A.1918C.

mandamus would not be granted on the application of a board of water commissioners to compel a town council to issue bonds for the construction of waterworks, where the board had failed to request the council to provide any specific sum for such construction, or to furnish the council with an estimate of the amount required, so as to enable it to determine the necessity of a bond issue.

It was held in *People ex rel. Tenth Nat. Bank v. New York* (1874) 3 Hun (N. Y.) 11, 5 Thomp. & C. 382, that to entitle one to a writ of mandamus to compel a county board of apportionment to issue bonds to pay an alleged advancement to the county, under statute authorizing the issuance of bonds to pay such advances, the relator must first establish a debt owing to him which he could lawfully require paid out of the proceeds of the bonds, where the validity of his claim was denied; and that this issue could not be determined on the motion for the writ.

But that the amount due the relator under the contract had not been ascertained by an officer properly authorized was held, in *Temple v. State* (1916) — Ind. —, 113 N. E. 233, not a defense to an action for mandamus by a contractor for a school building partly completed, to compel the sale of bonds authorized to procure funds with which to erect the building, the contract providing for payment as the work progressed. The court said: "Counsel misconstrue the theory of the pleading. It does not seek an order against the trustee to pay a sum of money measured by the architect's estimates, or any other sum, but demands the performance of a ministerial duty in procuring funds through an authorized loan. The trustee, of course, would not be bound by the architect's estimates per se, but by facts showing performance of the contract, and the judgment appealed from in nowise prejudices the trustee in defending the school corporation against an improper claim."

An actual tender of certificates of stock of a railway company is not required in order to enable the company to maintain mandamus to compel town officers to issue bonds therefor pursuant to an election, where demand is made for the bonds and issue of them is refused, a readiness to deliver the certificates being sufficient. *Illinois Midland R. Co. v. Barnett* (1877) 85 Ill. 313.

And in *State ex rel. Burlington & M. R. River Co. v. County Judge* (1859) 9 Iowa, 288, it was held that, on an application for mandamus by a railway company

not show that the conditions precedent have been fulfilled.¹⁸

Existence of other remedy.

It is, of course, a well-established doctrine that mandamus will lie only where there is no other clear, adequate efficient, and speedy remedy.¹⁹ But generally in the cases in which a writ of mandamus has been sought to compel the issuance of bonds of a municipality or other public corporation, it has been held that there was no other adequate remedy

which would prevent the issuance of the writ.²⁰

The view has been taken that the existence of another adequate remedy would not prevent the granting of mandamus to compel the issuance of bonds of a municipal corporation.²¹

But in several cases mandamus to compel the issuance of bonds has been denied, because of the existence of a special statutory remedy, or because the relator should have pursued some other course to enforce his rights.²²

to compel a county judge to issue bonds in payment of stock of the railway company pursuant to a vote on the proposition, it was not necessary for the company to allege an actual tender of the certificates of stock, but only a readiness or willingness to issue the certificates when the bonds were delivered.

¹⁸ A petition for a writ of mandamus to compel a mayor to sign village bonds was held insufficient in *State ex rel. Pleasant Ridge v. Staley* (1899) 18 Ohio C. C. 406, for the reason that it did not allege compliance by the council with statutory requirements authorizing the council to issue bonds to extend the time of payment of municipal indebtedness, but providing that no indebtedness should be funded unless it was first determined to be an existing valid obligation of the municipality, by formal resolution of the council stating certain particulars.

¹⁹ 26 Cyc. 168.

²⁰ Where a contract with a city for the construction of a sewer provided that no payment should be made to the contractor until the cost of the work had been ascertained and collected from the taxpayers, the proper remedy of the contractor to compel payment, after the construction and acceptance of the sewer by the city, was by mandamus for the assessment of the tax or the issuance of bonds, as he could not maintain an action at law against the city. *People ex rel. Ready v. Syracuse* (1894) 144 N. Y. 63, 38 N. E. 1006.

And where a contract is made with municipal authorities for the purchase of bonds which they are authorized and required to issue, it is not a valid objection to the granting of a writ of mandamus to compel the issuance of the bonds, that the purchaser has a remedy at law by an action for damages, or a proceeding in equity for specific performance. *Smalley v. Yates* (1887) 36 Kan. 519, 13 Pac. 845.

So, where a contract was made by a municipality for the purchase of land, payment to be made in bonds, it was held that an action by the vendor for mandamus to compel the issuance of bonds could not be defeated on the ground that he might have other remedies, as a suit for specific performance, or an action for the price or for damages. *People ex rel. Taylor v. Brennan* (1863) 39 Barb. (N. Y.) 522. L.R.A. 1918C.

It was held in *Temple v. State* (1916) — Ind. —, 113 N. E. 233, that a complaint in an action on a building contract was not insufficient on the theory that the relator might secure adequate relief in an action on the contract, where it alleged that there were no funds with which to pay the claim and no way to procure them except by the sale of bonds.

It was held in *Noble County v. Hunt* (1877) 33 Ohio St. 169, that mandamus, and not appeal, was the proper remedy to compel county commissioners to issue bonds in compliance with a contract with the relators for road improvements to be paid for in bonds of the county, where the work had been completed and accepted by the commissioners, but the latter refused to issue the bonds.

It was held in *People ex rel. Keteltas v. Fitch* (1894) 78 Hun, 321, 29 N. Y. Supp. 163, that one to whom awards had been made for land taken for park purposes did not have a remedy at law against the city which would be a defense to an action for mandamus to compel the comptroller of New York city to issue bonds therefor, as authorized by the board of estimate and apportionment.

²¹ In *People ex rel. Sherrill v. Guggenheimer* (1899) 28 Misc. 735, 59 N. Y. Supp. 913, which is affirmed in (1900) 47 App. Div. 9, 62 N. Y. Supp. 11, the court, in granting a writ of mandamus to compel a city council to issue bonds to pay an award in condemnation proceedings for property of a water company, which a statute authorized the city to acquire, dismissed the point as to the existence of a remedy at law with the statement that as to corporations the existence of another and adequate remedy was no objection to awarding the writ. This case seems to apply the rule which is stated in 26 Cyc. 172, that, in the case of corporations and ministerial officers, there is an exception to the general rule, and that they may be compelled to exercise their functions according to law by mandamus, even though the party has another remedy against them by action for neglect of duty.

²² It was held in *Robinson v. Itawamba County* (1913) 105 Miss. 90, 62 So. 3, that mandamus would not lie on behalf of road commissioners to compel county supervisors to issue road bonds, for the reason that a

Miscellaneous.

An officer should not, of course, be ordered by mandamus to perform or secure performance of acts pertaining to the issuance of bonds which lie beyond his department, and can be performed only by other officers not under his control.²³ And mandamus by a contractor with a municipality, to compel the issuance of bonds, has been denied on the ground that he elected to reduce his claim to a money judgment, and what-

ever rights he may have had under the contract to the issuance of bonds became merged in the judgment.²⁴

Mandamus to compel the governor to issue or deliver bonds has been denied in the cases cited in the footnote, among possibly others, not, however, on grounds distinctive to the issuance of bonds, but on general grounds that the court should not assume jurisdiction to control the executive department of the government.²⁵

plain and adequate remedy was provided by statute by appeal to the circuit court from the decision of the supervisors.

It was held also in *State ex rel. Rader v. Union Twp.* (1881) 43 N. J. L. 518, that a writ of mandamus would not be granted to compel the issuance of township bonds to pay a judgment obtained by the relators, pursuant to a statute authorizing the issuance of such bonds to pay indebtedness, were it was not alleged that the relators could not collect their debt by the ordinary process of law.

And a writ of mandamus sought by a holder of municipal warrants to compel the municipal authorities to report said indebtedness to the loan commissioners of the territory, and to demand the funding of the same by the latter, was denied in *Bravin v. Tombstone* (1899) 6 Ariz. 212, 56 Pac. 719, for the reason that the petitioner had mistaken his remedy, it being the duty of the commissioners under statute to fund the indebtedness on the application of holders of warrants.

One desiring to bid for public bonds offered for sale cannot compel their proper execution by mandamus, for the reason that he, or any other successful bidder at the sale, will be entitled to bonds properly executed, and if the bonds tendered are not so executed he may compel the issuance of proper bonds. *Graham v. Gillett* (1909) 156 Cal. 113, 103 Pac. 195.

²³ *People ex rel. Taylor v. Brennan* (1863) 39 Barb. (N. Y.) 522, holding that, while mandamus would lie to compel a city comptroller to comply with a resolution of the common council to issue bonds in payment of land purchased by the city, an order directing a peremptory mandamus to issue, commanding him to prepare and sign the bonds, was erroneous in so far as it also commanded him to procure the signature of the mayor and the affixing of the corporate seal.

²⁴ *State ex rel. Eugster v. New Orleans* (1884) 36 La. Ann. 726, holding that a contractor for street improvements who obtained a money judgment against a city for the work done, and registered the judgment, could not afterwards obtain a writ of mandamus to compel the city to issue improvement bonds for the debt, even if, at the time he instituted the suit, he was entitled to payment in the latter mode. L.R.A.1918C.

The court said: "Granting that the judgment creditor was entitled to demand, when he instituted his suit, payment of his debt in the mode stipulated, yet it appears he did not do so, but preferred seeking its liquidation or satisfaction in money. Whatever his rights may have been under his contract, they become merged in the judgment he sought and obtained. That judgment became the exponent of his rights and the measure of his debtor's liability. That right, as thus determined, was to enforce payment of his debt by money, and the liability of the debtor was to pay in money and nothing else. The creditor might have chosen otherwise, and the debtor might have insisted, in the progress of the suit, on satisfying the debt under the terms of the obligation, in bonds instead of money. But, however that may be, when the option of the creditor was declared and exercised, and the privilege of the debtor was waived, and the rights and obligations of the parties respectively were determined otherwise than might have been fixed upon a different presentation of their respective claims or rights, the determination became final and the mutual rights and obligations of the parties became a thing adjudged."

²⁵ *People ex rel. Billings v. Bissell* (1857) 19 Ill. 229, 68 Am. Dec. 591 (to compel the governor to issue new bonds for arrears of interest on other bonds, as it was contended he was required to do by statute); *Chamberlain v. Sibley* (1860) 4 Minn. 309, Gil. 228 (to compel the governor to deliver bonds to the assignee of a railroad company); *State ex rel. Oliver v. Warmoth* (1870) 22 La. Ann. 1, 2 Am. Rep. 712 (holding that mandamus would not lie to compel the governor to execute and deliver state bonds which the relator contended he was entitled to receive in payment of public works authorized by the legislature); *Jonesboro, F. B. & B. Gap Turnp. Co. v. Brown* (1875) 8 Baxt. (Tenn.) 490, 35 Am. Rep. 713. See also *Bledsoe v. International R. Co.* in note 14, *supra*.

And see *State ex rel. Hope & Co. v. Board of Liquidation* (1890) 42 La. Ann. 647, 7 So. 706, 8 So. 577, denying a writ of mandamus to compel the board of liquidation, composed of the governor and other executive officers of the state, to take action on the relators' bonds, and determine

Questions as to statutory construction;²⁶ as to the effect of a change in the membership of the board which authorizes the issuance of the bonds;²⁷ as to

whether they were fundable under a statute enacted for the purpose of restricting and funding the state indebtedness.

Generally, as to mandamus to governor, see notes in 6 L.R.A.(N.S.) 750; 32 L.R.A.(N.S.) 355; and L.R.A.1917F, 774.

²⁶ A provision in a drainage law that the court in which the proceeding is pending may by mandamus enforce compliance with any of the provisions of the section was held, in *People ex rel. Dumphy v. Chaney* (1916) 171 App. Div. 303, 156 N. Y. Supp. 1035, to refer only to the issuance of bonds provided for by that section, which constituted direct obligations of the town, and not to authorize the granting of a writ of mandamus by the county court to compel the issuance of bonds under other sections of the law, which constituted mere collateral obligations.

²⁷ Within the principle that a change in the membership of a municipal body which has determined to perform a ministerial duty will not relieve from the performance of the duty, when the rights of others have intervened, it has been held that a change of membership in a continuous body, as a board of councilmen of a town, will not prevent the granting of mandamus to compel the present holders of the office to issue bonds duly authorized by their predecessors in office, who accepted the relator's bid therefor. *Edward C. Jones Co. v. Guttenberg* (1902) 66 N. J. L. 659, 51 Atl. 274.

²⁸ Although the court has a discretion as to the granting of the writ, it has been held that mandamus on the application of a railway company, to compel a town to issue bonds in exchange for stock of the company, pursuant to a vote of the town, will not be denied because of a delay, not explained or excused, on the part of the company for nearly six years after the right to the bonds accrued, in bringing the action, where the town might, at any time during this period have compelled compliance with the contract,—especially where it does not appear that the town will be more seriously injured by being compelled to issue the bonds at the time the writ is granted than if it had been compelled to do so earlier. *State ex rel. Green Bay & M. R. Co. v. Jennings* (1880) 48 Wis. 549, 4 N. W. 641.

²⁹ The following cases are here included because the questions involved appear somewhat distinctive to, or at least likely to arise in, a proceeding to compel the issuance of bonds. It should be observed that there are possibly other cases of a more general nature dealing with the right to maintain a proceeding for mandamus which are not included herein, although the action was to compel the issuance of bonds:

It was held in *People ex rel. Taylor v.* L.R.A.1918C

the effect of delay in applying for the writ;³⁰ as to the standing of various parties to maintain the proceeding;³¹ and other questions of a miscellaneous

Brennan (1863) 39 Barb. (N. Y.) 522, that an owner who contracted with a city for the sale of land to it, payment to be made in bonds which the common council directed the city comptroller to issue, could enforce the issuance of the bonds by mandamus, at least so long as the municipality assented to the proceeding.

And under a statute providing that the person entitled to the award might require the city officers to raise the money necessary to enable the comptroller to pay the same, it was held, in *People ex rel. Keteltas v. Fitch* (1894) 78 Hun, 321, 29 N. Y. Supp. 163, that one to whom awards had been made for land taken for park purposes was entitled to a writ of mandamus to compel the comptroller of New York city to issue bonds, authorized by the board of estimate and apportionment, to pay therefor, and that it was not a good defense to the proceeding that the comptroller owed the duty to issue the bonds only to the mayor, etc., and not to the relator.

One who, as the highest bidder, is entitled to bonds duly authorized by the common council, has such interest as entitles him to mandamus to compel signature of the bonds by the mayor, even though he is a nonresident of the state. *Halsey v. Nowrey* (1904) 71 N. J. L. 481, 59 Atl. 449.

But a status to compel by mandamus the proper execution of bonds offered for sale does not arise merely from the fact that the petitioner is desirous of bidding for the bonds. *Graham v. Gillett* (1909) 156 Cal. 113, 103 Pac. 195.

It was held in *State ex rel. Amick v. Francisco* (1916) 98 Kan. 808, 160 Pac. 217, that, since the state had an interest in seeing that public duties were not disregarded by public officers, it could maintain a proceeding for mandamus to compel city officers to issue bonds which had been voted for the purchase of a water-works plant.

It was held in *Pearsons v. Ranlett* (1872) 110 Mass. 118, that a majority of the board of water commissioners, representing the board, might maintain mandamus to compel the town treasurer to sign and deliver water bonds which the town was authorized by statute to issue, and that the proceeding need not necessarily be brought by the town.

And where a statute authorized a municipality to acquire the property of a water company, and provided that the city officers were authorized and directed to issue bonds therefor, it was held that citizens and taxpayers of the city were entitled to mandamus to compel the issuance of the bonds. *People ex rel. Sherrill v. Guggenheimer* (1899) 28 Misc. 735, 59 N. Y. Supp. 913, affirmed in (1900) 47 App. Div. 9, 62 N. Y. Supp. 11.

nature, are considered in the cases cited in the accompanying footnote.³⁰

See also State ex rel. Doremus v. Passaic County, in note 7, supra.

³⁰ A motion to quash an alternative writ of mandamus was sustained in State ex rel. Hasbrouck v. Milwaukee (1867) 22 Wis. 397, for the reason that it was defective under the rule that the writ must expressly state the duty required to be performed, in that it commanded the defendant to pay the judgment therein mentioned, or to issue bonds for its payment, or to levy a tax for that purpose.

In an action for mandamus to compel city officers to collect the balance of a tax assessed to pay for a sewer constructed by the relator, or to issue bonds for that purpose, it was held that it was not a good defense that the sewer was not constructed in accord with the terms of the contract,

and that the engineer's return and certificate were incorrect and given under a mistaken idea of the facts, where the undisputed evidence showed that the work of constructing the sewer was prosecuted under the constant supervision and inspection of the representatives of the city as provided by the contract, that the sewer was accepted by the city engineer under the terms of the contract, that the common council ratified such acceptance and set in motion the machinery of taxation to raise the money due the relator, and that the city had for long time been using the sewer. People ex rel. Ready v. Syracuse (1894) 144 N. Y. 63, 38 N. E. 1006, affirming (1892) 65 Hun, 321, 20 N. Y. Supp. 236.

R. E. H.

OKLAHOMA SUPREME COURT.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.

JOE McELREATH et al.

(— Okla. —, 169 Pac. 628.)

Carriers— provision for notice of injury.

1. A provision in a contract with the carrier for an interstate shipment of live stock, "that, as a condition precedent to the bringing of any suit for damages for any loss or injuries to the person or persons or property covered by this contract, the claimant shall give notice in writing of the claim for such damages to some general officer, claim agent, or station agent of the said first party, not later than ninety days after the date of the loss or injury claimed, and a failure to strictly comply with this provision shall be a bar to a recovery to any and all damages occasioned to the person or persons or property embraced in this contract," is reasonable and valid, and no action can be maintained by the shipper for damages for loss or injuries occasioned by said shipment without showing a substantial compliance with the requirements of said provision as to notice.

For other cases, see *Carriers*, III. g, 4, in Dig. 1-52 N. S.

Evidence — sufficiency.

2. The evidence and all the reasonable inferences to be drawn therefrom held to be insufficient to justify the court in sub-

Headnotes by HOOKER, C.

Note.— As to reasonableness of time fixed in a contract of shipment of live stock, for presentation of claim for damages, see notes to *Wabash R. Co. v. Thomas*, 7 L.R.A. (N.S.) 1041, and *Baldwin v. Chicago, R. I. & P. R. Co.* L.R.A.1916D. 341 L.R.A.1918C.

mitting this cause to the jury upon the issue of a substantial compliance with the provision of said contract.

For other cases, see *Trial*, II. b, in Dig. 1-52 N. S.

(November 6, 1917.)

ERROR to the District Court for Pontotoc County to review a judgment in favor of plaintiffs in an action brought to recover damages for injuries alleged to have been caused to their cattle by defendant's negligent handling of them in shipment. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. C. O. Blake, R. J. Roberts, W. H. Moore, and K. W. Shartel, for plaintiff in error:

The provision in the contract as to notice is valid and failure to comply therewith defeats plaintiffs' right to recover.

St. Louis & S. F. R. Co. v. Phillips, 17 Okla. 264, 87 Pac. 470; St. Louis & S. F. R. Co. v. Copeland, 23 Okla. 837, 102 Pac. 104; Missouri, K. & T. R. Co. v. Davis, 24 Okla. 677, 24 L.R.A.(N.S.) 866, 104 Pac. 34; St. Louis & S. F. R. Co. v. Cake, 25 Okla. 227, 105 Pac. 322; Missouri, K. & T. R. Co. v. Hancock, 26 Okla. 254, 109 Pac. 220; Chicago, R. I. & P. R. Co. v. Spears, 31 Okla. 469, 122 Pac. 228; St. Louis & S. F. R. Co. v. Ladd, 33 Okla. 160, 124 Pac. 461; St. Louis & S. F. R. Co. v. Bilby, 35 Okla. 589, 130 Pac. 1089; St. Louis & S. F. R. Co. v. Rinkle, 37 Okla. 631, 133 Pac. 199; St. Louis & S. F. R. Co. v. Ziekafosse, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717; Clegg v. St. Louis & S. F. R. Co. 122 C. C. A. 273, 203 Fed. 971.

Messrs. Crawford & Bolen, Lester Maxey, and B. H. Epperson for defendants in error.

Hooker, C., filed the following opinion:

This is an action to recover damages for injuries alleged to have been caused to cattle of the defendants in error by the negligent handling of the plaintiff in error in the shipment thereof. The shipments involved were interstate, and the evidence and the pleadings show that the same were made under and by virtue of a contract which contained the two following provisions:

"Sixth. That, as a condition precedent to the bringing of any suit for damages for any loss or injuries to the person or persons or property covered by this contract, the claimant shall give notice in writing of the claim for such damages to some general officer, claim agent, or station agent of the said first party not later than ninety days after the date of the loss or injury claimed, and a failure to strictly comply with this provision shall be a bar to a recovery of any and all damages occasioned to the person or persons or property embraced in this contract.

"Seventh. That, as a condition precedent to claiming or recovering damages for any loss or injury to or detention of live stock, or delay in transportation thereof, covered by this contract, the second party, as soon as he discovers such loss or injury, shall promptly give notice thereof in writing to some general officer, claim agent, or station agent of the first party, or to the agent at destination, or to some general officer of the delivering line, before such stock is removed from the point of shipment or from the place of destination, as the case may be, and before such stock is mingled with other stock; and such written notice shall in any event be served within one day after delivery of the stock at its destination, in order that such claim may be fully and fairly investigated. It is agreed that a failure to strictly comply with all the foregoing provisions shall be a bar to the recovery of any and all such claims."

The plaintiff in error as to one of these shipments was the initial carrier, and as to the other the intermediate one.

It is admitted that defendants in error complied with provision 7 of this contract, but it is a disputed question as to whether any compliance was had with provision 6 thereof. The lower court submitted this question to the jury, which found that section 6 of this contract had been complied with; so the first question for us to determine is to ascertain whether this provision of the contract is a valid and an enforceable one, and if so, whether there was any evidence justifying the submission of this question to the jury. There are other questions raised, but under the view we have taken of this case it is unnecessary to con-

sider them. These contracts were fairly entered into by the parties, and they constitute the agreements under which these shipments were made. If provision 6 of these contracts is valid and enforceable, then, before defendants in error are entitled to recover, they must show a substantial compliance therewith. In order to determine the reasonableness of this provision it is our duty to construe the contract as a whole, and consider the duty imposed by virtue of section 7 thereof in connection therewith. It is admitted that defendants in error gave the one day's notice provided by this contract. Now, having given to the delivering line this notice, is it unreasonable to require the defendants in error to give the notice of its claim as provided by section 6 before any liability can accrue by reason of any damage suffered to the shipment in question? In our opinion, the giving of the one-day notice at the point of destination to the delivering carrier did not obviate the necessity of complying with the other provision of the contract, which required the notice of the claim to be presented to the company against which damages are sought within the ninety days.

First. Is this provision of the contract reasonable? If so, it will be upheld.

In the case of *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397, the Supreme Court of the United States said:

"The court below held that the stipulation in the shipping contract that no suit shall be brought after the lapse of ninety days from the happening of any loss or damage, 'any statute or limitation to the contrary notwithstanding,' was void.

"It is conceded that there are statutes in Missouri, the state of the making of the contract, and the state in which the loss . . . occurred, and in Texas, the state of the forum, which declare contracts invalid which require the bringing of an action for a carrier's liability in less than the statutory period, and that this action, though started after the lapse of the time fixed by the contract, was brought within the statutory period of both states.

"The liability sought to be enforced is the 'liability' of an interstate carrier for loss or damage under an interstate contract of shipment declared by the Carmack Amendment of the Hepburn Act of June 29, 1906. The validity of any stipulation in such a contract which involves the construction of the statute, and the validity of a limitation upon the liability thereby imposed, is a Federal question, to be determined under the general common law, and as such is withdrawn from the field of state law or legislation. . . . The liability imposed

by the statute is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence.

"The policy of Statutes of Limitation is to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents, or failure of memory. But there is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short. That is a question of law for the determination of the court. Such stipulations have been sustained in insurance policies. . . . A stipulation that an express company should not be held liable unless claim was made within ninety days after a loss was held good in *Southern Exp. Co. v. Caldwell*, 21 Wall. 264, 22 L. ed. 556. Such limitations in bills of lading are very customary, and have been upheld in a multitude of cases. . . . The provision requiring suit to be brought within ninety days is not unreasonable."

In *Ray v. Missouri, K. & T. R. Co.* 90 Kan. 244, 133 Pac. 847, the supreme court of Kansas said that the Carmack Amendment does not prevent the carrier and shipper from stipulating for a reasonable limitation as to the time for bringing an action in case of loss of or damage to an interstate shipment.

And in *Hafer v. St. Louis Southwestern R. Co.* 101 Ark. 310, 142 S. W. 176, Ann. Cas. 1913E, 866, it was held that a stipulation in a contract of shipment that actions for the recovery of any claim arising thereunder must be commenced within six months after the cause of action accrues does not violate Acts 1907, p. 557, forbidding common carriers to abridge, modify, limit, or abrogate their common-law liability, and that a contract, however, which does not in any way abridge or defeat the complete vestiture of a right to recover from the carrier for any breach of duty imposed upon it by the common law, or growing out of any liability created against it by the common law, does not operate as a limitation, modification, or abridgment of any duty or liability imposed by the common law upon the carrier. The limitation of the time within which suit shall be brought for any cause of action is but a period fixed in which the right itself must be asserted. It does not in any way abridge or impair such right itself, nor limit in any way any liability incurred by the carrier which creates such right. It simply effects the remedy L.R.A.1018C.

for the enforcement of such right. The general period of limitation fixed by statute names a time within which an action must be brought against a carrier; and yet such Statute of Limitation cannot be said to abridge or limit any liability of a common carrier as fixed by the common law. For the same reason a contract limiting the time within which the right of action shall be asserted does not abridge or limit such liability.

And in *Gulf, C. & S. F. R. Co. v. Trawick*, 68 Tex. 314, 2 Am. St. Rep. 494, 4 S. W. 567, it was held that a contract between a shipper of live stock and a railway company which limited the time within which suit might be brought by the shipper for any claim for damages arising under the contract to forty days from the time the damage occurs was held to be reasonable and valid, notwithstanding a statutory provision that common carriers cannot limit or restrict their common-law liability. Such a contract did not in any way defeat the complete vestiture of the right to recover from a common carrier for a breach of duty that the common law would give, and hence did not operate as a restriction on the common-law liability of the carrier, but merely required the assertion of that right by action at an earlier period than would be necessary to defeat it through the operation of the ordinary Statutes of Limitation.

The Supreme Court of the United States, in *Georgia, F. & A. R. Co. v. Blish Mill Co.* 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541, said: "The effect of a stipulation in a bill of lading for an interstate shipment requiring claims for damages or misdelivery to be presented within four months after a reasonable time for delivery has elapsed cannot be avoided by suing the carrier in trover on the theory that in making the misdelivery it converted the shipment and thus abandoned the contract, since the parties could not waive the terms of the contract under which the shipment was made, pursuant to the Act of February 4, 1887 (24 Stat. at L. 379, chap. 104), as amended by the Act of June 29, 1906 (34 Stat. at L. 593, chap. 3591, Comp. Stat. 1916, § 8592), nor could the carrier by its conduct give the shipper the right to ignore the terms and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations."

And in the body of the opinion it is said:

"With other defenses, the railway company pleaded that the shipper had failed to comply with the following provision of the bill of lading issued by the initial carrier: 'Claims for loss, damage, or delay must be made in writing to the carrier at

the point of delivery or at the point of origin within four months after the delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.' . . .

"These decisions also established that the question as to the proper construction of the bill of lading is a Federal question. The clause with respect to the notice of claims—upon which the plaintiff in error relies in its second contention—specifically covers 'failure to make delivery.' . . . When the goods have been misdelivered there is as clearly a 'failure to make delivery' as when the goods have been lost or destroyed; and it is quite as competent in the one case as in the other for the parties to agree upon reasonable notice of the claim as a condition of liability. It may be urged that the carrier is bound to know whether it has delivered to the right person, or according to instructions. This argument, however, even with respect to the particular carrier which makes a misdelivery, loses sight of the practical object in view. In fact, the transactions of a railroad company are multitudinous, and are carried on through numerous employees of various grades. Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction. The purpose of the stipulation is not to escape liability, but to facilitate prompt investigation. And to this end it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it even with respect to its own operation.

"There is, however, a further and controlling consideration. We are dealing with a clause in a bill of lading issued by the initial carrier. The statute casts upon the initial carrier responsibility with respect to the entire transportation. The aim was to establish unity of responsibility. . . . It is not to be doubted that if, in the case of an inter-state shipment under a through bill of lading, the terminal carrier makes a misdelivery, the initial carrier is liable; and when it inserts in its bill of lading a provision requiring reasonable notice of claims 'in case of failure to make delivery,' the fair meaning of the stipulation is that it includes all cases of such failure, as well those due to misdelivery as those due to the loss of the goods. But the provision in question is not to be construed in one way with respect to the initial carrier, and in another with respect to the connecting or terminal carrier. As we have said, the lat-

ter takes the goods under the bill of lading issued by the initial carrier, and its obligations are measured by its terms. . . . The clause gave abundant opportunity for presenting claims, and we regard it as both applicable and valid. . . .

"It is urged however, that the carrier, in making the misdelivery, converted the flour, and thus abandoned the contract. But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed. . . . We are not concerned in the present case with any question save as to the applicability of the provision and its validity, and as we find it to be both applicable and valid, effect must be given to it."

The Supreme Court of the United States in *Southern Exp. Co. v. Caldwell*, 21 Wall. 264, 22 L. ed. 556, in construing a contract executed by the company which contained a provision as follows: "It was agreed between them and the plaintiff, and made one of the express conditions upon which the package was received, that they should not be held liable for any loss of, or damage to, the package whatever, unless claim should be made therefor within ninety days from its delivery to them,"—said:

"Notwithstanding the great rigor with which courts of law have always enforced the obligations assumed by common carriers, and notwithstanding the reluctance with which modifications of that responsibility, imposed upon them by public policy, have been allowed, it is undoubtedly true that special contracts with their employers limiting their liability are recognized as valid, if in the judgment of the courts they are just and reasonable,—if they are not in conflict with sound legal policy. The contract of a common carrier ordinarily is an assumption by him of the exact duty which the law affixes to the relation into which he enters when he undertakes to carry. That relation the law regards as substantially one of insurance against all loss or damage except such as results from what is denominated the act of God or of the public enemy. But the severe operation of such a rule in some cases has led to a relaxation of its stringency, when the consignor and the carrier agree to such a relaxation. All the modern authorities concur in holding that to a certain extent the extreme liability

exacted by the common law originally may be limited by express contract. The difficulty is in determining to what extent, and here the authorities differ. Certainly it ought not to be admitted that a common carrier can be relieved from the full measure of that responsibility which ordinarily attends his occupation, without a clear and express stipulation to that effect obtained by him from his employer. And even when such a stipulation has been obtained the court must be able to see that it is not unreasonable. . . .

"Hence, as we have said, it is now the settled law that the responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable, and not inconsistent with sound public policy. . . . In *York Mfg. Co. v. Illinois C. R. Co.* 3 Wall. 107, 18 L. ed. 170, it is ruled that the common-law liability of a common carrier may be limited and qualified by special contract with the owner, provided such special contract does not attempt to cover losses by negligence or misconduct. And in a still later case, *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, 10 Am. Neg. Cas. 624, where the decisions are extensively reviewed, the same doctrine is asserted. . . . The question, then, which is presented to us by this record is whether the stipulation asserted in the defendant's plea is a reasonable one, not inconsistent with sound public policy.

"It may be remarked, in the first place, that the stipulation is not a conventional limitation of the right of the carrier's employer to sue. He is left at liberty to sue at any time within the period fixed by the Statute of Limitations. He is only required to make his claim within ninety days, in season to enable the carrier to ascertain what the facts are, and having made his claim, he may delay his suit.

"It may also be remarked that the contract is not a stipulation for exemption from responsibility for the defendants' negligence, or for that of their servants. . . . But an agreement that in case of failure by the carrier to deliver the goods a claim shall be made by the bailor, or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity which the strictest rules of the common law ever required. . . . The defendants are an express company. We cannot close our eyes to the nature of their

business. They carry small parcels, easily lost or mislaid, and not easily traced. They carry them in great numbers. Express companies are modern conveniences, and notoriously they are very largely employed. They may carry—they often do carry—hundreds, even thousands, of packages daily. . . . If a bailor may delay giving notice to them of a loss, or making a claim indefinitely, they may not be able to trace the parcels bailed, and to recover them, if accidentally misssent, or if they have in fact been properly delivered. With the bailor the bailment is a single transaction, of which he has full knowledge; with the bailee it is one of a multitude. There is no hardship in requiring the bailor to give notice of the loss, if any, or make a claim for compensation within a reasonable time after he has delivered the parcel to the carrier. There is great hardship in requiring the carrier to account for the parcel long after that time, when he has had no notice of any failure of duty on his part, and when the lapse of time has made it difficult, if not impossible, to ascertain the actual facts. For these reasons such limitations have been held valid in similar contracts, even when they seem to be less reasonable than in the contracts of common carriers.

"Policies of fire insurance, it is well known, usually contain stipulations that the insured shall give notice of a loss and furnish proofs thereof within a brief period after the fire; and it is undoubted that if such notice and proofs have not been given in the time designated, or have not been waived, the insurers are not liable. Such conditions have always been considered reasonable, because they give the insurers an opportunity of inquiring into the circumstances and amount of the loss at a time when inquiry may be of service. And, still more, conditions in policies of fire insurance that no action shall be brought for the recovery of a loss unless it shall be commenced within a specified time, less than the statutory period of limitations, are enforced, as not against any legal policy. . . .

"Our conclusion, then, founded upon the analogous decision of the courts, as well as upon sound reason, is that the express agreement between the parties averred in the plea was a reasonable one, and hence that it was not against the policy of the law. It purported to relieve the defendants from no part of the obligations of a common carrier. They were bound to the same diligence, fidelity, and care as they would have been required to exercise if no such agreement had been made. All that the stipulation required was that the shipper, in case the package was lost or damaged, should assert.

his claim in season to enable the defendants to ascertain the facts; in other words, that he should assert it within ninety days."

See also *Chicago, R. I. & P. R. Co. v. Gray*, — Okla. —, 165 Pac. 157; *St. Louis & S. F. R. Co. v. Wynn*, — Okla. —, 153 Pac. 1156; *Chicago, R. I. & P. R. Co. v. Craig*, — Okla. —, 157 Pac. 87; *A. J. Phillips Co. v. Grand Trunk Western R. Co.* 236 U. S. 662, 50 L. ed. 774, 35 Sup. Ct. Rep. 444. Numerous other authorities might be cited as to the validity and reasonableness of the provisions of the contract. We do not think it is necessary to present them here. To our minds this provision of the contract is reasonable, just, and valid; it did not relieve the carrier from responsibility for any act of negligence, but merely imposed upon the shipper or consignee the duty of presenting a claim for damages within the period of time stated, and unless this provision of the contract has been complied with, recovery cannot be had.

Second. If this provision of the contract was valid, and if it is just and reasonable, and it was so regarded by the parties and the trial court, is there any evidence in this record that justified the trial court in submitting this case to the jury? We think not. All the evidence bearing upon this question may be found at pages 145, 146, and 147 of the case made, which is presented here verbatim:

Joe McElreath, recalled. Direct examination by Mr. Bolen:

Q. You stated you got to Ada with these cattle on the 10th of June, 1912?

A. Yes.

Q. And the record shows you filed suit on the 18th day of October, ninety-eight days after that. Now, please state to the jury whether or not you notified the Rock Island Railway Company by letter through your attorney of your claim for damages within ninety days from the time you arrived at Ada?

By Mr. Moore: Defendant objects to the question as being incompetent, irrelevant, and immaterial; goes to a very material part of the case. That raises—

By the Court: Objection overruled.

By Mr. Moore: Defendant excepts.

A. I did some thirty or forty days before this suit was filed. Mr. Bolen, my attorney, got the address from I. McNair, Frisco agent.

Q. You present when I phoned Mr. McElreath?

A. Yes, sir.

Q. Live stock claim agent for the Rock Island?

A. Yes, sir.

Q. You present when I wrote the letter?

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A. Yes, sir. We got the address from Mr. McNair. Mr. Bolen telephoned Mr. McNair for the address of the Rock Island live stock agent.

Q. Who mailed the letter?

A. I mailed the letter. You gave it to me, and I brought it down and mailed it.

Cross-examination by Mr. Moore:

Q. Who is Mr. McNair?

A. Frisco agent.

Q. He gave you the name?

A. Gave it to Mr. Bolen.

Q. Don't know what name he gave you?

A. No, sir.

Q. Don't know what the address was?

A. Someone in Chicago, Illinois.

Q. Live stock agent?

A. I think that is what he asked for: live stock agent's address.

Q. Mr. McElreath, do you not know there is no such officer of the Rock Island Company called live stock agent?

A. I don't know.

Q. All you know you wrote to someone whose address you got from Mr. McNair?

A. Mr. Bolen asked Mr. McNair for the proper address of someone to notify of this claim.

Q. You wrote it on the typewriter?

A. Yes, sir.

Q. You got a carbon?

A. I don't know.

Q. You know whether it is the custom of Mr. Bolen to preserve copies of his letters?

A. I don't know.

Redirect examination by Mr. Bolen:

Q. It was claim agent been calling live stock agent?

A. Yes, sir.

Re-cross-examination by Mr. Bolen:

By Mr. Moore: Objected to; it is in evidence that Mr. Bolen telephoned to Mr. McNair; and ask it all be stricken.

By the Court: I will strike out the testimony of what Mr. McNair said to Mr. Bolen; I will leave the testimony as to writing the letter and mailing the letter.

(Witness excused.)

In our judgment, this does not substantially comply with this provision of the contract. While it is true that the question as to whether or not the notice was given in time was submitted to the jury, and the jury found that the notice was given in time, yet before a jury can decide any question of fact, some competent evidence sufficient to justify a decision should be presented to them. This record fails to show that any notice was given to the company within the time fixed by the contract, as the only evidence upon that issue is that

within thirty or forty days before suit was filed the notice was given in manner and form stated; yet it was not within the time named in the contract.

Entertaining the view that the provision of the contract is valid and binding, and that before recovery can be had it must be shown that substantial compliance therewith was had, and that the evidence here is

insufficient for that purpose, the judgment of the lower court is therefore reversed, and this cause remanded for a new trial

Per Curiam:

Adopted in whole.

Petition for rehearing denied January 8, 1918.

OKLAHOMA SUPREME COURT.

JOSEPH ZEHR and Wife, Plffs. in Err.,
v.

GEORGE W. MAY.

(— Okla. —, 189 Pac. 1077.)

Homestead — purchase-money lien.

1. No homestead right can be acquired or asserted in land upon which the purchase money is unpaid, either in whole or in part, as against the party to whom such purchase money is due.

For other cases, see *Homestead, II. in Dig.* 1-52 N. S.

Same — money lent.

2. Money paid for land by a third person directly to the grantor for the grantee, at the grantee's request, is generally considered purchase money as against the homestead right of the grantee, and entitles the person so advancing the purchase money to be subrogated to all the rights of the grantor as regards the vendor's lien.

For other cases, see *Homestead, II. in Dig.* 1-52 N. S.

Same — constitutional provision.

3. Under § 2, art. 12, of the Constitution, the homestead of the family is not exempt from forced sale for the payment of the purchase money, or a part of the purchase money, for such homestead.

For other cases, see *Homestead, II. in Dig.* 1-52 N. S.

(December 4, 1917.)

ERROR to the District Court of Alfalfa County to review a judgment in favor of plaintiff in an action brought to compel specific performance of a contract for the purchase of defendants' interest in certain real property. Affirmed.

The facts are stated in the opinion.

Mr. A. R. Carpenter, for plaintiffs in error:

There is nothing in the contract between

Headnotes by RAINEY, J.

Note. — For homestead exemption as against claim for money loaned by third person to pay off existing purchase-money obligation, see note to *Phillips v. Colvin*, L.R.A.1915E, 875, and other notes of collateral interest therein referred to. L.R.A.1918C.

plaintiff and defendant Joseph Zehr that would entitle plaintiff to the relief of subrogation.

37 Cyc. 375, 376, 390; *Traders Bank v. Myers*, 3 Kan. App. 636, 44 Pac. 292; *Gadsden v. Brown*, Speers, Eq. 37; *Suppiger v. Garrels*, 20 Ill. App. 625; *Brown v. Rouse*, 125 Cal. 645, 58 Pac. 267; *Guy v. DuUprey*, 16 Cal. 190, 76 Am. Dec. 518; *Myers v. Sierra Valley Stock & Agri. Asso.* 122 Cal. 669, 55 Pac. 689; *Packard v. Dunfee*, 119 App. Div. 599, 104 N. Y. Supp. 141; *Dreese v. Myers*, 52 Kan. 126, 39 Am. St. Rep. 336, 34 Pac. 349; *Kahn v. McConnell*, 37 Okla. 219, 47 L.R.A.(N.S.) 1189, 131 Pac. 682; *Hyde v. Ishmael*, 42 Okla. 279, 143 Pac. 1044.

Messrs. Titus & Talbot for defendant in error.

Rainey, J., delivered the opinion of the court:

The facts necessary to a determination of this case are substantially as follows: In September, 1915, the plaintiffs in error, Joseph Zehr and Anna Zehr, husband and wife, were occupying a quarter section of school land as their homestead. Joseph Zehr was the lessee of said tract of land, and as such owned the improvements thereon, and had the preference right to purchase the same, but had no other title to it. This land was ordered sold as provided by law, on September 10, 1915, at which time Joseph Zehr was indebted to the state of Oklahoma in the sum of \$679.90, for rent of the land, and for the payment of which the state had a lien against the land and the improvements placed thereon by Zehr. Zehr did not have the money to pay the rent, nor to make the initial payment of 5 per cent. on the purchase price in the event he purchased the land, and, on the day of the sale, approached defendant in error, George W. May, plaintiff below, and asked May if he intended to bid on the land. It was not clear, and in fact there is a conflict in the evidence, as to whether or not May informed Zehr he intended bidding on the land. May testified that he informed Zehr that he did not intend to bid on the land, if Zehr did. Zehr testified that he went to May, and

asked him if he were going to bid on the land, and that May replied he (May) did not know. During this conversation, which was just a short time before the sale, Zehr informed May that if he (Zehr) bought the land he would convey it and his improvements to him (May), provided they could agree upon the price. After some negotiations May agreed to purchase the land from Zehr for \$500 above the appraised value of the land and the improvements. It does not appear from the evidence that any effort was made to keep others from bidding on the land, except that Zehr went to a Mr. Hinkle and asked him if he were going to bid on the land, and that Hinkle replied that he was not, if Zehr wanted it himself. After the land was bid in by Zehr, May paid the state of Oklahoma the initial payment of \$270 and the \$679.90 delinquent rent due the state by Zehr. A written contract was then entered into between Zehr and May. Zehr agreed to have his wife sign this contract, but this she refused to do. The contract is as follows:

Cherokee, Oklahoma, September 10, 1915.

This agreement, made and entered into this 10th day of September, 1915, by and between Joseph Zehr and Anna Zehr, parties of the first part, and George W. May, party of the second part, witnesseth: That in consideration of the payment of the sum of six hundred seventy nine and $\frac{90}{100}$ (679.90) dollars, in cash this day paid by said second party to said first parties, and the further sum of nineteen hundred twenty and $\frac{10}{100}$ (\$1,920.10) dollars, to be paid as hereinafter specified, said parties of the first part bargain and sell to said party of the second part all their right, title, and interest in and to the southwest quarter of section thirty-six (36), township twenty-eight (28) north, of range twelve (12) W. I. M., Alfalfa county, state of Oklahoma. That said transfer to said second party is to be made by said first parties as soon as can be, and under the methods and plans as provided by the commissioners of the land office of the state of Oklahoma. It is understood by said parties that said land was purchased by said first parties this day at public sale of school lands by the state of Oklahoma, at the sum of \$5,400, which said sum is to be evidenced by a cash payment this day made in the sum of \$270, and the balance by the plan as provided by said commissioners aforesaid; that said second party assumes and agrees to pay said sum of \$5,400, and has this day advanced and paid said sum of \$270, the said advance payment, to said commissioners aforesaid. It is further

understood that the appraised value of the improvements on said land, and which were the property of said first parties, is the sum of \$2,100; that said second party agrees to pay said sum to said first parties, and an additional sum of \$500, making a total payment to said first parties by said second party of the sum of \$2,600. That there is due as rent on said land to said commissioners aforesaid the sum of \$679.90, and which sum is required to be paid in order to effect the sale from the commissioners aforesaid to said first parties, and which sum said second party has this day advanced as aforesaid. It is further understood and agreed, and said second party hereby promises and agrees, to pay to said parties of the first part said sum of \$1,920.10, the balance due them as aforesaid at the time that they complete the transfer of such title to said land as is provided by the rules and regulations of the commissioners aforesaid, governing such lands. Possession of said land and property to be given by said first parties to said second party within 60 days from date hereof. Said second party to have immediate possession for the purpose of putting in wheat. This contract is binding upon the heirs, administrators, executors and assigns of the parties hereto.

In witness whereof said parties have hereunto set their hands this 10th day of September, 1915. Joseph Zehr,

Parties of the First Part.

George W. May,

Party of the Second Part.

Zehr agreed to have his wife Anna Zehr sign the above contract, but this she refused to do. Upon her failure to sign the contract, and when they both refused to comply with the terms thereof, or to return the money advanced, May instituted the present action alleging the above facts, and asked for a specific performance of the contract, or, in the alternative, that he be decreed to have a lien on the land for the purchase price so paid by him. The defendants filed a denial, and the defendant Anna Zehr filed an additional answer, in which she asserted a homestead interest in the property and the invalidity of the contract, for the reason that the same was not signed by her. The case was tried to the court, without a jury, and on the issues presented the court made the following findings of fact: "And the court finds that the land involved in this action, to wit, the southwest quarter of section thirty-six (36), township twenty-eight (28) north, of range twelve (12) W. I. M., Alfalfa county, Oklahoma, was the homestead of the defendants, and that

by reason thereof the contract set out in plaintiff's petition was and is void as not signed by the wife of Joseph Zehr. And the court further finds that the money so advanced by plaintiff on the 10th day of September, 1915, being the amount sued for in this action, was used by defendant Joseph Zehr in payment of the amount due the state of Oklahoma, as alleged and set out in plaintiff's petition, and that by reason thereof plaintiff is entitled to be subrogated to the lien held by the state for the sums so paid."

Judgment was then rendered for the plaintiff for the sum of \$999.73, and said sum was adjudged to be a lien against the land, subject to the lien of the state for the unpaid purchase price. And it was further ordered that, in event the defendants did not pay the judgment within eight months, an execution issue against said land, and that the same be sold, subject to the lien of the state, as upon execution, and that the proceeds be applied in the payment of the costs of suit and sale, and to the payment of the judgment of the plaintiff, with interest, and that the residue be brought into court to be disposed of as the court should order. From this judgment Joseph Zehr and his wife appealed to this court.

While the question has been raised in some cases as to whether or not mere possession without title is sufficient to support the homestead right, the courts generally adhere to the view that such possession is sufficient to give the party in possession the homestead right against all the world but the true owner, and the Zehrs would therefore have a homestead right in the land, which they were holding and occupying as lessees, but, under the terms of the act providing for the leasing of the public lands, this right expired at the expiration of the lease, or when the land was sold by the state. Okla. Rev. Laws 1910, § 7171. Therefore when this land was sold by the state, on September 10th 1915, all the homestead rights of the lessees, Joseph Zehr and Anna Zehr, his wife, expired; but, since he was the purchaser at said sale, he became the equitable owner of the land, and a new homestead right in favor of him and his wife immediately attached thereto, subject to the lien of the state, given by § 7152, Rev. Laws of Oklahoma, 1910, which reads as follows: "The state shall have first lien upon all lands sold under this article together with all improvements and appurtenances thereunto belonging, until all payments, both principal and interest, are made thereon."

The question then arises: Was May L.R.A.1918C.

entitled to a lien for the money advanced by him and used by Zehr in the purchase of the land from the state? It is well settled that no homestead right can be acquired or asserted in land upon which the purchase money is unpaid, either in whole or in part, as against the party to whom such purchase money is due. *Brown v. Ennis*, 69 Ark. 123, 86 Am. St. Rep. 171, 61 S. W. 379; *Wilhelm v. Locklar*, 46 Fla. 375, 110 Am. St. Rep. 111, 35 So. 6; *Strohecker v. Irvine*, 76 Ga. 639, 2 Am. St. Rep. 62. In such cases, although the land may be impressed with the homestead character, it remains subordinate to the lien for the unpaid purchase price, and in the event of a default in the payment of the said purchase price, the same may be sold and the proceeds thereof applied in satisfaction of the judgment for the purchase money. *Austin v. Underwood*, 37 Ill. 438, 87 Am. Dec. 254; *Magee v. Magee*, 51 Ill. 500, 99 Am. Dec. 571; *Steger v. Traveling Men's Bldg. & L. Assn.*, 208 Ill. 236, 100 Am. St. Rep. 225, 70 N. E. 236.

Does this rule apply where the money is advanced or loaned by a third person? The general rule is stated in 13 R. C. L. § 67, p. 604, as follows: "Money paid for land by a third person directly to the grantor for the grantee is generally considered purchase money as against the homestead right of the grantee and entitles the person so advancing the purchase money to be subrogated to all the rights of the grantor as regards the vendor's lien."

While there are a few decisions to the effect that the person who furnishes the money to the purchaser to enable him to pay the seller for the homestead is not entitled to a lien for the money advanced, the rule is inequitable, and is, in our opinion, clearly against the weight of authority. In 86 Am. St. Rep., page 180, in the notes to the case of *Brown v. Ennis*, 69 Ark. 123, 61 S. W. 379, there is a collection of numerous authorities on the question under consideration, from which the general rule is deduced as above stated. See also *Austin v. Underwood*, supra; *Magee v. Magee*, 51 Ill. 500, 99 Am. Dec. 571. But even where the general rule obtains, the mere fact that money was borrowed and used to satisfy an indebtedness secured by the homestead does not entitle the party furnishing the money to be subrogated to such claim, and where one loans money to a purchaser of land without any distinct understanding or agreement that the money is to be used in the purchase of the homestead or the erection of improvements thereon, the transaction does not create a lien against such home-

stead. The distinction recognized by most of the courts is stated in the case of *Carey v. Boyle*, 53 Wis. 574, 11 N. W. 47 wherein the court said: "It must be understood that the extension of this equity to a third person is strictly confined to those who furnish or advance the purchase money to the purchaser in such manner that they can be said either to have paid it to the vendor personally, or caused it to be paid on behalf or for the benefit of the purchaser, and to this extent they become parties to the transaction. It must not be a general loan, to be used by the purchaser to pay the consideration of the purchase, or to be used for any other purpose at his pleasure. In such case, the simple fact that the money can be traced into the land as having been paid by the purchaser to the vendor, as the whole or part of the purchase money, gives the person who loaned it no such right."

Neither will the mere fact that borrowed money is subsequently invested in the homestead give the lender any lien on the premises. The case of *Magee v. Magee*, supra, is similar to the case at bar, in that, at the time the money was advanced by the third person to the vendee, the vendee had not secured a deed from the vendor, and the money was borrowed for the purpose of taking up the payments due the vendor by the vendee. The vendee promised to execute a mortgage, which he never did, and the court held that the money advanced by the third party was purchase money, and that no homestead right could be asserted to prevent the sale of the property in payment of the debt.

Section 2, art. 12, of our Constitution, provides that "the homestead of the family shall be, and is hereby protected from forced sale for the payment of debts, except for the purchase money therefor, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon."

The case of *Nichols v. Overaker*, 16 Kan. 54, is similar in principal to the instant case. It was there held: "Where a husband and wife occupying a certain piece of land as their homestead, but without having any title thereto, and N. loans to the husband a certain sum of money with the understanding and agreement that said money should be used in purchasing said land, and that the husband shall then give his note and mortgage on the land to N. for such money, and such money is so used, and the land is purchased therewith, and then the husband executes the note and mortgage as agreed, but the wife

does not join in the execution of either, nor does she give her consent thereto, and she has no interest in the land except as the wife of her husband and as an occupant with him of the land, held, that the loaning of the money, the purchasing of the land, and giving of the note and mortgage, are not separate and independent transactions, but are parts and portions of one single and entire transaction; that they were all done in and about the purchase of said land, and to accomplish that purpose; that the obligation to repay the money is an 'obligation contracted for the purchase of said premises,' within the meaning of § 9 of article 15 of the Constitution, and therefore that there is no homestead exemption law as against the enforcement of such obligation."

The court further observed that the rule is just the same as if no exemption law had ever been adopted.

Unquestionably the \$270, being 5 per cent of the appraised value of the land, exclusive of the improvements, was a part of the purchase price of the land, and we also think that the delinquent rent in the sum of \$679.90 was purchase money within the spirit, if not within the strict meaning, of the term. The law requires the payment of this delinquent rent before Zehr was permitted to buy the land, and it was absolutely necessary for this money to be paid before he and his wife could acquire any homestead right whatever in the land when the same was sold by the state. If the land had been purchased by some other person, the amount of the delinquent rent, under the law, would have been deducted by the state from the appraised value of the improvements in making settlement with Zehr. It seems to us that the money required under the law to be paid in order to consummate the purchase of the land, under the circumstances of this case, falls clearly within the spirit of the law. It would be highly inequitable to permit Zehr and his wife to enjoy the land in controversy as a homestead as against the just claim of May, whose money procured the land for them. The money was furnished by May with the distinct understanding that the same was to be used in part payment of the purchase price, and the money was so used, and the homestead right in the premises so purchased is subordinate to the lien for the purchase money, and the trial court did not err in impressing a lien thereon, and ordering the land sold in satisfaction thereof.

The judge of the trial court is affirmed:

All the justices concur.

OKLAHOMA SUPREME COURT.

FRANK R. NOE, Plff. in Err.,

v.

T. H. SMITH et al.

(— Okla. —, 189 Pac. 1108.)

Estoppel — clothing stranger with title.

1. When an instrument which clothes another with the indicia of title to property is used by him, the equities of innocent purchasers are protected. For where the true owner holds out another or allows him to appear as the owner of, or as having full power of disposition over, the property, and thus leads a third person to do what he would not otherwise have done, the owner will not then be allowed to subject such third person to loss or injury by disappointing the expectations upon which he acted.

For other cases, see *Estoppel*, III. g, 2, in Dig. 1-52 N. S.

Deed — consideration — cancellation of debt.

2. (a) The complete satisfaction and discharge of an antecedent debt is a valuable consideration for the conveyance of real estate.

(b) A complete satisfaction and discharge of a pre-existing debt to a partnership is a valuable consideration for the conveyance of real estate to a member of the firm, since the proportion of the sum credited upon the account owned by the other members of the firm is cast upon that member to whom the real estate is conveyed.

For other cases, see *Contracts*, I. c, 2, in Dig. 1-52 N. S.

Vendor and purchaser — value — change of position.

3. Where a purchaser in good faith and without notice has changed his position for the worse, and is placed in a worse condition than he was before, he is a purchaser for value, and is entitled to the protection of the Recording Acts.

For other cases, see *Vendor and Purchaser*, III. in Dig. 1-52 N. S.

(November 27, 1917.)

ERROR to the District Court for Seminole County to review a judgment in favor of plaintiff in an action brought to quiet title to certain real estate. Reversed.

The facts are stated in the opinion.

Mr. John W. Willmott, for plaintiff in error:

Plaintiff in error being a bona fide purchaser for value, without notice of any

Headnotes by BRETT, J.

Note. — For discharge of antecedent debt as a consideration sustaining one's character as a bona fide purchaser or encumbrancer for value, entitled to protection of Recording Acts, see annotation following this case, post, 438.
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equities in T. H. Smith (plaintiff below), the trial court erred in holding that, because the former paid \$295.85 of the \$1,000 consideration by paying and satisfying the account of D. A. Marlow upon the books of the Noe Brothers in that amount, he should be deprived of the land, and be entitled only to reimbursement to the extent of the actual cash money paid out by him.

39 Cyc. 1699; *Saffold v. Wade*, 51 Ala. 214; *Gassen v. Hendrick*, 74 Cal. 444, 16 Pac. 242; *Jerome v. Carbonate Nat. Bank*, 22 Colo. 37, 43 Pac. 215; *Harris v. Evans*, 134 Ga. 161, 67 S. E. 880; *Pugh v. Highley*, 152 Ind. 252, 44 L.R.A. 392, 71 Am. St. Rep. 327, 53 N. E. 171; *Busey v. Reese*, 38 Md. 264; *Hanold v. Kays*, 64 Mich. 439, 8 Am. St. Rep. 835, 31 N. W. 420; *O'Hara v. Alexander*, 56 Miss. 316; *State Bank v. Frame*, 112 Mo. 502, 20 S. W. 620; *Clements v. Doerner*, 40 Ohio St. 632; *Cammack v. Soran*, 30 Gratt. 292; *Nugent v. Gifford*, 1 Atk. 463, 26 Eng. Reprint, 294; *Tobin v. Benson*, — Tex. Civ. App. —, 152 S. W. 642; 2 Pom. Eq. Jur. 3d ed. p. 1335; *Alder-Goldman Commission Co. v. Clemons*, 64 Ark. 197, 41 S. W. 417; 2 *Warvelle, Vend. & P.* 2d ed. § 606; *Boone v. Chiles*, 10 Pet. 210, 9 L. ed. 400.

Messrs. Crump, Fowler, & Skinner, S. S. Orwig, and T. S. Cobb for defendant in error Smith.

Brett, J., delivered the opinion of the court:

This action was commenced in the district court of Seminole county by T. H. Smith, one of the defendants in error, as plaintiff, against Frank R. Noe and D. A. Marlow, as defendants, to quiet title in a 120-acre tract of land described in the petition. The material facts are:

That the land was originally owned by a Seminole freedman, who in 1911 deeded the land to D. A. Marlow by general warranty deed for a consideration of \$800. Smith, however, furnished the purchase price of the land. Marlow later filed suit, in his own name, to cancel an outstanding spurious deed and quiet title to the land in himself. In the summer of 1912, Smith requested Marlow to execute a quitclaim deed to him, which Marlow refused to do. In March, 1913, Marlow conveyed the land by warranty deed to the defendant Noe for a consideration of \$1,000. Marlow owed Noe Brothers, of which firm defendant Frank R. Noe was a member, \$295.85, and the defendant Noe credited this account in full, and paid Marlow the difference of \$704.15 in cash. When Noe's deed was placed of record, Smith immediately notified him that Marlow did not own the land, but only held it in trust for him. Also told Noe

that he had better take steps to protect himself against Marlow's fraud, since he intended to file suit at once to cancel the deed.

The suit was filed, and Smith's petition alleges in substance that he furnished the full consideration for the purchase of said land, and that title was taken in the name of the defendant Marlow, the defendant Marlow holding the legal title in said land for the use and benefit of Smith, the equitable owner, and that thereafter said land was conveyed by said Marlow to Noe, at which time the said Noe well knew that said Smith was the owner of said land, and that said Noe was therefore not an innocent purchaser of same for value, and prays that the court decree him the owner of said land, and quiet the title thereto in him. Noe answered by general denial, and also that he was an innocent purchaser for value.

The only issue raised by the pleadings upon which there was any controversy is whether or not Noe was an innocent purchaser for value. The case was tried to the court and upon this controverted question the court, in his finding of facts, says: "While there are a number of circumstances in this case that would justify the court in finding that the defendant was not an innocent purchaser, yet the said circumstances are susceptible of explanation, and, being so explained, the court concludes that the defendant Frank Noe was an innocent purchaser, to the extent of the amount of the money actually paid, to wit, \$704."

The court then proceeded to cancel the deed from Marlow to Noe, and quiet title in Smith, and gave Noe judgment against both Smith and Marlow for \$704.15, which was the amount of the purchase price that Noe paid in cash. The case is brought here by Noe by petition in error and case made, asking for a reversal, and that he be adjudged owner of the land in controversy. And Smith files his cross petition, and asks that he be relieved of that part of the judgment requiring him to reimburse Noe for the cash Noe paid Marlow in the deal.

The one question in this case which must determine the rights of the parties is whether or not, under the law and facts, Noe was an innocent purchaser for value. There are a number of assignments of error in both the petition and cross petition to error, but they all converge to the one question as to whether or not Noe was an innocent purchaser for value, and we will consider this question, bearing in mind the different angles from which this question is presented by the assignments and arguments of counsel.

Smith, the plaintiff below, insists that Noe was not and could not, under the law, have been an innocent purchaser for value; L.R.A. 1918C.

that there were facts known to Noe that, under the law, put him on inquiry. And if he had prosecuted this inquiry with ordinary diligence it would have led to actual knowledge of the fact that Marlow was only holding the legal title to said land for the use and benefit of Smith, who was the equitable owner. And one fact that he says should have put Noe on inquiry, and which is argued most strenuously, is that Marlow sold Noe the land for \$1,000, when the evidence showed it was worth from \$2,000 to \$3,000, and that this gross inadequacy of consideration was a circumstance that should have aroused suspicion and suggested inquiry.

But under the facts in this case we fail to see the force of the argument. For, only about two years before Noe bought the land of Marlow, Marlow had purchased it for only \$800, and in his deal with Noe was making a profit of \$200 on an \$800 investment. And there was certainly nothing in that transaction to arouse suspicion. Besides, the records showed the title to be in Marlow, and the district court, in a suit instituted by Marlow for that very purpose, had decreed Marlow to be the owner in fee of this land.

Smith sat by and permitted all this to be done without asserting any interest in the land, as he says, "because he entertained such confidence and trust in Marlow." And yet he insists that Noe, and all the rest of the world, should have looked with suspicion upon every action of this very man in whom he had such great confidence, and should have even questioned his title to and his right to convey a tract of land, which the records and a solemn decree of the district court showed him to own in fee.

But it seems to us that even if Smith had "entertained such great confidence and trust in Marlow," that, as he says, "he had permitted him to carry his check book, and check upon his account, to deal in cattle and hogs for him, and to go to Texas and buy several carloads of cattle for him on his own judgment, and to hold this land in trust for him," yet when Marlow, in the summer of 1912, refused to give him a quitclaim deed to this land, which he was only holding in trust for him, that should have aroused Smith's suspicion and led him to take steps to protect himself and the world against the possibility of the very thing that did occur, and of which he is complaining in this suit.

It was his negligence that made this fraud possible. He had clothed Marlow with the indicia of title, and neglected to take steps to protect himself, when he had reason to believe that Marlow intended to

use that indicia of title to defraud him. And in such cases, when an instrument which clothes another with the indicia of title to property is used by him, the equities of innocent parties must and will be considered. And there is nothing in this record which, when viewed in the light of our common everyday experiences, would charge Noe with knowing that Smith had any interest in this land, or put him upon inquiry as to the right of Marlow to convey it. And under such circumstances the rule established by the overwhelming weight of authority is that the equities of innocent purchasers are protected, even though the party who has been imposed upon or defrauded by his agent or trustee must suffer. As is forcefully said in *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341: "Where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over, the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing as against them, the existence of the title or power, which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance."

And in *Dickerson v. Colgrove*, 100 U. S. 580, 25 L. ed. 619, it is said: "The vital principle," upon which this doctrine is based, "is that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both." *Dover v. Pittsburg Oil Co.* 143 Cal. 501, 77 Pac. 405; *Woods v. Cole*, 69 Cal. 142, 10 Pac. 331.

2. (a) But though we have found Noe to be an innocent purchaser, that is, without notice of the equities of Smith, yet the further question is involved in this case, Was he an innocent purchaser for value? Two hundred and ninety-five dollars of the consideration was an antecedent debt,—a debt that Marlow owed Noe Brothers at the time the deed was made. And counsel for Smith insist that "no one can be an innocent purchaser for value, so far as an antecedent debt may enter into the consideration."

But this is a question upon which the courts are divided, and Mr. Pomeroy says that the numerical weight of authority is to the effect that the complete satisfaction L.R.A.1918C.

and discharge of an antecedent debt is a valuable consideration for the conveyance of real property. 2 Pom. Eq. Jur. 3d ed. p. 1328 (citing cases). And to our mind the weight of reason is also with that holding. For the one reason that courts give for holding that an antecedent debt is not a valuable consideration is that the purchaser is placed in no worse position than he was before; that he has parted with nothing of value. But where there is a complete satisfaction and discharge of the debt, that is not true. For there is a marked distinction between taking property in complete satisfaction and discharge of an antecedent debt, and simply taking a mortgage on it to secure an antecedent debt. And a failure of some courts to bear in mind this distinction is responsible for much of the confusion on this question. In the case at bar, had Noe simply taken a mortgage on the property to secure the antecedent debt of Marlow, that would have placed Noe in no worse condition than he was before: he would, in that event, have parted with nothing of value, but would still have had his debt just as it existed before the taking of the mortgage, his right of an action, and his right to demand security upon the original obligation. But as is said in *State Bank v. Frame*, 112 Mo. 502, 20 S. W. 620: "By the satisfaction [and discharge] of the debt the creditor divests himself of the right of an action, or of securing the original liability, and places himself in a worse condition than he would have done by a definite forbearance of the debt."

(b) Besides, in the case at bar, the debt which was canceled in part consideration of the deed from Marlow to Frank R. Noe was an antecedent debt due a partnership, and the cancelation of the deed as between the grantor and the grantee would not release the grantee (partner) from his liability to the partnership. *Rice v. Soders*, 1 Posey. Unrep. Cas. (Tex.) 615, is a case in which, upon this point, the facts are almost identical with the facts in the case at bar, and in the syllabus it is said: "Crediting on a pre-existing debt due the firm by his vendor the price of land conveyed by the debtor to one of the members is, as against prior equities of third parties therein, a sufficiently valuable consideration to support a conveyance of land to the vendee, where he has no notice of such equities. *Greneaux v. Wheeler*, 6 Tex. 528; *Blum v. Loggins*, 53 Tex. 121; *Planters' Bank v. Evans*, 36 Tex. 595; *Alstin v. Cundiff*, 52 Tex. 464; *Johnson v. Newman*, 43 Tex. 642."

And in the body of the opinion the court said: "In this case, *Rice*, the purchaser, did more than credit the amount of the purchase money upon an antecedent indebted-

edness due to himself. His purchase was made and the land paid for by crediting; that is, satisfying pro tanto the account of Wm. M. Rice & Co. against Ward. On taking the land, Rice became chargeable [it seems the land was bought by Rice and not by the firm] to Wm. M. Rice & Co. with the amount of the purchase. A cancellation of the trade between Rice and Ward would not restore Rice's account with the firm of Wm. M. Rice & Co. to its condition before the purchase. It might cast upon him that part of the account. The proportion of the sum credited upon the account owned by the others of the firm would be a consideration satisfied by the trade. This would be valuable—something paid out or lost in the trade not restored on its rescission. *Johnson v. Newman*, supra."

And we know of no court that does not hold that, if for any reason the purchaser is placed in a worse condition than he was before, he is entitled to the protection of the Recording Acts. For he has been led to change his condition because the true owner or the holder of a secret equity, through negligence or mistaken confidence, has allowed another to appear as the owner with full power of disposition, and "he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted." But, if either must suffer, it must be he who permitted or made possible the deception.

3. Besides, Noe paid \$700 in cash, in addition to the cancellation of this debt, and that was within itself a valuable consideration.

In the few cases that we have found in which this identical condition exists, even courts that hold that a pre-existing debt is not a valuable consideration hold that "the fact that a part of the consideration paid for the purchase of land was a pre-existing debt will not prevent the purchaser from being entitled to protection as an innocent purchaser, where the rest of the consideration was new." *Adler-Goldman Commission v. Clemons*, 64 Ark. 197, 41 S. W. 417.

And this must be true, for the courts universally hold that if the purchaser has changed his position for the worse, that is, if he is placed in a position that he would suffer injury if the deed should be canceled, he is a purchaser for value, and is entitled to the protection of the Recording Acts. And certainly, when Frank R. Noe parted with \$700 in cash on the strength of the apparent title of Marlow, he changed his position for the worse, and was placed in a position where he would suffer injury if the deed should be canceled. And that is the true test as to whether or not one is a purchaser for value. And on this additional ground Noe must be deemed a purchaser for value, and entitled to the benefit of the Recording Acts.

The judgment is therefore reversed and the cause remanded, with directions to the trial court to enter a judgment and decree in favor of Frank R. Noe, in accordance with the views herein expressed.

All the Justices concur.

Petition for rehearing denied January 22, 1918.

Annotation—Discharge of antecedent debt as a consideration sustaining one's character as a bona fide purchaser or encumbrancer for value, entitled to protection of Recording Acts.

This note supplements a note on the same subject appended to *Western Grocer Co. v. Alleman*, 27 L.R.A.(N.S.) 620.

The few cases considering the question subsequently to the above note are in harmony with the majority rule stated in the earlier note, that a discharge of existing indebtedness is not such a consideration as will constitute a grantee of land a bona fide purchaser for value, under the Recording Acts, as to an outstanding title under an unrecorded conveyance by his grantor. *Hubert v. Merchants' Bank* (1911) 137 Ga. 70, 72 S. E. 505; *Noe v. Smith*, ante, 435; *Buckley v. Runge* (1911) — Tex. Civ. App. —, 136 S. W. 533.

But this general rule does not apply to L.R.A.1918C.

the grantee in a deed, the consideration for which was the surrender and cancellation of a pre-existing indebtedness, where he did not obtain knowledge of the outstanding title under an unrecorded conveyance until after all action upon the notes he had surrendered was barred by the Statute of Limitations. In such case the grantor will be held to have parted with something of value, and hence to be a bona fide purchaser for value within the Recording Act. *Tobin v. Benson* (1913) — Tex. Civ. App. —, 152 S. W. 642, citing note in 27 L.R.A.(N.S.) 620.

An attorney accepting a deed to a portion of land involved in litigation, in payment of his fee therein, is a bona fide purchaser for value. *Masterson v. Cross*

by (1912) — **Tex.** Civ. App. —, 152 S. W. 173.

It has been held that in a proceeding in which the grantee undertakes to show that he is a bona fide purchaser for value within the Recording Acts, evidence is inadmissible that the consideration for

the deed to him was certain indebtedness then owing to him by the grantor; for this evidence is immaterial, since it does not tend to show that the grantee was an innocent purchaser for value. *Buckley v. Runge (Tex.) supra.* A. G. S.

UNITED STATES SUPREME COURT.

NEW YORK CENTRAL RAILROAD COMPANY, Plff. in Err.,

v.

JAMES WINFIELD.

(244 U. S. 147, 61 L. ed. 1046, 37 Sup. Ct. Rep. 546.)

Commerce — Federal Employers' Liability Act — state Workmen's Compensation Act.

The entire subject of the liability of interstate railway carriers for the death or injury of their employees while employed by them in interstate commerce is so completely covered by the provisions of the Federal Employers' Liability Act of April 22, 1908, as to prevent any award under a state Compensation Act, where an employee was injured or killed without fault on the railway company's part while he was engaged in interstate commerce, although the Federal act gives the right of recovery only when the injury results in whole or in part from negligence attributable to the carrier. *For other cases, see Commerce, II. c, in Dig. 1-52 N. S.*

(Mr. Justice Brandeis and Mr. Justice Clarke dissent.)

(May 21, 1917.)

ERROR to the Appellate Division of the Supreme Court, Third Department, of the State of New York, to review a judgment affirmed by the Court of Appeals, approving an award of the state Workmen's Compensation Commission to an employee of the defendant railroad, injured without its fault while engaged in interstate commerce. Reversed.

The facts are stated in the opinion.

Messrs. **Robert E. Whalen, William L. Visscher, Frank V. Whitting, and H. Leroy Austin**, for plaintiff in error:

Claimant, when injured, was employed in interstate commerce by the railroad, which also was then engaging in intrastate commerce.

Pedersen v. Delaware, L. & W. R. Co.

Note. — The applicability of State Compensation Statutes to non-negligent injuries of railroad employees while engaged in interstate commerce is discussed in the annotation following this case, post, 450. L.R.A.1918C.

229 U. S. 146, 151, 152, 57 L. ed. 1125, 1127, 1128, 33 Sup. Ct. Rep. 648. Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; *Shanks v. Delaware, L. & W. R. Co.* 239 U. S. 556, 60 L. ed. 436, L.R.A.1916C, 797, 38 Sup. Ct. Rep. 188; *Zikos v. Oregon R. & Nav. Co.* 179 Fed. 897; *Colasurdo v. Central R. Co.* 180 Fed. 832, affirmed in 113 C. C. A. 379, 192 Fed. 903; *San Pedro, L. A. & S. L. R. Co. v. Davide*, 127 C. C. A. 454, 210 Fed. 872; *Tralich v. Chicago, M. & St. P. R. Co.* 217 Fed. 677; *Lombardo v. Boston & M. R. Co.* 223 Fed. 427.

Hence, the Federal Employers' Liability Act alone governs Winfield's claim to recover.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 55, 56 L. ed. 327, 348, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 66, 67, 57 L. ed. 417, 419, 420, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 704, 57 L. ed. 1031, 1033, 33 Sup. Ct. Rep. 703; *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 157, 158, 57 L. ed. 1129, 1133, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 266, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109; *Taylor v. Taylor*, 232 U. S. 363, 368, 58 L. ed. 638, 640, 34 Sup. Ct. Rep. 350, 6 N. C. C. A. 436; *Wabash R. Co. v. Hayes*, 234 U. S. 86, 89, 58 L. ed. 1226, 1230, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224; *Atlantic Coast Line R. Co. v. Burnette*, 239 U. S. 199, 201, 60 L. ed. 226, 227, 36 Sup. Ct. Rep. 75; *Central Vermont R. Co. v. White*, 238 U. S. 507, 511, 512, 59 L. ed. 1433, 1436, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265; *Chicago, R. I. & P. R. Co. v. Devine*, 239 U. S. 52, 54, 60 L. ed. 140, 142, 36 Sup. Ct. Rep. 27.

In the absence of negligence, the interstate carrier by railroad can be held to no liability whatever.

Southern R. Co. v. Railroad Commission, 236 U. S. 439, 446, 447, 59 L. ed. 661, 665, 666, 35 Sup. Ct. Rep. 304; *New York C. & H. R. R. Co. v. Hudson County*, 227 U. S. 248, 264, 57 L. ed. 499, 505, 33 Sup. Ct. Rep. 269; *Seaboard Air Line R. Co. v. Horton*,

233 U. S. 492, 501, 58 L. ed. 1062, 1068, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Toledo, St. L. & W. R. Co. v. Slavin, 236 U. S. 454, 457, 59 L. ed. 671, 672, 35 Sup. Ct. Rep. 306; Smith v. Industrial Acci. Commission, 26 Cal. App. 560, 147 Pac. 600; Staley v. Illinois C. R. Co. 186 Ill. App. 593, 268 Ill. 356, L.R.A.1916A, 450, 109 N. E. 342; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858.

The Workmen's Compensation Act itself precludes an award in this case.

Jensen v. Southern P. Co. 215 N. Y. 521, L.R.A.1916A, 403, 109 N. E. 600, Ann. Cas. 1916B, 276, 9 N. C. C. A. 286; Connole v. Norfolk & W. R. Co. 216 Fed. 823.

Messrs. **Harold J. Hinman**, **Egburt E. Woodbury**, Attorney General of New York, and **E. Clarence Aiken**, for defendant in error:

The Federal Employers' Liability Law is not *ejusdem generis* as the Workmen's Compensation Law, and so does not apply to oust the Workmen's Compensation Commission of jurisdiction.

Harper, Workmen's Compensation, p. 125; Hammill v. Pennsylvania R. Co. 87 N. J. L. 388, 94 Atl. 313; Winfield v. Erie R. Co. 88 N. J. L. 619, 96 Atl. 394.

The state law will be upheld unless the repugnance or conflict between the state and national acts is direct and positive, so that the two acts cannot be reconciled or consistently stand together.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101; Chiles v. Chesapeake & O. R. Co. 218 U. S. 71, 54 L. ed. 936, 30 Sup. Ct. Rep. 667, 20 Ann. Cas. 980; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 402, 410, 57 L. ed. 1511, 1542, 1546, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 720, Ann. Cas. 1916A, 18; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819.

So far as the provisions of the Workmen's Compensation Law have been construed by the highest court of the state, the United States Supreme Court will follow such construction and interpretation.

Fairfield v. Gallatin County, 100 U. S. 47, 25 L. ed. 544; Old Colony Trust Co. v. Omaha, 230 U. S. 100, 57 L. ed. 1410, 33 Sup. Ct. Rep. 967, L.R.A.1918C.

Mr. Justice Van Devanter delivered the opinion of the court:

While in the service of a railroad company in the state of New York, James Winfield sustained a personal injury whereby he lost the use of an eye. At that time the railroad company was engaging in interstate commerce as a common carrier and Winfield was employed by it in such commerce. The injury was not due to any fault or negligence of the carrier, or of any of its officers, agents, or employees, but arose out of one of the ordinary risks of the work in which Winfield was engaged. He was a section laborer assisting in the repair of the carrier's main track, and while tamping across ties struck a pebble which chanced to rebound and hit his eye. Following the injury he sought compensation therefor from the carrier under the Workmen's Compensation Law of the state¹ and an award was made to him by the state Commission, one member dissenting. The carrier appealed and the award was affirmed by the appellate division of the supreme court, two judges dissenting (168 App. Div. 351, 153 N. Y. Supp. 499), and also by the court of appeals (216 N. Y. 284, 110 N. E. 614, Ann. Cas. 1916A, 817, 10 N. C. C. A. 916). Before the Commission and in the state courts the carrier insisted that its liability or obligation and the employee's right were governed exclusively by the Employers' Liability Act of Congress (chap. 149, 35 Stat. at L. 65, Comp. Stat. 1916, § 8657; chap. 143, 36 Stat. at L. 291), and therefore that no award could be made under the law of the state. That insistence is renewed here.

It is settled that under the commerce clause of the Constitution Congress may regulate the obligation of common carriers and the rights of their employees arising out of injuries sustained by the latter where both are engaged in interstate commerce; and it also is settled that when Congress acts upon the subject all state laws covering the same field are necessarily superseded by reason of the supremacy of the national authority.² Congress acted upon the subject in passing the Employers' Liability Act, and the extent to which that act covers the field is the point in controversy. By one side it is said that the act, although regulating the liability or obligation of the carrier and the right of the employee where the injury results in whole or in part from

¹ See New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629.

² Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 53-55, 56 L. ed. 327, 347, 348, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169,

negligence attributable to the carrier, does not cover injuries occurring without such negligence, and therefore leaves that class of injuries to be dealt with by state laws; and by the other side it is said that the act covers both classes of injuries and is exclusive as to both. The state decisions upon the point are conflicting. The New York court in the present case and the New Jersey court in *Winfield v. Erie R. Co.* 88 N. J. L. 619, 96 Atl. 394, hold that the act relates only to injuries resulting from negligence, while the California court in *Smith v. Industrial Acci. Commission*, 20 Cal. App. 560, 147 Pac. 800, and the Illinois court in *Staley v. Illinois C. R. Co.* 268 Ill. 356, L.R.A.1916A, 450, 109 N. E. 342, hold that it has a broader scope and makes negligence a test,—not of the applicability of the act, but of the carrier's duty or obligation to respond pecuniarily for the injury.

In our opinion the latter view is right and the other wrong. Whether and in what circumstances railroad companies engaging in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the nation as a whole is interested, and there are weighty considerations why the controlling law should be uniform and not change at every state line. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 378, 379, 37 L. ed. 772, 777, 778, 13 Sup. Ct. Rep. 914. It was largely in recognition of this that the Employers' Liability Act was enacted by Congress. *Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.)* 223 U. S. 1, 51, 56 L. ed. 327, 346, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. It was drafted and passed shortly following a message from the President advocating an adequate national law covering all such injuries, and leaving to the action of the several states only the injuries occurring in intrastate employment. Cong. Rec., 60th Cong., 1st Sess., 1347. And the reports of the congressional committees having the bill in charge disclose, without any uncertainty, that it was intended to be very comprehensive, to withdraw all injuries to railroad employees in interstate commerce from the

operation of varying state laws, and to apply to them a national law having a uniform operation throughout all the states. House Report No. 1386 and Senate Report No. 460, 60th Cong. 1st Sess. Thus, in the House Report it is said: "It [the bill] is intended in its scope to cover all commerce to which the regulative power of Congress extends. . . . by this bill it is hoped to fix a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees. . . . A Federal statute of this character will supplant the numerous state statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all the states."

True, the act does not require the carrier to respond for injuries occurring where it is not chargeable with negligence, but this is because Congress, in its discretion, acted upon the principle that compensation should be exacted from the carrier where, and only where, the injury results from negligence imputable to it. Every part of the act conforms to this principle, and no part points to any purpose to leave the states free to require compensation where the act withholds it. By declaring in § 1 that the carrier shall be liable in damages for any injury to the employee "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track" [35 Stat. at L. 65 chap. 149, Comp. Stat. 1916, § 8657], etc.,³ the act plainly shows, as was expressly held in *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 501, 58 L. ed. 1062, 1068, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834, that it was the intention of Congress to make negligence the basis of the employee's right to damages, and to exclude responsibility of the carrier to the employee for an injury not resulting from its negligence or that of its officers, agents, or other employees. The same principle is seen also in § 3, which

1 N. C. C. A. 875; *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703; *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; *Taylor v. Taylor*, 232 U. S. 363, 58 L. ed. 638, 34 Sup. Ct. Rep. 350, 6 N. C. C. A. 436; *Chicago, R. I. & P. R. Co. v. Devine*, 239 U. S. 52, 60 L. ed. 140, 36 Sup. Ct. Rep. 27; *Texas & P. R. Co. v. Riggsby*, 241 U. S. 33, 41, 60 L. ed. 874, 878, 36 Sup. Ct. Rep. 482; *Northern P. R. Co. v. Washington*, 222 L.R.A.1918C.

U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; *Erie R. Co. v. New York*, 233 U. S. 671, 58 L. ed. 1149, 52 L.R.A.(N.S.) 206, 34 Sup. Ct. Rep. 756, Ann. Cas. 1915D, 138; *Southern R. Co. v. Railroad Commission*, 236 U. S. 439, 59 L. ed. 661, 35 Sup. Ct. Rep. 304.

³ The act is printed in full in *Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.)* 223 U. S. 1, 6-10, 56 L. ed. 327, 329-331, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

requires that where the carrier and the employee are both negligent, the recovery shall be diminished in proportion to the employee's contribution to the total negligence; and in § 4, which regards injuries arising from risks assumed by the employee as among those for which the carrier should not be made to respond. The committee reports upon the bill show that this principle was adopted deliberately, notwithstanding there were those within and without the committees who looked with greater favor upon a different principle which puts negligence out of view and regards the employee as entitled to compensation wherever the injury is an incident of the service in which he is employed. A few years after the passage of the act a legislative commission drafted and the Committees on the Judiciary in the two Houses of Congress favorably reported a bill substituting the latter principle for the other (Senate Report No. 553, 62d Cong., 2d Sess., House Report No. 1441, 62d Cong., 3d Sess.), but that bill did not become a law.

That the act is comprehensive and also exclusive is distinctly recognized in repeated decisions of this court. Thus, in *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 576, 57 L. ed. 355, 363, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134, and other cases, it is pointed out that the subject which the act covers is "the responsibility of interstate carriers by railroad to their employees injured in such commerce;" in *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 66, 67, 57 L. ed. 417, 419, 420, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176, it is said that "we may not piece out this act of Congress by resorting to the local statutes of the state of precedence or that of the injury;" that by it "Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce," and that it is "paramount and exclusive;" in *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 256, 58 L. ed. 591, 594, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109, it is held that where it appears that the injury occurred while the carrier was engaged and the employee employed in interstate commerce, the Federal act governs to the exclusion of the state law; in *Seaboard Air Line R. Co. v. Horton*, *supra*, pp. 501, 503, it is said not only that Congress intended "to exclude responsibility of the carrier to its employees" in the absence of negligence, but that it is not conceivable that Congress "intended to permit the legislatures of the several states to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of L.R.A.1918C.

employees, since this would in effect relegate to state control two of the essential factors that determine the responsibility of the employer;" and in *Wabash R. Co. v. Haynes*, 234 U. S. 86, 89, 58 L. ed. 1226, 1230, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224, it is said: "Had the injury occurred in interstate commerce, as was alleged, the Federal act undoubtedly would have been controlling, and a recovery could not have been had under the common or statute law of the state; in other words, the Federal act would have been exclusive in its operation, not merely cumulative [citing cases]. On the other hand, if the injury occurred outside of interstate commerce, the Federal act was without application and the law of the state was controlling."

The act is entitled, "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," and the suggestion is made that the words "in certain cases" require that the act be restrictively construed. But we think these words are intended to do no more than to bring the title into reasonable accord with the body of the act, which discloses in exact terms that it is not to embrace all cases of injury to the employees of such carriers, but only such as occur while the carrier is engaging and the employee is employed in "commerce between any of the several states," etc. See *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

Only by disturbing the uniformity which the act is designed to secure and by departing from the principle which it is intended to enforce can the several states require such carriers to compensate their employees for injuries in interstate commerce occurring without negligence. But no state is at liberty thus to interfere with the operation of a law of Congress. As before indicated, it is a mistake to suppose that injuries occurring without negligence are not reached or affected by the act, for, as is said in *Prigg v. Pennsylvania*, 16 Pet. 539, 617, 10 L. ed. 1060, 1089, "if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is

as the direct provisions made by it." Thus the act is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability. In other words, it is a regulation of the carriers' duty or obligation as to both. And the reasons which operate to prevent the states from dispensing with compensation where the act requires it equally prevent them from requiring compensation where the act withholds or excludes it.

It follows that, in the present case, the award under the state law cannot be sustained.

Judgment reversed.

Mr. Justice Brandeis, dissenting:

I dissent from the opinion of the court; and the importance of the question involved induces me to state the reasons.

By the Employers' Liability Act of April 22, 1908 [35 Stat. at L. 65, chap. 149, Comp. Stat. 1916, § 8657], Congress provided, in substance, that railroads engaged in interstate commerce shall be liable in damages for their negligence resulting in injury or death of employees while so engaged. The majority of the court now holds that by so doing Congress manifested its will to cover the whole field of compensation or relief for injuries suffered by railroad employees engaged in interstate commerce; or, at least, the whole field of obligation of carriers relating thereto; and that it thereby withdrew the subject wholly from the domain of state action. In other words, the majority of the court declares that Congress, by passing the Employers' Liability Act, prohibited states from including within the protection of their general Workmen's Compensation Laws employees who, *without fault on the railroad's part*, are injured or killed while engaged in interstate commerce; although Congress itself offered them no protection. That Congress *could* have done this is clear. The question presented is: Has Congress done so? Has Congress so willed?

The Workmen's Compensation Law of New York here in question has been declared by this court to be among those which "bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations." *New York C. R. Co. v. White*, 243 U. S. 188, 207, 61 L. ed. 667, 676, L.R.A. 1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629. And this court has definitely formulated the rules which should govern in determining when a Federal statute regulating commerce will be held to supersede L.R.A. 1918C.

state legislation in the exercise of the police power. These rules are:

1. "In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." *Sherlock v. Alling*, 93 U. S. 99, 103, 23 L. ed. 819, 820.

2. "If the purpose of the act cannot otherwise be accomplished,—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect,—the state law must yield to regulation of Congress within the sphere of its delegated power. . . .

"But the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state." *Savage v. Jones*, 225 U. S. 501, 533, 56 L. ed. 1182, 1194, 32 Sup. Ct. Rep. 715.

3. "The question must, of course, be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the state is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together." *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 623, 42 L. ed. 878, 881, 18 Sup. Ct. Rep. 488.

Guided by these rules and the cases in which they have been applied⁴ we en-

⁴ The following cases show that Congress, in legislating upon a particular subject of interstate commerce, will not be held to have inhibited by implication the exercise by the states of their reserved police power, unless such state action would actually frustrate or impair the intended operation of the Federal legislation.

1. In *Sligh v. Kirkwood*, 237 U. S. 52, 62, 59 L. ed. 835, 839, 35 Sup. Ct. Rep. 501, it was held that the Federal Food and Drugs Act dealing, among other things, with shipment in interstate commerce of fruit in filthy, decomposed, or putrid condition, did not prevent a state from penalizing the shipment of citrus fruits "which are immature or otherwise unfit for consumption."

2. In *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, 293, 58 L. ed. 1312, 1318, 34 Sup. Ct. Rep. 829, it was held that Congress did not, by the passage of the Federal Safety Appliance Acts, dealing with the equipment of locomotives, as well

deavor to determine whether Congress, in enacting the Employers' Liability Act, intended to prevent states from entering the specific field of compensation for injuries to employees arising *without fault on the railroad's part*, for which Congress made no provision.

To ascertain the intent we must look, of course, first at what Congress has said; then at the action it has taken, or omitted to take. We look at the words of the statute to see whether Congress has used any which in terms express that will. We inquire whether, without the use of explicit words, that will is expressed in specific action taken. For Congress must be presumed to have intended the necessary consequences of its action. And if we find

that its will is not expressed, or is not clearly expressed, either in words or by specific action, we should look at the circumstances under which the Employers' Liability Act was passed; look, on the one hand, at its origin, scope, and purpose; and, on the other, at the nature, methods, and means of state Workmen's Compensation Laws. If the will is not clearly expressed in words, we must consider all these in order to determine what Congress intended.

First: As to words used: The act contains no words expressing a will by Congress to cover the whole field of compensation or relief for injuries received by or for death of such employees while engaged in interstate commerce; or the whole field

as of cars, and the Act to Regulate Commerce, preclude the states from legislating concerning locomotive headlights, as to which Congress had not specifically acted.

3. In *Missouri, K. & T. R. Co. v. Harris*, 234 U. S. 412, 420, 58 L. ed. 1377, 1382, L.R.A.1915E, 942, 34 Sup. Ct. Rep. 790, it was held that the Carmack Amendment (34 Stat. at L. 584, 595, chap. 3591, Comp. Stat. 1916, §§ 8563, 8604a, 8604aa), regulating the carrier's liability for loss of interstate shipments, did not prevent a state from providing for the allowance of a moderate attorney's fee in a statute applicable both in the case of interstate and intrastate shipments.

4. In *Savage v. Jones*, 225 U. S. 501, 529, 36 L. ed. 1182, 1193, 32 Sup. Ct. Rep. 715, it was held that the passage by Congress of the Food and Drugs Act of 1906, which, among other things, prohibited misbranding, did not prevent the states from regulating the sale and requiring to be affixed a statement of ingredients and minimum percentage of fat and proteins.

5. In *Missouri P. R. Co. v. Larabee Flour Mills Co.* 211 U. S. 612, 623, 53 L. ed. 352, 361, 29 Sup. Ct. Rep. 214, it was held that Congress, by granting, in the Act to Regulate Commerce, power to the Interstate Commerce Commission to compel equal switching service on cars destined to interstate commerce, did not, in the absence of the exercise by the Commission of its power, prohibit states from legislating on the subject.

6. In *Asbell v. Kansas*, 209 U. S. 251, 257, 52 L. ed. 778, 781, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101, it was held that Congress, in providing that a certificate of inspection issued by the National Bureau of Animal Industry should entitle cattle to be shipped into any state without further inspection, did not prevent a state from penalizing the importation of cattle which had not been inspected either by the Federal Bureau or by designated state officials.

7. In *Crossman v. Lurman*, 192 U. S. 189, 199, 48 L. ed. 401, 405, 24 Sup. Ct. Rep. 234, it was held that the Act of Congress of August 30, 1890 (26 Stat. at L. 414, L.R.A.1918C

chap. 839, Comp. Stat. 1916, § 8683), prohibiting importation into the United States of adulterated and unwholesome food, did not prevent the states from legislating for the prevention of the sale of articles of food so adulterated, as come within valid prohibitions of their statutes.

8. In *Reid v. Colorado*, 187 U. S. 137, 149, 47 L. ed. 108, 114, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506, it was held that Congress, by making it an offense under the Animal Industry Act for anyone to send from state to state cattle known to be affected with communicable disease, did not prevent the states from penalizing the importation of cattle without inspection by designated state officials.

9. In *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 623, 42 L. ed. 878, 881, 18 Sup. Ct. Rep. 488, it was held that the Federal Animal Industry Act, making it a misdemeanor for any person or corporation to transport cattle known to be affected with contagious disease, did not prevent a state from imposing a civil liability for damages sustained by owners of domestic cattle by reason of the importation of such diseased cattle.

10. In *Smith v. Alabama*, 124 U. S. 465, 482, 31 L. ed. 508, 513, 1 Inters. Com. Rep. 904, 8 Sup. Ct. Rep. 564, it was held that Congress did not, by the passage of the Act to Regulate Commerce, prohibit the states from enacting laws requiring persons to undergo examination before being permitted to act as locomotive engineers.

11. In *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819, it was held that Congress did not, by the passage of many laws regulating navigation, with a view to safety, and providing for liability in certain cases prohibit the application to an accident in navigable waters of a state of a statute providing for liability for wrongful death.

The following cases, holding that the Federal Employers' Liability Act supersedes the common or statutory laws of the states relating to the liability of railroads for negligent injuries to their employees while engaged in interstate commerce, are, of course, wholly consistent with the cases

of carriers' obligations in relation thereto. The language of that act, so far as it indicates anything in this respect, points to just the contrary. For its title is: "An Act Relative to the Liability of Common Carriers by Railroad in Certain Cases."⁵

Second: As to specific action taken: The power exercised by Congress is not such that, when exercised, it necessarily excludes the state action here under consideration. It would obviously have been possible for Congress to provide in terms, that wherever such injuries or death result from the railroad's negligence, the remedy should be sought by action for damages; and wherever injury or death results from causes other than the railroad's negligence, compensation may be sought under the Workmen's Compensation Laws of the states. Between the Federal and the state law there would be no conflict whatsoever. They would, on the contrary, be complementary.

Third: As to origin, purpose, and scope of the Employers' Liability Act and the nature, methods, and means of state Workmen's Compensation Laws: The facts are of common knowledge. Do they manifest that, by entering upon one section of the field of indemnity or relief for injuries or death suffered by employees engaged in interstate commerce, Congress purposed to occupy the whole field?

(A) The origin of the Federal Employers' Liability Act.

By the common law as administered in the several states, the employee, like every

other member of the community, was expected to bear the risks necessarily attendant upon life and work, subject only to the right to be indemnified for any loss inflicted by wrongdoers. The employer, like every other member of the community, was in theory liable to all others for loss resulting from his wrongs; the scope of his liability for wrongs being amplified by the doctrine of respondeat superior. This legal liability, which, in theory, applied between employer and employee as well as between others, came, in course of time, to be seriously impaired in practice. The protection it provided employees seemed to wane as the need for it grew. Three defenses—the doctrines of fellow servant's negligence, of assumption of risk, and of contributory negligence, rose and flourished. When applied to huge organizations and hazardous occupations, as in railroadings, they practically abolished the liability of employers to employees; and in so doing they worked great hardship and apparent injustice. The wrongs suffered were flagrant; the demand for redress insistent; and the efforts to secure remedial legislation widespread. But the opponents were alert, potent, and securely entrenched. The evils of the fellow-servant rule as applied to railroads were recognized as early as 1856, when Georgia passed the first law abolishing the defense. Between the passage of that act and the passage of the first Federal Employers' Liability Act (Act of June 11, 1906, 34 Stat. at L. 232, chap. 3073), fifty years elapsed. In those fifty years only four more states had wholly abolished the defense of fellow servant's negligence. Furthermore, in only

above referred to, the "field" of both Federal and state laws there under consideration being identical: Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 55, 56 L. ed. 327, 348, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 576, 57 L. ed. 355, 363, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 66, 57 L. ed. 417, 419, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 704, 57 L. ed. 1031, 1033, 33 Sup. Ct. Rep. 703; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; Taylor v. Taylor, 232 U. S. 363, 368, 58 L. ed. 638, 640, 34 Sup. Ct. Rep. 350, 6 N. C. C. A. 436; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 501, 58 L. ed. 1062, 1068, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Washash R. Co. Co. v. Hayes, 234 U. S. 86, 89, 58 L. ed. 1226, 1230, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224; Toledo, St. L. & W. R. Co. v. Slavin, 236 U. S. 454, 458, 59 L. ed. 671, 673, 35 Sup. Ct. Rep. 306; St. Louis, I. M. & S. R. Co. v. Craft, 237 U. S. 648, 59 L. ed. 1160, 35 Sup. Ct. Rep. 704, 9 N. C. C. A. 764; Chicago, R. I. & P. R. Co. v. Devine, 239 U. S. 52, 54, 60 L. ed. 140, 142, 36 Sup. Ct. Rep. 27; Chicago, R. I. & P. R. Co. v. Wright, 239 U. S. 548, 551, 60 L. ed. 431, 434, 36 Sup. Ct. Rep. 185; Seaboard Air Line R. Co. v. Kenney, 240 U. S. 489, 493, 60 L. ed. 762, 765, 36 Sup. Ct. Rep. 458; Osborne v. Gray, 241 U. S. 16, 19, 60 L. ed. 865, 867, 36 Sup. Ct. Rep. 486.

⁵ The title of this act may be profitably compared with that of the bill (not enacted) prepared by the Employers' Liability and Workmen's Compensation Commission pursuant to Joint Resolution No. 41, approved June 25, 1910 (36 Stat. at L. 884), proposing a Federal Workmen's Compensation Law, which reads: "A Bill to Provide an Exclusive Remedy and Compensation for Accidental Injuries Resulting in Disability or Death to Employees of Common Carriers by Railroad Engaged in Interstate or Foreign Commerce, or in the District of Columbia, and for Other Purposes." (Sen. Doc. 338, p. 107, 62d Cong. 2d Sess.)

one state had a statute been passed making recovery possible where the employee had been guilty of contributory negligence.⁶ Meanwhile, the number of accidents to railroad employees had become appalling. In the year 1905-06 the number killed while on duty was 3,807, and the number injured 55,524.⁷ The promoters of remedial action, unable to overcome the efficient opposition presented in the legislatures of the several states, sought and secured the pow-

erful support of the President.⁸ Congress was appealed to and used its power over interstate commerce to afford relief. The promotion of safety was, of course, referred to in the committee's report as justifying congressional action; but the moving cause for the Federal Employers' Liability Act was not the desire to promote safety or to secure uniformity, as in standardizing equipment by the Safety Appliance Acts.⁹ There was, in the nature of things, no more

⁶ At the time the first Federal Employers' Liability Act was passed the so-called common-law defenses remained in force, in large part, in most of the states, as to railroad employees.

A. The fellow-servant rule.—(See compilation of statutes in "Liability of Employers." Senate Hearing 1906, pp. 183-288; and in Senate Document No. 207, 60th Congress, 1st Session.)

(1) It had been completely abolished as to railroad employees in only five states: Georgia (1856), Kansas (1874), North Carolina (1897), Colorado (1901), North Dakota (1903).

(2) It remained in full force, or substantially so, in twenty-five states or territories: Arizona, California, Connecticut, Delaware, Idaho, Illinois, Kentucky, Louisiana, Michigan, Maine, Maryland, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wyoming.

(3) In sixteen other states it had been modified; abolished either as to certain more dangerous kinds of work, or as to certain classes of employees: Alabama, Arkansas, Florida, Indiana, Iowa, Massachusetts, Minnesota, Mississippi, Missouri, New York, Oregon, South Carolina, Texas, Utah, Virginia, Wisconsin.

(4) The passage of the first Federal act immediately stimulated further state legislation. In 1907 the fellow-servant rule was abolished as to railroads in Arkansas, Nevada, Oklahoma, South Dakota; and largely in California, Nebraska, Pennsylvania, and Wisconsin.

B. Contributory negligence.—(See compilations cited supra.)

(1) In all but one state there had been no statutory change of the rule that contributory negligence constituted a complete defense. Georgia (1895) had substituted the comparative-negligence doctrine. In Kansas and Illinois early cases at common law seeming to apply this doctrine had been repudiated. The common law of Tennessee also contained some traces of the doctrine.

(2) During the year following the passage of the first Federal act, which adopted the rule of comparative negligence, with mitigation of damages proportionate to the degree of plaintiff's negligence, several states introduced this modification: Nebraska, Nevada, North Dakota, South Dakota, Wisconsin.

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C. Assumption of risk.—(See the compilation cited supra.)

The harshness of this rule had been mitigated by statute or other statutory action taken in only fourteen states: Alabama, California, Colorado, Georgia, Massachusetts, Mississippi, New Mexico, New York, North Carolina, Ohio, Oregon, South Carolina, Texas, Virginia. In 1907 Iowa abolished the rule as to employees giving notice of a known defect.

⁷ See Report of Interstate Commerce Commission for the year 1906. Summary of Casualties, Table A, p. 161.

⁸ President's Messages December 2, 1902; December 6, 1904; December 5, 1905; January 31, 1908.

⁹ The following facts are significant as showing that employers' liability was not deemed a factor in safety to employees or the public, or a matter in which uniformity was desirable, or as otherwise presenting a railroad problem:

(1) The Annual Reports of the Interstate Commerce Commission to Congress for the eleven years ending December, 1908, deal each year at large with accidents, casualties to employees, and the promotion of safety. These reports contain numerous recommendations for legislation concerning safety appliances, hours of labor, block signals, train control, inspection; and accident reporting; but no recommendation or even mention of employers' liability.

(2) The National Convention of Railroad Commissioners, an association comprising the commissioners of the several states, is formed for the purpose of discussing and aiding in the solution of American railroad problems. Likewise, in its reports for eleven years ending October, 1908, no reference has been found, either in the annual president's address, or in the report of the committee on legislation, or in the discussions, to the subject of employers' liability; or any mention of the passage by Congress of the two Employers' Liability Acts, or of the decision of this court on the first act.

The absence of such reference is particularly noteworthy in the legislative report for the year 1908, pp. 218-233, which is devoted to a consideration of harmonious or uniform legislation. It contains a résumé of the legislation in Congress recommended and supported by the National Convention of Railroad Commissioners during a period of nineteen years and attendances at congressional hearings on safety appliances, block signal, and hours of labor legislation.

reason for providing a Federal remedy for negligent injury to employees, than there would have been for providing such a remedy for negligent injury to passengers or to other members of the public. The Federal Employers' Liability Act was, in a sense, emergency legislation. The circumstances attending its passage were such as to preclude the belief that thereby Congress intended to deny to the states the power to provide for compensation or relief for injuries not covered by it.

(B) The scope of the Federal Employers' Liability Act.

(1) The act leaves uncovered a large part of the injuries which result from the railroads' negligence. The decision of this court in the first Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, had declared that Congress lacked power to legislate in respect to any injuries occurring otherwise than to employees engaged in interstate commerce. Later decisions disclose how large a part of the injuries resulting from the railroads' negligence are thus excluded from the operation of the Federal law. For the act was held to apply only to those *directly* engaged in interstate commerce. This excludes not only those engaged in intrastate commerce, but also the many who—while engaged on work for interstate commerce, as in repairing engines or cars—are not directly engaged in it. Likewise it excludes employees who, though habitually engaged directly in interstate commerce, happen to be injured or killed through the railroads' negligence, while performing some work in intrastate commerce.¹⁰

(2) The act leaves uncovered all of the injuries which result *otherwise* than from the railroads' negligence, though occurring when the employee is engaged directly in interstate commerce.

The scope of the act is so narrow as to

preclude the belief that thereby Congress intended to deny to the states the power to provide compensation or relief for injuries not covered by it.

(C) The purpose of the Employers' Liability Act.

The facts showing the origin and scope of the act discussed above indicate also its purpose. It was to end the denial of the right to damages for injuries due to the railroads' negligence,—a right denied under judicial decisions through the interposition of the defenses of fellow servant, assumption of risk, and contributory negligence. It was not the purpose of the act to deny to the state the power to grant *the wholly new right* to protection or relief in the case of injuries suffered otherwise than through fault of the railroads.

The Federal Employers' Liability Act was, in no respect, a departure from the individualistic basis of right and of liability. It was, on the contrary, an attempt to enforce truly and impartially the old conception of justice as between individuals. The common-law liability for fault was to be restored by removing the abuses which prevented its full and just operation. The liability of the employer under the Federal act, as at common law, is merely a penalty for wrongdoing. The remedy assured to the employee is merely a more efficient means of making the wrongdoer indemnify him whom he has wronged. This limited purpose of the Employers' Liability Act precludes the belief that Congress intended thereby to deny to the states the power to provide compensation or relief for injuries not covered by the act.

(D) The nature of Workmen's Compensation Acts.

In the effort to remove abuses, a study had been made of facts, and of the world's experience in dealing with industrial accidents. That study uncovered as fiction many an assumption upon which American judges and lawyers had rested comfortably. The conviction became widespread that our individualistic conception of rights and liability no longer furnished an adequate basis for dealing with accidents in industry. It was seen that no system of indemnity dependent upon fault on the employers' part could meet the situation, even if the law were perfected and its administration made exemplary. For, in probably a majority of cases of injury, there was no assignable fault; and in many more it must be impossible of proof. It was urged: Attention should be directed, not to the employer's fault, but to the employee's misfortune.

¹⁰ Compare Illinois C. R. Co. v. Behrens, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C. 163, 10 N. C. A. 153; New York C. R. Co. v. Carr, 238 U. S. 260, 59 L. ed. 1298, 35 Sup. Ct. Rep. 780, 7 N. C. C. A. 1; Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902; Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556, 60 L. ed. 436, L.R.A.1916C. 797, 36 Sup. Ct. Rep. 188; Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 60 L. ed. 941, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992; Erie R. Co. v. Welsh, 242 U. S. 303, 61 L. ed. 319, 37 Sup. Ct. Rep. 116; Raymond v. Chicago, M. & St. P. R. Co. 243 U. S. 43, 61 L. ed. 583, 37 Sup. Ct. Rep. 268. L.R.A.1918C.

Compensation should be general, not sporadic; certain, not conjectural: speedy, not delayed; definite as to amount and time of payment; and so distributed over long periods as to insure actual protection against lost or lessened earning capacity. To a system making such provision, and not to wasteful litigation, dependent for success upon the coincidence of fault and the ability to prove it, society, as well as the individual employee and his dependents, must look for adequate protection. Society needs such a protection as much as the individual; because ultimately society must bear the burden, financial and otherwise, of the heavy losses which accidents entail. And since accidents are a natural, and in part an inevitable, concomitant of industry as now practised, society, which is served thereby, should in some way provide the protection. To attain this end, co-operative methods must be pursued; some form of insurance,—that is, some form of taxation. Such was the contention which has generally prevailed. Thus, out of the attempt to enforce individual justice grew the attempt to do social justice. But when Congress passed the Employers' Liability Act of April 22, 1908 [35 Stat. at L. 65, chap. 149, Comp. Stat. 1916, § 8657], these truths had gained little recognition in the United States. Not one of the thirty-seven states or territories which now have Workmen's Compensation Laws had introduced the system. Yet the conception and value of compensation laws was not unknown to Congress. It then had under consideration the first Compensation Law for Federal Employees which was enacted in the following month (Act of May 30, 1908, 35 Stat. at L. 556, chap. 236). The need of its speedy passage had been called to the attention of Congress by the President in the same special message which urged the passage of this Employers' Liability Act.

Can it be contended that Congress, by simply passing the Employers' Liability Act, prohibited the states from providing in *any* way for the maintenance of such employees (and their dependents) for whose injuries a railroad, innocent of all fault, could not be called upon to make indemnity under that act? It is the state which is both primarily and ultimately concerned with the care of the injured and of those dependent upon him, even though the accident may occur while the employee is engaged directly in interstate commerce. Upon the state falls the financial burden of dependency, if provision be not otherwise made. Upon the state falls directly the far heavier burden of the demoralization of its citizenry and of the social unrest

which attend destitution and the denial of opportunity. Upon the state also rests, under our dual system of government, the duty owed to the individual, to avert misery and promote happiness so far as possible. Surely we may not impute to Congress the will to deny to the states the power to perform either this duty to humanity or their fundamental duty of self-preservation. And if the states are left free to provide compensation, what is there in the Employers' Liability Act to show an intent on the part of Congress to deny to them the power to make the provision by raising the necessary contributions, in the first instance, through employers?

(E) Methods and means of Workmen's Compensation Laws.

The principle underlying Workmen's Compensation Laws is the same in all the states. The methods and means by which that principle is carried out vary materially. The principle is that of insurance, the premiums to which are contributed by employers generally. How the insurance fund shall be raised and administered; what the scale of compensation or relief shall be; how the contributing groups of employers shall be formed; whether or not a state fund shall be created; whether the individual employer shall be permitted to become a self-insurer; whether he shall be permitted to deal directly with the employee in making settlement of the compensation to be awarded; on all these questions the laws of the several states do and properly may differ radically.

What methods and means the state shall adopt in order to provide compensation for injuries to citizens or residents where Congress has left it free to legislate rests (subject to constitutional limitations) wholly within the judgment of the state. It might conclude, in view of the hazard involved, that no one should engage in the occupation of railroading without providing against the financial consequences of accidents through contributing an adequate amount to an accident insurance fund. It might conclude that it was wise to make itself the necessary contributions to such a fund, out of moneys raised from general taxation. Or it might conclude, as the state of Washington did, that the fairest and wisest form of taxation for the purpose was to impose upon the employer directly the duty of making the required contributions,—relying upon the laws of trade to effect, through the medium of transportation charges, an equitable distribution of the burden. The method last suggested is pursued in substance also by the state of New York. In

its essence the laws of the states are the same in this respect, as is shown in *Mountain Timber Co. v. Washington*, 243 U. S. 219, ante, 260, 37 Sup. Ct. Rep. 260. It is misleading to speak of the new obligation of the employer to contribute to compensation for injuries to workmen as an increase of the "employer's liability." It is not a liability for a violation of a duty. It is a direct—a primary—obligation in the nature of a tax. And the right of the employee is as free from any suggestion of wrong done to him as the new right granted by *Mothers' Pension Laws*.

(F) Federal and state legislation are not in conflict.

The practical difficulty of determining in a particular case, according to presence or absence of railroad fault, whether indemnity is to be sought under the Federal Employers' Liability Act or under a state compensation law, affords, of course, no reason for imputing to Congress the will to deny to the states power to afford relief through such a system. The difficulty and uncertainty is, at worst, no greater than that which now exists in so many cases where it is necessary to determine whether the employee was, at the time of the accident, engaged in interstate or intrastate commerce.¹¹ Expedients for minimizing inherent difficulties will doubtless be found by experience. All the difficulties may conceivably be overcome in practice. Or they may prove so great as to lead Congress to repeal the Federal Employers' Liability Act and leave to the states (which alone can deal comprehensively with it), the whole subject of indemnity and compensation for injuries to employees, whether engaged in interstate or intrastate commerce, and whether such injuries arise from negligence or without fault of the employer.

We are admonished also by another weighty consideration not to impute to Congress the will to deny to the states this power. The subject of compensation for accidents in industry is one peculiarly appropriate for state legislation. There must, necessarily, be great diversity in the conditions of living and in the needs of the in-

jured and of his dependents, according to whether they reside in one or the other of our states and territories, so widely extended. In a large majority of instances they reside in the state in which the accident occurs. Though the principle that compensation should be made, or relief given, is of universal application, the great diversity of conditions in the different sections of the United States may, in a wise application of the principle, call for differences between states in the amount and method of compensation, the periods in which payment shall be made, and the methods and means by which the funds shall be raised and distributed. The field of compensation for injuries appears to be one in which uniformity is not desirable, or at least not essential to the public welfare.

The contention that Congress has, by legislating on one branch of a subject relative to interstate commerce, pre-empted the whole field, has been made often in this court; and, as the cases above cited show, has been repeatedly rejected in cases where the will of Congress to leave the balance of the field open to state action was far less clear than under the circumstances here considered. Tested by those decisions and by the rules which this court has framed for its guidance, I am of opinion, as was said in *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 289, 294, 58 L. ed. 1312, 1319, 34 Sup. Ct. Rep. 829, that "the intent to supersede the exercise of the state police power with respect to this subject cannot be inferred from the restricted action which thus far has been taken." The field covered by Congress was a limited field of the carrier's liability for negligence, not the whole field of the carrier's obligation arising from accidents. I find no justification for imputing to Congress the will to deny to a large class of persons engaged in a necessarily hazardous occupation¹² and otherwise unprovided for, the protection afforded by beneficent statutes enacted in the long-deferred performance of an insistent duty and in a field peculiarly appropriate for state action.

Mr. Justice Clarke concurs in this dissent.

¹¹ The number of cases on the October, 1915, term of this court, was 1,069. Of these 93 involved one or more questions arising under the Federal Employers' Liability Act of April 22, 1908. Of these 93 cases, 37 presented the question whether or not the employee was engaged in interstate commerce or intrastate commerce. In 52 of the cases the question was presented whether there was evidence of negligence on L.R.A.1918C.

the part of defendant. In 24 of the cases the question was also presented whether or not the employee had assumed the risk.

¹² The experience of the organization [Brotherhood of Locomotive Firemen and Enginemen] shows that more than 60 per cent of all deaths and disabilities are caused by railroad accidents. W. S. Carter, Sen. Doc. 549, p. 137, 64th Cong. 1st Sess.

Annotation—Applicability of state compensation statutes to non-negligent injuries of railroad employees while engaged in interstate commerce.

Exhaustive annotation on the Workmen's Compensation Acts will be found in L.R.A.1916A, 23, and L.R.A.1917D, 80; and on the Federal Employers' Liability Acts in 47 L.R.A.(N.S.) 38, and L.R.A.1915C, 48.

As to the applicability of the Federal Employers' Liability Act or state Compensation Acts to injuries within admiralty jurisdiction, see note to *Southern P. Co. v. Jensen*, post, 439.

The decision of the United States Supreme Court in *New York C. R. Co. v. Winfield*, ante, 439, disposes adversely of the contention that the Federal Employers' Liability Act does not prevent the application of state statutes to injuries received by employees of interstate railroads while they themselves are engaged in the work of furthering interstate commerce, if such injuries occur without negligence on the part of the railroad company or its agents or employees. The court of last resort has determined that, Congress having entered the field, the states have no longer any right to legislate with respect to employees of interstate railways while they themselves are engaged in furthering interstate commerce, although the injured employee may have no remedy under the Federal act.

The opinion of the Federal Supreme Court was reiterated in *Erie R. Co. v. Winfield* (1917) 244 U. S. 170, 61 L. ed. 1057, 37 Sup. Ct. Rep. 556, wherein it was stated that Congress intended that the Federal act should be as comprehensive of those instances in which it excluded liability, i. e., where there is no causal negligence for which the carrier is responsible, as of those in which liability is imposed; and in both classes such act is paramount to, and exclusive of, state regulation.

As is stated in the foregoing opinion, and also as is shown in the annotation in L.R.A.1916A, 461, and L.R.A.1917D, 85, the state courts had been in conflict upon this question. In New York and New Jersey the view was taken that the Federal act applied only to injuries caused by the negligence of the railroad company or its agents or employees, while the contrary view has been taken by courts in Illinois, California, and Massachusetts. Since the decision of the United States Supreme Court in the WINFIELD CASE, the question has been passed upon in the following cases, the L.R.A.1918C.

state courts, of course, following the decision of the United States Supreme Court: *Walker v. Chicago, I. & L. R. Co.* (1917) — *Ind. App.* —, 117 N. E. 969; *Matney v. Bush* (1918) 102 Kan. 293, 169 Pac. 1150; *Carey v. Grand Trunk Western R. Co.* (1918) — *Mich.* —, 169 N. W. 492; *Rounsaville v. Central R. Co.* (1917) — *N. J.* —, 101 Atl. 182; *Panhandle & S. F. R. Co. v. Brooks* (1917) — *Tex. Civ. App.* —, 199 S. W. 665.

While it is finally determined that the states have no power to pass a statute which will render the railroad company liable for any injury to an employee while engaged in interstate commerce, the contention has been made in some cases that a state Compensation Act which is elective in character may be adopted by the railroads, so that they will come within the state act by virtue of their own election. This view, however, has been repudiated.

The Federal Supreme Court has held that the state has no right to put an interstate carrier and their interstate employees to an election between the provisions of the Federal act and the state Compensation Act, or to impute an election to them by a statutory presumption. *Erie R. Co. v. Winfield* (1917) 244 U. S. 170, 61 L. ed. 1057, 37 Sup. Ct. Rep. 556, reversing the New Jersey court of errors and appeals (1916) 88 N. J. L. 619, 96 Atl. 394.

In the Michigan case of *Carey v. Grand Trunk Western R. Co.* (1918) — *Mich.* —, 166 N. W. 492, in which case it was contended that as the railroad company had formally elected to accept the provisions of the Michigan Compensation Act, which expressly provided that any interstate carrier and its interstate employees might, so far as not forbidden by any act of Congress, voluntarily accept and be bound by the provisions of the state act, the railroad company had by its election become bound by the Compensation Act as to non-negligent injuries. The court held, however, that the decision of the Federal Supreme Court in the WINFIELD CASE, determined conclusively for all American jurisdictions that employees of an interstate carrier, engaged in interstate commerce at the time of the injury, are not within the application of state Compensation Acts.

The Michigan court suggests that the

phrase used in the state act, "so far as not forbidden by any act of Congress," might include the passage of the Federal act; that is, the passage of the act itself might be considered as forbidding the state to legislate upon the subject. It would seem, however, that the phrase in question has reference to the provision in the Federal act which forbids any limitation of its liability by any common carrier subject to the provisions of the act.

The contention that by accepting the state Compensation Act, the railroad becomes bound by its election even as to non-negligent injuries of interstate employees, seems very plausible, and it certainly seems as though that question had not been determined by either of the decisions of the United States Supreme Court. The decision under the New York act would apparently not be conclusive in the case of a non-negligent injury where the railroad company had voluntarily elected to come in under the state act so far as it could; and the case under the New Jersey law simply decides that the state cannot compel a railroad to elect as between the Federal act and a state Compensation Act.

Entirely aside from the question of

interstate commerce, it is submitted that the state Compensation Acts, if construed to cover non-negligent injuries of employees who, as to their negligent injuries, are within the protection of the Federal act, would be unconstitutional.

It is very difficult to defend the Compensation Acts against the contention that they take property without due process of law. There is indeed a taking, but this is justified only in view of the fact that the employers have compensation therefor. While these statutes impose an additional burden on employers as to injuries not caused by their negligence, they relieve these employers from all danger of a suit for damages in which the cost to the employer might be many times the amount which he has to pay under the Compensation Act. This makes the statutes, in a sense, a matter of give and take; but if the state Compensation Acts are construed to apply to non-negligent injuries, while the employer is still liable under the Federal act for not only his own negligence, but that of his agents and employees, he will in nowise be compensated for the burden placed upon him in rendering him liable for non-negligent injuries.

W. M. G.

UNITED STATES SUPREME COURT.

SOUTHERN PACIFIC COMPANY, Plff. in Err.,
v.

MARIE JENSEN.

(244 U. S. 205, 61 L. ed. 1086, 37 Sup. Ct. Rep. 524.)

Master and servant — employers' liability — applicability of statute to ocean-going ships.

1. Congress did not establish a rule of liability with respect to injuries received by an employee on an ocean-going ship plying between ports of different states, owned and operated by a corporation which is also an interstate railway carrier, by enacting the provisions of the Employers' Liability Act of April 22, 1908, giving a right of recovery against interstate carriers by railroad for the death or injury of employees while engaged in interstate commerce, caused by the negligence of the carriers' officers, agents, or employees, or by any defect or insufficiency, due to its negligence, in its "cars, engines, appliances, machinery,

track, roadbed, works, boats, wharves, or other equipment." The word "boats" in the statute refers to vessels which may be properly regarded as in substance part of a railroad's extension or equipment, as understood and applied in common practice.

For other cases, see *Master and Servant*, II. a, 1, in *Dig. 1-52 N. S.*

Admiralty — jurisdiction — state legislation affecting maritime law.

2. State legislation changing, modifying, or affecting the general maritime law which contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of such general maritime law, or interferes with the proper harmony or uniformity of that law in its international and interstate relations, is invalid as being repugnant to U. S. Const. art. 3, § 2, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction; U. S. Const. art. 1, § 8, giving Congress power to make all laws necessary and proper to carry into execution the powers vested in the Federal government; and U. S. Judicial Code, §§ 24, 256, giving the Federal district courts exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it.

For other cases, see *Admiralty*, I. in *Dig. 1-52 N. S.*

Note — The applicability of the Federal Employers' Liability Act or State Compensation Acts to injuries within admiralty jurisdiction is discussed in the annotation following this case, post, 474.
L.R.A.1918C.

Same — state Workmen's Compensation Laws.

3. The application to an injury sustained by a longshoreman while he was unloading in a New York port an ocean-going steamship owned by a nonresident corporation, and plying between ports of different states, of the provisions of the New York Workmen's Compensation Act, which, in lieu of the common-law liability enforceable by suit in cases of negligence, imposes a liability upon employers, enforceable without judicial action, to make compensation for disabling or fatal accidental injuries to employees, without regard to fault as a cause, graduating compensation for disabilities according to a prescribed scale based upon loss of earning power, and measuring death benefits according to the dependency of the surviving wife, husband, or infant children, renders the statute, to that extent, invalid as conflicting with U. S. Const. art. 3, § 2, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction; U. S. Const. art. 1, § 8, giving Congress power to make all laws necessary and proper to carry into execution the powers vested in the Federal government; and U. S. Judicial Code, §§ 24, 256, giving Federal district courts exclusive judicial cognizance of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right to a common-law remedy where the common law is competent to give it; being also inconsistent with the policy of Congress to encourage investments in ships, manifested by U. S. Rev. Stat. §§ 4283-4285, Act of June 26, 1884, § 18, which declare a limitation upon the liability of their owners.

For other cases, see Admiralty, I. in Dig. 1-52 N. S.

(Mr. Justice Holmes, Mr. Justice Pitney, Mr. Justice Brandeis, and Mr. Justice Clarke dissent.)

(May 21, 1917.)

ERROR to the Appellate Division of the Supreme Court, Third Department, of the state of New York, to review a judgment affirmed by the Court of Appeals, approving an award of the State Workmen's Commission to claimant for the death of her husband. Reversed.

The facts are stated in the opinion.

Messrs. Norman B. Beecher and Ray Rood Allen, for plaintiff in error:

The New York Workmen's Compensation Law imposes a direct and unconstitutional burden upon the interstate commerce transacted by the plaintiff in error.

Barrett v. New York, 232 U. S. 14, 33, 58 L. ed. 483, 491, 34 Sup. Ct. Rep. 203; People v. Brooks, 4 Denio, 469; Passenger Cases, 7 How. 283, 12 L. ed. 702; Philadelphia & S. S. Co. v. Pennsylvania, 122 U. S. 326, 336, 30 L. ed. 1200, 1201, 1 L.R.A.1918C.

Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 23; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Postal Telg. Cable Co. v. Taylor, 192 U. S. 64, 48 L. ed. 342, 24 Sup. Ct. Rep. 208; D. E. Foote & Co. v. Stanley, 232 U. S. 494, 58 L. ed. 698, 34 Sup. Ct. Rep. 377; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 396, 57 L. ed. 1511, 1540, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Heyman v. Hays, 236 U. S. 178, 186, 59 L. ed. 527, 530, 35 Sup. Ct. Rep. 403; Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378; Western U. Telg. Co. v. Commercial Mill. Co. 218 U. S. 406, 416, 54 L. ed. 1088, 1091, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815; Central of Georgia R. Co. v. Murphy, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 Ann. Cas. 514; Chicago, B. & Q. R. Co. v. Railroad Commission, 237 U. S. 220, 59 L. ed. 926, P.U.R.1915C, 309, 35 Sup. Ct. Rep. 560; McNeill v. Southern R. Co. 202 U. S. 543, 561, 50 L. ed. 1142, 1148, 26 Sup. Ct. Rep. 722; Yazoo & M. Valley R. Co. v. Greenwood Grocery Co. 227 U. S. 1, 57 L. ed. 389, 33 Sup. Ct. Rep. 213; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; Powell v. Pennsylvania, 127 U. S. 678, 22 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Hall v. De Cuir, 95 U. S. 485, 24 L. ed. 547.

It denies this plaintiff in error the equal protection of the laws because, although it complies with the Compensation Act, it is not freed from further liability to workmen injured on shipboard, but remains liable to suits in admiralty.

Atlantic Transport Co. v. Imbrovek, 284 U. S. 52, 58 L. ed. 1208, 51 L.R.A. (N.S.) 1157, 34 Sup. Ct. Rep. 733; *The Lottawanna* (Rodd v. Heartt) 21 Wall. 558, 22 L. ed. 654; *Workman v. New York*, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212; *The Max Morris*, 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29; *The Thode Fagelund*, 211 Fed. 685; *The Thielbek*, 218 Fed. 251; *The Fred E. Sander*, 208 Fed. 724, 4 N. C. C. A. 891; *The Rosalie Mahony*, 218 Fed. 698; *Cunningham v. Northwestern Improv. Co.* 44 Mont. 180, 119 Pac. 554, 1 N. C. C. A. 720.

It infringes upon the exclusive admiralty jurisdiction of the United States.

Atlantic Transport Co. v. Imbrovek, *supra*.

Congress, by the Federal Employers' Liability Act of 1908, has dealt with and assumed exclusive jurisdiction over the field of compensation payable for injuries received by the employee of a common carrier by railroad while both employer and employee are engaged in interstate commerce.

The Passaic, 190 Fed. 644; *Erie R. Co. v. Jacobus*, 137 C. C. A. 151, 221 Fed. 335; *The Pawnee*, 205 Fed. 333; *Pedersen v. Delaware, L. & W. R. Co.* 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 571, 576, 57 L. ed. 361, 363, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; *St. Louis, I. M. & S. R. Co. v. McWhirter*, 229 U. S. 265, 275, 57 L. ed. 1179, 1185, 33 Sup. Ct. Rep. 858; *Toledo, St. L. & W. R. Co. v. Slavin*, 236 U. S. 454, 457, 59 L. ed. 671, 672, 35 Sup. Ct. Rep. 306; *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 432, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; *Smith v. Industrial Acci. Commission*, 26 Cal. App. 560, 147 Pac. 600; *Staley v. Illinois C. R. Co.* 268 Ill. 356, L.R.A.1916A, 450, 109 N. E. 342.

No action for death to an employee engaged in interstate commerce can be brought against the railroad company except within the time provided by Congress.

Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806; *St. Louis, S. E. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; *Taylor v. Taylor*, 232 U. S. 363, 58 L. ed. 638, 34 Sup. Ct. Rep. 350, 6 N. C. C. A. 436; *Atlantic Coast Line R. Co. v. Burnette*, 239 U. S. 199, 60 L. ed. 226, 36 Sup. Ct. Rep. 75.

The fact that there is no liability imposed by Congress in favor of certain rela-

tives of a deceased workman, or that Congress has made no provision for the recovery of other than pecuniary damage in death cases, does not leave the field of legislation in these respects open to the states, for the act of Congress creates the only obligation that has existed since its enactment.

Atlantic Coast Line R. Co. v. Burnette, 239 U. S. 199, 201, 60 L. ed. 226, 227, 36 Sup. Ct. Rep. 75.

Congress by refraining from acting may as effectually withdraw a field from state legislation as though it had enacted affirmative measures.

The Hours of Service Act Cases, *Erie R. Co. v. New York*, 233 U. S. 671, 58 L. ed. 1149, 52 L.R.A. (N.S.) 266, 34 Sup. Ct. Rep. 756, Ann. Cas. 1915D, 138; *Northern P. R. Co. v. Washington*, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160.

The test is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the state had any jurisdiction of a subject over which Congress had exerted its exclusive control.

Southern R. Co. v. Railroad Commission, 236 U. S. 439, 448, 59 L. ed. 661, 666, 35 Sup. Ct. Rep. 304.

Messrs. E. Clarence Aiken, Egbert E. Woodbury, Attorney General of New York, and Harold J. Hinman, for the New York State Industrial Commission:

It may be a doubtful question as to whether the case would come under admiralty at all, as the claimant's intestate was on the gang plank which connected the land with the ship, and it might be contended that the gang plank was an extension of the shore, and not a part of the ship.

Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58 L. ed. 1208, 51 L.R.A. (N.S.) 1157, 34 Sup. Ct. Rep. 733; *The Plymouth* (Hough v. Western Transp. Co.) 3 Wall. 20, 8 L. ed. 125; *The H. S. Pickands*, 42 Fed. 239; *Swayne & Hoyt v. Barsch*, 141 C. C. A. 337, 226 Fed. 581; *Martin v. West*, 222 U. S. 191, 56 L. ed. 159, 36 L.R.A. (N.S.) 592, 32 Sup. Ct. Rep. 42; *Cleveland Terminal & Valley R. Co. v. Cleveland S. S. Co.* 208 U. S. 316, 52 L. ed. 508, 28 Sup. Ct. Rep. 414, 13 Ann. Cas. 1215.

No action in rem is given by the statute of the state or by Congress for the death of a person caused by negligence, and therefore there is no cause of action in rem in admiralty.

The Corsair (Barton v. Brown) 145 U. S. 335, 36 L. ed. 727, 12 Sup. Ct. Rep. 949.

There being no law, either state or national, giving a right of action in rem for death, there is only one remedy in this case; viz., a right of action in personam for the death of Jensen, enforceable either in the

state courts or the United States courts. The Workmen's Compensation Law would therefore be a defense to an action brought in admiralty in personam.

Stoll v. Pacific Coast S. S. Co. 205 Fed. 169; *The Fred E. Sander*, 212 Fed. 545, 5 N. C. C. A. 97; *Schweitzer v. Hamburg-American Line*, 149 App. Div. 900, 134 N. Y. Supp. 812, 78 Misc. 448, 138 N. Y. Supp. 944.

All that the Workmen's Compensation Law does is to substitute a remedy for the common-law remedy, making two remedies as before.

The requirement for insurance against injury provided in this statute is not obnoxious to the commerce clause of the Federal Constitution.

Stoll v. Pacific Coast S. S. Co. 205 Fed. 169; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819.

While Congress has legislated upon this subject of limitation of liability, it is not legislation that excludes action in the state courts.

The City of Boston, 182 Fed. 174.

A proceeding limiting liability of ship-owners is not an action in rem, but is sui generis, which takes rather the character of an action in personam (*Re Morrison*, 147 U. S. 14, 37 L. ed. 60, 13 Sup. Ct. Rep. 246), and it applies to nonmaritime torts (*Richardson v. Harmon*, 222 U. S. 96, 56 L. ed. 110, 32 Sup. Ct. Rep. 27), and it also applies to cases of personal injuries as well as to cases of loss or injury to property (*Butler v. Boston & S. S. Co.* 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612; *Craig v. Continental Ins. Co.* 141 U. S. 638, 35 L. ed. 886, 12 Sup. Ct. Rep. 97).

Mr. Christopher M. Bradley, amicus curiæ:

The police power belongs to the states, has not been surrendered by them to the general government nor restrained by the Constitution of the United States, and is essentially exclusive.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Jones v. Brim*, 165 U. S. 180, 41 L. ed. 677, 17 Sup. Ct. Rep. 282; *Re Rahrer*, 140 U. S. 545, 36 L. ed. 572, 11 Sup. Ct. Rep. 865; *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

The police power has heretofore been invoked and established to support compulsory Workmen's Compensation Laws.

State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 177, 37 L.R.A. (N.S.) 466, 117 Pac. 1106, 2 N. C. C. A. 828, 3 N. C. C. A. 599; *Western Indemnity Co. v. Pillsbury*, 170 Cal. 688, 151 Pac. 398, 10 N. C. C. A. 1.

In cases under the maritime law, where the facts give the seamen a lien because of L.R.A.1918C.

his injuries, the vessel herself is the offending thing or the wrongdoer, although, of course, ultimately it is her owner who pays for the tort. The personal liability or obligation of the owner, for which he can be sued in personam, is a thing apart from the maritime lien of the seamen in the thing; and this personal obligation is no more maritime than nonmaritime.

Sherlock v. Alling, 93 U. S. 107, 23 L. ed. 822; *The Fullerton*, 92 C. C. A. 463, 167 Fed. 11; *Stewart v. Potomac Ferry Co.* 12 Fed. 300; *Knapp, S. & Co. Co. v. McCaffrey*, 177 U. S. 648, 44 L. ed. 926, 20 Sup. Ct. Rep. 824; *Taylor v. Carryl*, 20 How. 583, 15 L. ed. 1028.

In the absence of congressional legislation the state law can create and enforce the personal obligation.

Lindstrom v. International Nav. Co. 60 C. C. A. 649, 123 Fed. 475; *Kalleck v. Deering*, 161 Mass. 469, 42 Am. St. Rep. 421, 37 N. E. 450, 15 Am. Neg. Cas. 672; *Stern v. La Compagnie Générale Transatlantique*, 110 Fed. 998; *The Hamilton (Old Dominion S. S. Co. v. Gilmore)* 207 U. S. 398, 405, 406, 52 L. ed. 264, 270, 28 Sup. Ct. Rep. 133.

There is no question of interference with the general maritime law.

The Strabo, 90 Fed. 113; *Quinn v. New Jersey Lighterage Co.* 23 Fed. 363; *Quebec S. S. Co. v. Merchant*, 133 U. S. 375, 23 L. ed. 656, 10 Sup. Ct. Rep. 397; *Kalleck v. Deering*, 161 Mass. 472, 42 Am. St. Rep. 421, 37 N. E. 450, 15 Am. Neg. Cas. 672; *Gabrielson v. Waydell*, 135 N. Y. 13, 17 L.R.A. 228, 31 Am. St. Rep. 793, 31 N. E. 969; *Silveira v. Iverson*, 125 Cal. 266, 57 Pac. 996, 128 Cal. 187, 60 Pac. 687; *The Lamington*, 87 Fed. 755.

As to all cases not within the exclusive jurisdiction of the admiralty, the suitor may pursue his common-law remedy in the state tribunal; and where the matter is not within the admiralty and maritime jurisdiction, the state court may even provide a statutory remedy purely in rem, after the manner of the civil law.

The Glide, 167 U. S. 620, 42 L. ed. 301, 17 Sup. Ct. Rep. 930.

The remedy provided by the act is a common-law remedy.

Rounds v. Cloverport Foundry & Mach. Co. 237 U. S. 303, 59 L. ed. 966, 35 Sup. Ct. Rep. 596; *Knapp, S. & Co. Co. v. McCaffrey*, 177 U. S. 644, 44 L. ed. 925, 20 Sup. Ct. Rep. 824; *Benedict, Admiralty*, 4th ed. §§ 128, 129; *Colorado Midland R. Co. v. Jones*, 29 Fed. 193; *Searl v. School Dist.* 124 U. S. 197, 31 L. ed. 415, 8 Sup. Ct. Rep. 460.

The obligation here sought to be enforced is not in its essence maritime; and in the absence of congressional legislation provid-

ing different or maritime relief for seamen in cases covered by the act, the relief thereby provided can be enforced by the state.

Pacific Surety Co. v. Leatham & S. Towing & Wrecking Co. 80 C. C. A. 670, 151 Fed. 443; *The Pennsylvania*, 83 C. C. A. 139, 154 Fed. 9; *Lindstrom v. Mutual S. S. Co.* 132 Minn. 328, L.R.A. 1916D, 935, 156 N. W. 663; *Kennerston v. Thames Towboat Co.* 89 Conn. 367, L.R.A.1916A, 436, 94 Atl. 372; *Stoll v. Pacific Coast S. S. Co.* 205 Fed. 169; *Walker v. Clyde S. S. Co.* 215 N. Y. 529, 109 N. E. 604, Ann. Cas. 1916B, 87.

Mr. Justice McReynolds delivered the opinion of the court:

Upon a claim regularly presented, the Workmen's Compensation Commission of New York made the following findings of fact, rulings, and award, October 9, 1914:

1. "Christen Jensen, the deceased workman, was, on August 15, 1914, an employee of the Southern Pacific Company, a corporation of the state of Kentucky, where it has its principal office. It also has an office at Pier 49, North river, New York city. The Southern Pacific Company at said time was, and still is, a common carrier by railroad. It also owned and operated a steamship, *El Oriente*, plying between the ports of New York and Galveston, Texas.

2. "On August 15, 1914, said steamship was berthed for discharging and loading at Pier 49, North river, lying in navigable waters of the United States.

3. "On said date Christen Jensen was operating a small electric freight truck. His work consisted in driving the truck into the steamship *El Oriente*, where it was loaded with cargo, then driving the truck out of the vessel upon a gangway connecting the vessel with Pier 49, North river, and thence upon the pier, where the lumber was unloaded from the truck. The ship was about 10 feet distant from the pier. At about 10:15 A. M., after Jensen had been doing such work for about three hours that morning, he started out of the ship with his truck loaded with lumber, a part of the cargo of the steamship *El Oriente*, which was being transported from Galveston, Texas, to New York city. Jensen stood on the rear of the truck, the lumber coming about to his shoulder. In driving out of the port in the side of the vessel and upon the gangway, the truck became jammed against the guide pieces on the gangway. Jensen then reversed the direction of the truck and proceeded at third or full speed backward into the hatchway. He failed to lower his head and his head struck the ship at the top line, throwing his head forward and causing his chin to hit the lumber L.R.A.1918C.

in front of him. His neck was broken and in this manner he met his death.

4. "The business of the Southern Pacific Company in this state consisted at the time of the accident and now consists solely in carrying passengers and merchandise between New York and other states. Jensen's work consisted solely in moving cargo destined to and from other states.

5. "Jensen left surviving him Marie Jensen, his widow, twenty-nine years of age, and Howard Jensen, his son, seven years of age, and Evelyn Jensen, his daughter, three years of age.

6. "Jensen's average weekly wage was \$19.60 per week.

7. "The injury was an accidental injury and arose out of and in the course of Jensen's employment by the Southern Pacific Company, and his death was due to such injury. The injury did not result solely from the intoxication of the injured employee while on duty, and was not occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or another.

"This claim comes within the meaning of chapter 67 of the Consolidated Laws as re-enacted and amended by chapter 41 of the Laws of 1914, and as amended by chapter 316 of the Laws of 1914.

"Award of compensation is hereby made to Marie Jensen, widow of the deceased, at the rate of \$5.87 weekly during her widowhood, with two years' compensation in one sum in case of her marriage; to Harold Jensen, son of the deceased, at the rate of \$1.96 per week, and to Evelyn Jensen, daughter of the deceased, at the rate of \$1.96 per week until the said Harold Jensen and Evelyn Jensen respectively shall arrive at the age of eighteen years, and there is further allowed the sum of one hundred (\$100) dollars for funeral expenses."

In due time the Southern Pacific Company objected to the award "upon the grounds that the act does not apply, because the workman was engaged in interstate commerce on board a vessel of a foreign corporation of the state of Kentucky, which was engaged solely in interstate commerce; that the injury was one with respect to which Congress may establish, and has established, a rule of liability, and under the language of § 114¹ [copied in the margin], the act has no application; on the ground that the act includes only those engaged in the operation of vessels other than those of other states and coun-

¹ Section 114. "The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also in interstate or foreign commerce, for whom

tries in foreign and interstate commerce, while the work upon which the deceased workman was engaged at the time of his death was part of the operation of a vessel of another state, engaged in interstate commerce, and hence does not come within the provisions of the act; further, that the act is unconstitutional, as it constitutes a regulation of and burden upon commerce among the several states, in violation of article 1, § 8, of the Constitution of the United States; in that it takes property without due process of law, in violation of the 14th Amendment of the Constitution; in that it denies the Southern Pacific Company the equal protection of the laws, in violation of the 14th Amendment of the Constitution, because the act does not afford an exclusive remedy, but leaves the employer and its vessels subject to suit in admiralty; also that the act is unconstitutional in that it violates article 3, § 2, of the Constitution, conferring admiralty jurisdiction upon the courts of the United States."

Without opinion, the appellate division approved the award and the court of appeals affirmed this action (215 N. Y. 514, L.R.A.1916A, 403, 109 N. E. 600, Ann. Cas. 1916B, 276), holding that the Workmen's Compensation Act applied to the employment in question and was not obnoxious to the Federal Constitution. It said: "The scheme of the statute is essentially and fundamentally one by the creation of a state fund to insure the payment of a prescribed compensation based on earnings for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments. The state fund is created from premiums paid by employers based on the pay roll, the number of employees, and the hazards of the employment. The employer has the option of insuring with any stock corporation or mutual association authorized to transact such business, or of furnishing satisfactory proof to the Commission of his own financial ability to pay. If he does neither, he is liable to a penalty equal to the pro rata premium payable to the state fund during the period of his noncompliance, and is subject to a suit for damages by the injured employee, or his legal representative in case of death, in which he is deprived of the defenses of contributory negligence, assumed risk, and negligence of a

fellow servant. By insuring in the state fund, or by himself or his insurance carrier paying the prescribed compensation, the employer is relieved from further liability for personal injuries or death sustained by employees. Compensation is to be made without regard to fault as a cause of the injury, except where it is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or another, or results solely from his intoxication while on duty. Compensation is not based on the rule of damages applied in negligence suits, but, in addition to providing for medical, surgical, or other attendance or treatment and funeral expenses, it is based solely on loss of earning power. Thus, the risk of accidental injuries occurring with or without fault on the part either of employee or employer is shared by both, and the burden of making compensation is distributed over all the enumerated hazardous employments in proportion to the risks involved." See also *Walker v. Clyde S. S. Co.* 215 N. Y. 529, 109 N. E. 604, Ann. Cas. 1916B, 87.

In *New York C. R. Co. v. White*, 243 U. S. 188, 61 L. ed. 867, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, we held the statute valid in certain respects; and, considering what was there said, only two of the grounds relied on for reversal now demand special consideration. First. Plaintiff in error, being an interstate common carrier by railroad, is responsible for injuries received by employees while engaged therein under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. chap. 149, p. 65, Comp. Stat. 1916, § 8657), and no state statute can impose any other or different liability. Second. As here applied, the Workmen's Compensation Act conflicts with the general maritime law, which constitutes an integral part of the Federal law under art. 3, § 2, of the Constitution, and to that extent is invalid.

The Southern Pacific Company, a Kentucky corporation, owns and operates a railroad as a common carrier; also the steamship *El Oriente*, plying between New York and Galveston, Texas. The claim is that therefore rights and liabilities of the parties here must be determined in accordance with the Federal Employers' Liability Act. But we think that act is not applicable in the circumstances.

a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that such employer and his employees working only in L.R.A.1918C.

this state may, subject to the approval and in the manner provided by the Commission and so far as not forbidden by any act of Congress, accept and become bound by the provisions of this chapter in like manner and with the same effect in all respects as provided herein for other employers and their employees."

The First Federal Employers' Liability Act (June 11, 1906, 34 Stat. at L. 232, chap. 3073) extended in terms to all common carriers engaged in interstate or foreign commerce, and, because it embraced subjects not within the constitutional authority of Congress, was declared invalid. *Employers' Liability Cases* (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, Jan. 6, 1908. The later act is carefully limited and provides that "every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representatives, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment."

Evidently the purpose was to prescribe a rule applicable where the parties are engaging in something having direct and substantial connection with railroad operations, and not with another kind of carriage recognized as separate and distinct from transportation on land and no mere adjunct thereto. It is unreasonable to suppose that Congress intended to change long-established rules applicable to maritime matters merely because the ocean-going ship concerned happened to be owned and operated by a company also a common carrier by railroad. The word "boats" in the statute refers to vessels which may be properly regarded as in substance but part of a railroad's extension or equipment as understood and applied in common practice.

The fundamental purpose of the Compensation Law, as declared by the court of appeals, is "the creation of a state fund to insure the payment of a prescribed compensation based on earnings for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments," among them being "longshore work, including the load-

ing or unloading of cargoes or parts of cargoes of grain, coal, ore, freight, general merchandise, lumber or other products or materials, or moving or handling the same, on any dock, platform or place, or in any warehouse or other place of storage." Its general provisions are specified in our opinion in *New York C. R. Co. v. White*, *supra*, and need not be repeated. Under the construction adopted by the state courts no ship may load or discharge her cargo at a dock therein without incurring a penalty, unless her owners comply with the act, which, in order to secure payment of compensation for accidents, generally without regard to fault, and based upon annual wages, provides (§ 50) that—"an employer shall secure compensation to his employees in one of the following ways:

"1. By insuring and keeping insured the payment of such compensation in the state fund, or 2. By insuring and keeping insured the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this state. If insurance be so effected in such a corporation of mutual association the employer shall forthwith file with the Commission, in form prescribed by it, a notice specifying the name of such insurance corporation or mutual association together with a copy of the contract or policy of insurance. 3. By furnishing satisfactory proof to the Commission of his financial ability to pay such compensation for himself, in which case the Commission may, in its discretion, require the deposit with the Commission of securities of the kind prescribed in section thirteen of the Insurance Law, in an amount to be determined by the Commission, to secure his liability to pay the compensation provided in this chapter."

"If an employer fail to comply with this section, he shall be liable to a penalty during which such failure continues of an amount equal to the pro rata premium which would have been payable for insurance in the state fund for such period of noncompliance to be recovered in an action brought by the Commission."

Article 3, § 2, of the Constitution, extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction;" and article 1, § 8, confers upon the Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof." Considering our former opinions, it must now be accepted as set-

tled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. *Butler v. Boston & S. S. Co.* 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612; *Re Garnett*, 141 U. S. 1, 14, 35 L. ed. 631, 634, 11 Sup. Ct. Rep. 840. And further, that, in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction. *The Lottawanna* (*Rodd v. Heartt*) 21 Wall. 558, 22 L. ed. 664; *Butler v. Boston & S. S. Co.* 130 U. S. 527, 557, 32 L. ed. 1017, 1024, 9 Sup. Ct. Rep. 612; *Workman v. New York*, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212.

In *The Lottawanna*, Mr. Justice Bradley, speaking for the court, said: "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' . . . One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

By § 9, Judiciary Act of 1789 (1 Stat. at L. 76, 77, chap. 20), the district courts of the United States were given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, . . . saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." And this grant has been continued. Judicial Code, §§ 24 and 256 [36 Stat. at L. 1091, 1160, chap. 231, Comp. Stat. 1916, §§ 991 (1), 1233].

In view of these constitutional provisions and the Federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied. A lien upon a

vessel for repairs in her own port may be given by state statute (*The Lottawanna* (*Rodd v. Heartt*) 21 Wall. 558, 579, 580, 22 L. ed. 664, 663, 664; *The J. E. Rumbell*, 148 U. S. 1, 37 L. ed. 345, 13 Sup. Ct. Rep. 498); pilotage fees fixed (*Cooley v. Port Wardens*, 12 How. 299, 13 L. ed. 996; *Ex parte McNeil*, 13 Wall. 236, 242, 20 L. ed. 624, 626); and the right given to recover in death cases (*The Hamilton* (*Old Dominion S. S. Co. v. Gilmore*) 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133; *La Bourgogne* (*Deslions v. La Compagnie Générale Transatlantique*) 210 U. S. 95, 138, 52 L. ed. 973, 993, 28 Sup. Ct. Rep. 664). See *The City of Norwalk*, 55 Fed. 98, 106. Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. They cannot authorize proceedings in rem according to the course in admiralty (*The Moses Taylor*, 4 Wall. 411, 18 L. ed. 397; *American S. B. Co. v. Chase*, 16 Wall. 522, 534, 21 L. ed. 369, 372; *The Glide*, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. Rep. 930); nor create liens for materials used in repairing a foreign ship (*The Roanoke*, 189 U. S. 185, 47 L. ed. 770, 23 Sup. Ct. Rep. 491). See *Workman v. New York*, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212. And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from *The Lottawanna*.

A similar rule in respect to interstate commerce, deduced from the grant to Congress of power to regulate it, is now firmly established. "Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state to another. Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free." *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 507, 508, 31 L. ed. 700, 714, 715, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Vance v. W. A. Vanderecook Co.* 170 U. S. 438,

444, 42 L. ed. 1100, 1103, 18 Sup. Ct. Rep. 674; *Clark Distilling Co. v. Western Maryland R. Co.* 242 U. S. 311, 61 L. ed. 326, L.R.A.1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845, decided January 8, 1917. And the same character of reasoning which supports this rule, we think, makes imperative the stated limitation upon the power of the states to interpose where maritime matters are involved.

The work of a stevedore, in which the deceased was engaging, is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 59, 60, 68 L. ed. 1208, 1211, 1212, 51 L.R.A.(N.S.) 1157, 34 Sup. Ct. Rep. 733.

If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded. A far more serious injury would result to commerce than could have been inflicted by the Washington statute authorizing a materialman's lien, condemned in *The Roanoke*. The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid.

Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal district courts, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction. *The Hine v. Trevor*, 4 Wall. 571, 572, 18 L. ed. 456; *The Belfast*, 7 Wall. 624, 644, 19 L. ed. 266, 272; *American S. B. Co. v. Chase*, 16 Wall. 522, 531, 533, 21 L. ed. 369, 371, 372; *The Glide*, 167 U. S. 606, 623, 42 L. ed. 296, 302, 17 Sup. Ct. Rep. 930. And finally, this remedy is not consistent with the policy of Congress to encourage investments in ships, manifested in the Acts of 1851 [9 Stat. at L. 635, chap. 43] and 1884 (Rev. Stat. 4283-4285, Comp. Stat. 1916, §§ 8021-8023; L.R.A.1918C.

§ 18, Act of June 26, 1884, 23 Stat. at L. 57, chap. 121, Comp. Stat. 1916, § 8028), which declare a limitation upon the liability of their owners. *Richardson v. Harmon*, 222 U. S. 96, 104, 56 L. ed. 110, 113, 32 Sup. Ct. Rep. 27.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Holmes, dissenting:

The Southern Pacific Company has been held liable under the statutes of New York for an accidental injury happening upon a gangplank between a pier and the company's vessel, and causing the death of one of its employees. The company not having insured as permitted, the statute may be taken as if it simply imposed a limited but absolute liability in such a case. The short question is whether the power of the state to regulate the liability in that place and to enforce it in the state's own courts is taken away by the conferring of exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction upon the courts of the United States.

There is no doubt that the saving to suitors of the right of a common-law remedy leaves open the common-law jurisdiction of the state courts, and leaves some power of legislation, at least, to the states. For the latter I need do no more than refer to state pilotage statutes, and to liens created by state laws in aid of maritime contracts. Nearer to the point, it is decided that a statutory remedy for causing death may be enforced by the state courts, although the death was due to a collision upon the high seas. *American S. B. Co. v. Chase*, 16 Wall. 522, 21 L. ed. 369; *Sherlock v. Alling*, 93 U. S. 99, 104, 23 L. ed. 819, 820; *Knapp, S. & Co. Co. v. McCaffrey*, 177 U. S. 638, 646, 44 L. ed. 921, 925, 20 Sup. Ct. Rep. 824; *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. 352, 409, 57 L. ed. 1511, 1545, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18. The misgivings of Mr. Justice Bradley were adverted to in *The Hamilton* (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133, and held at least insufficient to prevent the admiralty from recognizing such a state-created right in a proper case, if indeed they went to any such extent. *La Bourgogne* (*Deslions v. La Compagnie Générale Transatlantique*) 210 U. S. 96, 138, 52 L. ed. 973, 993, 28 Sup. Ct. Rep. 664.

The statute having been upheld in other respects (*New York C. R. Co. v. White*, 243 U. S. 188, 61 L. ed. 667, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D,

629), I should have thought these authorities conclusive. The liability created by the New York act ends in a money judgment, and the mode in which the amount is ascertained, or is to be paid, being one that the state constitutionally might adopt, cannot matter to the question before us if any liability can be imposed that was not known to the maritime law. And as such a liability can be imposed where it was unknown not only to the maritime but to the common law, I can see no difference between one otherwise constitutionally created for death caused by accident and one for death due to fault. Neither can the statutes limiting the liability of owners affect the case. Those statutes extend to nonmaritime torts, which, of course, are the creation of state law. *Richardson v. Harmon*, 222 U. S. 96, 104, 56 L. ed. 110, 113, 32 Sup. Ct. Rep. 27. They are paramount to but not inconsistent with the new cause of action. However, as my opinion stands on grounds that equally would support a judgment for a maritime tort not ending in death, with which admiralty courts have begun to deal, I will state the reasons that satisfy my mind.

No doubt there sometimes has been an air of benevolent gratuity in the admiralty's attitude about enforcing state laws. But of course there is no gratuity about it. Courts cannot give or withhold at pleasure. If the claim is enforced or recognized it is because the claim is a right, and if a claim depending upon a state statute is enforced, it is because the state had constitutional power to pass the law. Taking it as established that a state has constitutional power to pass laws giving rights and imposing liabilities for acts done upon the high seas when there were no such rights or liabilities before, what is there to hinder its doing so in the case of a maritime tort? Not the existence of an inconsistent law emanating from a superior source, that is, from the United States. There is no such law. The maritime law is not a *corpus juris*—it is a very limited body of customs and ordinances of the sea. The nearest to anything of the sort in question was the rule that a seaman was entitled to recover the expenses necessary for his cure when the master's negligence caused his hurt. The maritime law gave him no more. *The Osceola*, 189 U. S. 158, 175, 47 L. ed. 760, 764, 23 Sup. Ct. Rep. 483. One may affirm with the sanction of that case that it is an innovation to allow suits in the admiralty by seamen to recover damages for personal injuries caused by the negligence of the master, and to apply the common-law principles of tort.

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Now, however, common-law principles have been applied to sustain a libel by a stevedore in personam against the master for personal injuries suffered while loading a ship. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 58 L. ed. 1208, 51 L.R.A.(N.S.) 1157, 34 Sup. Ct. Rep. 733, and *The Osceola* recognizes that in some cases, at least, seamen may have similar relief. From what source do these new rights come? The earliest case relies upon "the analogies of the municipal law" (*The Edith Godden*, 23 Fed. 43, 46),—sufficient evidence of the obvious pattern, but inadequate for the specific origin. I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say, "I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court." No more could a judge, exercising the limited jurisdiction of admiralty, say, "I think well of the common-law rules of master and servant, and propose to introduce them here en bloc." Certainly he could not in that way enlarge the exclusive jurisdiction of the district courts and cut down the power of the states. If admiralty adopts common-law rules without an act of Congress, it cannot extend the maritime law as understood by the Constitution. It must take the rights of the parties from a different authority, just as it does when it enforces a lien created by a state. The only authority available is the common law or statutes of a state. For from the often-repeated statement that there is no common law of the United States (*Wheaton v. Peters*, 8 Pet. 591, 658, 8 L. ed. 1055, 1079; *Western U. Teleg. Co. v. Call Pub. Co.* 181 U. S. 92, 101, 45 L. ed. 765, 770, 21 Sup. Ct. Rep. 581), and from the principles recognized in *Atlantic Transport Co. v. Imbrovek* having been unknown to the maritime law, the natural inference is that, in the silence of Congress, this court has believed the very limited law of the sea to be supplemented here as in England by the common law, and that here that means, by the common law of the state. *Sherlock v. Alling*, 93 U. S. 99, 104, 23 L. ed. 819, 820. *Taylor v. Carryl*, 20 How. 583, 598, 15 L. ed. 1028, 1033. So far as I know, the state courts have made this assumption without criticism or attempt at revision from the beginning to this day; e. g., *Wilson v. MacKenzie*, 7 Hill, 95, 42 Am. Dec. 51; *Gabrielson v. Waydell*, 125 N. Y. 1, 11, 17 L.R.A. 228, 31 Am. St. Rep. 793, 31 N. E. 969; *Kalleck v. Deering*, 161 Mass. 469, 37 N. E. 450, 42 Am. St. Rep. 421, 15 Am. Neg. Cas. 672. See *Ogle v. Barnes*, 8

T. R. 188, 101 Eng. Reprint, 1338; *Nicholson v. Mounsey*, 15 East, 384, 104 Eng. Reprint, 890, 13 Revised Rep. 601. Even where the admiralty has unquestioned jurisdiction the common law may have concurrent authority and the state courts concurrent power. *Schoonmaker v. Gilmore*, 102 U. S. 118, 26 L. ed. 95. The invalidity of state attempts to create a remedy for maritime contracts or torts, parallel to that in the admiralty, that was established in such cases as *The Moses Taylor*, 4 Wall. 411, 18 L. ed. 397, and *The Hine v. Trevor*, 4 Wall. 555, 18 L. ed. 451, is immaterial to the present point.

The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact. It always is the law of some state, and if the district courts adopt the common law of torts, as they have shown a tendency to do, they thereby assume that a law not of maritime origin, and deriving its authority in that territory only from some particular state of this Union, also governs maritime torts in that territory,—and if the common law, the statute law has at least equal force, as the discussion in *The Osceola* assumes. On the other hand, the refusal of the district courts to give remedies coextensive with the common law would prove no more than that they regarded their jurisdiction as limited by the ancient lines,—not that they doubted that the common law might and would be enforced in the courts of the states as it always has been. This court has recognized that in some cases different principles of liability would be applied as the suit should happen to be brought in a common law or admiralty court. Compare *The Max Morris*, 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29, with *Belden v. Chase*, 150 U. S. 674, 691, 37 L. ed. 1218, 1224, 14 Sup. Ct. Rep. 269. But hitherto it has not been doubted authoritatively, so far as I know, that even when the admiralty had a rule of its own to which it adhered, as in *Workman v. New York*, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212, the state law, common or statute, would prevail in the courts of the state. Happily such conflicts are few.

It might be asked why, if the grant of jurisdiction to the courts of the United States imports a power in Congress to legislate, the saving of a common-law remedy, i. e., in the state courts, did not import a like if subordinate power in the states. But leaving that question on one side, such cases as *American S. B. Co. v. Chase*, 16 Wall. 522, 21 L. ed. 369; *The*

Hamilton (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133, and *Atlantic Transport Co. v. Imbrokek*, supra, show that it is too late to say that the mere silence of Congress excludes the statute or common law of a state from supplementing the whole inadequate maritime law of the time of the Constitution, in the regulation of personal rights, and I venture to say that it never has been supposed to do so, or had any such effect.

As to the specter of a lack of uniformity, I content myself with referring to *The Hamilton* (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 406, 52 L. ed. 264, 270, 28 Sup. Ct. Rep. 133. The difficulty really is not so great as in the case of interstate carriers by land, which, "in the absence of Federal statute providing a different rule, are answerable according to the law of the state for nonfeasance or misfeasance within its limits." *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. 352, 408, 57 L. ed. 1511, 1545, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18, and cases cited. The conclusion that I reach accords with the considered cases of *Lindstrom v. Mutual S. S. Co.* 132 Minn. 328, L.R.A.1916D, 935, 156 N. W. 669; *Kenneron v. Thames Towboat Co.* 89 Conn. 367, L.R.A.1916A, 436, 94 Atl. 372; and *North Pacific S. S. Co. v. Industrial Acci. Commission*, — Cal. —, 163 Pac. 199, as well as with the *New York* decision in this case. 215 N. Y. 514, L.R.A.1916A, 403, 109 N. E. 600, Ann. Cas. 1916B, 276, 9 N. C. C. A. 286.

Mr. Justice Pitney, dissenting:

While concurring substantially in the dissenting opinion of Mr. Justice Holmes, I deem it proper, in view of the momentous consequences of the decision, to present some additional considerations.

This dissent is confined to that part of the prevailing opinion which holds that the Workmen's Compensation Act of New York, as applied by the state court to a fatal injury sustained by a stevedore while engaged in work of a maritime nature upon navigable water within that state, conflicts with the Constitution of the United States and the act of Congress conferring admiralty and maritime jurisdiction in civil cases upon the district courts of the United States, and is to that extent invalid. Except for the statute, an action might have been brought in a court of admiralty. *Atlantic Transport Co. v. Imbrokek*, 234 U. S. 52, 62, 58 L. ed. 1208, 1212, 51 L.R.A.(N.S.) 1157, 34 Sup. Ct. Rep. 733. No question is raised respecting the jurisdiction of the state court over the subject-matter. But

plaintiff in error contends, and the prevailing opinion holds, that it was a violation of a Federal right for the state court to apply the provisions of the local statute to a cause of action of maritime origin, because, by the Constitution of the United States, admiralty jurisdiction was conferred upon the Federal courts.

It should be stated, at the outset, that the case involves no question of penalties imposed by the New York act, but affects solely the responsibility of the employer to make compensation to the widow, in accordance with its provisions, which are outlined in *New York C. R. Co. v. White*, 243 U. S. 188, 192-195, 61 L. ed. 667, 671, 672, L.R.A. 1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629.

The argument is that, even in the absence of any act of Congress prescribing the responsibility of a shipowner to his stevedore, the general maritime law, as accepted by the Federal courts when acting in the exercise of their admiralty jurisdiction, must be adopted as the rule of decision by state courts of common law when passing upon any case that might have been brought in the admiralty; and that, just as the absence of an act of Congress regulating interstate commerce in some cases is equivalent to a declaration by Congress that commerce in that respect shall be free, so nonaction by Congress amounts to an imperative limitation upon the power of the states to interpose where maritime matters are involved. This view is so entirely unsupported by precedent, and will have such novel and far-reaching consequences, that it ought not to be accepted without the most thorough consideration.

Section 2 of article 3 of the Constitution reads as follows: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects." Acting under the authority of article 1, § 8, which empowers Congress to make all laws necessary and proper for carrying into execution the powers vested in the government or in any department or officer thereof, the first Congress, in the original Judi-

ciary Act (Act of September 24, 1789, chap. 20, § 9, 1 Stat. at L. 73, 77), conferred upon the Federal district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, . . . saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." The saving clause has been preserved in all subsequent revisions. Rev. Stat. § 563 (8), Judicial Code, § 24 (3), 36 Stat. at L. 1087, 1091, chap. 231, Comp. Stat. 1916, §§ 968, 991 (3).

From the language quoted from the Constitution, read in the light of the general purpose of that instrument and the contemporaneous construction found in the Judiciary Act, with regard also to the mischiefs that called for the establishment of a national judiciary, and from what I believe to be the unbroken current of decisions in this court from that day until the present, I draw the following conclusions: (1) That the framers of the Constitution intended to *establish jurisdiction*,—the power to hear and determine controversies of the various classes specified,—and *not to prescribe particular codes or systems of law* for the decision of those controversies; (2) that the civil jurisdiction in admiralty was not intended to be exclusive of the courts of common law, at least not until Congress should deem it proper so to enact; (3) that by the law of England, and by the practice of the colonial governments, the courts of common law, of equity, and of admiralty, were controlled in their decisions by separate, and, in a sense, independent systems of substantive law, and the constitutional grant of judicial power in "all cases in law and equity," and in "all cases of admiralty and maritime jurisdiction," was no more intended (in the absence of legislation by Congress) to make the rules of maritime law binding upon the Federal courts of common law when exercising their concurrent jurisdiction, than to make the rules of the common law binding upon the courts of admiralty; (4) that, if not binding upon the Federal courts, it results, a fortiori, that the rules of maritime law were not intended to be made binding upon the courts of the states; (5) that it is not necessary, in order to give full effect to the grant of admiralty and maritime jurisdiction, to imply that the rules of decision prevailing in admiralty must be binding upon common-law courts exercising concurrent jurisdiction in civil causes of maritime origin, and to give such a construction to the Constitution is to render unconstitutional the saving clause in § 9 of the Judiciary Act, and also to trench upon the proper powers of the states by interfering with their control over their water-borne internal com-

merce; and (6) that, in the absence of legislation by Congress abrogating the saving clause, the states are at liberty to administer their own laws in their own courts when exercising a jurisdiction concurrent with that of admiralty, and at liberty to change those laws by statute.

That the language of § 2 of art. 3 of the Constitution speaks only of establishing jurisdiction, and does not prescribe the mode in which or the substantive law by which the exercise of that jurisdiction is to be governed, seems to me entirely plain; and upon this point I need only refer to the language itself, which I have quoted.

That this view is in harmony with the general purpose of the Constitution seems to me equally plain. At this late date it ought not to be necessary to repeat that the object of the framers of that instrument was to lay the foundations of a government, to set up its framework, and to establish merely the general principles by which it was to be animated; avoiding, as far as possible, any but the most fundamental regulations for controlling its operations, and these usually in the form of restrictions. *Vanhorne v. Dorrance*, 2 Dall. 304, 308, 1 L. ed. 391, 393, Fed. Cas. No. 16,857; *Martin v. Hunter*, 1 Wheat. 304, 326, 4 L. ed. 97, 102.

The object was to enumerate, rather than to define, the powers granted. *Gibbons v. Ogden*, 9 Wheat. 1, 189, 194, 6 L. ed. 23, 68, 69; *Passenger Cases*, 7 How. 283, 549, 12 L. ed. 702, 813; *Lottery Case* (*Champion v. Ames*) 188 U. S. 321, 346, 47 L. ed. 492, 497, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561. To delineate only the great outlines of the judicial power, leaving the details to Congress, while providing for the organization of the legislative department and the mode in which and the restrictions under which its authority should be exercised. *Rhode Island v. Massachusetts*, 12 Pet. 657, 721, 9 L. ed. 1233, 1259. The reason for adopting general outlines only was well expressed by Mr. Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 407, 4 L. ed. 579, 601: "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the

American Constitution is not only to be inferred from the nature of the instrument, but from the language."

The adoption of any particular system of substantive law was not within the purpose of the Constitutional Convention; and the clause establishing the judicial power was ill adapted to the purpose, had it existed. So far as they intended to prescribe permanent rules of substantive or even procedural law in connection with the establishment of the judicial system, the framers employed express terms for the purpose, as appears from other provisions of article 3, including the definition of treason, the character of proof required, the limitation of the punishment, and the requirement of a jury trial for this and other crimes.

In a somewhat exhaustive examination of various sources of information, including *Elliot's Debates*, *Farrand's Records of the Federal Convention*, and *The Federalist*, Nos. 80-83, I have been unable to find anything even remotely suggesting that the judicial clause was designated to establish the maritime code or any other system of laws for the determination of controversies in the courts by it established, much less any suggestion that the maritime code was to constitute the rule of decision in common-law courts, either Federal or state.

Certainly, there is nothing in the mere provision establishing jurisdiction in admiralty and maritime causes to have that effect, unless the jurisdiction so established was in its nature exclusive. But, in civil causes, the jurisdiction was not exclusive by the law of England and of the colonies, and it was not made an exclusive jurisdiction by the Constitution.

In discussing this point, the distinction between the instance court and the prize court of admiralty must be observed. It was held in England that the question of prize or no prize, and other questions arising out of it, were exclusively cognizable in the admiralty, because that court took jurisdiction, owing to the fact of possession of a prize of war, and the controversy turned upon belligerent rights and was determinable by the law of nations, and not the particular municipal law of any country. *Le Caux v. Eden* (1781) 2 Dougl. K. B. 594, 602-613, 99 Eng. Reprint, 375, 379-385; *Lindo v. Rodney*, reported in a note to *Le Caux v. Eden*, 2 Dougl. K. B. 613, 99 Eng. Reprint, 385; *Smart v. Wolff* (1789) 3 T. R. 323, 340, et seq., 100 Eng. Reprint, 600; *Camden v. Home* (1791) 4 T. R. 382, 393, et seq., 100 Eng. Reprint, 1076, 6 Bro. P. C. 203, 2 Eng. Reprint, 1028, 2 H. Bl. 533, 126 Eng. Reprint, 687. But of civil actions in personam the instance

court exercised a jurisdiction concurrent with that of the courts of common law. As *Ld. Mansfield* said in *Lindo v. Rodney*, 2 Dougl. K. B. 614: "A thing being done upon the high sea don't exclude the jurisdiction of the court of common law. For seizing, stopping, or taking a ship, upon the high sea, *not as prize*, an action will lie; but for taking *as prize*, no action will lie. The nature of the question excludes; not the locality." And again, referring to the effect of certain statutes (p. 615): "The taking a ship upon the high sea is triable at law to repair the plaintiff in damages; but a taking on the high sea *as prize* is not triable at law to repair the plaintiff in damages. The nature of the ground of the action—*prize or no prize*—not only authorizes the prize court, but excludes the common law. These statutes don't exclude the common law in any case, and they confine the admiralty by the locality of the thing done, which is the cause of action. It must be done upon the high sea."

So, with respect to actions *ex contractu*, Mr. Justice Blackstone says, 3 Bl. Com. 107: "It is no uncommon thing for a plaintiff to feign that a contract, really made at sea, was made at the royal exchange, or other inland place, in order to draw the cognizance of the suit from the courts of admiralty to those of Westminster Hall." The concurrent jurisdiction of the courts of common law was affirmed by Dr. Browne, the first edition of whose work was published in 1797-1799. 2 Browne, *Civil & Admiralty Law*, 1st Am. ed. 112, 115.

The declaration of Mr. Justice Nelson, speaking for this court in *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 390, 12 L. ed. 465, 485, that the lodging by the Constitution of the entire admiralty power in the Federal judiciary, and the 9th section of the Judiciary Act, with its saving of common-law remedies, left the concurrent power of the courts of common law and of admiralty where it stood at common law, was not a chance remark. It has been so ruled in many other cases, to which I shall refer hereafter. The principles and history of the common law were well known to the framers of the Constitution and the members of the first Congress; it was from that system that their terminology was derived; and the provisions of the Constitution and contemporaneous legislation must be interpreted accordingly.

The statement that there is no common law of the United States (*Wheaton v. Peters*, 8 Pet. 591, 658, 8 L. ed. 1055, 1079; *Smith v. Alabama*, 124 U. S. 465, 478, 31 L. ed. 508, 512, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564) is true only in the sense that the Constitution neither of its

own force imposed, nor authorized Congress to impose, the common law or any other general body of laws upon the several states for the regulation of their internal affairs. As was pointed out in *Smith v. Alabama* (p. 478): "There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history."

As was well expressed by Shiras, District Judge, in *Murray v. Chicago & N. W. R. Co.* 62 Fed. 24, 31: "From them [citations of the decisions of this court] it appears beyond question, that the Constitution, the Judiciary Act of 1789, and all subsequent statutes upon the same subject, are based upon the general principles of the common law, and that, to a large extent, the legislative and judicial action of the government would be without support and without meaning if they cannot be interpreted in the light of the common law. When the Constitution was adopted, it was not the design of the framers thereof to create any new systems of general law, nor to supplant those already in existence. At that time there were in existence and in force in the colonies or states, and among the people thereof, the law of nations, the law admiralty and maritime, the common law, including commercial law, and the system of equity. Upon these foundations the Constitution was erected. The problem sought to be solved was not whether the Constitution should create or enact a law of nations, of admiralty, of equity, or the like, but rather how should the executive, legislative, and judicial powers and duties based upon these systems, and necessary for the proper development and enforcement thereof, be apportioned between the national and state governments."

And it is not to be supposed that the framers of the Constitution, familiar with the institutions and the principles of the common law, by which the admiralty jurisdiction was allowed on sufferance, and with a degree of jealousy born of the fact that the courts of admiralty were not courts of record, that they followed the practice of the civil law, allowed no trial by jury, and administered an exotic system of laws (3 Bl. Com. 69, 86, 87, 106-108),—it is not to be supposed, I say, that the framers of the Constitution, in granting judicial power over cases of admiralty and maritime jurisdiction, along with like power over all cases in law and equity arising under the laws of the United States, intended to exclude common-law courts, state or national, from

any part of their concurrent jurisdiction in cases of maritime origin, or to deprive them of the judicial power, theretofore existing, to decide such cases according to the rules of the common law.

It is matter of familiar history that one of the chief weaknesses of the Confederation was in the absence of a judicial establishment possessed of general authority. Except that the Continental Congress, as an incident of the war power, was authorized to establish rules respecting captures and the disposition of prizes of war, and to appoint courts for the trial of piracies and felonies committed on the high sea, and for determining appeals in cases of capture, and except that the Congress itself, through commissioners, was to exercise jurisdiction in disputes between the states and in controversies respecting conflicting land grants of different states, there was no provision in the Articles of Confederation for establishing a judicial system under the authority of the general government.

The result was that not only private parties, in cases arising out of the laws of the Congress, but the United States themselves, were obliged to resort to the courts of the states for the enforcement of their rights. Many cases of this character are reported, some even antedating the Confederation. *Respublica v. Sweers* (1779) 1 Dall. 41, 1 L. ed. 29; *Respublica v. Powell* (1780) 1 Dall. 47, 1 L. ed. 31; *Respublica v. De Longchamps* (1784) 1 Dall. 111, 1 L. ed. 59. Even treason was punished in state courts and under state laws. See cases of *Molder*, *Malin*, *Carlisle*, and *Roberts* (1778) 1 Dall. 33-39, 1 L. ed. 25-27.

Before the Revolution, courts of admiralty jurisdiction were a part of the judicial systems of the several colonies. *Waring v. Clarke*, 5 How. 441, 454-456, 12 L. ed. 226, 232-234; *Benedict*, Admiralty, §§ 118-165. Upon the outbreak of the war questions of prize law became acute, and the colonial Congress, by resolutions of November 25, 1775, passed in the exercise of the war power (*Penhallow v. Doane*, 3 Dall. 54, 80, 1 L. ed. 507, 518), made appropriate recommendations for the treatment of prizes of war, but remitted the jurisdiction over such questions to the courts of the several colonies, reserving to itself only appellate authority. This system continued until the year 1780 (after the submission of the Articles of Confederation, but before their final ratification), when the Congress established a court for the hearing of appeals from the state courts of admiralty in cases of capture. The opinions of this court are reported in 2 Dall. 1-42, 1 L. ed. 223-281, and numerous cases decided without opinion, as well as some of those de-

cided by committees of the Congress prior to the establishment of the court, are referred to in the late Bancroft Davis's "Federal Courts Before the Constitution," 181 U. S. xix.-xlix., Appx. The weak point of this system was the want of power in the central government to enforce the judgment of the appellate tribunal when it chanced to reverse the decree of a state court. There were some curious cases of conflicting jurisdiction, illustrated by *Doane v. Penhallow* (1787) 1 Dall. 218, 221, 1 L. ed. 108, 109; *Penhallow v. Doane* (1795) 3 Dall. 54, 79, 86, 1 L. ed. 507, 517, 520; and *United States v. Peters* (1809) 5 Cranch, 115, 135, 137, 3 L. ed. 53, 59, 60.

It was under the influence of numerous experiences of the inefficiency of a general government unendowed with judicial authority that the Constitutional Convention assembled in the year 1787. The fundamental need, to which the Convention addressed itself in framing the judiciary article, was to set up a judicial power covering all subjects of national concern. There was no greater need to establish jurisdiction over admiralty and maritime causes than over controversies arising under the Constitution and laws of the Union. There was no purpose to establish a system of substantive law in any of the several classes of cases included within the grant of judicial power. The language employed makes it plain that, with the few express exceptions already noted (treason, etc.), the rules of decision were to be sought elsewhere. The entire absence of a purpose to establish a maritime code is manifest not only from the omission of any reference to the laws of Oleron, the laws of Wisbuy, or any other of the maritime codes recognized by the nations of Europe, but further from the fact that the colonies differed among themselves as to maritime law and admiralty practice, and that their system in general differed from that which was administered in England. The evident purpose, in this as in the other classes of controversy, was that the courts of admiralty should administer justice according to the previous course and practice of such courts in the colonies, just as the courts of common law and equity jurisdiction were to proceed according to the several systems of substantive law appropriate to courts of their respective kinds; subject, of course, to the power of Congress to change the rules of law respecting matters lying within its appropriate sphere of action.

Undoubtedly the framers of the Constitution were advised of the ancient controversy in England between the common-law courts and the courts of admiralty respecting the extent of the jurisdiction of the latter.

They were aware of the dual function of the admiralty courts as courts of instance and as prize courts, and of the established rule that in civil causes the jurisdiction of the instance court was concurrent with that of the courts of common law. They must have known that, whatever question had existed as to the territorial limits of the jurisdiction of the admiralty, it never had been questioned that in suits for mariners' wages and suits upon policies of marine insurance, and in other actions *ex contractu* having a maritime character, and also in actions of tort arising upon the sea, the courts of common law exercised, and long had exercised, concurrent jurisdiction. Whatever early doubts may have existed had been based not upon any inherent incapacity of the common-law courts to deal with the subject-matters, but upon the ancient theory of the venue, and disappeared with the recognition of the fictitious venue.

The grant of judicial power in cases of admiralty and maritime jurisdiction never has been construed as excluding the jurisdiction of the courts of common law over civil causes that, before the Constitution, were subject to the concurrent jurisdiction of the courts of admiralty and the common-law courts. The first Congress did not so construe it, as the saving clause in the Judiciary Act conclusively shows. And, assuming that the states, in the absence of legislation by Congress, would be without power over the subject-matter, this saving clause, still maintained upon the statute book, is a sufficient grant of power. Jurisdiction in prize cases, as has been shown, springs out of the possession of a prize of war. Civil proceedings in rem, to be mentioned hereafter, are based upon the maritime lien, where possession in the claimant is neither necessary nor usual as is the case with common-law liens. With these exceptions, both resting upon grounds peculiar to the forum of the admiralty, concurrent jurisdiction of the courts of common law in civil cases of maritime origin always has been recognized by this court. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 390, 12 L. ed. 465, 485; *The Genesee* (Chief v. Fitzhugh, 12 How. 443, 458, 13 L. ed. 1058, 1065; *The Belfast*, 7 Wall. 624, 644, 645, 19 L. ed. 266, 272; *New England Mut. M. Ins. Co. v. Dunham*, 11 Wall. 1, 32, 20 L. ed. 90, 99; *Leon v. Galceran*, 11 Wall. 185, 187, 188, 20 L. ed. 74, 75; *American S. B. Co. v. Chase*, 16 Wall. 522, 533, 21 L. ed. 369, 372; *Schoonmaker v. Gilmore*, 102 U. S. 118, 26 L. ed. 95; *Manchester v. Massachusetts*, 139 U. S. 240, 262, 35 L. ed. 159, 166, 11 Sup. Ct. Rep. 559.

Nor is the reservation of a common-law remedy limited to such causes of action as L.R.A.1918C.

were known to the common law at the time of the passage of the Judiciary Act. It includes statutory changes. *American S. B. Co. v. Chase*, 16 Wall. 522, 533, 534, 21 L. ed. 369, 372, 373; *Knapp, S. & Co. Co. v. McCaffrey*, 177 U. S. 638, 644, 44 L. ed. 921, 924, 20 Sup. Ct. Rep. 824. Those remedies which were held not to be common-law remedies, within the saving clause, in *The Moses Taylor*, 4 Wall. 411, 427, 431, 18 L. ed. 397, 400, 402; *The Hine v. Trevor*, 4 Wall. 555, 571, 572, 18 L. ed. 451, 456; *The Belfast*, 7 Wall. 624, 644, 19 L. ed. 266, 272; *American S. B. Co. v. Chase*, 16 Wall. 522, 533, 21 L. ed. 369, 372, and *The Glide*, 167 U. S. 606, 623, 42 L. ed. 296, 302, 17 Sup. Ct. Rep. 930, provided for imposing a lien on the ship by proceedings in the nature of admiralty process in rem, and it was for this reason only that they were held to trench upon the exclusive admiralty jurisdiction of the courts of the United States. The distinction was noticed in *Leon v. Galceran*, 11 Wall. 185, 189, 20 L. ed. 74, 75, and again in *Knapp, S. & Co. Co. v. McCaffrey*, 177 U. S. 638, 642, 44 L. ed. 921, 923, 20 Sup. Ct. Rep. 824. In the latter case it was pointed out (p. 644) that the reservation of a common-law remedy where the common law is competent to give it was not confined to common-law actions, but included remedies without action, such as a distress for rent or for the trespass of cattle; a bailee's remedy by detaining personal property until paid for work done upon it or for expenses incurred in keeping it; the lien of an innkeeper upon the goods of his guests, and that of a carrier upon things carried; the remedy of a nuisance by abatement, and others. The most recent definition of the rule laid down in *The Hine v. Trevor* and other cases of that class is in *Rounds v. Cloverport Foundry & Mach. Co.* 237 U. S. 303, 59 L. ed. 966, 35 Sup. Ct. Rep. 596.

I have endeavored to show, from a consideration of the phraseology of the constitutional grant of jurisdiction and the act of the first Congress, passed to give effect to it, from the history in the light of which the language of those instruments is to be interpreted, and from the uniform course of decision in this court, from the earliest time until the present, these propositions: First, that the grant of jurisdiction to the admiralty was not intended to be exclusive of the concurrent jurisdiction of the common-law courts theretofore recognized; and, secondly, that neither the Constitution nor the Judiciary Act was intended to prescribe a system of substantive law to govern the several courts in the exercise of their jurisdiction, much less to make the rules of decision, prevalent in any one court, obliga-

tory upon others, exercising a distinct jurisdiction, or binding upon the courts of the states when acting within the bounds of their respective jurisdictions. In fact, while courts of admiralty undoubtedly were expected to administer justice according to the law of nations and the customs of the sea, they were left at liberty to lay hold of common-law principles where these were suitable to their purpose, and even of applicable state statutes, just as courts of common law were at liberty to adopt the rules of maritime law as guides in the proper performance of their duties. This eclectic method had been practised by the courts of each jurisdiction prior to the Constitution, and there is nothing in that instrument to constrain them to abandon it.

The decisions of this court show that the courts of admiralty in many matters are bound by local law. The doubt expressed by Mr. Justice Bradley in *Butler v. Boston & S. S. Co.* 130 U. S. 527, 558, 32 L. ed. 1017, 1024, 9 Sup. Ct. Rep. 612, as to whether a state law could have force to create a liability in a maritime case at all, was laid aside in *The Corsair* (*Barton v. Brown*) 145 U. S. 335, 36 L. ed. 727, 12 Sup. Ct. Rep. 949, and definitely set at rest in *The Hamilton* (*Old Dominion S. S. Co. v. Gilmore*) 207 U. S. 398, 404, 52 L. ed. 264, 269, 28 Sup. Ct. Rep. 133. The fact is that, long before *Butler v. Boston & S. S. Co.* it had been recognized that state laws might not merely create a liability in a maritime case, but impose a duty upon the admiralty courts of the United States to enforce such liability. Thus, while it was recognized that by the general maritime law a foreign ship, or a ship in a port of a state to which she did not belong, was subject to a suit in rem in the admiralty for repairs or necessities, the case of a ship in a port of her home state was governed by the municipal law of the state, and no lien for repairs or necessities would be implied unless recognized by that law. *The General Smith* (1819) 4 Wheat. 438, 443, 609, 611; *The Lottawanna* (*Rodd v. Heartt*) 21 Wall. 558, 571, 578, 22 L. ed. 654, 660, 663. Conversely, it was held in the case of *Peyroux v. Howard* (1833) 7 Pet. 324, 341, 8 L. ed. 700, 706, that a libel in rem in the admiralty might be maintained against a vessel for repairs done in her home port where a local statute gave a lien in such a case. To the same effect, *The J. E. Rumbell*, 148 U. S. 1, 12, 37 L. ed. 345, 347, 13 Sup. Ct. Rep. 498. As elsewhere pointed out herein, where a state statute conferred a lien operative strictly in rem, it was uniformly held not enforceable in the state courts, but only because it intrenched upon the peculiar jurisdiction

of the admiralty, and therefore was not a "common-law remedy" within the saving clause of the Judiciary Act of 1789. *The Moses Taylor*, 4 Wall. 411, 427, 431, 18 L. ed. 397, 400, 402; *The Hine v. Trevor*, 4 Wall. 555, 571, 572, 18 L. ed. 451, 456; *The Belfast*, 7 Wall. 624, 644, 19 L. ed. 266, 272; *American S. B. Co. v. Chase*, 16 Wall. 522, 533, 21 L. ed. 369, 372; *The Glide*, 167 U. S. 606, 623, 42 L. ed. 296, 302, 17 Sup. Ct. Rep. 930.

Under these decisions, and others to the same effect, the substance of the matter is that a state may, by statute, create a right to a lien upon a domestic vessel, in the nature of a maritime lien, which may be enforced in admiralty in the courts of the United States; but a state may not confer upon its own courts jurisdiction to enforce such a lien, because the Federal jurisdiction in admiralty is exclusive. *The J. E. Rumbell*, 148 U. S. 1, 12, 37 L. ed. 345, 347, 13 Sup. Ct. Rep. 498, and cases cited. But a lien imposed not upon the rem, but upon defendant's interests in the res, may be made enforceable in the state courts. *Rounds v. Cloverport Foundry & Mach. Co.* 237 U. S. 303, 307, 59 L. ed. 966, 968, 35 Sup. Ct. Rep. 596, and cases cited.

The Roanoke, 189 U. S. 185, 194, 198, 47 L. ed. 770, 772, 774, 23 Sup. Ct. Rep. 491, while approving *The General Smith*, *Peyroux v. Howard*, *The Lottawanna*, and *The J. E. Rumbell*, *supra*, gave a negative answer to the very different question whether a state could, without encroaching upon the Federal jurisdiction, create a lien against foreign vessels to be enforced in the courts of the United States.

In the present case there is no question of lien, and, I repeat, no question concerning the jurisdiction of the state court; the crucial inquiry is, To what law was it bound to conform in rendering its decision? Or, rather, the question is the narrower one: Do the Constitution and laws of the United States prevent a state court of common law from applying the state statutes in an action in personam arising upon navigable water within the state, there being no act of Congress applicable to the controversy? I confess that until this case and kindred cases submitted at the same time were brought here, I never had supposed that it was open to the least doubt that the reservation to suitors of the right of a common-law remedy had the effect of reserving at the same time the right to have their common-law actions determined according to the rules of the common law, or state statutes modifying those rules. This court repeatedly has so declared, at the same time recognizing fully that the point involves the question of state power. In *United States v.*

Bevans, 3 Wheat. 336, 388, 4 L. ed. 404, 416, the court, by Mr. Chief Justice Marshall, said: "Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise? This is a question on which the court is incapable of feeling a doubt. The article which describes the judicial power of the United States is not intended for the cession of territory or of general jurisdiction. It is obviously designed for other purposes. . . . In describing the judicial power, the framers of our Constitution had not in view any cession of territory, or, which is essentially the same, of general jurisdiction. It is not questioned that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of the sovereignty not yet given away." In *American S. B. Co. v. Chase*, 16 Wall. 522, 533, 21 L. ed. 360, 372, the court, by Mr. Justice Clifford, said (p. 534): "State statutes, if applicable to the case, constitute the rules of decision in common-law actions, in the circuit courts as well as in the state courts."

In *Atlee v. Northwestern Union Packet Co.* 21 Wall. 389, 395, 396, 22 L. ed. 619, 621, the court, by Mr. Justice Miller, said: "The plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this court the course of proceeding is in many respects different and the rules of decision are different. . . . An important difference as regards this case is the rule for estimating the damages. In the common-law court the defendant must pay all the damages or none. If there has been on the part of plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty court, where there has been such contributory negligence, or, in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. . . . Each court has its own set of rules for determining these questions, which may be in some respects the same, but in others vary materially." And see *The Max Morris*, 137 U. S. 1, 10, 34 L. ed. 586, 588; *Belden v. Chase*, 150 U. S. 674, 691, 37 L. ed. 1218, 1224, 14 Sup. Ct. Rep. 269; *Benedict, Admiralty*, § 201.

In the prevailing opinion, great stress L.R.A.1918C.

is laid upon certain expressions quoted from *The Lottawanna* (*Rodd v. Heartt*) 21 Wall. 558, 574, 22 L. ed. 654, 661; but it seems to me they have been misunderstood, because read without regard to context and subject-matter. That was an admiralty appeal, and involved the question whether, by the general maritime law, as accepted in the United States, there was an implied lien for necessities furnished to a vessel in her home port, where no such lien was recognized by the municipal law of the state. In the course of the discussion, the court, by Mr. Justice Bradley, said: "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' But by what criterion are we to ascertain the precise limits of the law thus adopted? *The Constitution does not define it.* It does not declare whether it was intended to embrace the entire maritime law as expounded in the treatises, or only the limited and restricted system which was received in England, or lastly, such modification of both of these as was accepted and recognized as law in this country. *Nor does the Constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary.* It assumes that the meaning of the phrase 'admiralty and maritime jurisdiction' is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of 'cases in law and equity,' or of 'suits at common law,' *without defining those terms, assuming them to be known and understood.*"

In this language there is the clearest recognition that the Constitution, in establishing and distributing the judicial power, did not intend to define substantive law, or to make the rules of decision in one jurisdiction binding proprio vigore in tribunals exercising another jurisdiction. The courts of common law were to administer justice according to the common law, the courts of equity according to the principles of equity, and the courts of admiralty and maritime jurisdiction according to the maritime law. The expression on page 375 respecting the uniform operation of the maritime law was predicated only of the operation of that law as administered in the courts of admiralty, for it is not to be believed that there was any purpose to overrule *Atlee v. Northwestern Union Packet Co.* 21 Wall. 389, 395,

22 L. ed. 619, 621, decided at the same time and only about two months before. The *Lottawanna* by a unanimous court, including Mr. Justice Bradley himself, in which it was held that where there was concurrent jurisdiction in the courts of common law and the courts of admiralty, each court was at liberty to adopt its own rules of decision. Moreover, the principal question at issue in *The Lottawanna* was whether the case of *The General Smith*, 4 Wheat, 438, 4 L. ed. 609, should be overruled, in which it had been held that, in the absence of state legislation imposing the lien, a ship was not subject to a libel in rem in the admiralty for repairs furnished in her home port. The general expressions referred to relate to that state of the law,—the absence of state legislation, as well as of legislation by Congress,—and upon this the decision in *The General Smith* was upheld (p. 578). But in proceeding to discuss the subordinate question whether there was a lien under the state statute, it was held (p. 580): "It seems to be settled in our jurisprudence that so long as Congress does not interpose to regulate the subject, the rights of materialmen furnishing necessities to a vessel in her home port may be regulated in each state by state legislation." And again (p. 581): "Whatever may have been the origin of the practice, and whether or not it was based on the soundest principles, it became firmly settled, and it is now too late to question its validity. . . . It would undoubtedly be far more satisfactory to have a uniform law regulating such liens, but until such a law be adopted (supposing Congress to have the power) the authority of the states to legislate on the subject seems to be conceded by the uniform course of decisions."

Again, in *Workman v. New York*, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212, which, like *The Lottawanna*, was a proceeding in admiralty, the court, in quoting the declarations contained in that case respecting the general operation of the maritime law throughout the navigable waters of the United States, was dealing only with its application in the courts of admiralty. This is plain from what was said as a preface to the discussion (p. 557): "In examining the first question, that is, whether the local law of New York must prevail, though in conflict with the maritime law, it must be borne in mind that the issue is not,—as was the case in *Detroit v. Osborne* (1890) 135 U. S. 492, 34 L. ed. 260, 10 Sup. Ct. Rep. 1012,—whether the local law governs as to a controversy arising in the courts of common law or of equity of the United States, but does the local law, if in conflict with the maritime law, control a court of admiralty L.R.A.1918C.

of the United States in the administration of maritime rights and duties, although judicial power with respect to such subjects has been expressly conferred by the Constitution (art. 3, § 2) upon the courts of the United States."

In the argument of the present case and companion cases, emphasis was laid upon the importance of uniformity in applying and enforcing the rules of admiralty and maritime law, because of their effect upon interstate and foreign commerce. This, in my judgment, is a matter to be determined by Congress. Concurrent jurisdiction and optional remedies in courts governed by different systems of law were familiar to the framers of the Constitution, as they were to English-speaking peoples generally. The judicial clause itself plainly contemplated a jurisdiction concurrent with that of the state courts in other controversies. In such a case, the option of choosing the jurisdiction is given primarily for the benefit of suitors, not of defendants. For extending it to defendants, removal proceedings are the appropriate means.

Certainly there is no greater need for uniformity of adjudication in cases such as the present than in cases arising on land and affecting the liability of interstate carriers to their employees. And, although the Constitution contains an express grant to Congress of the power to regulate interstate and foreign commerce, nevertheless, until Congress had acted, the responsibility of interstate carriers to their employees for injuries arising in interstate commerce was controlled by the laws of the states. This was because the subject was within the police power, and the divergent exercise of that power by the states did not regulate, but only incidentally affected, commerce among the states. *Sherlock v. Alling*, 93 U. S. 99, 103, 23 L. ed. 819, 820; *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 54, 56 L. ed. 327, 347, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. It required an act of Congress (Act of April 22, 1908, 35 Stat. at L. 65, chap. 149, Comp. Stat. 1916, § 8657) to impose a uniform measure of responsibility upon the carriers in such cases. So, it required an act of Congress (the so-called Carmack Amendment to the Hepburn Act of June 29, 1906, 34 Stat. at L. 584, 595, chap. 3591, Comp. Stat. §§ 8563, 8604a, 8604aa) to impose a uniform rule of liability upon rail carriers for losses of merchandise carried in interstate commerce. *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 504, 57 L. ed. 314, 319, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148. In a great number and variety of cases state laws and policies incidentally affecting interstate carriers in

their commercial operations have been sustained by this court, in the absence of conflicting legislation by Congress. Among them are: Laws requiring locomotive engineers to be examined and licensed by the state authorities (*Smith v. Alabama*, 124 U. S. 465, 482, 31 L. ed. 508, 513, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564); requiring such engineers to be examined for defective eyesight (*Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 100, 32 L. ed. 352, 354, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28); requiring telegraph companies to receive despatches and transmit and deliver them diligently (*Western U. Teleg. Co. v. James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934); forbidding the running of freight trains on Sunday (*Hennington v. Georgia*, 163 U. S. 299, 304, 308, etc., 41 L. ed. 166, 169, 170, 16 Sup. Ct. Rep. 1086); regulating the heating of passenger cars (*New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418); prohibiting a railroad company from obtaining by contract an exemption from the liability which would have existed had no contract been made (*Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 136, 137, 42 L. ed. 688, 691, 692, 18 Sup. Ct. Rep. 289); a like result arising from rules of law enforced in the state courts in the absence of statute (*Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 488, 491, 48 L. ed. 268, 272, 273, 24 Sup. Ct. Rep. 132); statutes prohibiting the transportation of diseased cattle in interstate commerce (*Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 630, 635, 42 L. ed. 878, 884, 885, 18 Sup. Ct. Rep. 488; *Reid v. Colorado*, 187 U. S. 137, 147, 151, 47 L. ed. 108, 114, 115, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506); statutes requiring the prompt settlement of claims for loss or damage to freight, applied incidentally to interstate commerce (*Atlantic Coast Line R. Co. v. Mazursky*, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378); even since the passage of the Carmack Amendment (*Missouri, K. & T. R. Co. v. Harris*, 234 U. S. 412, 417, 420, 58 L. ed. 1377, 1381, 1382, L.R.A.1915E, 942, 34 Sup. Ct. Rep. 790); statutes regulating the character of headlights used on locomotives employed in interstate commerce (*Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, 58 L. ed. 1312, 34 Sup. Ct. Rep. 829; *Vandalia R. Co. v. Public Service Commission*, 242 U. S. 255, 61 L. ed. 276, P.U.R.1917B, 1004, 37 Sup. Ct. Rep. 93). All these cases affected the responsibility of interstate carriers. Until now, Congress has passed no act concerning their responsibility for personal injuries sustained by passengers or strangers, or for deaths resulting from such injuries, L.R.A.1918C.

so that these matters still remain subject to the regulation of the several states. We have held recently that even the anti-pass provision of the Hepburn Act (34 Stat. at L. 584, 585, chap. 3591, § 1, Comp. Stat. 1916, § 8563) does not deprive a party who accepts gratuitous carriage in interstate commerce with the consent of the carrier, in actual but unintentional violation of the prohibition of the act, of the benefit and protection of the law of the state imposing upon the carrier a duty to care for his safety (*Southern P. Co. v. Schnyler*, 227 U. S. 601, 612, 57 L. ed. 662, 669, 43 L.R.A. (N.S.) 901, 33 Sup. Ct. Rep. 277).

In the very realm of navigation, the authority of the states to establish regulations effective within their own borders, in the absence of exclusive legislation by Congress, has been recognized from the beginning of our government under the Constitution. As to pilotage regulations, it was recognized by the first Congress (Act of August 7, 1789, chap. 9, § 4, 1 Stat. at L. 53, 54, Rev. Stat. § 4235, Comp. Stat. 1916, § 7981), and this court, in many decisions, has sustained local regulations of that character (*Cooley v. Port Wardens*, 12 How. 299, 320, 13 L. ed. 996, 1005; *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 450, 459, 17 L. ed. 805, 807; *Ex parte McNeil*, 13 Wall. 236, 241, 20 L. ed. 624, 626; *Wilson v. McNamee*, 102 U. S. 572, 26 L. ed. 234; *Olsen v. Smith*, 195 U. S. 332, 341, 49 L. ed. 224, 229, 25 Sup. Ct. Rep. 52; *Anderson v. Pacific Coast S. S. Co.* 225 U. S. 187, 195, 56 L. ed. 1047, 1051, 32 Sup. Ct. Rep. 625).

It is settled that a state, in the absence of conflicting legislation by Congress, may construct dams and bridges across navigable streams within its limits, notwithstanding an interference with accustomed navigation may result. *Wilson v. Black Bird Creek Marsh Co.* 2 Pet. 245, 252, 7 L. ed. 412, 414; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *Pound v. Turk*, 95 U. S. 459, 24 L. ed. 525; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 683, 27 L. ed. 442, 445, 2 Sup. Ct. Rep. 185; *Cardwell v. American River Bridge Co.* 113 U. S. 205, 208, 28 L. ed. 959, 960, 5 Sup. Ct. Rep. 423; *Hamilton v. Vicksburg, S. & P. R. Co.* 119 U. S. 280, 30 L. ed. 393, 7 Sup. Ct. Rep. 206; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8, 31 L. ed. 629, 631, 8 Sup. Ct. Rep. 811; *Lake Shore & M. S. R. Co. v. Ohio*, 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357; *Manigault v. Springs*, 199 U. S. 473, 478, 50 L. ed. 274, 277, 26 Sup. Ct. Rep. 127.

So, as to harbor improvements (*Mobile County v. Kimball*, 102 U. S. 691, 697, 26 L. ed. 238, 239); improvements and obstructions to navigation (*Huse v. Glover*, 119 U.

S. 543, 548, 30 L. ed. 487, 490, 7 Sup. Ct. Rep. 313; *Leovy v. United States*, 177 U. S. 621, 625, 44 L. ed. 914, 916, 20 Sup. Ct. Rep. 797; *Cummings v. Chicago*, 188 U. S. 410, 427, 47 L. ed. 525, 530, 23 Sup. Ct. Rep. 472; inspection and quarantine laws (*Gibbons v. Ogden*, 9 Wheat. 1, 203, 6 L. ed. 23, 71); wharfage charges (*Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. ed. 377; *Cincinnati, P. B. S. & P. Packet Co. v. Catlettsburg*, 105 U. S. 559, 563, 26 L. ed. 1169, 1171; *Parkersburg & O. River Transp. Co. v. Parkersburg*, 107 U. S. 691, 702, 27 L. ed. 584, 588, 2 Sup. Ct. Rep. 732; *Ouachita & M. River Packet Co. v. Aiken*, 121 U. S. 444, 447, 30 L. ed. 976, 977, 1 Inters. Com. Rep. 379, 7 Sup. Ct. Rep. 907); tolls for the use of an improved waterway (*Sands v. Manistee River Improv. Co.* 123 U. S. 288, 295, 31 L. ed. 149, 151; 8 Sup. Ct. Rep. 113).

So, of provisions fixing the tolls for transportation upon an interstate ferry (*Port Richmond & B. P. Ferry Co. v. Hudson County*, 234 U. S. 317, 331, 58 L. ed. 1330, 1336, 34 Sup. Ct. Rep. 821), or upon vessels plying between two ports located within the same state (*Wilmington Transp. Co. v. Railroad Commission*, 236 U. S. 151, 156, 59 L. ed. 508, 517, P.U.R.1915A, 845, 35 Sup. Ct. Rep. 276).

In each of these cases, except the last, which related to intrastate transport, the state regulation had an incidental effect upon the very conduct of navigation in interstate or foreign commerce. If in such cases the states possess the power of regulation in the absence of inconsistent action by Congress, much more clearly do they possess that power where Congress is silent, with respect to a liability which arises but casually, through the accidental injury or death of an employee engaged in a maritime occupation.

Indeed, with respect to injuries that result in death, it already is settled that although the general maritime law, like the common law, affords no civil remedy for death by wrongful act (*The Harrisburg*, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140; *The Alaska*, 130 U. S. 201, 209, 32 L. ed. 923, 925, 9 Sup. Ct. Rep. 461), yet a right of action created by statute is enforceable in a state court although the tort was committed upon navigable water (*American S. B. Co. v. Chase*, 16 Wall. 522, 533, 21 L. ed. 369, 372; *Sherlock v. Alling*, 93 U. S. 99, 104, 23 L. ed. 819, 820), and the liability arising out of a state statute in such a case will be recognized and enforced in the admiralty (*The Hamilton* (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133), although not by proceeding in rem unless the statute L.R.A.1918C.

expressly creates a lien (*The Corsair* (Barton v. Brown) 145 U. S. 335, 347, 36 L. ed. 727, 731, 12 Sup. Ct. Rep. 949).

In *Sherlock v. Alling*, supra, which was an action in a state court, and based upon a state statute, to recover damages for a death by wrongful act, occurring in interstate navigation, it was contended that the statute could not be applied to cases where the injury was caused by a marine tort, without interfering with the exclusive regulation of commerce vested in Congress. The court, after declaring that any regulation by Congress, or the liability for its infringement, would be exclusive of state authority, proceeded to say, by Mr. Justice Field (93 U. S. 104): "But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the state govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the state to which the vessels belong; and it may be said, generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit. In our judgment, the statute of Indiana falls under this class. Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of opinion that the statute of Indiana applies," etc.

I deem *The Hamilton*, supra, to be a controlling authority upon the question now presented. It was there held, not only that the constitutional grant of admiralty jurisdiction, followed and construed by the Judiciary Act of 1789, leaves open the common-law jurisdiction of the state courts over torts committed at sea, but also that it leaves the states at liberty to change the law respecting such torts by legislation, as by a statute creating a liability for death by wrongful act, which was the particular legislation there in question.

To what extent uniformity of decision should result from the grant of jurisdiction to the courts of the United States concurrent with that of the state courts is a subject that repeatedly has been under consideration in this court, but it never has been held that the jurisdictional grant required state courts to conform their de-

cisions to those of the United States courts. The doctrine clearly deducible from the cases is that, in matters of commercial law and general jurisprudence, not subject to the authority of Congress, or where Congress has not exercised its authority, and in the absence of state legislation, the Federal courts will exercise an independent judgment and reach a conclusion upon considerations of right and justice generally applicable, the Federal jurisdiction having been established for the very purpose of avoiding the influence of local opinion; but that where the state has legislated, its will, thus declared, is binding, even upon the Federal courts, if it be not inconsistent with the expressed will of Congress respecting a matter that is within its constitutional power. The doctrine concedes as much independence to the courts of the states as it reserves for the courts of the Union *Burgess v. Seligman*, 107 U. S. 20, 33, 34, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10; *East Alabama R. Co. v. Doe*, 114 U. S. 340, 353, 29 L. ed. 136, 140, 5 Sup. Ct. Rep. 869; *Gibson v. Lyon*, 115 U. S. 439, 446, 29 L. ed. 440, 442, 6 Sup. Ct. Rep. 129; *Anderson v. Santa Anna*, 116 U. S. 356, 362, 29 L. ed. 633, 635, 6 Sup. Ct. Rep. 413; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 372, 37 L. ed. 772, 775, 13 Sup. Ct. Rep. 914; *Folsom v. Township 96*, 159 U. S. 611, 625, 40 L. ed. 278, 283, 16 Sup. Ct. Rep. 174; *Stanly County v. Coler*, 190 U. S. 437, 444, 47 L. ed. 1126, 1131, 23 Sup. Ct. Rep. 811; *Kuhn v. Fairmount Coal Co.* 215 U. S. 349, 357, 360, 54 L. ed. 228, 233, 234, 30 Sup. Ct. Rep. 140.

In *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 372, 37 L. ed. 772, 775, 13 Sup. Ct. Rep. 914, the court had under review the judgment of a circuit court of the United States in an action by a locomotive fireman injured through negligence of the engineer. The cause of action arose in the state of Ohio, and the question presented was whether the engineer and the fireman were fellow servants. Under the decisions of the Ohio courts they were, but this court held that, as there was no state statute, the question should not be treated as a question of local law, to be settled by an examination merely of the decisions of the state court of last resort, but should be determined upon general principles; the courts of the United States being under an obligation to exercise an independent judgment. The court, by Mr. Justice Brewer, said (149 U. S. 378): "There is no question as to the power of the states to legislate and change the rules of the common law in this respect, as in others; but, in the absence of such legislation, the question is one determinable only by the general principles of that law. L.R.A.1918C.

Further than that, it is a question in which the nation as a whole is interested. It enters into the commerce of the country. Commerce between the states is a matter of national regulation, and to establish it as such was one of the principal causes which led to the adoption of our Constitution."

In other words, the general effect of the question upon interstate commerce rendered it one of the class that called for the application of general principles; nevertheless, state legislation would be controlling—in the absence of valid legislation by Congress, of course.

In *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 136, 137, 42 L. ed. 688, 691, 692, 18 Sup. Ct. Rep. 289, the doctrine was concisely stated by Mr. Justice Gray, speaking for the court, as follows (169 U. S. 136): "The question of the right of a railroad corporation to contract for exemption from liability for its own negligence is, indeed, like other questions affecting its liability as a common carrier of goods or passengers, one of those questions not of merely local law, but of commercial law or general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the state in which the cause of action arises. But the law to be applied is none the less the law of the state, and may be changed by its legislature, except so far as restrained by the Constitution of the state or by the Constitution or laws of the United States."

I freely concede the authority of Congress to modify the rules of maritime law so far as they are administered in the Federal courts, and to make them binding upon the courts of the states so far as they affect interstate or international relations, or regulate "commerce with foreign nations, and among the several states, and with the Indian tribes." What I contend is that the Constitution does not, *proprio vigore*, impose the maritime law upon the states except to the extent that the admiralty jurisdiction was exclusive of the courts of common law before the Constitution; that is to say, in the prize jurisdiction, and the peculiar maritime process *in rem*; and that as to civil actions *in personam* having a maritime origin, the courts of the states are left free, except as Congress, by legislation passed within its legitimate sphere of action, may control them; and that Congress, so far from enacting legislation of this character, has from the beginning left the state courts at liberty to apply their own systems of law in those cases where, prior to the Constitution, they had concurrent jurisdiction with the admiralty, for

the saving clause in the Judiciary Act necessarily has this effect.

Surely it cannot be that the mere grant of judicial power in admiralty cases, with whatever general authority over the subject-matter can be raised by *implication*, can, in the absence of legislation, have a greater effect in limiting the legislative powers of the states than that which resulted from the *express* grant to Congress of an authority to regulate interstate commerce,—the limited effect of which, in the absence of legislation by Congress, we already have seen. The prevailing opinion properly holds that, under the circumstances of the case at bar, although plaintiff in error was engaged in interstate commerce, and the deceased met his death while employed in such commerce, the provisions of the Federal Employers' Liability Act (April 22, 1908, 35 Stat. at L. 65, chap. 149, Comp. Stat. 1916, § 8657) do not apply, because they cover only railroad operations and work connected therewith, whereas the deceased was employed upon an ocean-going ship. In effect it holds also that, in the absence of applicable legislation by Congress, the express grant of authority to regulate such commerce, as contained in the Constitution, does not exclude the operation of the state law. It seems to me a curious inconsistency to hold, at the same time, that the rules of the maritime law exclude the operation of a state statute without action by Congress, although the Constitution contains no express grant of authority to establish rules of maritime law, and the authority must be implied from the mere constitutional grant of judicial power over the subject-matter; and, most remarkable, that this result is reached in the face of the fact that the judicial power in cases of admiralty jurisdiction has been put into effect by Congress subject to an express reservation of the previous concurrent jurisdiction of the courts of law over actions of this character. This, besides ignoring the reservation, gives a greater potency to an implied power than to a power expressly conferred.

The effect of the present decision cannot logically be confined to cases that arise in interstate or foreign commerce. It seems to be thought that the admiralty jurisdiction of the United States has limits co-extensive with the authority of Congress to regulate commerce. But this is not true. The civil jurisdiction in admiralty in cases *ex contractu* is dependent upon the subject-matter; in cases *ex delicto* it is dependent upon locality. In cases of the latter class, if the cause of action arise upon navigable waters of the United States, even though it be upon a vessel engaged in commerce

wholly intrastate, or upon one not engaged in commerce at all, or (probably) not upon any vessel, the maritime courts have jurisdiction. The *Genesee Chief v. Fitzhugh*, 12 How. 443, 452, 13 L. ed. 1058, 1062; The *Commerce* (Commercial Transp. Co. v. Fitzhugh) 1 Black, 574, 578, 579, 17 L. ed. 107, 109; The *Belfast*, 7 Wall. 624, 636, 638, 640, 19 L. ed. 266, 269-271; *Ex parte Boyer*, 109 U. S. 629, 632, 27 L. ed. 1056, 1057, 3 Sup. Ct. Rep. 434; *Re Garnett*, 141 U. S. 1, 15, 17, 35 L. ed. 631, 634, 635, 11 Sup. Ct. Rep. 840. It results that if the constitutional grant of judicial power to the United States in cases of admiralty and maritime jurisdiction is held by inference to make the rules of decision that prevail in the courts of admiralty binding *proprio vigore* upon state courts exercising a concurrent jurisdiction in cases of maritime origin, the effect will be to deprive the several states of their police power over navigable waters lying wholly within their respective limits, and of their authority to regulate their intrastate commerce so far as it is carried upon navigable waters.

The following additional consideration is entitled to great weight: The same Judiciary Act which, in its 9th section, conferred upon the district courts of the United States original cognizance of civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, in its 25th section allowed a writ of error from this court to review the final judgment or decree of a state court of last resort resulting from a decision overruling any special claim of right, privilege, or exemption based upon the construction of any clause of the Constitution or statutes of the United States. By later legislation the review was broadened (Act of February 5, 1867, chap. 28, § 2, 14 Stat. at L. 385, 386, § 709, Rev. Stat. § 237, Judicial Code, 36 Stat. at L. 1156, chap. 231, Comp. Stat. 1916, § 1214), and by recent legislation the writ of *certiorari* has been substituted for the writ of error in many cases (Act of September 6, 1916, chap. 448, 39 Stat. at L. 726, Comp. Stat. 1916, § 1207). But, at all times, the right to review in this court the decisions of the state courts upon questions of Federal law has existed, so that if, by the true construction of art. 3, § 2, of the Constitution, or of § 9 of the Judiciary Act of 1789, it had been the right of parties suing or sued in state courts upon causes of action of a maritime nature to insist that their cases should be determined according to the rules of decision found in the law maritime, this right or immunity might have been asserted as a Federal right, and its denial made the

ground of a review of the resulting judgment, under a writ of error (or, now, a writ of certiorari) from this court to the state court of last resort. Yet, until the present case, and others submitted at the same time, the reported decisions of this court show not a trace of any such question raised. I can conceive of no stronger evidence to prove that from the foundation of the government until the present time it has been the opinion of the bar and of the judiciary, in the state courts as well as in the courts of the United States, that it was not the right of parties suing or sued in state courts of law or equity upon causes of action arising out of maritime affairs, to have them decided according to the principles that would have controlled the decision had the suits been brought in the admiralty courts.

There is no doubt that, throughout the entire life of the nation under the Constitution, state courts not only have exercised concurrent jurisdiction with the courts of admiralty in actions *ex contractu* arising out of maritime transactions, and in actions *ex delicto* arising upon the navigable waters, but that, in exercising such jurisdiction, they have, without challenge until now, adopted as rules of decision their local laws and statutes, recognizing no obligation of a Federal nature to apply the law maritime. State courts of last resort, in several recent cases, have had occasion to consider the precise contention now made by plaintiff in error, and upon full consideration have rejected it. *Lindstrom v. Mutual S. S. Co.* 132 Minn. 328, L.R.A.1916D, 935, 156 N. W. 669; *North Pacific S. S. Co. v. Industrial Acci. Commission*, — Cal. —, 163 Pac. 199; *Kennerson v. Thames Towboat Co.* 89 Conn. 367, 373, L.R.A.1916A, 436, 94 Atl. 372. See also *Walker v. Clyde S. S.*

Co. 215 N. Y. 529, 531, 109 N. E. 604, Ann. Cas. 1916B, 87; *Jensen v. Southern P. Co.* 215 N. Y. 514, L.R.A.1916A, 403, 109 N. E. 600, Ann. Cas. 1916B, 276, 9 N. C. C. A. 236 (this case). I have found no case to the contrary except a decision by the United States district court for the northern district of Ohio in *Schuede v. Zenith S. S. Co.* 216 Fed. 566, now under consideration by this court. The reasoning is unsatisfactory, and it was repudiated in *Keithley v. North Pacific S. S. Co.* 232 Fed. 255, 259.

I may remark in closing that there is no conflict between the New York Workmen's Compensation Act and the acts of Congress for limiting the liability of shipowners (Rev. Stat. §§ 4283-4285, Comp. Stat. 1916, §§ 8021-8023; Act of June 26, 1884, chap. 121, § 18, 23 Stat. at L. 53, 57, Comp. Stat. 1916, §§ 7707, 8028). So long as the aggregate liabilities of the owner, including that under the New York law, do not amount to as much as the interest of the owner in the vessel and freight pending, the act of Congress does not come into play. Where it does apply, it reduces all liabilities proportionately, under whatever law arising,—the liability under the New York law along with the others. *Butler v. Boston & S. S. S. Co.* 130 U. S. 527, 552, 558, 32 L. ed. 1017, 1022, 1024, 9 Sup. Ct. Rep. 612; *The Hamilton* (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 406, 52 L. ed. 264, 270, 28 Sup. Ct. Rep. 133; *Richardson v. Harmon*, 222 U. S. 96, 104, 105, 56 L. ed. 110, 113, 114, 32 Sup. Ct. Rep. 27.

Mr. Justice Brandeis and Mr. Justice Clarke concur in the dissent, both upon the grounds stated by Mr. Justice Holmes and upon those stated by Mr. Justice Pitney.

Annotation—Applicability of the Federal Employers' Liability Act or state Compensation Acts to injuries within admiralty jurisdiction.

Exhaustive annotations on the Workmen's Compensation Acts will be found in L.R.A.1916A, 23, and L.R.A.1917D, 80; and on the Federal Employers' Liability Acts in 47 L.R.A.(N.S.) 38, and L.R.A.1915C, 48.

As to the applicability of state Compensation Acts to non-negligent injuries of railroad employee while engaged in interstate commerce, see note to *New York C. R. Co. v. Winfield*, ante, 450.

The decision of the Federal Supreme Court in *Southern P. Co. v. Jensen*, ante, 451, that neither the Federal Employers' Liability Act nor a state Compensation Act applies to injuries com-

ing within admiralty jurisdiction, is conclusive, since this is a Federal question, as to which the United States Supreme Court is the ultimate authority.

That there had been some conflict in the state courts prior to the decision of the Federal Supreme Court is shown in the annotations in L.R.A.1916A, 461, and L.R.A.1917D, 85. As the question is settled by the foregoing decision, and as the prevailing and dissenting opinions review the whole matter so exhaustively, it is deemed unnecessary to set out at length, or even cite, the state decisions passing upon this question.

In the note to *Southern P. Co. v. Win-*

field, ante, 450, upon the application of state Compensation Acts to non-negligent injuries of railroad employees while engaged in interstate commerce; attention is called to the possibility that the state acts, if applicable to such non-negligent injuries, would be unconstitutional. The same argument would apply in the case of injuries coming within admiralty jurisdiction; that is, a statute imposing liability upon an employer in cases in which he had in nowise been negligent would seem to be in violation of the constitutional provision against taking of property without due compen-

sation, unless all other liability were taken away, and of course a state has no power to remove any liability imposed by the maritime law. In this connection attention is called to the very interesting statement made in the prevailing opinion, that the remedy which the Compensation Statute gives is of a character wholly unknown to the common law and incapable of enforcement by the ordinary processes of any courts, and consequently that remedy is not saved to suitors from the grant of exclusive jurisdiction conferred upon the Federal court by the Judiciary Acts. W. M. G.

UNITED STATES SUPREME COURT.

PENNSYLVANIA RAILROAD COMPANY,
Plff. in Err.,
v.

ALBERT G. TOWERS et al., Constituting
the Public Service Commission of Mary-
land.

(245 U. S. 6, 62 L. ed. —, 38 Sup. Ct.
Rep. 2.)

Appeal — scope of review — statutory construction.

1. The Federal Supreme Court must accept as conclusive, on writ of error to a state court, the decision of the latter court that the state Public Service Commission had authority, under the state law, to revise downward a new system of commutation railway rates voluntarily established by the carrier.

For other cases, see Appeal and Error, II. a, 2, in Dig. 1-52 N. S.

Constitutional law — regulation of railway rates — commutation tickets.

2. Intrastate rates for commutation tickets may be fixed by a state through a duly authorized Public Service Commission at less than the legally established, normal, one-way single passenger fare without taking the carrier's property without due process of law, or denying to it the equal protection of the laws, where a system of commutation rates has already voluntarily been established by the carrier.

For other cases, see Constitutional Law, II. a, 3, b; II. b, 4, c, in Dig. 1-52 N. S.

(Mr. Chief Justice White, Mr. Justice McKenna, and Mr. Justice McReynolds dissent.)

(October 15, 1917.)

Note.—As to power of Public Service Commission to regulate commutation rates, see annotation following this case, post, 480.

The subject of what questions the Federal Supreme Court will consider in reviewing the judgments of state courts is considered in the note to *Missouri ex rel. Hill v. Dockery*, 63 L.R.A. 571.

L.R.A. 1919C.

ERROR to the court of Appeals of the State of Maryland to review a decree which affirmed a decree of the Circuit Court No. 2 of Baltimore City, refusing to enjoin the enforcement of an order of the State Public Service Commission requiring the sale of commutation railway tickets at certain specified rates. Affirmed.

The facts are stated in the opinion.

Messrs. Frederic D. McKenney, Henry Wolf Bicklé, Shirley Carter, and John Spalding Flannery, for plaintiff in error:

A state legislature may not, either directly or through the medium of a public service commission, under the guise of regulating commerce, compel carriers engaged in both interstate and intrastate commerce commingled, to establish and maintain intrastate rates for the benefit of a comparative few, at less than both the interstate and intrastate standard and legally established maxima.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 868, 19 Sup. Ct. Rep. 565; *Northern P. R. Co. v. North Dakota*, 236 U. S. 585, 586, 59 L. ed. 735, 739, L.R.A. 1917F, 1148, P. U. R. 1916C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; *Wisconsin M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 297, 45 L. ed. 194, 199, 21 Sup. Ct. Rep. 115; *Erie R. Co. v. Williams*, 233 U. S. 685, 701, 58 L. ed. 1155, 1161, 51 L.R.A. (N.S.) 1097, 34 Sup. Ct. Rep. 761; *Chicago, M. & St. P. R. Co. v. Wisconsin*, 238 U. S. 401, 499, 59 L. ed. 1423, 1430, L.R.A. 1916A, 1113, P.U.R. 1915D, 706, 35 Sup. Ct. Rep. 869; *Beardsley v. New York, L. E. & W. R. Co.* 162 N. Y. 230, 56 N. E. 488; *Com. v. Atlantic Coast Line R. Co.* 7 L.R.A. (N.S.) 1086, and note, 106 Va. 61, 117 Am. St. Rep. 983, 55 S. E. 572, 9 Ann. Cas. 1124; *State v. Bonneval*, 128 La. 902, 55 So. 569, Ann. Cas. 1912C, 837; *State ex rel. McCue v. Great Northern R. Co.* 17 N. D. 370, 116 N. W. 89; *Atty. Gen. v. Old Colony R. Co.* 160 Mass. 62, 22 L.R.A. 112, 35 N. E. 252.

Mr. W. Cabell Bruce, for defendants in error:

There is no objection to classification when it is not arbitrary and unreasonable, and rests upon essential differences, which really separate the situation of one class from that of another.

Barbier v. Connolly, 113 U. S. 27, 32, 28 L. ed. 923, 925, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703, 708, 28 L. ed. 1145, 1146, 5 Sup. Ct. Rep. 730; Powell v. Pennsylvania, 127 U. S. 678, 687, 32 L. ed. 253, 257, 8 Sup. Ct. Rep. 992, 1257; Dent v. West Virginia, 129 U. S. 114, 124, 32 L. ed. 623, 626, 9 Sup. Ct. Rep. 231; State v. Broadbelt, 89 Md. 565, 45 L.R.A. 433, 73 Am. St. Rep. 201, 43 Atl. 771; Scholle v. State, 90 Md. 729, 50 L.R.A. 411, 46 Atl. 326; Watson v. State, 105 Md. 650, 66 Atl. 635; State v. Potomac Valley Coal Co. 116 Md. 380, 81 Atl. 686; State v. Loden, 117 Md. 373, 40 L.R.A. (N.S.) 193, 83 Atl. 564, Ann. Cas. 1913E, 1300.

A party rate ticket does not operate an undue or unreasonable preference and advantage to a particular description of traffic or an unjust discrimination against other people.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844.

The mere details of what appears to be a reasonable scheme of rates, or a tariff or schedule affording substantial compensation, are not subject to judicial review.

Northern P. R. Co. v. North Dakota, 236 U. S. 586, 604, 59 L. ed. 735, 745, L.R.A. 1917F, 1148, P.U.R. 1915C, 227, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; Norfolk & W. R. Co. v. Conley, 236 U. S. 606, 59 L. ed. 745, P.U.R. 1915C, 293, 35 Sup. Ct. Rep. 437.

An interstate rate, unless an adjudicated rate, is powerless to override or supplant an intrastate rate.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Houston, E. & W. T. R. Co. v. United States, 234 U. S. 342, 351, 58 L. ed. 1341, 1348, 34 Sup. Ct. Rep. 833; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465.

Mr. Justice Day delivered the opinion of the court:

This was an action in the circuit court No. 2 of Baltimore city, Maryland, to enjoin the Public Service Commission of Maryland from enforcing an order to sell commutation tickets at certain rates specified. The injunction was refused, and, on appeal, the court of appeals of Maryland L.R.A.1918C.

affirmed the decree and held that, although the order fixing the rates declared the same to be in force for ten years, there should be reserved to the railroad company the right to apply to the Commission after the lapse of a reasonable time for a rescission or modification of its order, if experience demonstrated that the revenue derived under the tariff as established by the Commission was not properly compensatory for the services performed. 126 Md. 59, P.U.R. 1915D, 398, 94 Atl. 330, Ann. Cas. 1917B, 1144.

The order of the Commission required the Pennsylvania Railroad Company, lessee of the Northern Central Railway, to sell tickets for the transportation of passengers between Baltimore and Parkton, within the state of Maryland, on the line of the Northern Central Railway.

A table appearing in the opinion of the court of appeals shows the relative rates under the former schedules and the new order of the Public Service Commission to be as follows:

Rates Prior to Nov. 25, 1914.	Rates as Per Schedule Filed Nov. 25, 1914.	Rates Under Order P. S. Commission, Dec. 23, 1914.
1. Round trip, 10 day, 24¢ per M.	Round trip, no limit, 24¢ per M.	Round trip, 24¢ per M.
2. Exc. days, 2-10 days, 24¢ per M.	Discontinued.	No ruling made.
3. 10-strip ticket, 1 yr., 1 8/10¢ per M.	10-strip, 3 mos., 23¢ per M.	10-strip, 3 mos., 2¢ per M.
4. 60-trip 1 mo., 2¢ for first 3 M., 1¢ for each addl. 3 M.	60-trip, 1 mo. former rate plus 25¢ flat.	60-trip, 1 mo. former rate plus 25¢.
5. 100-trip 1 yr. at double 60-trip.	Discontinued.	100 - trip, 4 mos., former rate, plus \$1.
6. 180-trip 3 mos., same as 4, less 10%.	180-trip, 3 mos. at 3 times 60-trip.	180 - trip, 3 mos., former rate plus 75¢.
7. 46 - trip School, 1 mo., 46/60 of 60-trip.	46-trip School, 1 mo., 46/60 of 60-trip.	46-trip School, 1 mo., 46/60 of 60-trip.

The attack upon the order of the Commission in this court is based upon the contention that its effect is to take the property of the railroad company without due process of law, contrary to the 14th Amendment to the Constitution of the United States. It is also averred in the bill that the order, if enforced, will work a discrimination against interstate travel in favor of travel within the state, and is otherwise unreasonable and void.

The court of appeals of Maryland stated the question to be whether it is within the power of the Public Service Commission to require the establishment of a schedule of commutation rates by the railroad company; not where no such rates had there-

tofore been established, but where a new system of commutation rates had been proposed by the railroad company and submitted to the Commission. Whether commutation rates should be established was declared to be a question of policy to be decided by the company. The court found authority in the Commission, under the statutes of Maryland, to revise commutation rates where such rates had already been established by the action of the company. We must accept this definition of authority in the Commission, so far as the state law is concerned, and direct our inquiry to the Federal question presented.

The question, as counsel for plaintiff in error states it, is whether a state legislature, either directly or through the medium of a public service commission, under the guise of regulating commerce, may compel carriers engaged in both interstate and intrastate commerce to establish and maintain intrastate rates at less than both the interstate and intrastate standard and legally established maxima. It is asserted that there is no constitutional authority to compel railroad companies to continue the sale of commutation or special class tickets at rates less than the legally established standard or normal one-way single passenger fare upon terms more favorable than those extended to the single one-way traveler.

To maintain this proposition plaintiff in error relies upon and quotes largely from the opinion of this court in *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565. In that case a majority of this court held a statute of the state of Michigan to be invalid. A previous statute of the state had fixed a maximum passenger rate of 3 cents per mile. The statute in controversy required the issuing of mileage books for 1,000 miles, good for two years, at a less rate. This court held that a maximum rate for passengers having been established, that rate was to be regarded as the reasonable compensation for the service, and that the fixing of the less rate to particular individuals was an arbitrary exercise of legislative power and an unconstitutional interference with the business of the carrier, the effect of which was to violate the provisions of the 14th Amendment to the Federal Constitution by depriving the railroad company of its property without due process of law and denying to it the equal protection of the law.

The Lake Shore Case did not involve, as does the present one, the power of a state commission to fix intrastate rates for commutation tickets where such rates had already been put in force by the railroad company of its own volition, and we con-

sine ourselves to the precise question presented in this case, which involves the supervision of commutation rates when rates of that character have been voluntarily established by the carrier. The rates here involved are wholly intrastate. The power of the states to fix reasonable intrastate rates is too well settled at this time to need further discussion or a citation of authority to support it.

In *Interstate Commerce Commission v. Baltimore & O. R. Co.* 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844, this court held that a "party rate ticket" for the transportation of ten or more persons at a less rate than that charged a single individual did not make a discrimination against an individual charged more for the same service, or amount to an unjust or unreasonable discrimination within the meaning of the Act to Regulate Commerce. In the course of the opinion the right to issue tickets at reduced rates, good for limited periods, upon the principle of commutation, was fully recognized. See pp. 277-280.

Having the conceded authority to regulate intrastate rates, we perceive no reason why such power may not be exercised through duly authorized commissions, and rates fixed with reference to the particular character of the service to be rendered.

In *Norfolk & W. R. Co. v. Conley*, 236 U. S. 605, 608, 59 L. ed. 745, 747, P.U.R. 1915C, 293, 35 Sup. Ct. Rep. 437, after making reference to *Northern P. R. Co. v. North Dakota*, 236 U. S. 585, 59 L. ed. 735, L.R.A. 1917F, 1148, P.U.R. 1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1, this court said:

"It was recognized [in the *North Dakota Case*] that the state has a broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction; that it is not necessary that there should be uniform rates or the same percentage of profit on every sort of business; and that there is abundant room for reasonable classification and the adaptation of rates to various groups of services."

That the state may fix maximum rates governing one-way passenger travel is conceded. Having the general authority to fix rates of a reasonable nature, we can see no good reason for denying to the state the power to exercise this authority in such manner as to fix rates for special services different from those charged for the general service. In our opinion the rate for a single fare for passengers generally may be varied so as to fit the particular and different service which involves, as do commutation rates, the disposition of tickets to passengers who have a peculiar relation to the service. The

service rendered in selling a ticket for one continuous trip is quite different from that involved in disposing of commutation tickets where a single ticket may cover 100 rides or more within a limited period. The labor and cost of making such tickets, as well as the cost of selling them, is less than is involved in making and selling single tickets for single journeys to one-way passengers.

The service rendered the commuter, carrying little baggage and riding many times on a single ticket for short distances, is of a special character and differs from that given the single-way passenger.

It is well known that there have grown up near to all the large cities of this country suburban communities which require this peculiar service, and as to which the railroads have themselves, as in this instance, established commutation rates. After such recognition of the propriety and necessity of such service, we see no reason why a state may not regulate the matter, keeping within the limitation of reasonableness.

On the strength of these commutation tariffs, it is a fact of public history that thousands of persons have acquired homes in city suburbs and near-by towns in reliance upon this action of the carriers in fixing special rates and furnishing particular accommodations suitable to the traffic. This fact has been recognized by the courts of the country, by the Interstate Commerce Commission, and quite generally by the railroad commissions of the states.¹

The question of the power of the Public Service Commission of the state of New York in this respect was before the appellate division of the supreme court of that state in *People ex rel. New York, N. H. & H. R. Co. v. Public Service Commission*, 159 App. Div. 531, 145 N. Y. Supp. 503. In that case it was said:

"Subdivision 4 of § 33 of the Public Service Commissions Law (Consol. Laws, chap. 48 [Laws 1910, chap. 480], as amended by Laws 1911, chap. 546) empowers the Commission to fix reasonable and just rates for such service. It is urged, however, that the statute is invalid under the rule of *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565. In that case the statute of Michigan had fixed a maximum passenger rate at 3 cents per mile. A subsequent enactment required the issuing of mileage books for 1,000 miles.

good for two years, at a less rate. The court held that, having fixed a uniform maximum rate as to all passengers, such rate was the reasonable compensation for the service, and that the fixing of a less rate to particular individuals was an unreasonable and arbitrary exercise of legislative power; that it was not for the convenience of the public, and thus within the police power, but was for the convenience of certain individuals, who were permitted to travel upon the railroads for less than the reasonable rate prescribed by law; that the law was, therefore, in violation of the 14th Amendment of the Federal Constitution in depriving the company of its property without due process of law and by depriving it of the equal protection of the laws.

"In *Beardsley v. New York, L. E. & W. R. Co.* 162 N. Y. 230, 56 N. E. 488, the court of appeals felt constrained by the *Smith Case* to declare the Mileage Book Law of this state invalid as to companies in existence at the time of its passage, but in *Purdy v. Erie R. Co.* 162 N. Y. 43, 48 L.R.A. 669, 56 N. E. 508, that law was held valid as to companies organized after the statute was passed.

"In *Louisville & N. R. Co. v. Kentucky*, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95, after citing the *Smith Case* and like cases, the court says (at p. 511): 'Nor, yet, are we ready to carry the doctrine of the cited cases beyond the limits therein established.'

"In the *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18, the legality of an order of the Commission of that state was recognized which fixed a maximum freight rate and passenger rate, the latter at 2 cents a mile as the maximum fare for passengers twelve years of age or over, and 1 cent a mile for those under twelve years of age.

"In *Interstate Consol. Street R. Co. v. Massachusetts*, 207 U. S. 79, 52 L. ed. 111, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 535, the Massachusetts law prescribing special rates less than the maximum for school children was held valid. These cases indicate that the *Smith Case* is not to be extended beyond the facts upon which it rests.

"The *Smith Case* distinguishes itself from this case, where the court (at p. 693) says: 'This act is not like one establishing certain hours in the day during which trains

¹ (1912) 44 Ann. Rep. Mass. R. C. 67, 107, 113; (Mass.) P.U.R.1915B, 362; (R. I.) P.U.R.1915E, 269; 3 P. S. C. (2d Dist. N. Y.) 212, 461; 4 P. S. C. (2d Dist. N. Y.) 11; (N. J.) P.U.R.1915B, 161; (1914) 1 Ill. P. C. C. 553, 590; (1913-1914) Colo. P. U. L.R.A.1918C.

C. 131; (Idaho) P.U.R.1915D, 742; 1 Cal. R. C. 451, 855; 2 Cal. R. C. 910; 3 Cal. R. C. 5, 30, 32, 749, 800, 807, 973; 5 Cal. R. C. 555; 6 Cal. R. C. 853, 1008; 7 Cal. R. C. 179, 894; *Commutation Rate Case*, 21 Inters. Com. Rep. 428.

shall be run for a less charge than during the other hours. In such cases, it is the establishing of maximum rates of fare for the whole public during those hours, and it is not a discrimination in favor of certain persons by which they can obtain lower rates by purchasing a certain number of tickets by reason of which the company is compelled to carry them at the reduced rate, and thus, in substance, to part with its property at a less sum than it would be otherwise entitled to charge. The power to compel the company to carry persons under the circumstances as provided for in this act, for less than the usual rates, does not seem to be based upon any reason which has hitherto been regarded as sufficient to authorize an interference with the corporation, although a common carrier and a railroad.'

"Our flourishing cities owe their position and prosperity, in part, to the commutation rates for suburban service; the health and welfare of the public are concerned that people doing business in the large cities may live in the country where the surroundings are pleasanter, more healthy, and to the advantage of themselves and their families. It is a known fact that such rates exist upon all railways entering large cities, and have usually been established by the companies voluntarily in the interest of themselves and the public. The service is different in its nature from the other passenger service. It is so universal, of such large proportion, has become so necessary to the public, that it cannot be said that the fixing of reasonable and just rates for it is unusual or unreasonable, or the granting of a benefit to individuals, and not for convenience to the public.

"Nearly one half of the passengers handled by the relator at the Grand Central Terminal were of this class. Perhaps the same ratio would exist upon the other railroads serving the city. We conclude that the statute in question is valid as conferring a power on the Commission to regulate rates for the public convenience and welfare."

That decision was affirmed by the court of appeals of New York on the opinion of the appellate division (215 N. Y. 689, 109 N. E. 1089).

The subject was elaborately considered by the Interstate Commerce Commission in the Commutation Rate Case, 21 Inters. Com. Rep. 428, in which the authority of the Commission to fix reasonable rates was sustained. In the course of the opinion, Commissioner Harlan, speaking for a unanimous Commission, said:

"Another case strongly relied upon by the defendants is Lake Shore & M. S. R. Co. L.R.A.1918C.

v. Smith, 173 U. S. 699, 43 L. ed. 864, 19 Sup. Ct. Rep. 565. It there appeared that the legislature of the state of Michigan had fixed the maximum passenger fare to be charged by railroad companies for local journeys within the state. By a subsequent enactment it required the carriers to sell 1,000-mile tickets for use within the lower peninsula at a price not exceeding \$20 and in the upper peninsula at a price not exceeding \$25. Various conditions affecting the use of the tickets were also fixed by the act, and, among others, that they should be valid for two years after the date of purchase. It was held that, in the exercise of its general police power, a state may fix maximum fares, but that it may not fix a rate for 1,000-mile tickets that involves a discrimination in favor of those who buy them. The statute was held to be invalid.

The case, however, involved mileage tickets, which, we must repeat, differ very essentially in character from commutation tickets.

"We have been referred to no other adjudication by the courts and are left to conclude that the precise point now before us has not been passed upon by the courts.

"It will not be necessary to dwell here upon the importance of the question not only to the particular suburban communities involved on the record before us, but to many other such communities throughout the country, the prosperity and growth of which largely depend upon an efficient and reasonable commutation service. Many such communities have not only been encouraged by the carriers, but were, in fact, originally established largely on their initiative. Suburban property has been bought, homes have been established, business relations made, and the entire course of life of many families adjusted to the conditions created by a commutation service. This may not have been done on the theory that the fares in effect at any particular time would always be maintained as maximum fares, but countless homes have been established in suburban communities in the belief that there would be a reasonable continuity in the fares and that the carriers, in any event, would perform the service at all times for a reasonable compensation.

"Nor need we stop to point out the distinction between commutation tickets on the one hand and excursion and mileage tickets on the other. Compared with the normal one-way fare all such tickets may be said to be abnormal. But the resemblance stops at that point. Although they are mentioned together in § 22, the force and effect of that provision must necessarily differ with the differing character of the several kinds of tickets. It seems to be settled under that section that a carrier

may enter upon the policy and practice of issuing mileage books and excursion tickets at less than its regular normal fare for the one-way journey, and, having adopted such a policy, may subsequently withdraw from it and refuse longer to issue such tickets. That has been the view of this Commission, and is the view generally entertained, although there may be exceptional circumstances where a different conclusion would be required. It by no means follows, however, that a carrier, under § 22, may exercise the same scope and freedom of action with respect to commutation tickets."

The reasoning of these decisions is sound and involves no violation of the Federal Constitution. True it is that it may not

be possible to reconcile these views with all that is said in the opinion delivered for the majority of the court in the case of *Lake Shore & M. S. R. Co. v. Smith*, supra. The views therein expressed which are inconsistent with the right of the states to fix reasonable commutation fares when the carrier has itself established fares for such service must be regarded as overruled by the decision in this case.

We find no error in the decree of the Court of Appeals of Maryland, and the same is affirmed.

Dissenting: Mr. Chief Justice White, Mr. Justice McKenna, and Mr. Justice McReynolds.

Annotation—Power of Public Service Commission to regulate commutation rates.

As applied to passenger traffic, commutation seems to signify the payment, in a single sum, of the cost to the traveler for transportation, limited in point of time and in the number of trips, between two designated points; apparently it implies also a fare per trip that is less than the normal fare for a one-way journey. *Commutation Rate Case (1911) 21 Inters. Com. Rep. (Fed.) 438*. Commutation tickets differ from excursion tickets, mileage books, and street car ticket books.

Rates similar to what are now known as commutation rates had their origin when traveling was by stage coaches. Commutation traffic, we are told, grew very rapidly on the rail lines out of the conditions that existed on the stage and coach lines before the rail line commenced to operate. This additional daily traffic, picked up as an incident to through traffic, could be carried without adding proportionately to the cost, and was transported for that reason at a charge less than the normal cost for the one-way journey. Besides adding volume to the regular passenger traffic and thus tending materially to reduce the operating cost per passenger, it had the effect of substantially increasing the freight traffic moving between suburban communities and adjacent large centers. From these considerations the Interstate Commerce Commission has concluded that commutation service stands by itself as a special and distinct kind of service. *Commutation Rate Case (Fed.) supra*.

The decisions of the courts and the commissions are in harmony with the holding of the United States Supreme Court in *PENNSYLVANIA R. CO. v. TOWERS*, ante, 475, which affirmed (1917) 126 L.R.A.1918C.

Md. 59, P.U.R.1915D, 398, 94 Atl. 330, Ann. Cas. 1917B, 1144, to the effect that commutation rates voluntarily established by carriers are subject to regulation by the commission. As pointed out by the court, such rates have been the subject of regulation in a number of cases in which it was assumed the commission had the power to do so.

The *Commutation Rate Case (1911) 21 Inters. Com. Rep. (Fed.) 428*, involved the power of the Commission to pass upon the reasonableness of commutation fares when they were less than the normal fares between the same points, it being contended on the part of the carriers that, under the language of § 22 of the Act to Regulate Commerce, "nothing in this act shall prevent . . . the issuance of mileage, excursion, or commutation passenger tickets," that the issuance of such tickets at a lower price than the normal fare was a right that might be exercised by the carrier in its sole discretion without hindrance or control by the Commission, so long as the normal fare between the same points is itself reasonable and so long as the rules and regulations governing the use of such tickets do not offend the provisions of §§ 2-4 of the act relative to discrimination. After considering the origin and history of commutation rates, the Commission pointed out that commutation service was a distinct kind of service for which the carrier could demand no more than a reasonable compensation, and concluded that commutation rates were subject to regulation by the Commission. Commissioner Harlan said: "Suburban communities have grown into existence on the theory, voluntarily accepted by the carriers as

well as by the public, that one who makes daily use of an agency of transportation between his place of business and his home must necessarily be accorded a special and a low rate. This theory is firmly fixed in the history and traditions of transportation by rail and must therefore be regarded as embraced in the law under which such transportation is regulated." In *Interstate Commerce Commission v. Baltimore & O. R. Co.* (1892) 145 U. S. 263, 36 L. ed. 999, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844, it is intimated that in framing the Act to Regulate Commerce Congress did not intend to ignore the principle that one can sell at wholesale cheaper than at retail. Applying the thought to the thousands of commuters directly affected by this proceeding it must not be forgotten that by separating their homes from their places of business they have committed themselves to the several defendants that respectively serve them, as daily travelers back and forth over their lines,—as wholesale purchasers of their transportation. Out of this relation grow a number of economies to the carrier which we need not stop now to point out. It suffices to say that in our judgment the carriage of a commuter differs in many respects from other passenger traffic, and is an independent and a special service and a special kind of traffic. This being so, we see no reason why the reasonableness of the fares demanded for the service may not be looked into by the Commission under § 1. It is conceded on behalf of the principal complainant that a carrier may not be compelled, under the present law, to undertake a commutation service and to establish commutation rates. That is probably true. But having undertaken a definite and regular commutation service, such as is shown of record on the part of each of the defendants in this proceeding, the power as well as the duty of the Commission under § 1 to examine into the reasonableness of the charges exacted, when complaint has been made, seems to be beyond question."

In *People ex rel. New York, N. H. & H. R. Co. v. Public Service Commission* (1914) 159 App. Div. 531, 145 N. Y. Supp. 503, affirmed without opinion in (1915) 215 N. Y. 689, 109 N. E. 1089, it was held that a statute authorizing the Public Service Commission to regulate commutation rates was not invalid under the rule of *Lake Shore & M. S. R. Co. v. Smith* (1899) 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565, which held

that a statute requiring the sale of mileage books at a less rate than the statutory maximum passenger rate was an unreasonable and arbitrary exercise of the legislative power. The court said: "It is a known fact that such rates [commutation] exist upon all railways entering large cities, and have usually been established by the companies voluntarily, in the interest of themselves and the public. The service is different in its nature from the other passenger service. It is so universal, of such large proportion, has become so necessary to the public, that it cannot be said that the fixing of reasonable and just rates for it is unusual or unreasonable, or the granting of a benefit to individuals and not for convenience to the public."

In *Pennsylvania R. Co. v. Public Utility Comrs.* (1912) 83 N. J. L. 67, 83 Atl. 945, affirmed without opinion in (1913) 84 N. J. L. 759, 88 Atl. 1103, it was held that the Board of Public Utility Commissioners had power to require railroads affording commutation service to sell tickets for such commutation service, specifically designating both termini of the journey, and to publish rates for such service for the purpose of eliminating discrimination between persons and localities. To the same effect is *Delaware, L. & W. R. Co. v. Public Utility Comrs.* (1913) 84 N. J. L. 619, 87 Atl. 801.

In *Sprigg v. Baltimore & O. R. Co.* (1900) 8 Inters. Com. Rep. (Fed.) 443, it was held that the Commission had no power to prevent a carrier from discontinuing the sale of a 180-trip quarterly ticket which for several years had been available over its lines between Washington and Baltimore although its 60-trip monthly individual ticket, as well as other forms of commutation tickets between those points, were still offered to the public, upon the ground that the Commission had no power to prescribe rates for the future. This case, it will be observed, was decided before the passage of the statute conferring full rate-making power upon the Commission.

In referring to the *Sprigg* Case in the *Commutation Rate Case* (1911) 21 Inters. Com. Rep. (Fed.) 436, it was said that so far as it conflicts with the conclusions there reached it must be understood as now being overruled.

No case has been found passing upon the power of a commission to require a carrier to issue commutation tickets where it has not voluntarily furnished such service. In a few cases carriers furnishing such service on some of their lines only have been required to furnish

such service on other lines to eliminate discrimination between localities, in which the power of the Commission was not questioned, e. g., *Bitzer v. Washington-Virginia R. Co.* (1912) 24 Inters. Com. Rep. (Fed.) 255; *McKenna v. New York, N. H. & H. R. Co.* (1915, R. I.) P.U.R.1915E, 269).

In *Weber Club & Intermountain Fair Asso. v. Oregon Short Line R. Co.* (1909) 17 Inters. Com. Rep. (Fed.) 212, it was said, in referring to the *Sprigg Case* (Fed.) supra, that the Commission must not be understood to hold that the granting and refusing of commutation tickets might not work a discrimination which the Commission would have power to correct.

And in *Re Mileage Excursion & Commutation Tickets* (1912) 23 Inters. Com. Rep. (Fed.) 96, Commissioner Clements said: "It is true that the carriers, individually and jointly, may afford many facilities, accommodations, and conveniences to shippers and passengers which they may not be compelled to afford, but they are no more at liberty to unjustly discriminate with respect to such services than with respect to those things which, under the law, they may be compelled to do. Among the things which they are permitted but not compelled by the act to do is to establish excursion, commutation, and mileage tickets."

A. L. R.

FLORIDA SUPREME COURT.

ERNEST AMOS, Comptroller of the State of Florida, et al., Appts.,
v.

W. H. MOSELEY.

(— Fla. —, 77 So. 619.)

Statute — journal evidence.

1. Where the Constitution provides that each house of the legislature shall "keep a journal of its own proceedings which shall be published," and expressly requires that "the vote on the final passage of every bill or joint resolution shall be taken by yeas and nays, to be entered on the journal of each house," the journals are conclusive on the point whether the yea and nay vote was so taken and entered.

For other cases, see Statutes, I. d, in Dig. 1-52 N. S.

Same — failure to pass.

2. In testing the question whether an act of the legislature was passed in conformity with the requirements of the Constitution, the journals of the houses of the legislature will be examined; and if they furnish conclusive evidence that any bill was not passed in a constitutional manner, it cannot be recognized as a law.

For other cases, see Statutes, I. d, in Dig. 1-52 N. S.

Headnotes by BROWNE, Ch. J.

Note. — The subject of the conclusiveness of an enrolled bill, including impeachment by legislative journals and other evidence, is treated in the note to *Atchison, T. & S. F. R. Co. v. State*, 40 L.R.A.(N.S.) 1; and see later cases, *Allen v. State*, 44 L.R.A.(N.S.) 468; *Re Drainage Dist.* L.R.A. 1915A, 1210; *State ex rel. Hammond v. Lynch*, L.R.A.1915D, 119; and *Ritzmann v. Campbell*, L.R.A.1916E, 1251. L.R.A.1918C.

Evidence — legislative journals — weight.

3. Under constitutional requirements that journals of the proceedings of the legislative bodies shall be kept and published, where the journal entries as to the legislative proceedings are explicit, and conflict even with legislative acts regularly authenticated, the journals are superior, and the courts will be governed by them as to matters clearly, explicitly, and affirmatively stated therein. *For other cases, see Statutes, I. d, in Dig. 1-52 N. S.*

Same — judicial notice — printed journals.

4. It is common knowledge which this court can take cognizance of that the proceedings of each house of the legislature are printed daily in pamphlet form, and published and distributed.

For other cases, see Evidence, I. c, in Dig. 1-52 N. S.

Legislature — journals — what constitutes.

5. The daily printed pamphlets which contain the record of the proceedings of each house of the legislature are the "journals" of the respective houses.

For other cases, see Statutes, I. d, in Dig. 1-52 N. S.

Evidence — judicial notice — effect.

6. Those things of which the court may take judicial notice require no proof.

For other cases, see Evidence, I. in Dig. 1-52 N. S.

As to requisites of appropriation for official salary or expenses, see notes to *State ex rel. Davis v. Eggers*, 16 L.R.A.(N.S.) 631; *Menefee v. Askew*, 27 L.R.A.(N.S.) 537, and *State ex rel. Birdzell v. Jorgenson*, 49 L.R.A.(N.S.) 67; and later case, *State ex rel. Turner v. Henderson*, L.R.A.1917F, 770.

Same — weight.

7. Judicial notice is superior to evidence, as it stands for proof and fulfils the object which evidence is designed to fulfil, and makes evidence on the point established by judicial notice unnecessary.

For other cases, see Evidence, I. in Dig. 1-52 N. S.

Same — scope.

8. Judicial notice is taken only of those matters which are commonly known.

For other cases, see Evidence, I. in Dig. 1-52 N. S.

Same — individual knowledge.

9. Individual and extrajudicial knowledge on the part of a judge will not dispense with proof of facts not judicially cognizable, and cannot be resorted to for the purpose of supplementing the record.

For other cases, see Evidence, I. in Dig. 1-52 N. S.

Same — source of information.

10. It is not essential that matters of judicial cognizance be actually known to the judge; if they are proper subjects of judicial knowledge, the judge may inform himself in any way which may seem best in his discretion, and act accordingly.

For other cases, see Evidence, I. in Dig. 1-52 N. S.

Same — proof of journals.

11. Journals of a branch of the legislature are "public records." "They prove their own authenticity." Being kept in virtue of a provision of law, judicially known to the judge, their existence and function in legislation are also judicially known.

For other cases, see Evidence, I. c, in Dig. 1-52 N. S.

Statute — proof — judicial notice.

12. In determining the validity of a law found upon the statute books, where it is attacked upon the ground that the constitutional requirements were not observed in its passage through the legislature, the courts should not exclude from their knowledge matters of general and common knowledge which they are presumed to share with the public generally.

For other cases, see Evidence, I. a, in Dig. 1-52 N. S.

Same — scope — title.

13. A specific provision for the payment of salaries and expenses, necessary, proper, incidental, or growing out of a law itself, or which may be deemed needful in carrying it or its subject into execution, being matter properly connected with the subject of the law as expressed in the title, is not prohibited by the Constitution.

For other cases, see Statutes, I. c, 1, in Dig. 1-52 N. S.

Same — appropriation.

14. An act, the general purpose of which is not to make appropriations for salaries of public officers and for other current expenses of the state, may make provision for the payment of expenses necessary, proper, incidental, or growing out of the law itself.

L.R.A.1918C.

including the salaries of persons whose services and duties are provided for in the act. *For other cases, see Appropriations, in Dig. 1-52 N. S.*

Same — constitutional provisions.

15. The purpose of the constitutional provision that "laws making appropriations for the salaries of public officers and other current expenses of the state shall contain provisions upon no other subject" is to prevent including in bills appropriating money to carry on the government of the state measures foreign to that purpose, and, by taking advantage of the necessities of the state, force the legislature to adopt them, or stop the entire machinery of the government for want of funds to carry it on.

For other cases, see Appropriations, in Dig. 1-52 N. S.

Same — provision for salaries.

16. Where a law is not primarily one to appropriate money to pay "salaries of public officers and other current expenses of the state," it is not obnoxious to the Constitution because, as an incident to its main purpose, it provides for salaries and expenses necessary to carry into effect the purpose of the law.

For other cases, see Appropriations, in Dig. 1-52 N. S.

Same — practical construction.

17. A practical construction of a statute by a governmental department, while not of such high authority as a judicial interpretation of the act, when not in conflict with the Constitution or the plain intent of the act, is of great persuasive force and efficacy.

For other cases, see Statutes, II. a, in Dig. 1-52 N. S.

Same — legislative construction — effect.

18. The construction placed upon a provision of the Constitution by the legislative and executive branches of the government will not be permitted to overturn and render nugatory a clear provision of the Constitution, in cases where the meaning of a clause in the instrument is capable of two interpretations.

For other cases, see Constitutional Law, I. a, 3, a, in Dig. 1-52 N. S.

Appropriations — continuing — power.

19. The provision of the Constitution which requires, "The legislature shall provide for raising revenues sufficient to defray the expenses of the state for each fiscal year," is not an inhibition on the power of the legislature to make continuing appropriations.

For other cases, see Appropriations, in Dig. 1-52 N. S.

Evidence — burden of proof — validity of statute.

20. The burden of showing that an act of the legislature which has been duly signed by the presiding officer of each house and by the secretary of the senate and clerk of the house of representatives and has become a law with or without the approval of the

governor, as shown by the records of official acts of the legislative department, as the same are kept by the secretary of state as required by section 21 of article 4 of the Constitution, is upon the person who asserts that the act did not pass in the manner prescribed by the Constitution. *For other cases, see Evidence, II. a, in Dig. 1-52 N. S.*

(December 20, 1917.)

APPEAL by defendants from an order of the Circuit Court for Leon County granting a temporary injunction restraining the defendant comptroller from issuing warrants to the members of the Tax Commission in payment of their salaries. Reversed.

The facts are stated in the opinion.

Messrs. Van C. Swearingen, Attorney General, C. O. Andrews, Assistant Attorney General, H. Stafford Caldwell, and Glenn Terrell, for appellants:

The page (2318) of the bound journal of the senate is sufficient to show that the yeas and nays upon the passage of the bill were taken and recorded, but, through oversight, misplaced in the final make-up in the office of the state printer.

Goff v. Rickerson, 61 Fla. 29, 54 So. 264; *West v. State*, 50 Fla. 154, 39 So. 412; *Lincoln v. Haugan*, 45 Minn. 451, 58 N. W. 196; *State v. Bethea*, 61 Fla. 60, 55 So. 550; *Montgomery Beer Bottling Works v. Gaston*, 126 Ala. 425, 51 L.R.A. 396, 85 Am. St. Rep. 42, 28 So. 497; *State ex rel. Brickman v. Wilson*, 123 Ala. 259, 45 L.R.A. 772, 26 So. 485; *State ex rel. Douglas County v. Frank*, 60 Neb. 327, 83 N. W. 74; *State ex rel. Morris v. Mason*, 43 La. Ann. 590, 9 So. 776; *Homrighausen v. Knoche*, 58 Kan. 646, 50 Pac. 879; *People ex rel. Manville v. Leddy*, 53 Colo. 109, 123 Pac. 824; *Atchison, T. & S. F. R. Co. v. State*, 40 L.R.A. (N.S.) 1, note; *Woolfolk v. Albrecht*, 22 N. D. 36, 133 N. W. 310.

No particular language is required in any law to constitute a valid appropriation.

People ex rel. Hegwer v. Goodykoontz, 22 Colo. 507, 45 Pac. 414; *Carr v. State*, 127 Ind. 205, 11 L.R.A. 370, 22 Am. St. Rep. 628, 26 N. E. 780; *State ex rel. Henderson v. Burdick*, 4 Wyo. 272, 24 L.R.A. 266, 33 Pac. 126; *Menefee v. Askew*, 25 Okla. 623, 27 L.R.A. (N.S.) 537, 107 Pac. 159; *Falk v. Huston*, 25 Idaho, 26, 135 Pac. 745; *Reynolds v. Taylor*, 43 Ala. 420; *Thomas v. Owens*, 4 Md. 189; *Green v. Purnell*, 12 Md. 320; *State ex rel. Roberts v. Weston*, 4 Neb. 216; *State ex rel. Buck v. Hickman*, 10 Mont. 497, 26 Pac. 386; *State ex rel. Davis v. Eggers*, 29 Nev. 469, 16 L.R.A. (N.S.) 630, 91 Pac. 819; *Conley v. Daugh-* L.R.A.1918C.

ters of the Republic, — Tex. Civ. App. —, 151 S. W. 877.

Chapter 6500 is not an "appropriation of a general character," nor is it primarily an appropriation bill within the purview of § 30 of article 3.

Evanhoff v. State Industrial Acci. Commission, 78 Or. 503, 154 Pac. 106; *Cooley*, Const. Lim. 7th ed. 102.

The act must stand as being valid.

Jordan v. Duval County, 68 Fla. 48, 66 So. 298; *Jacksonville v. Bowden*, 67 Fla. 181, L.R.A.1916D, 913, 64 So. 769; *Dutton Phosphate Co. v. Priest*, 67 Fla. 370, 65 So. 282; *Hill v. Rae*, 52 Mont. 378, L.R.A.1917A. 495, 158 Pac. 826, Ann. Cas. 1917E, 210.

Messrs. Y. S. Watson and William J. Oven, for appellee:

The act is not valid because the journal affirmatively shows no record of the "aye" and "nay" vote taken in the senate on the final passage of the bill.

Wade v. Atlantic Lumber Co. 51 Fla. 633, 41 So. 72; *State ex rel. Atty. Gen. v. Green*, 36 Fla. 172, 18 So. 334; *State ex rel. Markens v. Brown*, 20 Fla. 421; *Auditor General v. Menominee County*, 89 Mich. 552, 51 N. W. 483; *People ex rel. Atty. Gen. v. Burch*, 84 Mich. 408, 47 N. W. 765; *Atty. Gen. v. Rice*, 64 Mich. 385, 31 N. W. 203; *Detroit v. Board of Assessors (Detroit v. Rentz)* 91 Mich. 78, 16 L.R.A. 59, 51 N. W. 787; *People ex rel. Wies v. Bowman*, 247 Ill. 276, 93 N. E. 244; *State ex rel. McKinley v. Martin*, 160 Ala. 181, 48 So. 846; *McCulloch v. State*, 11 Ind. 424; *Wilson v. Markley*, 13 N. C. 616, 45 S. E. 1023; *Wise v. Bigger*, 79 Va. 269; *Heiskell v. Knox County*, 132 Tenn. 180, 177 S. W. 485, Ann. Cas. 1916E. 1281; *Richmond County v. Farmers Bank*, 152 N. C. 387, 67 S. E. 969, 21 Ann. Cas. 812; *New Hanover County v. Armour Packing Co.* 135 N. C. 62, 47 S. E. 411; *Montgomery Beer Bottling Works v. Gaston*, 126 Ala. 425, 51 L.R.A. 396, 85 Am. St. Rep. 42, 28 So. 497; *Ex parte Howard-Harrison Iron Co.* 119 Ala. 484, 72 Am. St. Rep. 928, 24 So. 517; *People ex rel. Manville v. Leddy*, 53 Colo. 109, 123 Pac. 824.

The sections of the act which seek to make or create an annual or continuing appropriation for the Commission are invalid.

Re Revenue Law, 14 Fla. 286; *Ritchie v. People*, 165 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Fergus v. Russell*, 270 Ill. 304, 110 N. E. 130, Ann. Cas. 1916B, 1102; *State ex rel. Hilliard v. Cornell*, 60 Neb. 276, 83 N. W. 72; *Mathews v. People*, 202 Ill. 389, 63 L.R.A. 73, 95 Am. St. Rep. 241, 67 N. E. 28; *Lund v. Dickinson*, 126 Ark. 243, 190 S. W. 428; *Dickinson v. Clibourn*, 125 Ark. 101, 187 S. W. 909; *State ex rel. Lyon v. State Warehouse Commission*, 92 S. C. 81, 75 S. E. 392; *Hill v.*

Rae, 52 Mont. 378, L.R.A.1917A, 495, 158 Pac. 826, Ann. Cas. 1917E, 210; People v. Joyce, 246 Ill. 124, 92 N. E. 607, 20 Ann. Cas. 472.

Browne, Ch. J., delivered the opinion of the court:

This is a suit in equity brought by W. H. Moseley in the circuit court for Leon county to enjoin the comptroller from issuing warrants to the members of the Tax Commission in payment of their salaries.

A temporary restraining order was made by the chancellor, and an appeal is taken therefrom to this court which raises the question of the validity of chapter 6500, Laws of Florida, Acts of 1913.

This attack is predicated upon the grounds that the journals of the proceedings of the senate for the session of 1913 do not show that on the final passage of the bill the vote was taken by yeas and nays, and entered on the journals of that body, as required by § 17 of article 3 of the Constitution, and, because the bill contained a section making appropriations for expenses, it was in violation of § 30, art. 3, of the Constitution of the state of Florida, which provides that "laws making appropriations for salaries of public officers and other current expenses of the state shall contain provisions on no other subject."

At the hearing of the application for a temporary injunction the complainant offered in evidence, which was admitted without objection on the part of the respondent, a bound volume of what purported to be the journals of the senate of Florida for the session of 1913, to which was attached the following certificate from the secretary of state: "I, H. Clay Crawford, secretary of state of the state of Florida, do hereby certify that the attached volume is a true and correct copy of the journal of the senate of the state of Florida, showing the proceedings of the senate during the session of the legislature held in 1913, as filed in this office."

The defendants offered in evidence what purported to be a certified copy of page 132 of the daily printed journal of the senate for June 4, 1913, which was admitted over the objection of the complainant.

It is a well-settled rule in this state that, where the Constitution says that each house of the legislature shall "keep a journal of its proceedings which shall be published," and expressly requires that "the vote on the final passage of every bill or joint resolution shall be taken by yeas and nays, to be entered on the journal of each house," the journals are conclusive on the point whether the yeas and nays vote was so taken and entered. Thus in *State ex rel. Atty. L.R.A.1918C*

Gen. v. Green, 36 Fla. 154, 18 So. 334, this court said: "It is generally held that the plain constitutional injunctions as to the mode and manner of enacting laws are mandatory, and the equally high authority that journals of the proceedings shall be kept strengthens the view that the evidence of a compliance with such injunctions should be found in the journals."

See also *Wade v. Atlantic Lumber Co.* 51 Fla. 628, 41 So. 72; *Mathis v. State*, 31 Fla. 291, 12 So. 681; *State ex rel. Markens v. Brown*, 20 Fla. 407.

In the latter case this court held: "In testing the question whether an act of the legislature was passed in conformity to the requirements of the Constitution, the journals of the houses of the legislature will be examined; and, if the journals furnish conclusive evidence that any bill was not passed in a constitutional manner, it cannot be recognized as a law."

The rule in this state is thus stated by Chief Justice Mabry in the case of *State ex rel. Atty. Gen. v. Green*, supra: "There are two conflicting views held by the decisions on this subject. Under constitutional requirements that journals of the proceedings of the legislative bodies shall be kept and published, it has been held in many decisions that, where the journal entries as to the legislative proceedings are explicit and conflict even with legislative acts regularly authenticated, the journals are superior, and the courts will be governed by them as to matters clearly, explicitly, and affirmatively stated therein. The other view, maintained by high authority, is that the legislative act itself, embodied in a bill engrossed and enrolled, and bearing the proper official signatures, is of higher dignity than the journals, and will override them. This court has placed itself on the side of those maintaining the view first stated (*State ex rel. Markens v. Brown*, supra; *State ex rel. Boyd v. Deal*, 24 Fla. 293, 12 Am. St. Rep. 204, 4 So. 899; *Mathis v. State*, 31 Fla. 291, 12 So. 681); and, as there is ample authority to sustain this view, we will not now make any departure."

The question, however, which we must first determine is, What is the journal? Is it the bound volume which purports to be a copy of all the journals of the entire session, or is it the printed and published pamphlet which contains the record of each day's proceedings? The word "journal" is derived from the French word "jour" which means "day." The Century Dictionary defines a "journal" to be "a diary or daily record; an account of daily transactions or events," and says that "journal" is a doublet of "diurnal," from the Latin *diurnalis*. The journal which the Constitution requires

each house of the legislature to keep is, therefore, a daily record. It is common knowledge which this court can take cognizance of that the proceedings of each house of the legislature are printed daily in pamphlet form, and published and distributed. In the record of the proceedings of the second day of the session of 1913 we find a resolution, unanimously adopted, providing "that the state printer be directed to furnish for the use of the senate two thousand (2,000) copies of each day's journal; that each senator shall be entitled to have mailed out, as he may direct, fifty (50) copies of each day's journal; and that the sergeant at arms shall see that said journals are mailed in accordance with lists to be furnished by the several senators."

These are corrected daily under the orders of business "Reading the Journal" and "Correcting and Approving the Journal," and are published and distributed to the people of the state in conformity with the purpose of the constitutional provision requiring them to be published.

The law with regard to binding the journals in one volume is found in section 657, General Statutes of Florida, and further provides for them to be indexed by the attorney general, and that the indexes, with the journals, shall be delivered to the contractor who shall print and bind the same without delay. Here is a statutory recognition of the daily printed pamphlets as "the journals," and a provision for a reprint of them by a contractor. There is no provision for any official to examine and certify to the correctness of the work of the contractor, but, when he completes the work of printing and binding the copies made by him of the original journals, he is to deliver 250 of them to the secretary of state, who is to furnish certain officials with a copy, "and retain in his office the remaining copies for gratuitous distribution to anyone who may desire a copy and will deposit or forward a sufficient amount to prepay postage thereon." These bound volumes, which purport to be a reprint of the original journals of each day, are not examined or corrected by the members of the respective houses, and errors could readily be made in the printing and compilation which they would have no opportunity to detect, or correct if detected. It would be dangerous, indeed, to give absolute verity to the product of the work of a contractor who was not an officer of the state, and whose mistakes could destroy the work of the legislature constitutionally performed. This does not apply to the daily pamphlets, which are placed on the desk of every member of the legislature, and ample opportunity af-

forded to correct all errors, typographical or otherwise; the corrections appearing in the journal of the succeeding legislative day.

In the case of *State ex rel. Turner v. Hocker*, 36 Fla. 358, 18 So. 767, Mr. Justice Taylor who delivered the opinion of the court said: "It is well settled that the journals kept by the two houses of the legislature of their proceedings are public records of which the courts will take judicial notice."

In the case of *Bloxham v. Florida C. & P. R. Co.* 35 Fla. 625, 17 So. 902, the court, in order to satisfy itself about a matter not in the record, examined the articles of incorporation of the Florida Central & Northern Railroad Company which were on file in the office of the secretary of state, and used the information thus derived in reaching a conclusion on certain aspects of the case.

In the case of *Wade v. Atlantic Lumber Co.* supra, this court took judicial notice of the journals of the two houses of the legislature. In that case an act granting lands to the Atlantic, Suwannee River, & Gulf Railroad Company was attacked on demurrer to a bill, one of the grounds being that the title of the act was insufficient to embrace the land grant. This court resorted to the journals of the senate and house, and followed the bill in its course through those bodies and in the joint committee on enrolled bills, and found that the title of the bill as introduced and voted on was different from and more restricted than the title as published in the printed acts as chapter 4267, Laws of Florida. Acts of 1893, and treated the act as having the more restrictive title which the court took judicial notice of from its examination of the journals.

In these cases the court acted in accordance with a well-established rule that those things of which a court may take judicial notice require no proof. Thus, in *State v. Main*, 69 Conn. 123, 36 L.R.A. 623, 61 Am. St. Rep. 30, 37 Atl. 80, the court said: "Judicial notice takes the place of proof, and is of equal force. As a means of establishing facts it is, therefore, superior to evidence. In its appropriate field it displaces evidence, since, as it stands for proof, it fulfils the object which evidence is designed to fulfil, and makes evidence unnecessary. . . . If, in regard to any subject of judicial notice, the court should permit documents to be referred to or testimony introduced, it would not be in any proper sense the admission of evidence, but simply a resort to a convenient means of refreshing the memory, or making the prior aware of that of which everybody ought to be aware. *State v. Morris*, 47 Conn. 179, 180."

We take the following from volume 15, R. C. L. pp. 1060, 1061: "Judicial knowl-

edge in any case is by no means determined or limited by the knowledge of the particular judge or court. Where a judge is personally conversant with a fact which is judicially cognizable, proof thereof is, of course, not required. But judicial notice is taken only of those matters which are 'commonly' known. And therefore individual and extrajudicial knowledge on the part of a judge will not dispense with proof of facts not judicially cognizable, and cannot be resorted to for the purpose of supplementing the record. On the other hand, it is not essential that matters of judicial cognizance be actually known to the judge. If they are proper subjects of judicial knowledge the judge may inform himself in any way which may seem best to his discretion, and act accordingly."

On the question now under consideration, —the right of this court to take judicial notice of the legislative journals,—Chamberlayne in his work on the Modern Law of Evidence, vol. 1, § 661, says: "Journals of a branch of the legislature are public records. 'They prove their own authenticity.' Being kept in virtue of a provision of law judicially known to the judge, their existence and function in legislation are also judicially known. Judges of a majority of American states hold that they may resort to these journals for the purpose of ascertaining what is the law which they are charged with the responsibility of knowing at their peril, when a statute went into effect whether it was properly enacted, and facts of similar nature. In so doing they judicially notice facts brought to their attention on such inspection, and give effect to them, even to the extent of controlling the official certificate of enactment."

Judge Cooley announces the same doctrine in his work on Constitutional Limitations and as a justice of the supreme court of Michigan. In the seventh edition, p. 193, of the former he says: "Each house keeps a journal of its proceedings, which is a public record, and of which the courts are at liberty to take judicial notice."

In the case of *People ex rel. Drake v. Mahaney*, 13 Mich. 481, he says: "As the courts are bound judicially to take notice of what the law is, we have no doubt it is our right, as well as our duty, to take notice not only of the printed statute books, but also of the journals of the two houses, to enable us to determine whether all the constitutional requisites to the validity of a statute have been complied with."

The supreme court of Wisconsin says: "The courts will take judicial notice of the statute laws of the state, and to this end they will take like notice of the contents of the journals of the two houses of the

legislature far enough to determine whether an act published as a law was actually passed by the respective houses in accordance with constitutional requirements." *McDonald v. State*, 80 Wis. 407, 50 N. W. 185.

The case of *Worthen v. Badgett*, 32 Ark. 496, was submitted on demurrer to a bill to which was attached as an exhibit a transcript from a house journal which failed to show that the bill passed, but the court went beyond the proof thus submitted, and made "a personal examination of the house journal," which had not been offered in evidence, and decided the case upon what it found from its personal inspection. In all the states where the rule exists that the validity of a law may be impeached by the journals, and some which hold the contrary rule, the courts take judicial notice of the journals. See *Stein v. Leeper*, 78 Atl. 517; *Worthen v. Badgett*, 32 Ark. 496; *Evansville v. State*, 118 Ind. 426, 4 L.R.A. 93, 21 N. E. 267; *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571; *Barnard v. Gall*, 43 La. Ann. 959, 10 So. 6; *Legg v. Annapolis*, 42 Md. 203; *People ex rel. Drake v. Mahaney*, 13 Mich. 481; *State ex rel. Douglas County v. Frank*, 61 Neb. 679, 85 N. W. 956; *Re Opinion of Justices*, 52 N. H. 622; *People ex rel. Scott v. Chenango*, 8 N. Y. 317; *Miller v. State*, 3 Ohio St. 475; *Portland v. Yick*, 44 Or. 439, 102 Am. St. Rep. 633, 75 Pac. 706; *State ex rel. Atty. Gen. v. Platt*, 2 S. C. 150, 16 Am. Rep. 647; *Williams v. State*, 6 Lea, 549; *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 670; *Re Welman*, 20 Vt. 653, Fed. Cas. No. 17,407; *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640; *McDonald v. State*, 80 Wis. 407, 50 N. W. 185; *State ex rel. Sullivan v. Schnitger*, 16 Wyo. 479, 95 Pac. 698; *Blake v. National Banks*, 23 Wall. 307, 23 L. ed. 119; *Gardner v. Collector (Gardner v. Barney)* 6 Wall. 499, 18 L. ed. 890. This rule, which is in accord with sound reason, is supported by the great weight of the authorities.

In determining the validity of a law found upon the statute books, where it is attacked upon the ground that the constitutional requirements were not observed in its passage through the legislature, the courts should not exclude from their knowledge matters of general and common knowledge which they are presumed to share with the public generally. This does not mean knowledge which they individually possess by reason of personal investigation and research, but matters of common notoriety which, because of such notoriety, they share or should share in common with the public. It has been well said, however, that "This power is to be exercised by courts with caution. Care must

be taken that the requisite notoriety exists." *Brown v. Piper*, 91 U. S. 37, 23 L. ed. 200

The courts of the land, which are charged with the great responsibility of determining matters upon which the life and death of a human being may depend, can well be trusted to exercise the proper caution in determining what matters they will take judicial notice of. It is upon the wisdom and discretion of the judges of our courts that the doctrine of judicial notice must rest.

In this state the Constitution requires each house of the legislature to "keep a journal of its proceedings which shall be published," and it is a matter of common and general knowledge that the senate and house of representatives cause the record of their proceedings to be published daily in pamphlet form and distributed generally throughout the state, and, where the validity of a statute is attacked on the ground that the constitutional requirements in its passage by the legislature were not obeyed, it is our duty to take judicial notice of these journals, to satisfy ourselves about what actually transpired in the passage of the act. This we have done, and as the daily printed journal of June 4, 1913, kept by the senate, which we have before us, and of which the court takes judicial notice, shows that the yeas and nays were entered on the final passage by the senate of chapter 6500 was entered on the senate journal immediately before an entry stating that the bill passed the senate, such vote being 20 to 8 for the passage of the bill, the mere fact that the bound copies of the journals, printed and bound by a contractor under the statute and filed with the secretary of state, do not show such yeas and nays in immediate connection with the entry that the bill here considered passed the senate, but such vote does, by mistake or otherwise, appear on the same page in connection with the final passage by the senate of another bill, does not overcome the probative force of the daily journal kept by the senate under the Constitution, of which daily printed journal the court takes judicial notice without proof.

It appearing from the daily journal of the senate of June 4, 1913, that the vote on the final passage of the bill was taken by yeas and nays, was entered on the journal of the senate, and passed by a vote of 20 yeas to 8 nays, the objection to the law on this ground is not sustained.

Before leaving this branch of the case we call the attention of the legislature to the fact that there is no provision in our laws for filing the daily printed journals of the respective branches of the legislature in the office of the secretary of state or elsewhere, where they may be at all times available to the courts.

The next ground of attack on the bill is L.R.A.1918C.

that it is in violation of § 30, art. 3, of the Constitution, which provides that "laws making appropriations for salaries of public officers and other current expenses of the state shall contain provisions on no other subject."

It is contended by the appellee that because the bill creating the State Tax Commission contained a section making an appropriation for the payment of the salaries of the Commissioners, it is in contravention of the Constitution. Such a construction eliminates the second clause of the paragraph, "and other current expenses of the state," and extends the restriction to any law containing an appropriation for the salary of an official. This provision of the Constitution must be considered in its entirety, and when so construed it becomes apparent that it refers to what is known as the General Appropriation Bill. No more apt words than "salaries of public officers and other current expenses of the state" could be used to describe the law in which such appropriations are made at each legislative session. This, however, will not prevent a law, other than the General Appropriation Bill, the purpose of which is to provide for salaries and other current expenses of the state, from being obnoxious to the provision of the Constitution under consideration. In the advisory opinion of Mr. Justice Westcott in 14 Fla. 283, the governor asked the opinion of the judges of the supreme court "upon the proper construction to be put upon the aforesaid § 3 of the General Appropriation Bill," and in answering the inquiry Mr. Justice Westcott says: "The third section of the 'General Appropriation Bill which you call our attention to,' etc. Thus both the executive and judicial departments of the government stand sponsors for calling laws described in § 30, art. 3, 'General Appropriation Bills.'" As the law under consideration in the first advisory opinion was one "providing for salaries of public officers and other current expense of the state government," called by the governor and the supreme court the "General Appropriation Bill," the decision applies exclusively to such laws.

In the second Advisory Opinion of the Justices, 14 Fla. 285, § 2, art. 11, of the Constitution, which provides for raising revenues for the government, and § 30, art. 5, in relation to "laws making appropriations for salaries of public officers and other current expenses of the state," were under consideration, and Mr. Justice Westcott said: "It would seem to follow from this that the spirit, if not the letter, of the Constitution, renders the junction of a law making appropriations for salaries and other current ex-

penes with any other subject obnoxious to the charge of a violation of its provisions."

Construing these opinions together, it is apparent that it was the General Appropriation Bill that he referred to when he said there must not be a junction therein with any other subject and was but a reiteration of the law announced in the first advisory opinion as to what should not be contained in the General Appropriation Bill. Wherever in this advisory opinion the words, "law making appropriations for salaries of public officers and other current expenses of the state," are used, they must be taken to mean the General Appropriation Bill, because, in the first advisory opinion, he used that term to describe such a law as referred to in § 30, art. 3, of the Constitution. As if apprehensive lest, in a case such as that now under consideration, isolated sentences from their opinion might be cited for a purpose other than the court intended, it added with prophetic vision this clarifying paragraph: "It would not, however, result from this that a specific provision for the payment of expenses, necessary, proper, incidental, or growing out of a law itself, or which may be deemed useful in carrying it or its subject into execution, would not be valid, because such a provision, being matter properly connected with the subject of the law as expressed in the title, would not be prohibited by the Constitution. For instance, the provisions for the payment of the persons employed, and the expenses of all kinds incurred in the assessment and collection of the revenue, are matters properly connected with such assessment and collection, and cannot be disconnected therefrom."

In the case of *State v. Southern Land & Timber Co.* 45 Fla. 374, 33 So. 999, a distinction is drawn between general appropriation laws, and a law making an appropriation. In that case an attack was made on the tax levy for state board of health purposes, and this court said: "It is contended that, inasmuch as there is no appropriation for board of health purposes in the General Appropriation Law of 1897, there could be no levy for that purpose, as such a levy would violate §§ 3 and 4, art. 9, of the Constitution. The legislature seems to have regarded § 784, Revised Statutes, as being, *ex proprio vigore*, equivalent to an appropriation law, as we can discover no appropriation in the General Appropriation Laws for the board of health purposes. This is the practical construction placed upon the section by the administrative officers of the state, and we think the language of the section warrents this construction, especially so taken in connection with § 1, art. 15, of the Constitution. No error of law appears in the rate of state taxation for 1897." L.R.A.1918C.

Section 784, Revised Statutes, which Mr. Justice Hocker, who delivered the opinion of the court, said was equivalent to an appropriation law, is § 20 of the State Board of Health Act, passed at the extra session of the legislature, 1889 (Laws 1889, Ex. Sess. chap. 3839), which provides: There shall be levied and collected annually upon the assessable property of the state a tax of one half mill to create a special fund for the maintenance and support of the state board of health other than for maintenance, quarantine or maritime sanitation."

There seems to be no reason why an act, the general purpose of which is not to make appropriations for salaries of public officials and for current expenses of the state, may not, as was said by Judge Westcott, make provision for the payment of expenses necessary, proper, incidental, or growing out of the law itself, including payment of the persons employed; while experience teaches the wisdom of the constitutional inhibition against including in a general appropriation bill provisions on any other subject. The purpose of such a provision is generally conceded to be to prevent including in bills appropriating money to carry on the government of the state measures foreign to that purpose, and, by taking advantage of the necessities of the state, force the legislature to adopt them, or stop the entire machinery of the government for want of funds to carry it on.

The constitutions of most, if not all, the states have provisions similar to § 30, art. 3, of our Constitution, but we have been able to find a decision from only one state, Oregon, whose constitutional provision is identical with ours. Other decisions relating to constitutional provisions differing somewhat from ours have been cited which, though interesting, are not sufficiently in point to be guiding.

Section 7, art. 9, of the Oregon Constitution provides: "Laws making appropriations for the salaries of public officers and other current expenses of the state, shall contain provisions upon no other subject."

That is the exact language of the provision of our Constitution, and an attack was made on the Workmen's Compensation Act (Or. Laws 1913, p. 188) on the ground that it was in contravention of this provision of the Oregon Constitution. So much was said by the court that is applicable to the instant case, both as to the law and legislative practice, that we quote at length from the opinion: "The evident purpose of this provision was to prevent matters foreign to the general purpose of appropriation bills being attached to them as riders, thereby taking advantage of the necessity of the state for money to defray its current expenses and to pay its officers, to pass

measures that perhaps would otherwise have been defeated. The instant act is not primarily an act to appropriate money to pay salaries or other current expenses. It is not an appropriation bill in the sense that bills providing for general current expenses or salaries of the constitutional offices of the state are such. We have been cited to no case, in this state or elsewhere, where a provision similar to the one at bar has been construed in accordance with counsel's contention, and in this state contemporary legislative construction has been the other way. Thus, at the first regular session of the legislature held after the adoption of the Constitution we find an act, entitled 'An Act for the Appointment of a Librarian and Defining His Duties' (Laws 1860, p. 64), was passed, creating the office of the state librarian, defining his duties, prescribing the hours during which he should keep the library open, and appropriating \$400 annually for the purchase of books and \$150 annually for his salary. The president of the senate, the speaker of the house, and many members of both houses had been members of the constitutional convention. From that time to the present it is safe to say that there has not been a session of the legislature where similar acts have not been passed. Some of them are: The Food and Dairy Commission Act; the Immigration Commission Act, passed in 1885; the Fish Commission Act, in 1887; the State Board of Horticulture Act, in 1895; the Bureau of Labor Statistics Act, in 1903; the act creating the office of state engineer, and providing a water code, in 1906; the Bank Examiner Act, the Railroad Commission Act, and the Sheep Inspector Act, in 1907; the act creating the office of insurance commissioner and a fund known as the 'insurance fund,' and the act creating our present water board, in 1909; the act creating the state forestry board, and the act providing for the construction of a branch insane asylum in Eastern Oregon, in 1911; the act providing for a state industrial school for girls; an act creating an Industrial Welfare Commission; an act creating the State Highway Commission; and an act creating the State Live Stock Sanitary Board, in 1913. Most of these acts fixed the salary or compensation of the officers designated to carry out their purposes, and appropriated the money necessary to pay such salaries and to accomplish the general objects for which the law was enacted. An examination of the late session laws of other states having identical or similar provisions in their constitutions shows that the same legislative practice has been pursued in these jurisdictions, so that it may be said practically the uniform contemporaneous construction of this section

of the Constitution is that it does not prohibit the legislature from passing an act designed to effect a particular purpose, and in the same act to provide the funds necessary to accomplish that purpose." *Evanhoff v. State Industrial Acci. Commission*, 78 Or. 503, 154 Pac. 106.

Judged by a long line of enactments by the legislature, that co-ordinate branch of the government has placed on § 30, art. 3, of our Constitution a construction in accord with Mr. Justice Westcott's opinion, that a specific provision for the payment of expenses necessary, proper, incidental, or growing out of a law itself, including provisions for the payment of persons employed, is not prohibited by the Constitution; for ever since it went into effect in 1887 laws have been passed creating offices, prescribing the powers and duties of the incumbents, and making appropriations for their salaries. In both the special and the regular sessions of the legislature of 1889 there were several members who were delegates to the constitutional convention that ordained § 30, art. 3. At the former the state board of health was created by an act which enumerated its provisions, defined its duties, and provided for a state health officer who should receive a salary of \$3,000 "out of funds hereinafter provided, together with his actual traveling expenses." The regular session of 1889 created the office of state chemist and inspector of fertilizers, and provided for their salaries. Since then the legislature has, from time to time, given its sanction to such acts, among which are the following: Providing for the office of inspector of feeding stuffs and fertilizers; for bank examiners; state geologist; inspectors for chemical division of the agricultural department; inspector of nursery stock; rural school inspectors; state labor inspector; hotel commission; shellfish commission; state highway commission; state board of examiners of teachers; live stock sanitary board; and state marketing commissioners. The last three were enacted in 1917. All of these laws make appropriations for salaries and expenses, and some have never been provided for in the general appropriation bill, or other special law. None, however, include "other current expenses of the state."

The construction placed by the legislature on this provision of the Constitution is entitled to weight with the courts, when there is doubt as to the constitutionality of a law. This does not mean, however, that if the legislature clearly violates a constitutional provision, the frequent repetition of the wrong will create a right; but, as was said by Mr. Justice Johnson in *Ogden v. Saunders*, 12 Wheat. 213, text 290, 6 L.

ed. 606, 632: "It proceeds upon the presumption that the contemporaries of the Constitution have claims to our deference, on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the Constitution, and of the sense put upon it by the people, when it was adopted by them."

Judge Cooley in his work on Constitutional Limitations, 7th ed. p. 102, says: "But where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist. Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the Constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention. And where this has been given by officers in the discharge of their official duty, and rights have accrued in reliance upon it, which would be devastated by a decision that the construction was erroneous, the argument *ab inconvenienti* is sometimes allowed to have very great weight."

In *Bloxham v. Consumers' Electric Light & Street R. Co.* 36 Fla. 519, 29 L.R.A. 507, 51 Am. St. Rep. 44, 18 So. 444, it was held that "a practical construction of a statute by a governmental department, while not of such high authority as a judicial interpretation of the act, is, when not in conflict with the Constitution or the plain intent of the act, of great persuasive force and efficacy."

All the acts of the legislature which we have mentioned herein are of the same general character as that under consideration. They provide for the performance of certain duties by officers or other persons, and make appropriations for their salaries and expenses, and they have been recognized by the executive branch, by making appointments thereunder, and paying the salaries and expenses provided for, in most instances without any provision being made therefor in the general appropriation bill. Thus, to guide us to some extent, we have the interpretation put upon such laws by the legislative and executive branches of the government. As was said, however, in the case of *Evanhoff v. State Industrial Acl. Commission*, *supra*: "While such a construction will not be permitted to overturn and render nugatory a clear provision of the Constitution, in cases where the meaning of a L.R.A.1918C.

clause in the instrument is capable of two interpretations, it is entitled to great weight."

In the case under consideration we have no doubt about the validity of this act, and the construction placed on it by the legislative and executive departments of the government confirms rather than influences our conclusion.

We are strongly of the opinion that this act is not in contravention of § 30, art. 3, of the Constitution, because it is not a law "making appropriations for the salaries of public officers and other current expenses of the state," but is one inaugurating a new governmental policy in the assessment of property for taxes, and is a comprehensive scheme embracing the entire state and affecting the taxation of all property in the state. The matter of appropriations for carrying the law into effect is but a small part of the great purpose of the act.

The appellee next contends that because the act makes a continuing appropriation it is in contravention of § 2, art. 9, of the Constitution which says that "the legislature shall provide for raising revenue sufficient to defray the expenses of the state for each fiscal year."

We fail to find in this provision of the Constitution any inhibition on the power of the legislature to make continuing appropriations. Most, if not all, the laws heretofore mentioned contained continuing appropriations, and the power of the legislature to do this having been sustained in the case of *State v. Southern Land & Timber Co.* 45 Fla. 374, 33 So. 999, it disposes of this contention.

The judgment is reversed.

Taylor, Whitfield, and Ellis, JJ., and Wills, Circuit Judge, concur. West, J., disqualified.

Ellis, J., concurring:

I think that the word "journal," as used in § 12 of article 3 of the Constitution, which requires each house of the legislature to keep a journal of its own proceedings and to publish the same, and as used in § 17 of the same article, which requires the vote on the final passage of every bill or joint resolution to be taken by yeas and nays and entered on the journal of each house, means the record of the proceedings of each house as it is daily made and published in pamphlet form and placed each morning upon the desks of the members for correction and approval.

The bound copies of the journals which the contractor for the public printing is required, under §§ 657 and 660 of the General Statutes, to print and bind and deliver to

the secretary of state for distribution to the officials named therein, are not verified copies, nor can they be said to be reprints in the sense that they are new impressions from the same molds or forms upon which the journals or daily pamphlets were printed.

The burden of showing that an act of the legislature which has been duly signed by the presiding officer of each house and by the secretary of the senate and the clerk of the house of representatives and become a law with or without the approval of the governor, as shown by the record of official acts of the legislative department, as the same are kept by the secretary of state as required by § 21 of article 4 of the Constitution, is upon the person who asserts that the act did not pass in the manner prescribed by the Constitution.

Such has been the holding of this court since the case of *State ex rel. Markens v. Brown*, 20 Fla. 407, was decided, in which Chief Justice Randall said: "If the journals show conclusively that any material portion of a bill as passed was omitted in the enrolling, so that it may be considered that the act as approved was not passed by the legislature, and does not express the legislative will, the act as approved, at least to the extent that it is affected by the omission, must be held invalid. This is a rule now well settled by the American courts. The Constitution [1868] requires the keeping of journals of their proceedings by the respective houses of the legislature; and these journals are received as evidence of such proceedings. [Italics mine.] When an act is duly approved and published, it

is prima facie a law; but if the legislative journals show that instead of being passed it was defeated, or that it is not the same that was passed, it is not a law."

This having been the law of the state for more than thirty years, and having decided that the daily printed pamphlets showing the legislative proceedings of each house constitute the journals of that house, the burden was upon the appellee to show by the journal of one of the houses that the act (Laws 1913, chap. 8500) did not pass in the manner and according to the requirements prescribed by the Constitution, in order to sustain the first point made by him in his attack upon the validity of the act.

This burden was not carried by the appellee. He sought by the introduction of the bound copies of the journal of the senate of the session of 1913 to throw the burden upon appellants of showing by the journal of the senate that the bill in question did pass. Even if the bound journals may be considered as secondary evidence of the daily proceedings of each house, a proposition which I am not prepared to accept as law, there was no effort to show that the "senate journal" could not be produced, and therefore no ground for the introduction of secondary evidence was laid.

The appellee having therefore failed to show by the "journal" of either house of the legislature of the session of 1913 that the act did not pass, the prima facie validity of the act was not overcome.

I also concur in the conclusion reached as to the second point.

OKLAHOMA SUPREME COURT.

CHICAGO, ROCK ISLAND, & PACIFIC
RAILWAY COMPANY et al., Appts.,
v.

STATE OF OKLAHOMA et al.

'(— Okla. —, P.U.R.1918A, 587, 168 Pac.
230.)

Carriers — depots.

1. By § 26, art. 9, Constitution of this state, the duty is expressly imposed upon every railroad company to provide and maintain adequate, comfortable, and clean depot buildings at its several stations for the accommodation of passengers; said depot buildings to be kept well lighted and

Headnotes by HARDY, J.

Note. — As to power of Public Service Commission to prescribe the character of materials for depots, see annotation following this case, post, 495.
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warmed for the comfort and accommodation of the traveling public.

For other cases, see *Carriers*, II. 1, in Dig.
1-52 N. 8.

Same — power of Corporation Commission.

2. By § 18, art. 9, Constitution, the Corporation Commission is empowered and it is made its duty to require every railroad company to perform the duty imposed upon it by § 26 of said article; the only limitation upon the action of the Commission in this respect being that it shall be reasonable and just.

For other cases, see *Carriers*, IV. d, in Dig.
1-52 N. 8.

Public Service Commission — power to prescribe material for depot.

3. The Corporation Commission may, where such order would be reasonable and just, prescribe the kind of material to be used in the construction of a depot to be erected by a railway company.

For other cases, see *Carriers*, IV. d, in Dig.
1-52 N. 8.

Same — reasonableness of order.

4. The order in this case required the railway company to erect a depot at Walters to be constructed of brick. Held, under the circumstances of the case, that the order was reasonable and just, and that said order did not deprive the railway company of its property without due process of law.

For other cases, see *Constitutional Law*, II, b, 4, c, in *Dig. 1-52 N. S.*

(October 9, 1917.)

A PPEAL by defendants from an order of the Corporation Commission prescribing the kind of material to be used in the construction of a depot by the defendant railway. Affirmed.

The facts are stated in the opinion.

Messrs. John E. DuMars, C. O. Blake, R. J. Roberts, and W. H. Moore, for appellants:

The order of the Corporation Commission is not supported by sufficient evidence, is contrary to law, and is unreasonable, burdensome, and unjust.

Great Northern R. Co. v. Minnesota, 238 U. S. 340, 59 L. ed. 1337, P.U.R.1915D, 701, 35 Sup. Ct. Rep. 753; St. Louis & S. F. R. Co. v. Sutton, 29 Okla. 553, 119 Pac. 423; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 91, 57 L. ed. 431, 433, 33 Sup. Ct. Rep. 185; Florida East Coast R. Co. v. United States, 234 U. S. 167, 58 L. ed. 1267, 34 Sup. Ct. Rep. 867.

The order of the Commission is in violation of the 5th and 14th Amendments to the Constitution of the United States and § 7 of article 2, Constitution of Oklahoma.

Great Northern R. Co. v. Minnesota, 238 U. S. 340, 346, 59 L. ed. 1337, 1339, P.U.R. 1915D, 701, 35 Sup. Ct. Rep. 753; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Chicago, R. I. & P. R. Co. v. State, 24 Okla. 370, 24 L.R.A.(N.S.) 393, 103 Pac. 617; St. Louis, I. M. & S. R. Co. v. State, 28 Okla. 372, 111 Pac. 396, 114 Pac. 1096; Mississippi R. Commission v. Mobile & O. R. Co. 244 U. S. 388, 61 L. ed. 1216, 37 Sup. Ct. Rep. 602; Cooper v. Chicago, R. I. & P. R. Co. 31 Okla. 282, 121 Pac. 654.

Messrs. S. P. Freeling, Attorney General, John B. Harrison, Assistant Attorney General, Paul A. Walker, and Amil H. Jann, for appellees:

The Corporation Commission has jurisdiction. L.R.A.1918C.

tion to prescribe the character of material for depot buildings.

St. Louis & S. F. R. Co. v. Sutton, 29 Okla. 553, 119 Pac. 423; Missouri, K. & T. R. Co. v. State, 38 Okla. 401, 133 Pac. 35.

The Commission's order is presumed to be prima facie just, reasonable, and correct.

Kansas City, M. & O. R. Co. v. State, 25 Okla. 715, 107 Pac. 912; St. Louis & S. F. R. Co. v. Travelers Corp. 47 Okla. 374, 148 Pac. 166.

The order does not deprive the railway company of its property without due process of law or without just compensation, and is not in violation of any provisions of the Constitution of the United States or of the state of Oklahoma.

8 Cyc. 1116; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 275, 54 L. ed. 472, 478, 30 Sup. Ct. Rep. 330; New York & N. E. R. Co. v. Bristol, 151 U. S. 567, 38 L. ed. 273, 14 Sup. Ct. Rep. 437; State ex rel. Nebraska State R. Commission v. Missouri P. R. Co. 100 Neb. 700, P.U.R.1917C, 597, 161 N. W. 270.

Hardy, J., delivered the opinion of the court:

This is an appeal from order No. 1171 of the Corporation Commission prescribing the kind of material to be used in the construction of the depot at Walters, by the Chicago, Rock Island, & Pacific Railway Company. The depot at that place was destroyed by fire on or about April 9, 1916, since which time a box car has been used as a substitute for a depot or station building. After the fire, plans and specifications were drawn by the railway company for the construction of a depot building, which plans were satisfactory to all parties concerned except for the fact that the material prescribed was wood, whereas the citizens of Walters and the Corporation Commission were of the opinion that brick should be used in lieu of wood. Upon the failure of the railway company to proceed with the construction of the depot, complaint was filed before the Corporation Commission, and order No. 1171 was issued, from which the railway company prosecutes this appeal.

It is first urged that the order is not supported by sufficient evidence, is contrary to law, and is unreasonable, burdensome, and unjust. Under this proposition, it is argued that the Commission was without power to prescribe the material of which said depot building should be constructed; that the order is not supported by the evidence, and that the property and moneys of the railway company are its private property; and

that the company was better qualified than any other person to judge of its immediate demands and necessities, and that the order appealed from was an invasion of this right. The private right of ownership of railway property exists in connection with the right of the public to regulate the use thereof, provided such regulation is not exercised in an arbitrary and unreasonable way so as to cause it to be an infringement on the right of ownership under the guise of regulation. *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; *Missouri P. R. Co. v. Kansas*, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; *State ex rel. Nebraska State R. Commission v. Missouri P. R. Co.* 100 Neb. 700, P.U.R.1917C, 597, 161 N. W. 270.

By § 26 of article 9 of the Constitution of this state, the duty is expressly enjoined upon every railway company to provide and maintain adequate, comfortable, and clean depots and depot buildings at its several stations for the accommodation of passengers, and by § 18, art. 9, the Corporation Commission is empowered and it is made the duty of the Commission to require every railroad company to perform such duty, and it has been held that this delegation of power is sufficiently broad to confer upon the Corporation Commission authority to prescribe the materials to be used in a depot building ordered constructed on the line of any railroad pursuant to said section of the Constitution. *St. Louis & S. F. R. Co. v. Sutton*, 29 Okla. 553, 119 Pac. 423. On rehearing this question was re-examined and the doctrine reaffirmed, and we are still convinced that the holding in that case upon this proposition is correct. *Missouri, K. & T. R. Co. v. State*, 38 Okla. 401, 133 Pac. 35.

As to whether it is reasonably necessary to construct a building of brick or other material in order for it to be adequate and meet the needs of the public, as required by said § 26, art. 9, is a question of fact to be determined, in the first instance, by the Corporation Commission. *St. Louis & S. F. R. Co. v. Sutton*, *supra*. And, upon appeal from an order of this character, the Constitution declares that such orders shall be *prima facie* just, reasonable, and correct, and the supreme court in reviewing such an order will ascribe to the findings of the Commission the strength due to the judgment of a tribunal appointed by law and informed by experience. *Kansas City, M. & O. R. L.R.A.1918C*.

Co. v. State, 25 Okla. 715, 107 Pac. 912; *St. Louis & S. F. R. Co. v. Travelers' Corp.* 47 Okla. 374, 148 Pac. 166; *United States Exp. Co. v. State*, 47 Okla. 656, 150 Pac. 178; *Guthrie Gas, Light, Fuel & Improv. Co. v. Board of Education*, — Okla. —, L.R.A.—, —, P.U.R.1917E, 200, 166 Pac. 128. In determining whether a depot building required to be erected by an order of the Commission is adequate or reasonable, such fact must be determined from a consideration of the size of the place where said building is to be erected, the cost thereof, the extent of the demand for transportation, and all the other facts which would have a bearing upon the question of convenience and cost. The question as to what may be deemed adequate in any given case is not capable of exact definition. It is a relative expression and must be considered as calling for such facilities as might be fairly demanded from a consideration of the things enumerated. *St. Louis, I. M. & S. R. Co. v. State*, 28 Okla. 372, 111 Pac. 396, 114 Pac. 1096; *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121.

The evidence shows that Walters is the county seat and largest town in Cotton county; that the Chicago, Rock Island, & Pacific Railway Company has the only line of railroad running through this city or this section of the country; that the territory served by and tributary to Walters, and the line of railroad passing through said town is extensive; that the town is growing, prosperous, and has indications of being much larger as the country continues to develop; that business at the time of the hearing before the Commission was largely augmented due to prospecting for oil, and that development of oil and gas fields was likely to bring increased business to the railway company; that the receipts for passenger business averaged more than \$1,000 per month, and freight revenue ran from \$5,600 to \$16,000 per month; that, exclusive of express business, the average revenues from freight and passenger business at this station are probably around \$12,000 per month; that the depot site is situated within a short distance of the fire limits; that all buildings now being constructed for business and school purposes are brick or other noncombustible material, and that 90 per cent of the business houses already constructed are of such material; that there are oil tanks owned by leasees of the railway company's right of way in close proximity to the station site from which there is danger of fire. The cost of the building as proposed by the railway

company would be about \$5,000, while to construct it of brick as required by the order would be about \$10,000. The question of removing or destroying a building already erected that could, by additional expense, be made adequate, and replacing it with one of different material at an additional expenditure, is not involved in this case. Considering the income from the combined passenger and freight business derived from the station, together with its present needs and prospective growth, we cannot say that the order of the Commission is unreasonable, and that the presumption pertaining thereto by reason of the Constitution has been overthrown. The appellant has not the arbitrary right to name the material of which it will build its station, when it appears that it would be of more benefit to the public to construct it of other material, and that at the same time the appellant's interests would be conserved by a station building erected of fireproof material, which would insure a more permanent improvement maintained at less expense. The authority of the Commission to make the order is no longer an open question, and the only question which is open for our consideration is whether under the record the order appealed from was unreasonable. The burden to show this was upon the appellant, and it has not made it to so appear. *St. Louis & S. F. R. Co. v. Sutton*, supra.

Neither does said order deprive appellant of its property without due process of law. The rule repeatedly announced by the Supreme Court of the United States is that though railway corporations are private cor-

porations, as distinguished from those for municipal and governmental purposes, their uses are public, and they are therefore subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression, and that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts or the deprivation of property without due process or of the equal protection of the laws, by the state, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals, and that such corporations are not deprived of property without due process of law by reasonable regulations of their business and the requirement of facilities to be furnished to the public when such regulation or requirement is ascertained in a mode suited to the case, and is not merely arbitrary and capricious, and that this regulation by the state as to their state business may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, and that there is no incompatibility between the private ownership of such property and the right of regulation. *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; *Missouri P. R. Co. v. Kansas*, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330.

The order and judgment of the Commission is affirmed.

All the Justices concur.

Annotation—Power of Public Service Commission to prescribe the character of materials for depots.

Generally, as to power to compel establishment of stations or the stopping of trains at stations, see note to *Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission*, 17 L.R.A.(N.S.) 821. That note, so far as concerns the stopping of trains, is supplemented by the note to *St. Louis & S. F. R. Co. v. Langer*, 44 L.R.A.(N.S.) 478.

As to whether railroad companies may be required to establish or maintain a station that will not pay expenses, see note to *Chicago, R. I. & P. R. Co. v. Nebraska State R. Commission*, 26 L.R.A.(N.S.) 444.

As to delegation by legislature of power to regulate carriers, including the establishment of stations and stopping

trains at stations, see note to *State v. Atlantic Coast Line R. Co.* 32 L.R.A.(N.S.) at page 650.

For authorities passing upon power to compel railroads to change the location of stations, see note to *St. Louis, I. M. & S. R. Co. v. Bellamy*, L.R.A.1915D, 91.

As to railroad's right to change location of station, see note to *Louisville & Interurban R. Co. v. Callahan*, 34 L.R.A.(N.S.) 412.

As to power to require establishment of union station, see note to *Railroad Commission v. Alabama G. S. R. Co.* L.R.A.1915D, 98.

The few cases passing upon the subject of the present note are in accord with

the holding in *CHICAGO, R. I. & P. R. Co. v. STATE*, ante, 492, to the effect that a Public Service Commission has power to prescribe the kind of materials to be used in the construction of depots, subject to the limitation that the order is reasonable under the circumstances, and the further limitation, as held in one case, that such order shall not conflict with the local building regulations.

In *St. Louis & S. F. R. Co. v. Sutton* (1911) 29 *Okl.* 553, 119 *Pac.* 423, it was held that it is within the sound discretion of the Corporation Commission to prescribe in advance of the undertaking the material to be used in a depot building. In this case the plans and specifications and the size of the depot were agreed upon both by the Commission and the railroad company, the only controverted point being as to whether it should be built of wood as proposed by the railroad company, or by cement or brick as directed by the Commission. The order of the Commission was sustained.

In *Gulf, C. & S. F. R. Co. v. State* (1914) — *Tex. Civ. App.* —, 167 *S. W.* 192, it was held that the Railroad Commission, upon ordering the erection of a union depot, had power to require the railroad companies to report to it the kind and character of building they expected to erect, together with plans and specifications thereof, subject to the Commissions' approval, and that the court had power to issue a writ of mandamus to compel the railroad companies to file such plans and specifications with the Commission before undertaking to erect a depot.

In *State v. Great Northern R. Co.* (1916) 135 *Minn.* 19, *P.U.R.* 1917B, 413, 159 *N. W.* 1089, it was held that the Commission, upon ordering a new depot, might require that it be constructed of fireproof materials to comply with the fire ordinances of the municipality. The court said that it was within the power of the Commission "to determine whether the depots provided by the railroad company are suitable, and, if not, to require the construction and maintenance of depots which are suitable for their purposes. . . . We see nothing unreasonable in the requirement that the depot constructed shall be of some material that will comply with the fire ordinance of the village. The depot is quite in the center of the village. The council of the village has established fire limits, and has made the maintenance of frame buildings within such limits un-

lawful. This building is within the fire limits. Whether these facts alone would warrant an order for the construction of a new depot if the existing depot were otherwise adequate, we do not decide. They are sufficient to warrant an order that a depot to be constructed shall conform to the ordinances of the village."

In *State ex rel. Burr v. Atlantic Coast Line R. Co.* (1916) 71 *Fla.* 102, *P.U.R.* 1916C, 519, 70 *So.* 941, it was held that the Railroad Commission was not entitled to a writ of mandamus to compel a railroad company to comply with an order for the construction of a wooden building of designated dimensions, where the municipal ordinances required that buildings in the area of the proposed depot should be of fireproof materials. The court said: "It appears that, if the order as made be complied with, it will violate a municipal ordinance of St. Cloud forbidding the erection of a wooden building within an area including the point where the depot is required to be erected. The validity of the municipal ordinance cannot be determined in this proceeding to which the municipality is not a party; but, as it is apparent that the reasonableness of the order of the Railroad Commissioners here sought to be enforced is directly affected by the municipal ordinance, a governmental regulation, requiring buildings in the area including the depot site to be 'made of brick, stone, or other fireproof material,' such ordinance should have been considered by the Commissioners when the existence of the ordinance was called to their attention as alleged in the answer; for, if by virtue of the ordinance the order is unreasonable either because it requires the violation of a municipal ordinance, or because under the ordinance a much more expensive depot than that contemplated by the order is required to be built, the order should not be enforced by mandamus."

In *Gulf, C. & S. F. R. Co. v. State (Tex.)* supra, an order of the Railroad Commission directing the erection of a union depot was upheld over the objection, among others, that it was too vague and indefinite to be complied with in that it failed to state the character of building required, the court remarking that the Commission had a right to determine for itself the character and kind of depot, but that it was permissible for it to leave that matter of detail to the railroads.

A. L. R.

UNITED STATES SUPREME COURT.

HITCHMAN COAL & COKE COMPANY
v.

JOHN MITCHELL et al.

(245 U. S. 229, 62 L. ed. —, 38 Sup. Ct.
Rep. 65.)**Appearance — special — effect to give jurisdiction.**

1. Under the Federal practice, appearance to object to the jurisdiction of the court does not bind the defendant to submit to the jurisdiction on the overruling of the objection.

For other cases, see Appearance, in Dig. 1-52 N. S.

Injunction — effect — want of service.

2. An injunction is not binding upon parties who were not served with process, and who appeared only to object to the jurisdiction of the court.

For other cases, see Appearance, in Dig. 1-52 N. S.

Same — binding successors in office of original defendants.

3. An injunction is improperly issued in a suit commenced and carried to final decree in the trial court before the taking effect of the present equity rules, against persons who, pending suit, have been chosen to succeed some of the original defendants as officers of a labor organization, but who were not served with process and did not appear.

For other cases, see Injunction, III. in Dig. 1-52 N. S.

Evidence — declarations of associates in common enterprise.

4. When any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one in furtherance of the common object is the act of all, and is admissible as primary and original evidence against them.

For other cases, see Evidence, X. g, in Dig. 1-52 N. S.

Same — declarations of co-conspirators.

5. While, in order to render the declaration and conduct of third parties admissible as against a defendant, it is necessary to show by independent evidence that there was a combination between them, it is not necessary to show by independent evidence that the combination was criminal or otherwise

Note. — As to lawfulness of a strike or of threat to so act as to induce a strike when there is no dispute between the strikers and their own employers, see notes in 6 L.R.A.(N.S.) 1067, and L.R.A.1916C, 989.

As to controversy over open or closed shop as justification for means employed to aid a strike, see notes in 17 L.R.A.(N.S.) 162; 35 L.R.A.(N.S.) 787, and L.R.A.1917F, 760. L.R.A.1918C.

unlawful, but the element of illegality may be shown by the declarations themselves.

For other cases, see Evidence, X. g, in Dig. 1-52 N. S.

Same — acts and declarations of agent.

6. The declarations and conduct of an agent, within the scope and course of his agency, are admissible as original evidence against the principal.

For other cases, see Evidence, X. e, in Dig. 1-52 N. S.

Same — organizer of labor union.

7. The declarations and conduct of one employed by a labor union as an organizer, in the execution of a purpose to which its members have given consent, and in which some of them are actively co-operating, are admissible in evidence against them.

For other cases, see Evidence, X. e, in Dig. 1-52 N. S.

Master and servant — interference with employees dischargeable at will — right of action.

8. An employer who has made nonmembership in a labor union a condition of obtaining or continuing in employment is entitled to be protected in the enjoyment of the resulting status, although the employment is terminable by either party at any time.

For other cases, see Case, II. in Dig. 1-52 N. S.

Labor union — interference with relation between master and servant — justification.

9. Any grievance which employees may have against their employer will not justify or excuse the conduct of officers and agents of a labor union, of which such employees are not members, in instigating a strike.

For other cases, see Case, II. in Dig. 1-52 N. S.

Same — right to organize — limitation.

10. The right of workmen to organize for legitimate objects and to enlarge their organization by inviting other workmen to join is not so absolute that it may be exercised under any circumstances and without any qualification, but it must always be exercised with reasonable regard for the conflicting rights of others.

For other cases, see Labor Organizations, in Dig. 1-52 N. S.

Injunction — unlawful interference with relation of master and servant — right to protection.

11. The conduct of officers and members of a labor union in seeking by persuasion, accompanied with intimations of a possible reduction of wages and deceptive statements as to the attitude of the employer, to induce employees whose employment is conditioned on their nonmembership in any labor organization to agree to join the union and at the same time to continue in their employer's service, for the purpose, when the support of a sufficient number of employees should be obtained, of coercing the employer, through a strike, or the threat of one, to enter into a closed-shop agreement,—is un-

lawful, and acts done in pursuance of such purpose may be enjoined.

For other cases, see Injunction, I. d, in Dig. 1-52 N. S.

Same — absence of evidence to support order granted.

12. An injunction against picketing and acts of physical violence is improperly granted where there is no evidence to show that such conduct is threatened.

For other cases, see Injunction, III. in Dig. 1-52 N. S.

(Mr. Justice Brandeis, Mr. Justice Holmes, and Mr. Justice Clarke dissent.)

(December 10, 1917.)

PETITION for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit, to review a decree which reversed a decree of the District Court for the Northern District of West Virginia, granting an injunction against interference by defendants with the relations existing between plaintiff and its employees. Reversed.

The facts are stated in the opinion.

Messrs. Hannis Taylor and George R. E. Gilchrist, for petitioner:

Labor unions may be unlawful.

Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240; *Curran v. Galen*, 152 N. Y. 33, 37 L.R.A. 802, 57 Am. St. Rep. 496, 46 N. E. 297; *Jacobs v. Cohen*, 183 N. Y. 207, 2 L.R.A. (N.S.) 292, 111 Am. St. Rep. 730, 76 N. E. 5, 5 Ann. Cas. 280; *Plant v. Woods*, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Berry v. Donovan*, 188 Mass. 353, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; *Brennan v. United Hatters*, 73 N. J. L. 729, 9 L.R.A.(N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 Ann. Cas. 698.

The plaintiff has a right to protect itself against the United Mine Workers by refusing to employ or to keep in its employ any member of that union.

Howard v. Danner, 17 Times L. R. 548.

The attempt to force all laborers to combine in unions is against the policy of the law, because aiming at monopoly.

Berry v. Donovan, 188 Mass. 353, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738.

The dispute, forged as a weapon to strike in illegitimate attack, cannot be turned into a screen to conceal the nature and object of the combination.

Long v. Larkin [1914] 2 Ir. R. 302; *Adair v. United States*, 208 U. S. 161-173, 52 L. ed. 436-442, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 704; *Coppage v. Kansas*, supra.

Employment at the will of the parties L.R.A.1918C.

does not make it employment at the will of others.

Moran v. Dunphy, 177 Mass. 485, 52 L.R.A. 115, 83 Am. St. Rep. 289, 59 N. E. 125; *Berry v. Donovan*, supra; *Brennan v. United Hatters*, 73 N. J. L. 729, 9 L.R.A. (N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 Ann. Cas. 698; *Perkins v. Pendleton*, 90 Me. 166, 60 Am. St. Rep. 252, 38 Atl. 96; *Lucke v. Clothing Outters' & T. Assembly*, 77 Md. 396, 19 L.R.A. 408, 39 Am. St. Rep. 421, 28 Atl. 505; *London Guarantee & Acci. Co. v. Horn*, 101 Ill. App. 355, 206 Ill. 493, 99 Am. St. Rep. 185, 69 N. E. 526; *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367, 1 So. 934; *Blumenthal v. Shaw*, 23 C. C. A. 590, 39 U. S. App. 490, 77 Fed. 954; *Truax v. Raich*, 239 U. S. 33, 60 L. ed. 131, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; *Larkin v. Long*, [1915] A. C. 829, W. N. 191, 84 L. J. P. C. N. S. 201, 113 L. T. N. S. 337, 31 Times L. R. 405, 59 Sol. Jo. 455, 49 Ir. L. T. 121.

Where there is a contract between two persons for exclusive personal service to be rendered by the one to the other, an action lies against a third person (not a party to the contract) who intentionally induces the former party to break his contract so as to cause, as the natural consequences of the breach, loss to the other.

Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Reprint, 749, 22 L. J. Q. B. N. S. 463, 17 Jur. 827, 1 Week. Rep. 432, 1 Eng. Rul. Cas. 706; *Simpson, Torts*, 1908, p. 329; *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, 50 L. J. Q. B. N. S. 305, 44 L. T. N. S. 75, 29 Week. Rep. 367, 45 J. P. 373, 1 Eng. Rul. Cas. 717; *Temperton v. Russell* [1893] 1 Q. B. 715, 62 L. J. Q. B. N. S. 412, 4 Reports, 367, 69 L. T. N. S. 78, 41 Week. Rep. 556, 57 J. P. 676; *Quinn v. Leatham* [1901] A. C. 495, 1 B. R. C. 197, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749; *South Wales Miners' Federation v. Glamorgan Coal Co.* [1905] A. C. 239, 1 B. R. C. 1, 74 L. J. K. B. N. S. 525, 53 Week. Rep. 593, 92 L. T. N. S. 710, 21 Times L. R. 44, 2 Ann. Cas. 436; *Larkin v. Long*, supra; *Flaccus v. Smith*, 199 Pa. 128, 54 L.R.A. 640, 85 Am. St. Rep. 779, 48 Atl. 894; *Louisville & N. R. Co. v. Bittermann*, 75 C. C. A. 203, 144 Fed. 34; *Bittermann v. Louisville & N. R. Co.* 207 U. S. 205, 52 L. ed. 171, 28 Sup. Ct. Rep. 91, 12 Ann. Cas. 693.

Freedom of contract is guaranteed by the West Virginia law against interference from labor unions.

State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *Thacker Coal & Coke Co. v. Burke*, 59 W.

Va. 253, 5 L.R.A. (N.S.) 1091; 53 S. E. 161, 8 Ann. Cas. 885.

Also by the Constitution of the United States.

North Carolina v. Vanderford, 35 Fed. 282; Railroad Tax Cases, 8 Sawy. 238, 13 Fed. 746; Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 389, affirmed in 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 286; People ex rel. Manhattan Sav. Inst. v. Otis, 90 N. Y. 48; State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559; Braceville Coal Co. v. People, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 208, 35 N. E. 62; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; Young v. Com. 101 Va. 853, 45 S. E. 327; Butchers' Union S. L. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 18 Ann. Cas. 764; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; Bitterman v. Louisville & N. R. Co. 207 U. S. 205, 52 L. ed. 171, 28 Sup. Ct. Rep. 91, 12 Ann. Cas. 698; West Virginia Transp. Co. v. Standard Oil Co. 50 W. Va. 611, 56 L.R.A. 804, 88 Am. St. Rep. 895, 40 S. E. 591; Thacker Coal & Coke Co. v. Burke, 59 W. Va. 253, 5 L.R.A. (N.S.) 1091, 53 S. E. 161, 8 Ann. Cas. 885; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L.R.A. 1915C, 960, 35 Sup. Ct. Rep. 240; Larkin v. Long [1915] A. C. 814, W. N. 191, 84 L. J. P. C. N. S. 201, 113 L. T. N. S. 337, 31 Times L. R. 405, 69 Sol. Jo. 456, 49 Ir. L. T. 121. Petitioner has a right to injunctive relief.

Bitterman v. Louisville & N. R. Co. 207 U. S. 205, 52 L. ed. 171, 28 Sup. Ct. Rep. 91, 12 Ann. Cas. 693; Slater v. Gunn, 170 Mass. 509, 41 L.R.A. 268, 49 N. E. 1017; American Law Book Co. v. Edward Thompson Co. 41 Misc. 396, 84 N. Y. Supp. 225; W. P. Davis Mach. Co. v. Robinson, 41 Misc. 329, 84 N. Y. Supp. 837; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900.

The judgment deprives petitioner of the freedom of contract guaranteed to it by the 5th Amendment.

Thacker Coal & Coke Co. v. Burke, 59 W. Va. 253, 5 L.R.A. (N.S.) 1091, 53 S. E. 161, 8 Ann. Cas. 885; Fayerweather v. Ritch, 195 U. S. 280, 49 L. ed. 194, 25 Sup. Ct. Rep. 58; Farrell v. O'Brien (O'Callaghan v. O'Brien) 190 U. S. 89, 50 L. ed. 101, 25 L.R.A. 1918C.

Sup. Ct. Rep. 727; Hovey v. Elliott, 167 U. S. 409, 417, 42 L. ed. 216, 221, 17 Sup. Ct. Rep. 841.

Mr. Charles E. Hogg, for respondents: Petitioner's contract with its employees is against public policy.

Curran v. Galen, 152 N. Y. 33, 37 L.R.A. 802, 57 Am. St. Rep. 496, 46 N. E. 297; Jacobs v. Cohen, 183 N. Y. 207, 2 L.R.A. (N.S.) 292, 111 Am. St. Rep. 730, 76 N. E. 5, 5 Ann. Cas. 280; Berry v. Donovan, 188 Mass. 353, 5 L.R.A. (N.S.) 809, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; Brennan v. United Hatters, 73 N. J. L. 729, 9 L.R.A. (N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 Ann. Cas. 698; Connors v. Connolly, 86 Conn. 641, 45 L.R.A. (N.S.) 564, 86 Atl. 600; A. R. Barnes & Co. v. Berry, 156 Fed. 72.

Labor unions at common law were not unlawful, and were only made so in England by virtue of acts of Parliament.

1 Eddy, Combinations, §§ 404, 405; Wright, Crim. Conspiracies, p. 43, § 404; 3 Stephen, History of Crim. Law, p. 209; National Protective Asso. v. Cumming, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; Martin, Labor Unions, § 3; Coleman v. Moody, 4 Hen. & M. 21; Findlay v. Smith, 6 Munt. 148, 8 Am. Dec. 73, 13 Mor. Min. Rep. 182; Stout v. Jackson, 2 Rand. (Va.) 147; Stokes v. Upper Appomattox Co. 3 Leigh, 337; Foster v. Com. 96 Va. 309, 42 L.R.A. 589, 70 Am. St. Rep. 846, 31 S. E. 503; Lightfoot v. Colgin, 5 Munt. 42; Thornton v. Smith, 1 Wash. (Va.) 83; McDodrigill v. Pardee & C. Lumber Co. 40 W. Va. 579, 21 S. E. 878; Cunningham v. Dorsey, 3 W. Va. 293; Tunstall v. Christian, 80 Va. 4, 56 Am. Rep. 58; Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1; Van Ness v. Pacard, 2 Pet. 144, 7 L. ed. 377; Reno Smelting Mill & Reduction Works v. Stevenson, 20 Nev. 269, 4 L.R.A. 60, 19 Am. St. Rep. 364, 21 Pac. 317; Vicksburg & J. R. Co. v. Patton, 31 Miss. 166, 66 Am. Dec. 552; Martin v. Bigelow, 2 Aik. (Vt.) 184, 16 Am. Dec. 696; Shively v. Bowlby, 152 U. S. 52, 38 L. ed. 350, 14 Sup. Ct. Rep. 548.

Labor unions formed for the purposes for which this union was organized are lawful.

Mogul S. S. Co. v. McGregor, L. R. 23 Q. B. Div. 598, [1892] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101; Continental Ins. Co. v. Fire Underwriters, 67 Fed. 310; Meier v. Speer, 98 Ark. 618, 32 L.R.A. (N.S.) 792, 132 S. W. 988, 24 Cyc. 819, 820; Thomas v. Cincinnati, N. O. & T. P. R. Co. 62 Fed. 803; Allis-Chalmers Co. v. Iron Molders' Union, 150 Fed 155; Wabash R. Co. v. Hannahan, 121

Fed. 563; *Everett Waddey Co. v. Richmond Typographical Union*, 105 Va. 188, 5 L.R.A.(N.S.) 792, 53 S. E. 278, 8 Ann. Cas. 798; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 295; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; *Longshore Printing Co. v. Howell*, 26 Or. 527, 28 L.R.A. 464, 46 Am. St. Rep. 640, 38 Pac. 547; *Macanley Bros. v. Tierney*, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; *Wilson v. Hey*, 232 Ill. 389, 16 L.R.A.(N.S.) 85, 122 Am. St. Rep. 119, 85 N. E. 928, 13 Ann. Cas. 82; *Pickett v. Walsh*, 192 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 421, 22 L.R.A.(N.S.) 607, 128 Am. St. Rep. 492, 114 S. W. 997; *Post v. Buck's Stove & Range Co.* 43 L.R.A.(N.S.) 502, 119 C. C. A. 214, 200 Fed. 918; *Kemp v. Division No. 241*, 255 Ill. 213, 99 N. E. 389, Ann. Cas. 1913D, 347; *J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 21 L.R.A.(N.S.) 550, 98 Pac. 1027, 16 Ann. Cas. 1165.

A combination of workmen formed for the purpose of maintaining or advancing the rate of wages is a perfectly legitimate one.

Martin, Labor Unions, §§ 10-13; *Ames v. Union P. R. Co.* 62 Fed. 14.

To determine whether an association or combination constitutes a conspiracy it is necessary to ascertain its purposes, and, if these are lawful, the association itself cannot be treated as illegal if its powers are abused by those who have the management of it.

Com. v. Hunt, 4 Met. 111, 38 Am. Dec. 346.

Labor organizations may even use persuasion to have others join their organization. If ruin to the employer results from their peaceable assertion of these rights, it is a damage without remedy.

My Maryland Lodge v. Adt, 100 Md. 238, 68 L.R.A. 757, 59 Atl. 721; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; *Everett Waddey Co. v. Richmond Typographical Union*, 105 Va. 188, 5 L.R.A.(N.S.) 792, 53 S. E. 273, 8 Ann. Cas. 798; *United States v. Weber*, 114 Fed. 950; *Longshore Printing & Pub. Co. v. Howell*, 26 Or. 527, 28 L.R.A. 464, 46 Am. St. Rep. 640, 38 Pac. 547; *Kolley v. Robinson*, 109 C. C. A. 247, 187 Fed. 415.

Petitioner cannot maintain this suit in order to declare the organization to which the respondents belong unlawful under the Sherman Act.

National Fireproofing Co. v. Mason L.R.A. 1918C.

Builders' Asso. 26 L.R.A.(N.S.) 148, 94 C. C. A. 535, 169 Fed. 259; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; *Bigelow v. Calumet & H. Min. Co.* 167 Fed. 709; *Gibbs v. McNeeley*, 60 L.R.A. 152, 55 C. C. A. 70, 118 Fed. 120; *Whitwell v. Continental Tobacco Co.* 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454.

The size of a business alone does not constitute a monopoly in restraint of interstate commerce in violation of § 2 of the Anti-trust Act; but to render a combination illegal thereunder it must intentionally or necessarily prevent other persons from engaging in such business, thereby stifling competition.

United States v. American Naval Stores Co. 172 Fed. 458; *Re Greene*, 52 Fed. 104.

A combination which does not exclude other persons from engaging in the business does not create a monopoly.

National Fireproofing Co. v. Mason Builders' Asso. 26 L.R.A.(N.S.) 148, 94 C. C. A. 535, 169 Fed. 259.

It will not be presumed that the members of a labor organization will carry out the purposes, lawful in themselves, of their association, in an unlawful manner.

Sheffield v. Balmer, 52 Mo. 474, 14 Am. Rep. 430; *Skiff v. Stoddard*, 63 Conn. 198, 21 L.R.A. 102, 26 Atl. 974, 23 Atl. 104.

The labor union, known as the United Mine Workers of America, does not constitute a common-law conspiracy.

Pettibone v. United States, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542; *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559.

The obligation or pledge which an initiate in a labor union is required to take is to be construed with reference to the declared purposes of the organization, and is binding only in so far as those purposes are lawful and are to be attained by lawful means.

Schneider v. Local Union No. 60, 116 La. 270, 5 L.R.A.(N.S.) 891, 114 Am. St. Rep. 549, 40 So. 700, 7 Ann. Cas. 868.

That a mere combination of persons may constitute a conspiracy such combination must be for an unlawful purpose.

Pettibone v. United States, supra.

Neither the petitioner nor any of its employees is in anywise connected with the Union or any of its branches, nor is any one of these by-laws sought to be enforced against petitioner.

States ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 402, 60 S. W. 91; *American Live Stock Commission Co. v. Chicago Live*

Stock Exch. 143 Ill. 210, 18 L.R.A. 190, 36 Am. St. Rep. 385, 32 N. E. 274; *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 610; *American Live Stock Commission Co. v. Chicago Live-Stock Exch.* 143 Ill. 210, 18 L.R.A. 190, 36 Am. St. Rep. 386, 32 N. E. 274.

There can be no conspiracy to do that which is lawful in a lawful manner.

Porter v. Mack, 50 W. Va. 581, 40 S. E. 459; 2 *Cooley's Bl. Com.* 4th ed. bk. 4, p. 1312.

A labor organization as such, under the common-law definition of the term, does not constitute a conspiracy, either under the laws of West Virginia or under the laws of other states.

Lindsay & Co. v. Montana Federation of Labor, 37 Mont. 264, 18 L.R.A. (N.S.) 707, 127 Am. St. Rep. 722, 96 Pac. 127; *Macaulay Bros. v. Tierney*, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; *National Protective Asso. v. Cumming*, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; *State v. Van Pelt*, 136 N. C. 663, 68 L.R.A. 760, 49 S. E. 177, 1 Ann. Cas. 495; *Ames v. Union P. R. Co.* 62 Fed. 14; *State v. Stockford*, 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769.

The contracts of petitioner with its several employees are such as not to be enforceable in a court of equity, nor can it call on a court of equity to protect and uphold such a contract.

Slaughter v. Thacker Coal & Coke Co. 55 W. Va. 642, 65 L.R.A. 342, 104 Am. St. Rep. 1013, 47 S. E. 247, 2 Ann. Cas. 335; *Charleston Natural Gas Co. v. Kanawha Natural Gas, Light & Fuel Co.* 58 W. Va. 22, 112 Am. St. Rep. 936, 50 S. E. 876, 6 Ann. Cas. 164; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 22 W. Va. 600, 46 Am. Rep. 527; *Tarr v. Stearman*, 264 Ill. 110, 105 N. E. 958.

The court could neither award nor perpetuate an injunction against persons not parties to the suit.

2 *High, Inj.* 4th ed. § 1548; *Fellows v. Fellows*, 4 Johns. Ch. 25, and note; *Sage v. Quay, Clarke, Ch.* 347; *Scott v. Donald*, 165 U. S. 107, 41 L. ed. 648, 17 Sup. Ct. Rep. 262; *Iveson v. Harris*, 7 Ves. Jr. 267, 13 *Standard Enc. Proc.* 179; *Harvey v. Smith*, 179 Mass. 592, 61 N. E. 217; *State ex rel. Pew v. District Ct.* 34 Mont. 233, 85 Pac. 525; *Acme Cement Plaster Co. v. Keys*, — Tex. Civ. App. —, 167 S. W. 186; *Peterson v. Smith*, 30 Tex. Civ. App. 139, 69 S. W. 542.

An injunction issues only to avert threatened substantial damages or injury.

Atkins v. W. A. Fletcher Co. 65 N. J. Eq. 658, 55 Atl. 1074; *Purvis v. Local No. 500*, U. B. C. J. 214 Pa. 348, 12 L.R.A. (N.S.) 642 112 Am. St. Rep. 757, 63 Atl. 585; *Union L.R.A.* 1918C.

P. R. Co. v. Ruef, 120 Fed. 102; *Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Asso.* 59 N. J. Eq. 49, 46 Atl. 208; *Flaccus v. Smith*, 199 Pa. 128, 54 L.R.A. 640, 85 Am. St. Rep. 779, 48 Atl. 894; *Allis-Chalmers Co. v. Reliable Lodge*, 111 Fed. 264.

Mr. Justice Pitney delivered the opinion of the court:

This was a suit in equity, commenced October 24, 1907, in the United States circuit (afterwards district) court for the northern district of West Virginia, by the Hitchman Coal & Coke Company, a corporation organized under the laws of the state of West Virginia, against certain citizens of the state of Ohio, sued individually and also as officers of the United Mine Workers of America. Other noncitizens of plaintiff's state were named as defendants, but not served with process. Those who were served and who answered the bill were T. L. Lewis, vice president of the U. M. W. A. and of the International Union U. M. W. A.; William Green, D. H. Sullivan, and "George" W. Savage (his correct Christian name is Gwilym), respectively president, vice president, and secretary-treasurer of district No. 6, U. M. W. A.; and A. R. Watkins, John Zelenka, and Lee Rankin, respectively president, vice president, and secretary-treasurer of sub-district No. 5 of district No. 6.

Plaintiff owns about 5,000 acres of coal lands situate at or near Benwood, in Marshall county, West Virginia, and within what is known as the "Panhandle district" of that state, and operates a coal mine thereon, employing between 200 and 300 men, and having an annual output, in and before 1907, of about 300,000 tons. At the time of the filing of the bill, and for a considerable time before and ever since, it operated its mine "nonunion," under an agreement with its men to the effect that the mine should be run on a nonunion basis, that the employees should not become connected with the Union while employed by plaintiff, and that, if they joined it, their employment with plaintiff should cease. The bill set forth these facts, inter alia, alleged that they were known to defendants and each of them, and "that the said defendants have unlawfully and maliciously agreed together, confederated, combined, and formed themselves into a conspiracy, the purpose of which they are proceeding to carry out and are now about to finally accomplish, namely: to cause your orator's mine to be shut down, its plant to remain idle, its contracts to be broken and unfulfilled, until such time as your orator shall submit to the demand of the Union that it shall unionize its plant, and, hav-

ing submitted to such demand, unionize its plant by employing only Union men who shall become subject to the orders of the Union," etc. The general object of the bill was to obtain an injunction to restrain defendants from interfering with the relations existing between plaintiff and its employees in order to compel plaintiff to "unionize" the mine.

A restraining order having been granted, followed by a temporary injunction, the served defendants filed answers, and thereupon made a motion to modify the injunction, which was refused. 172 Fed. 963. An appeal taken by defendants from this order was dismissed by the circuit court of appeals. 100 C. C. A. 137, 176 Fed. 549. Afterwards they applied for and obtained leave to withdraw their answers and file others; the order, however, prescribed that the withdrawn answers were "not to be removed from the file." The new answers denied all material averments of the bill, some of which had been admitted in the former answers. Plaintiff, having filed replications, obtained an order that the former answers should be treated as evidence on behalf of the plaintiff upon the issue joined. Upon this evidence and other evidence introduced before the court orally, the case was submitted, with the result that a final decree was made January 18, 1913, granting a perpetual injunction. 202 Fed. 512. This was reversed by the circuit court of appeals June 1, 1914 (131 C. C. A. 425, 214 Fed. 685), but the mandate was stayed pending an application to this court for a writ of certiorari. Afterwards an appeal was allowed. This court dismissed the appeal, but granted the writ of certiorari (241 U. S. 644, 60 L. ed. 1218, 36 Sup. Ct. Rep. 450), the record on appeal to stand as a return.

The final decree of the district court included an award of injunction against John Mitchell, W. B. Wilson, and Thomas Hughes, who, while named as defendants in the bill, were not served with process and entered no appearance except to object to the jurisdiction of the court over them. Under the Federal practice, the appearance to object did not bind these parties to submit to the jurisdiction on the overruling of the objection (*Harkness v. Hyde*, 98 U. S. 476, 479, 25 L. ed. 237, 238; *Southern P. Co. v. Denton*, 146 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; *Davis v. Cleveland, C. C. & St. L. R. Co.* 217 U. S. 157, 174, 54 L. ed. 708, 718, 27 L.R.A.(N.S.) 823, 30 Sup. Ct. Rep. 463, 18 Ann. Cas. 907), and L.R.A.1918C.

since the injunction operates only in personam, it was erroneous to include them as defendants. It also was erroneous to include personal relief by injunction against certain named parties who, pending suit, were chosen to succeed some of the original defendants as officers of the international, district, and subdistrict unions, but who were not served with process and did not appear, they being included upon the ground that they were "before the court by representation through service having been had upon their said predecessors in office." This is not a representative suit within the meaning of equity rule 38; nor is there such privity between the holder of an office in a voluntary association and his successor as to bind the latter by process issued against the former.

But these procedural difficulties do not affect that part of the decree which awarded an injunction against the answering defendants (Lewis, Green, Sullivan, Savage, Watkins, Zelenka, and Rankin) "individually," and not as officers of the Union or its branches, except as to Savage, against whom the decree goes in both his individual and official capacities, he alone having retained at the time of the final decree the same office he held at the beginning of the suit. If there was error in excluding the "official" responsibility of the others, it was not one of which they could complain, and it was not assigned for error upon their appeal to the circuit court of appeals. If they were subject to injunction at all, they were so in their individual capacities. Whether the injunction will bind their successors in office, or their fellow members of the Union, will depend upon questions of confederacy, agency, notice, and the like, which may be determined hereafter, under due process of law, if and when proceedings are taken to enforce the injunction against parties other than the answering defendants. The clause in the decree enjoining, as confederates, all present and future members of the Union, without naming them, is *brutum fulmen* in the absence of proof of confederacy submitted hereafter against particular members sought to be held for violating the injunction; its inclusion is not a matter of which the answering defendants may complain, nor was it assigned as error.

We proceed, therefore, to consider the case as it stands against the answering defendants.

The district court based its decision upon two grounds: (1) That the organization known as the United Mine Workers of America, and its branches, as conducted and managed at the time of the suit and for many years before, was a common-law con-

spiracy in unreasonable restraint of trade, and also and especially a conspiracy against the rights of nonunion miners in West Virginia; and (2) that the defendants, in an effort to compel the plaintiff to enter into contractual relations with the Union relating to the employment of labor and the production of coal, although having knowledge of express contracts existing between plaintiff and its employees which excluded relations with the Union, endeavored by unlawful means to procure a breach of these contracts by the employees.

A brief recital of previous transactions between the parties becomes material. The Union is a voluntary and unincorporated association which was organized in the year 1890 in the states of Ohio and Indiana, and afterwards was extended to other states. It is made up of national or "international," district, subdistrict, and local unions. District No. 6 comprises the coal districts of Ohio and the Panhandle of West Virginia. Subdistrict No. 5 of that district comprises five counties and parts of counties in Ohio, and the Panhandle.

The answering defendants were and are active and influential members—leaders—of the Union, as well as officers. Savage, Lewis, and Sullivan have been members from its formation in 1890, and have held important offices in it and attended the national conventions. The others are long-time members, and possessed an influence indicated by the offices they held, but not limited to the duties of those offices.

From 1897 to 1906 what were known as joint interstate conferences were held annually or biennially between officials of the Union and representatives of the operators in the "Central Competitive Field" (which includes Western Pennsylvania, Ohio, Indiana, and Illinois, but not West Virginia), for the purpose of agreeing upon the scale of wages and the conditions of employment in that field. In addition there were occasional conferences of the same character affecting other states and districts.

Plaintiff's mine is within the territorial limits of subdistrict No. 5 of district No. 6. Coal-mining operations were commenced there in the early part of the year 1902, and the mine was operated "non-union" until April, 1903, when, under threats from the Union officials, including defendants Watkins and Sullivan, that a certain unionized mine in Ohio, owned by the same proprietors, would be closed down if the men at the Hitchman were not allowed to organize, plaintiff consented to the unionization of the latter mine. This went into effect on the 1st of April, 1903, and upon the very next day the men were called out on strike because of a disagree-

ment with the company as to the basis upon which mining should be paid for. The strike continued until May 23, requiring plaintiff to cease operations and preventing it from fulfilling its contracts, the most important of which was one for the daily supply of engine coal to the Baltimore & Ohio Railroad at a coaling station adjoining the mine. The financial loss to plaintiff was serious: The strike was settled and the men resumed work upon the basis of a modification of the official mining scale applicable to the Hitchman mine.

Again, in the spring of 1904, there was difficulty in renewing the scale. A temporary scale, agreed upon between operators and miners for the month of April, 1904, was signed in behalf of the Hitchman company on the 18th of April. Two days later the men at the Hitchman struck, and the mine remained idle for two months, during which time plaintiff sustained serious losses in business and was put to heavy expense in obtaining coal from other sources to fill its contract with the Baltimore & Ohio Railroad Company. The strike was settled by the adoption of the official scale for the Panhandle district, with amendatory local rules for the Hitchman mine.

After this there was little further trouble until April 1, 1906, when a disagreement arose between the Union and an association of operators with which plaintiff was not connected—the association being in fact made up of its competitors—about arranging the terms of the scale for the ensuing two years. At the same time a similar disagreement arose between the operators and the Union officials in the Central Competitive Field. The result was a termination of the interstate conferences and a failure to establish any official scale for the ensuing two years, followed by a widespread strike, or a number of concurrent strikes, involving the most of the bituminous coal-producing districts. There was absolutely no grievance or ground of disagreement at the Hitchman mine, beyond the fact that the mining scale expired by its own terms on March 31, and the men had not received authority from the Union officials either to renew it or agree to a new one in its place. Plaintiff came to an understanding with the local union to the effect that if its men would continue at work, the company would pay them from April 1st whatever the new scale might be, except that if the new scale should prove to be lower than that which expired, on March 31, there should be no reduction in wages, while if the scale was raised the company would pay the increased amount, dating it back to April 1st. This was satisfactory to the men; but as the

question of a new scale was then under discussion at a conference between the officials of the Union and the representatives of the Operators' Association, and plaintiffs' employees wished to get the sanction of their officers, the manager of the Hitchman mine got into communication with those officials, including defendant Green, president of district No. 8, and endeavored to secure their assent to the temporary arrangement, but without success. Then a committee of the local union, including Daugherty, its president, took up the matter with Green and received permission to mine and load engine coal until further notice from him. Under this arrangement the men remained at work for about two weeks. On April 15th, defendant Zelenka, vice president of the subdistrict, visited the mine, called a meeting of the miners, and addressed them in a foreign tongue, as a result of which they went on strike the next day, and the mine was shut down until the 12th of June, when it resumed as a "nonunion" mine, so far as relations with the U. M. W. A. were concerned.

During this strike plaintiff was subjected to heavy losses and extraordinary expenses with respect to its business, of the same kind that had befallen it during the previous strikes.

About the 1st of June a self-appointed committee of employees called upon plaintiff's president, stated in substance that they could not remain longer on strike because they were not receiving benefits from the Union, and asked upon what terms they could return to work. They were told that they could come back, but not as members of the United Mine Workers of America; that thenceforward the mine would be run nonunion, and the company would deal with each man individually. They assented to this, and returned to work on a nonunion basis. Mr. Pickett, the mine superintendent, had charge of employing the men, then and afterwards, and to each one who applied for employment he explained the conditions, which were that while the company paid the wages demanded by the Union and as much as anybody else, the mine was run nonunion and would continue so to run; that the company would not recognize the United Mine Workers of America; that if any man wanted to become a member of that Union he was at liberty to do so; but he could not be a member of it and remain in the employ of the Hitchman Company; that if he worked for the company he would have to work as a nonunion man. To this each man employed gave his assent, understanding that while he worked for the company he must keep out of the Union.

Since January, 1908 (after the com-

mencement of the suit), in addition to having this verbal understanding, each man has been required to sign an employment card expressing in substance the same terms. This has neither enlarged nor diminished plaintiff's rights, the agreement not being such as is required by law to be in writing.

Under this arrangement as to the terms of employment, plaintiff operated its mine from June 12, 1906, until the commencement of the suit in the fall of the following year.

During the same period a precisely similar method of employment obtained at the Glendale mine, a property consisting of about 1,200 acres of coal land adjoining the Hitchman property on the south, and operated by a company having the same stockholders and the same management as the Hitchman; the office of the Glendale mine being at the Hitchman Coal & Coke Company's office. Another mine in the Panhandle, known as the Richland, a few miles north of the Hitchman, likewise was run "nonunion."

In fact, all coal mines in the Panhandle and elsewhere in West Virginia, except in a small district known as the Kanawha field, were run "nonunion," while the entire industry in Ohio, Indiana, and Illinois was operated on the "closed-shop" basis, so that no man could hold a job about the mines unless he was a member of the United Mine Workers of America. Pennsylvania occupied a middle ground, only a part of it being under the jurisdiction of the Union. Other states need not be particularly mentioned.

The unorganized condition of the mines in the Panhandle and some other districts was recognized as a serious interference with the purposes of the Union in the Central Competitive Field, particularly as it tended to keep the cost of production low, and through competition with coal produced in the organized field, rendered it more difficult for the operators there to maintain prices high enough to induce them to grant certain concessions demanded by the Union. This was the subject of earnest and protracted discussion in the annual international convention of the U. M. W. A. held at Indianapolis, Indiana, in the month of January, 1907, at which all of the answering defendants were present as delegates and participated in the proceedings. The discussion was based upon statements contained in the annual reports of John Mitchell, as president of the Union (joined as a defendant in the bill, but not served with process), and of defendant Lewis as vice president, respecting the causes and consequences of the strike of 1906, and the policy to be adopted by the Union for the future. In these reports it

was made to appear that the strike had been caused immediately by the failure of the joint convention of operators and miners representing the Central and Southwestern Competitive Fields, held in the early part of the year 1906, to come to an agreement for a renewal of the mining scale; that the strike was widespread, involving not less than 400,000 mine workers, was terminated by "district settlements" with variant results in different parts of the territory involved, and had not been followed by a renewal of the former relations between the operators and miners in the Central Competitive Field. Another result of the strike was a large decrease in the membership of the Union. Two measures of relief were proposed: first, that steps be taken to re-establish the joint interstate conferences; and second, the organization of the hitherto unorganized fields, including the Panhandle district of West Virginia, under closed-shop agreements, with all men about the mines included in the membership of the United Mine Workers of America. In the course of the discussion the purpose of organizing West Virginia in the interest of the unionized mine workers in the Central Competitive Field, and the probability that it could be organized only by means of strikes, were repeatedly declared and were disputed by nobody. All who spoke advocated strikes, differing only as to whether these should be nation-wide or sectional. Defendant Lewis, in his report, recommended an abandonment of the policy of sectional settlements which had been pursued in the previous year. This recommendation, interpreted as a criticism of the policy pursued under the leadership of President Mitchell in the settlement of the 1906 strike, was the subject of long and earnest debate, in the course of which Lewis said: "When we organize West Virginia, when we organize the unorganized sections of Pennsylvania, we will organize them by a strike movement." And again, towards the close of the debate: "No one has made the statement that we can organize West Virginia without a strike." Defendant Green took part, favoring the view of Mr. Lewis that strikes should be treated nationally instead of sectionally. In the course of his remarks he said: "I say to you, gentlemen, one reason why I opposed the policy that was pursued last year was because, over in Ohio, we were peculiarly situated. We had West Virginia on the south and Pennsylvania on the east, and after four months of a strike in eastern Ohio we had reached the danger line. We felt keenly the competition from West Virginia, and during the suspension our miners in Ohio chafed under the object lesson they had. They saw West L.R.A.1918C.

Virginia coal go by, trainload after trainload passing their doors, when they were on strike. This coal supplied the markets that they should have had. There is no disguising the fact, something must be done to remedy this condition. Year after year Ohio has had to go home and strike in some portion of the district to enforce the interstate agreement that was signed up here. . . . I confess here and now that the overwhelming sentiment in Ohio was that a settlement by sections would not correct the conditions we complained of. Now, something must be done; it is absolutely necessary to protect us against the competition that comes from the unorganized fields east of us." Mr. Mitchell opposed the view of defendant Lewis, reiterating an opinion, repeatedly expressed before, that West Virginia and the other unorganized fields "would not be thoroughly organized except as the result of a successful strike;" but declaring that "they will not be organized at all, strike or no strike, unless we are able to support the men in those fields from the first day they lay down their tools. . . . Now, I believe it is possible, indeed, I believe it is probable, that in the not distant future we will be able to inaugurate a movement in West Virginia and the other unorganized fields that will involve them in a strike, and then we will expect you to furnish the sinews of war, as you have done in the past, to keep these men in idleness."

The discussion continued during three days, and at the end of it the report of a committee which expressed disagreement with vice president Lewis's opposition to sectional settlements and recommended "a continuation in the future of the same wise, conservative, business-like policies" that had been pursued by President Mitchell, was adopted by a viva voce vote.

The plain effect of this action was to approve a policy which, as applied to the concrete case, meant that, in order to relieve the union miners of Ohio, Indiana, and Illinois from the competition of the cheaper product of the nonunion mines of West Virginia, the West Virginia mines should be "organized" by means of strikes local to West Virginia, the strike benefits to be paid by assessments upon the Union miners in the other states mentioned, while they remained at work.

This convention was followed by an annual convention of subdistrict 5 of district 6, held in the month of March, 1907, at which defendants Watkins and Rankin were present as president and secretary of the subdistrict. Defendant Lewis, as national vice president, occupied the chair during several of the sessions. Defendant Zelenka

was present as a delegate, and also Thomas Hughes, who, while named as a defendant in the present suit, was not served with process. Watkins and Rankin in their reports recommended the complete unionization of the mines in the Panhandle counties, with particular reference to the Hitchman, the Glendale, the Richland, and two others; and as a result it was resolved "that the sub-district officers, together with the district officers, be authorized to take up the work of organizing every mine in the subdistrict as quickly as it can be done."

Evidently in pursuance of this resolution, defendants Green, Zelenka, and Watkins, about July 1, 1907, called at plaintiff's office and laid before its general manager, Mr. Koch, a proposition for the unionization of the mine. He declined to consider it, but at their request laid it before plaintiff's board of directors, who rejected the proposition, and the manager informed Green of this. In one of the interviews Koch informed these defendants of the terms of plaintiff's working agreement with its employees to the effect that the mine was to be run nonunion and they were not to become members of the Union.

About the same time, a Mr. McKinley, who was operating the Richland mine non-union, was interviewed by the Union leaders, notified of the resolution adopted by the subdistrict convention, and, having asked that his mine be let alone, was met with the threat that they would secure the support of his men, and that if he did not recognize the Union, they would shut down his mine. In one of the interviews that ensued he was told that it was their purpose to organize the Glendale, the Hitchman, the Richland, and some other mines; that at the Glendale they had twenty-four men who had joined the organization, "and that they had sixty men who had signed up or had agreed to join the organization at Hitchman, and that they were going to shut the mine down as soon as they got a few more men." With respect to their progress at his own mine he was kept in the dark until about the middle of October, 1907, when, through the activities of the organizer Hughes, they succeeded in shutting it down, and it remained closed until a restraining order was allowed by the court, immediately after which it resumed nonunion.

The evidence renders it clear that Hughes was sent into the Panhandle to organize all the mines there, in accordance with the resolution of the subdistrict convention. The bill made a statement of his activities, and alleged that he was acting as an organizer, for the Union. Defendants' final answers made a complete denial, but in this are contradicted by admissions made in the ear-

lier answers and by other and undisputed evidence. The only defendant who testified upon the subject declared that Hughes was employed by district No. 6 as an organizer, but denied that he had power or authority to shut down the Hitchman mine.

He arrived at that mine sometime in September, 1907, and remained there or in that vicinity until the latter part of October, conducting a campaign of organization at the Hitchman and at the neighboring Glendale and Richland mines.

The evidence shows that he had distinct and timely notice that membership in the Union was inconsistent with the terms of employment at all three mines, and a violation of the express provisions of the agreement at the Hitchman and Glendale.

Having unsuccessfully applied to Koch and McKinley for their co-operation, Hughes proceeded to interview as many of the men as he could reach and to hold public meetings in the interest of the Union. There is clear and uncontradicted evidence that he did not confine himself to mere persuasion, but resorted to deception and abuse. In his public speeches he employed abusive language respecting Mr. Pickett, William Daugherty, and Jim Jarrett.¹ He prophesied, in such a way that ignorant, foreign-born miners, such as he was addressing, naturally might believe him to be speaking with knowledge, that the wages paid by the Hitchman would be reduced unless the mine was unionized. The evidence as to the methods he employed in personally interviewing the miners, while meager, is significant. Myers, a Hitchman miner, testified: "He told me that he was a good friend of Mr. Koch, and that Mr Koch had nothing against having the place organized again. He said he was a friend of his, and I made the remark that I would ask Mr. Koch and see if it was so; and he said no, that was of no use, because he was telling me the truth." He did not confine his attentions to men who already were in plaintiff's employ, but in addition dissuaded men who had accepted employment from going to work.

A highly significant thing, giving character to Hughes's entire course of conduct, is that while his solicitation of the men was more or less public, as necessarily it had to be, he was careful to keep secret the num-

¹ Mr. Pickett was superintendent of the Hitchman and Glendale mines, and it was with him that the miners made their agreements to refrain from membership in the Union; Daugherty and Jarrett were miners at the Hitchman, and had been, respectively, president and financial secretary of the local union at the time of the 1906 strike, when the local deserted the U. M. W. A.

ber and the names of those who agreed to join the Union. Myers, being asked to allow his name to be entered on a book that Hughes carried, tried to see the names already entered, "but he would not show anything; he told me he had it, and I asked him how many names was on it, and he said he had about enough to 'crack off.' " To Stewart, another Hitchman miner, he said "he was forming a kind of secret order among the men; he said he had a few men—he did not state the number of them—and he said each man was supposed to give him so much dues to keep it going, and then he said after he got the majority he would organize the place." Pickett, the mine superintendent, had learned of only five men at the Glendale who were inclined to join Hughes's movement; but when these were asked to remain outside of the mine for a talk, fifteen other men waited with them, and upon being reminded that while the company would not try to prevent them from becoming members of the Union, they could not be members and at the same time work for the Glendale Company, they all accepted this as equivalent to a notice of discharge. And, as has been stated, the owner of the Richland, while repeatedly threatened with unionization, was kept in the dark as to the progress made by the organizer amongst his employees until the mine was actually shut down.

The question whether Hughes had "power or authority" to shut down the Hitchman mine is beside the mark. We are not here concerned with any question of ultra vires, but with an actual threat of closing down plaintiff's mine, made by Hughes while acting as agent of an organized body of men who indubitably were united in a purpose to close it unless plaintiff would conform to their wishes with respect to its management, and who lacked the power to carry out that purpose only because they had not as yet persuaded a sufficient number of the Hitchman miners to join with them, and hence employed Hughes as an "organizer" and sent him to the mine with the very object of securing the support of the necessary number of miners. They succeeded with respect to one of the mines threatened (the Richland), and preparations of like character were in progress at the Hitchman and the Glendale at the time the restraining order was made in this cause.

If there be any practical distinction between organizing the miners and organizing the mine, it has no application to this case. Unionizing the miners is but a step in the process of unionizing the mine followed by the latter almost as a matter of course. Plaintiff is as much entitled to prevent the first step as the second, so far as its own employees are concerned, and to be L.R.A.1918C.

protected against irreparable injury resulting from either. Besides, the evidence shows, without any dispute, that defendants contemplated no half-way measures, but were bent on organizing the mine, the consent of plaintiff to be procured through such a control of its employees as would render any further independent operation of the mine out of the question. This is evident from the discussions and resolutions of the international and subdistrict conventions, from what was said by defendants Green, Zelenka, and Watkins to plaintiff's manager, and to the operator of the Richland, and from all that was said and done by Hughes in his effort to organize the Hitchman, Glendale, and Richland mines.

In short, at the time the bill was filed, defendants, although having full notice of the terms of employment existing between plaintiff and its miners, were engaged in an earnest effort to subvert those relations without plaintiff's consent, and to alienate a sufficient number of the men to shut down the mine, to the end that the fear of losses through stoppage of operations might coerce plaintiff into "recognizing the union" at the cost of its own independence. The methods resorted to by their "organizer" were such as have been described. The legal consequences remain for discussion.

The facts we have recited are either admitted or else proved by clear and undisputed evidence and indubitable inferences therefrom. The proceedings of the international and subdistrict conventions were shown by the introduction of official verbatim reports, properly authenticated. It is objected that these proceedings, especially in so far as they include the declarations and conduct of others than the answering defendants, are not admissible because the existence of a criminal or unlawful conspiracy is not made to appear by evidence aliunde. The objection is untenable. In order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that there was a combination between them and defendants, but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful. The element of illegality may be shown by the declarations themselves. The rule of evidence is commonly applied in criminal cases, but is of general operation; indeed, it originated in the law of partnership. It depends upon the principle that when any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of

all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them. *Pleasants v. Fant*, 22 Wall. 116, 119, 22 L. ed. 780, 782; *Connecticut Mut. L. Ins. Co. v. Hillmon*, 188 U. S. 208, 218, 47 L. ed. 446, 451, 23 Sup. Ct. Rep. 294; *Story*, Part. §§ 107, 108; 1 *Greenl. Ev.* §§ 112, 113 (184 b, c); 2 *Starkie, Ev.* 2d ed. 25, 26; *Rex v. Hardwick*, 11 East, 578, 585, 589, 103 Eng. Reprint, 1129; *Sandilands v. Marsh*, 2 Barn. & Ald. 673, 679, 106 Eng. Reprint, 511; *Wood v. Braddick*, 1 Taunt. 104, 105, 127 Eng. Reprint, 771, 9 Revised Rep. 711; *Van Reimsdyk v. Kane* (Story, J.) 1 Gall. 630, 635, Fed. Cas. No. 16,872; *Aldrich v. Warren*, 16 Me. 465, 468; *Pierce v. Wood*, 23 N. H. 519, 531; *Page v. Parker*, 40 N. H. 47, 62; *State v. Thibreau*, 30 Vt. 100, 105; *Jenne v. Joslyn*, 41 Vt. 478, 484; *Locke v. Stearns*, 1 Met. 560, 563, 35 Am. Dec. 382; *Lowe v. Dalrymple*, 117 Pa. 564, 568, 12 Atl. 567; *Main v. Aukam*, 4 App. D. C. 51, 56.

Upon a kindred principle, the declarations and conduct of an agent, within the scope and in the course of his agency, are admissible as original evidence against the principal, just as his own declarations or conduct would be admissible. *Barreda v. Silsbee*, 21 How. 146, 164, 165, 16 L. ed. 86, 92; *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99, 104, 30 L. ed. 299, 300; *La Abra Silver Min. Co. v. United States*, 175 U. S. 423, 498, 44 L. ed. 223, 250, 20 Sup. Ct. Rep. 168. And since the evidence of Hughes's agency is clear and undisputed,—that as the representative of a voluntary association of which the answering defendants were active members, and in the execution of a purpose to which they all had given consent, and in which some of them were actively co-operating, he was engaged in an effort to organize the coal mines of the Panhandle district,—it is equally clear that his declarations and conduct while so doing are evidential against the defendants.

What are the legal consequences of the facts that have been detailed?

That the plaintiff was acting within its lawful rights in employing its men only upon terms of continuing nonmembership in the United Mine Workers of America is not open to question. Plaintiff's repeated costly experiences of strikes and other interferences while attempting to "run union" were a sufficient explanation of its resolve to run "nonunion," if any were needed. But neither explanation nor justification is needed. Whatever may be the advantages of "collective bargaining," it is not bargaining at all, in any just sense, unless it is voluntary on both sides. The same

liberty which enables men to form unions, and through the union to enter into agreements with employers willing to agree, entitles other men to remain independent of the union and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. In the latter case, as in the former, the parties are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreement they may make. This court repeatedly has held that the employer is as free to make nonmembership in a union a condition of employment, as the working man is free to join the union, and that this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power. *Adair v. United States*, 208 U. S. 161, 174, 52 L. ed. 436, 442, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *Coppage v. Kansas*, 236 U. S. 1, 14, 59 L. ed. 441, 446, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240. In the present case, needless to say, there is no act of legislation to which defendants may resort for justification.

Plaintiff, having in the exercise of its undoubted rights established a working agreement between it and its employees, with the free assent of the latter, is entitled to be protected in the enjoyment of the resulting status, as in any other legal right. That the employment was "at will," and terminable by either party at any time, is of no consequence. In *Truax v. Raich*, 239 U. S. 33, 38, 60 L. ed. 131, 134, L.R.A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283, this court ruled upon the precise question as follows: "It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn, is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment with out illegal interference or compulsion, and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will." (Citing many cases.)

In short, plaintiff was and is entitled to the good will of its employees, precisely as a merchant is entitled to the good will of his customers although they are under no obligation to continue to deal with him. The value of the relation lies in the reasonable probability that, by properly treating its employees, and paying them fair wages,

and avoiding reasonable grounds of complaint, it will be able to retain them in its employ, and to fill vacancies occurring from time to time by the employment of other men on the same terms. The pecuniary value of such reasonable probabilities is incalculably great, and is recognized by the law in a variety of relations. See *Brennan v. United Hatters* (cited with approval in *Truax v. Raich*, supra), 73 N. J. L. 729, 749, 9 L.R.A. (N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 Ann. Cas. 698; *Brown v. Honiss*, 74 N. J. L. 501, 514, et seq., 68 Atl. 150; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 767, 53 Atl. 230; *Walker v. Cronin*, 107 Mass. 555, 565, 566; *Moran v. Dunphy*, 177 Mass. 485, 52 L.R.A. 115, 83 Am. St. Rep. 289, 59 N. E. 125, and cases there cited; *L. D. Willcutt & Sons Co. v. Driscoll*, 200 Mass. 110, 117 et seq., 23 L.R.A. (N.S.) 1236, 85 N. E. 897.

The right of action for persuading an employee to leave his employer is universally recognized,—nowhere more clearly than in West Virginia,—and it rests upon fundamental principles of general application, not upon the English statute of laborers. *Thacker Coal & Coke Co. v. Burke*, 59 W. Va. 253, 255, 5 L.R.A. (N.S.) 1001, 53 S. E. 161, 8 Ann. Cas. 886; *Walker v. Cronin*, 107 Mass. 555, 567; *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 13, 38 L. ed. 55, 62, 14 Sup. Ct. Rep. 240; *Noice v. Brown*, 39 N. J. L. 569, 572.

We turn to the matters set up by way of justification or excuse for defendants' interference with the situation existing at plaintiff's mine.

The case involves no question of the rights of employees. Defendants have no agency for plaintiff's employees, nor do they assert any disagreement or grievance in their behalf. In fact, there is none; but, if there were, defendants could not, without agency, set up any rights that employees might have. The right of the latter to strike would not give to defendants the right to instigate a strike. The difference is fundamental.

It is suggested as a ground of criticism that plaintiff endeavored to secure a closed nonunion mine through individual agreements with its employees, as if this furnished some sort of excuse for the employment of coercive measures to secure a closed union shop through a collective agreement with the Union. It is a sufficient answer, in law, to repeat that plaintiff had a legal and constitutional right to exclude union men from its employ. But it may be worth while to say, in addition: "First, that there was no middle ground open to plaintiff; no option to have an 'open shop' employing union men and nonunion men indifferently; it was the Union that insisted upon closed-

shop agreements, requiring even carpenters employed about a mine to be members of the Union, and making the employment of any nonunion man a ground for a strike; and, secondly, plaintiff was in the reasonable exercise of its rights in excluding all union men from its employ, having learned, from a previous experience, that, unless this were done, union organizers might gain access to its mine in the guise of laborers.

Defendants set up, by way of justification or excuse, the right of workmen to form unions, and to enlarge their membership by inviting other workmen to join. The right is freely conceded, provided the objects of the union be proper and legitimate, which we assume to be true, in a general sense, with respect to the Union here in question. *Gompers v. Buck's Stove & Range Co.* 221 U. S. 418, 439, 55 L. ed. 797, 805, 34 L.R.A. (N.S.) 874, 31 Sup. Ct. Rep. 492. The cardinal error of defendants' position lies in the assumption that the right is so absolute that it may be exercised under any circumstances and without any qualification; whereas in truth, like other rights that exist in civilized society, it must always be exercised with reasonable regard for the conflicting rights of others. *Brennan v. United Hatters*, 73 N. J. L. 729, 749, 9 L.R.A. (N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 Ann. Cas. 698. The familiar maxim, "*Sic utere tuo ut alienum non lædas*"—literally translated, "So use your own property as not to injure that of another person," but by more proper interpretation, "so as not to injure the rights of another" (*Broom, Legal Maxims*, 8th ed. 289)—applies to conflicting rights of every description. For example, where two or more persons are entitled to use the same road or passage, each one, in using it, is under a duty to exercise care not to interfere with its use by the others, or to damage them while they are using it. And a most familiar application is the action for enticing an employee, in which it never was a justification that defendant wished to retain for himself the services of the employee. 1 Bl. Com. 429; 3 Bl. Com. 142.

Now, assuming defendants were exercising, through Hughes, the right to invite men to join their Union, still they had plain notice that plaintiff's mine was run "non-union," that none of the men had a right to remain at work there after joining the Union, and that the observance of this agreement was of great importance and value both to plaintiff and to its men, who had voluntarily made the agreement and desired to continue working under it. Yet defendants, far from exercising any care to refrain from unnecessarily injuring plaintiff, deliberately and ad-

visedly selected that method of enlarging their membership which would inflict the greatest injury upon plaintiff and its loyal employees. Every Hitchman miner who joined Hughes's "secret order" and permitted his name to be entered upon Hughes's list was guilty of a breach of his contract of employment and acted a lie whenever thereafter he entered plaintiff's mine to work. Hughes not only connived at this, but must be deemed to have caused and procured it, for it was the main feature of defendants' plan, the *sine qua non* of their program. Evidently it was deemed to be necessary, in order to "organize the Panhandle by a strike movement," that at the Hitchman, for example, man after man should be persuaded to join the Union, and, having done so, to remain at work, keeping the employer in ignorance of their number and identity, until so many had joined that, by stopping work in a body, they could coerce the employer and the remaining miners to "organize the mine;" that is, to make an agreement that none but members of the Union should be employed; that terms of employment should be determined by negotiation not with the employees, but with union officers,—perhaps residents of other states and employees of competing mines,—and that all questions in controversy between the mine operator and the miners should likewise be settled with outsiders.

True, it is suggested that, under the existing contract, an employee was not called upon to leave plaintiff's employ until he actually joined the Union, and that the evidence shows only an attempt by Hughes to induce the men to *agree* to join, but no attempt to induce them to violate their contract by failing to withdraw from plaintiff's employment after *actually joining*. But, in a court of equity, which looks to the substance and essence of things and disregards matters of form and technical nicety, it is sufficient to say that to induce men to *agree* to join is but a mode of inducing them to join, and that when defendants "had sixty men who had signed up or agreed to join the organization at Hitchman," and were "going to shut the mine down as soon as they got a few more men," the sixty were for practical purposes, and therefore, in the sight of equity, already members of the Union, and it needed no formal ritual or taking of an oath to constitute them such; their uniting with the Union in the plan to subvert the system of employment at the Hitchman mine, to which they had voluntarily agreed and upon which their employer and their fellow employees were relying, was sufficient.

But the facts render it plain that what the defendants were endeavoring to do at L.R.A.19180.

the Hitchman mine and neighboring mines cannot be treated as a bona fide effort to enlarge the membership of the Union. There is no evidence to show, nor can it be inferred, that defendants intended or desired to have the men at these mines join the Union, *unless they could organize the mines*. Without this, the new members would be added to the number of men competing for jobs in the organized districts, while nonunion men would take their places in the Panhandle mines. Except as a means to the end of compelling the owners of these mines to change their method of operation, the defendants were not seeking to enlarge the Union membership.

In any aspect of the matter, it cannot be said that defendants were pursuing their object by *lawful* means. The question of their intentions—of their bona fides—cannot be ignored. It enters into the question of malice. As Bowen, L. J., justly said, in the Mogul S. S. Case, L. R. 23 Q. B. Div. 613: "Intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse." And the intentional infliction of such damage upon another, without justification or excuse, is malicious in law. *Bitterman v. Louisville & N. R. Co.* 207 U. S. 205, 223, 52 L. ed. 171, 182, 28 Sup. Ct. Rep. 91, 12 Ann. Cas. 693; *Brennan v. United Hatters*, 73 N. J. L. 729, 744 et seq., 9 L.R.A.(N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 Ann. Cas. 698, and cases cited. Of course, in a court of equity, when passing upon the right of injunction, damage threatened, irremediable by action at law, is equivalent to damage done. And we cannot deem the proffered excuse to be a "*just cause or excuse*," where it is based, as in this case, upon an assertion of conflicting rights that are sought to be attained by unfair methods, and for the very purpose of interfering with plaintiff's rights, of which defendants have full notice.

Another fundamental error in defendants' position consists in the assumption that all measures that may be resorted to are lawful if they are "peaceable,"—that is, if they stop short of physical violence, or coercion through fear of it. In our opinion, any violation of plaintiff's legal rights contrived by defendants for the purpose of inflicting damage, or having that as its necessary effect, is as plainly inhibited by the law as if it involved a breach of the peace. A combination to procure concerted breaches of contract by plaintiff's employees constitutes such a violation. *Flaccus v. Smith*, 199 Pa. 128, 54 L.R.A. 640,

85 Am. St. Rep. 779, 48 Atl. 894; South Wales Miners' Federation v. Glamorgan Coal Co. [1905] A. C. 239, 244, 250, 253, 1 B. R. C. 1, 74 L. J. K. B. N. S. 525, 53 Week. Rep. 593, 92 L. T. N. S. 710, 21 Times L. R. 441, 2 Ann. Cas. 436; George Jonas Glass Co. v. Glass Bottle Blowers' Asso. 77 N. J. Eq. 219, 223, 41 L.R.A. (N.S.) 445, 79 Atl. 262.

The present is not a case of merely withholding from an employer an economic need—as a supply of labor—until he assents to be governed by union regulations. Defendants have no supply of labor of which plaintiff stands in need. By the statement of defendant Lewis himself, made in his formal report to the Indianapolis convention of 1907, out of more than 370,000 coal miners in the states of Pennsylvania, Maryland, Virginia, and West Virginia, less than 80,000 (about 22 per cent) were members of the Union. Considering the Panhandle separately, doubtless the proportion was even smaller, and the supply of nonunion labor ample. There is no reason to doubt that if defendants had been actuated by a genuine desire to increase the membership of the Union without unnecessary injury to the known rights of plaintiff, they would have permitted their proselytes to withdraw from plaintiff's employ when and as they became affiliated with the Union,—as their contract of employment required them to do,—and that in this event plaintiff would have been able to secure an adequate supply of nonunion men to take their places. It was with knowledge of this, and because of it, that defendants, through Hughes as their agent, caused the new members to remain at work in plaintiff's mine until a sufficient number of men should be persuaded to join so as to bring about a strike and render it difficult if not practically impossible for plaintiff to continue to exercise its undoubted legal and constitutional right to run its mine "nonunion."

It was one thing for plaintiff to find, from time to time, comparatively small numbers of men to take vacant places in a going mine, another and a much more difficult thing to find a complete gang of new men to start up a mine shut down by a strike, when there might be a reasonable apprehension of violence at the hands of the strikers and their sympathizers. The disordered condition of a mining town in time of strike is matter of common knowledge. It was this kind of intimidation, as well as that resulting from the large organized membership of the Union, that defendants sought to exert upon plaintiff, and it renders pertinent what was said by this court in the Gompers Case, 221 U. S. 418, 439, L.R.A.1918C.

55 L. ed. 797, 805, 34 L.R.A. (N.S.) 874, 31 Sup. Ct. Rep. 492, immediately following the recognition of the right to form labor unions: "But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights and appealing to the preventive powers of a court of equity. When such appeal is made, it is the duty of government to protect the one against the many as well as the many against the one."

Defendants' acts cannot be justified by any analogy to competition in trade. They are not competitors of plaintiff; and if they were, their conduct exceeds the bounds of fair trade. Certainly, if a competing trader should endeavor to draw custom from his rival, not by offering better or cheaper goods, employing more competent salesmen, or displaying more attractive advertisements, but by persuading the rival's clerks to desert him under circumstances rendering it difficult or embarrassing for him to fill their places, any court of equity would grant an injunction to restrain this as unfair competition.

Upon all the facts, we are constrained to hold that the purpose entertained by defendants to bring about a strike at plaintiff's mine in order to compel plaintiff, through fear of financial loss, to consent to the unionization of the mine as the lesser evil, was an unlawful purpose, and that the methods resorted to by Hughes—the inducing of employees to unite with the Union in an effort to subvert the system of employment at the mine by concerted breaches of the contracts of employment known to be in force there, not to mention misrepresentation, deceptive statements, and threats of pecuniary loss communicated by Hughes to the men—were unlawful and malicious methods, and not to be justified as a fair exercise of the right to increase the membership of the Union.

There can be no question that plaintiff was threatened with danger of an immediate strike as a result of the activities of Hughes. The effect of his arguments and representations is not to be judged from the testimony of those witnesses who rejected his overtures. Naturally, it was not easy for plaintiff to find men who would testify that they had agreed with Hughes to break their contract with plaintiff. One such did testify. But the true measure of the extent of his operations and the probability

of his carrying them to success are indicated by his declaration to Myers that he had about enough names at the Hitchman to "crack off," by the statement to McKinley that twenty-four men at the Glendale mine had joined the organization, and sixty at the Hitchman, and by the fact that they actually succeeded in shutting down the Richland about the middle of October. The declaration made concerning the Glendale is corroborated by the evidence of what happened at that mine.

That the damage resulting from a strike would be irremediable at law is too plain for discussion.

Therefore, upon the undisputed facts of the case, and the indubitable inferences from them, plaintiff is entitled to relief by injunction. Having become convinced by three costly strikes, occurring within a period of as many years, of the futility of attempting to operate under a closed-shop agreement with the Union, it established the mine on a nonunion basis, with the unanimous approval of its employees,—in fact, upon their suggestion,—and under a mutual agreement, assented to by every employee, that plaintiff would continue to run its mine nonunion and would not recognize the United Mine Workers of America; that if any man wanted to become a member of that Union, he was at liberty to do so, but he could not be a member and remain in plaintiff's employ. Under that agreement plaintiff ran its mine for a year and more, and, so far as appears, without the slightest disagreement between it and its men, and without any grievance on their part. Thereupon defendants, having full notice of the working agreement between plaintiff and its men, and acting without any agency for those men, but as representatives of an organization of mine workers in other states, and in order to subject plaintiff to such participation by the Union in the management of the mine as necessarily results from the making of a closed-shop agreement, sent their agent to the mine, who, with full notice of, and for the very purpose of subverting, the status arising from plaintiff's working agreement, and subjecting the mine to the Union control, proceeded, without physical violence, indeed, but by persuasion accompanied with threats of a reduction of wages and deceptive statements as to the attitude of the mine management, to induce plaintiff's employees to join the Union and at the same time to break their agreement with plaintiff by remaining in its employ after joining; and this for the purpose not of enlarging the membership of the Union, but of coercing plaintiff, through a strike or the threat of one, into recognition of the Union.

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As against the answering defendants, plaintiff's right to an injunction is clear; as to the others named as defendants, but not served with process, the decree is erroneous, as already stated.

Respecting the sweep of the injunction, we differ somewhat from the result reached by the district court.

So far as it restrains—(1) Interfering or attempting to interfere with plaintiff's employees for the purpose of unionizing plaintiff's mine without its consent, by representing or causing to be represented to any of plaintiff's employees, or to any person who might become an employee of plaintiff, that such person will suffer or is likely to suffer some loss or trouble in continuing in or in entering the employment of plaintiff, by reason of plaintiff not recognizing the Union, or because plaintiff runs a nonunion mine; (2) interfering or attempting to interfere with plaintiff's employees for the purpose of unionizing the mine without plaintiff's consent, and in aid of such purpose knowingly and wilfully bringing about the breaking by plaintiff's employees of contracts of service known at the time to exist with plaintiff's present and future employees; (3) knowingly and wilfully enticing plaintiff's employees, present or future, to leave plaintiff's service on the ground that plaintiff does not recognize the United Mine Workers of America, or runs a nonunion mine, etc.; (4) interfering or attempting to interfere with plaintiff's employees, so as knowingly and wilfully to bring about the breaking by plaintiff's employees, present and future, of their contracts of service, known to the defendants to exist, and especially from knowingly and wilfully enticing such employees, present or future, to leave plaintiff's service without plaintiff's consent; (5) trespassing on or entering upon the grounds and premises of plaintiff or its mine for the purpose of interfering therewith or hindering or obstructing its business, or with the purpose of compelling or inducing, by threats, intimidation, violent or abusive language, or persuasion, any of plaintiff's employees to refuse or fail to perform their duties as such; and (6) compelling or inducing or attempting to compel or induce, by threats, intimidation, or abusive or violent language, any of plaintiff's employees to leave its service or fail or refuse to perform their duties as such employees, or compelling or attempting to compel by like means any person desiring to seek employment in plaintiff's mine and works from so accepting employment therein;—the decree is fully supported by the proofs. But it goes further, and awards an injunction against picketing and against acts of physical vio-

lence, and we find no evidence that either of these forms of interference was threatened. The decree should be modified by eliminating picketing and physical violence from the sweep of the injunction, but without prejudice to plaintiff's right to obtain an injunction hereafter against these forms of interference if proof shall be produced, either in proceedings supplemental to this action or in an independent action, that such an injunction is needed.

The decree of the Circuit Court of Appeals is reversed, and the decree of the District Court is modified as above stated, and as so modified it is affirmed, and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

Mr. Justice Brandeis, dissenting:

This suit was begun October 24, 1907. The Hitchman Coal & Coke Company, plaintiff below, is the owner of a coal mine in West Virginia. John Mitchell and nine others, defendants below, were then the chief executive officers of the United Mine Workers of America and of its district and subdistrict organizations having "jurisdiction" over the territory in which plaintiff's mine is situated, and were sued both individually and as such officers. The mine had been "unionized" about three years prior to April 16th, 1906; and until about that date was operated as a "union" mine, under a collective agreement with a local union of the United Mine Workers of America. Then a strike was declared by the union, and a short shutdown followed. While the strike so declared was still in force, as the bill alleges, the company reopened the mine as a closed nonunion mine. Thereafter per-

sons applying for work were required, as a condition of obtaining employment, to agree that they would not, while in the service of the company, be a member of the union, and if they joined the Union would withdraw from the company's employ.²

Alleging that efforts were being made illegally to unionize its mine "without its consent," the company brought in the United States circuit (now district) court for the northern district of West Virginia this suit to enjoin such efforts. District Judge Dayton granted a restraining order upon the filing of the bill. An order was entered May 26, 1908, continuing it as a temporary injunction. A motion to modify the same was denied, September 21, 1909 (172 Fed. 963). An appeal from this order was dismissed by the circuit court of appeals, March 11, 1910 (100 C. C. A. 137, 176 Fed. 549). The case was then heard on the merits; defendants having denied in their answer all the charges of unlawful conduct set forth in the bill; and on January 18, 1913, a decree was entered for a perpetual injunction substantially in the form of the restraining order (202 Fed. 512). This decree was reversed by the circuit court of appeals on June 1, 1914 (131 C. C. A. 425, 214 Fed. 685); but a stay was granted pending an application to this court for a writ of certiorari. The company appealed to this court and also applied for a writ of certiorari. The appeal was dismissed, as the jurisdiction of the circuit (district) court was rested wholly upon diversity of citizenship, plaintiff being a corporation organized under the laws of West Virginia and all the defendants citizens and residents of other states (241 U. S. 644, 60 L. ed. 1218, 36 Sup.

² About two months after the restraining order was issued in this case the plaintiff company began the practice of requiring applicants for work to sign employment cards, in the following terms:

"I am employed by and work for the Hitchman Coal & Coke Company with the express understanding that I am not a member of the United Mine Workers of America, and will not become so while an employee of the Hitchman Coal & Coke Company; that the Hitchman Coal & Coke Company is run nonunion and agrees with me that it will run nonunion while I am in its employ. If at any time I am employed by the Hitchman Coal & Coke Company I want to become connected with the United Mine Workers of America or any affiliated organization, I agree to withdraw from the employment of said company, and agree that while I am in the employ of that company I will not make any efforts amongst its employees to bring about the unionizing of that mine against the company's wish. I have either read the above or heard the same read."

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Prior to that time, the agreement rested in oral understanding merely, and is sufficiently indicated in the following excerpts from the testimony of the mine superintendent as to what he told the men applying for employment:

I also told them that any man who wanted to become a member of the United Mine Workers—that that was his business—but he could not be a member of the United Mine Workers and be affiliated with the United Mine Workers and be under the employ of the Hitchman Coal & Coke Company, or be under the jurisdiction of the United Mine Workers: that the mine was run nonunion so far as the United Mine Workers of America were concerned.

Q. You mean you made every man understand that while he worked for the Hitchman Company he must keep out of the Union?

A. Yes, sir; or at least they said they understood it.

Ct. Rep. 450). A writ of certiorari was granted, however, March 13, 1916. The case was argued at that term and a reargument was ordered.

The district court held that the United Mine Workers of America, with its subordinate branches, constitutes an unlawful organization—illegal both under the law of West Virginia and under the Federal Anti-trust Act; that its long-continued effort to unionize the mines of West Virginia had not been “in the interest either of the betterment of mine labor in the state or of upholding that free commerce in coal between the states guaranteed by Federal law, but to restrain and even destroy it” for the benefit of “rival operators and producers in Ohio, Western Pennsylvania, Illinois, and Indiana, competitive fields” in which the mines have been unionized; and that “in pursuit of its unlawful purposes” the Union “have sought and still seek to compel the plaintiff . . . to submit to contractual relations with it as an organization relating to the employment of labor and production contrary to the will and wish of said company; that is officers, in pursuance of such unlawful effort to monopolize labor and restrain trade, and with knowledge of the express contracts existing between this plaintiff and its employees, have unlawfully sought to cause the breach of the said contracts on the part of its said employees.”

The decree, besides the usual injunction against threat, intimidation, force, or violence, and against inducing breaches of employees' contracts or trespassing upon plaintiff's property, enjoined defendants (and others hereinafter described), among other things, from:

1. “Representing [“for the purpose of unionizing plaintiff's mine without plaintiff's consent”] . . . to any of plaintiff's employees or to any person who might become an employee of plaintiff, that such person . . . is likely to suffer some loss or trouble in continuing in or in entering the employment of plaintiff, . . . representing . . . to such employee . . . that such loss or trouble . . . may come by reason of plaintiff not recognizing the United Mine Workers of America, or because plaintiff runs a nonunion mine.”

2. “. . . knowingly and wilfully enticing [“for the purpose of unionizing plaintiff's mine, without plaintiff's consent”] plaintiff's employees, present or future, . . . to leave plaintiff's service, giving or assigning . . . as a reason . . . for leaving of plaintiff's service, that plaintiff does not recognize the United Mine Workers of America, or that plaintiff runs a nonunion mine.
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3. “. . . knowingly and wilfully enticing plaintiff's employees, present or future . . . to leave plaintiff's service without plaintiff's consent, against plaintiff's will and to plaintiff's injury.”

4. “. . . establishing a picket . . . for the purpose of inducing . . . by . . . persuasion . . . any person . . . coming to plaintiff's mine to accept employment . . . to refuse . . . to accept service with plaintiff.”

5. “. . . interfering in any manner whatsoever, either by . . . persuasion or entreaty with any person in the employ of plaintiff who has contracted with and is in the actual service of plaintiff to . . . induce him to quit the service of plaintiff . . . or assisting, or abetting in any manner” his doing so.

Three of the defendants—Mitchell, Wilson, and Hughes—were never served with process and did not enter any appearance except to object to the jurisdiction of the court over them. Of the remaining seven all but two had, prior to the entry of the final decree, ceased to hold any office either in the United Mine Workers of America or in any of the district or subdistrict organizations. Nevertheless the decree directed that the injunction issue against each of the ten original defendants, “individually;” and also in their official capacities against their successors in office (who were named in the decree), although these had not been served with process or been named in the bill; the court declaring such persons to be “before the court by representation through service having been made upon their said predecessors in office, sued as such officers and as members of the United Mine Workers of America.” The decree extended the injunction, among others, also to “all persons now members of said United Mine Workers of America, and all persons who, though not now members, do become members of said United Mine Workers of America.”

The circuit court of appeals, reversing the decree of the district court, held that the United Mine Workers of America was not an unlawful organization under the laws of West Virginia, that its validity under the Federal Anti-trust Act could not be considered in this proceeding; that so long as defendants “refrained from resorting to unlawful measures to effectuate” their purpose “they could not be said to be engaged in a conspiracy to unionize plaintiff's mine;” that “the evidence failed to show that any unlawful methods were resorted to by these defendants in this instance;” and specifically, that there was nothing in the individual contracts which barred defendants from inducing the em-

ployees to join the Union. With these conclusions I agree substantially.

First: The alleged illegality of the United Mine Workers of America under the law of West Virginia.

The United Mine Workers of America does not appear to differ essentially in character and purpose from other international unions which, like it, are affiliated with the American Federation of Labor. Its membership is said to be larger than that of any other, and it may be more powerful. But the common law does not limit the size of unions or the degree to which individual workmen may, by union, increase their bargaining power. As stated in *Gompers v. Buck's Stove & Range Co.* 221 U. S. 418, 439, 35 L. ed. 797, 805, 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 492: "The law, therefore, recognizes the right of workmen to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association." We do not find, either in the decisions or the statutes of West Virginia, anything inconsistent with the law as declared by this court. The union is not an unlawful organization, and is not in itself an unlawful conspiracy. We have no occasion to consider the legality of the specific provisions contained in its constitution or by-laws.

Second: The alleged illegality of the United Mine Workers of America under the Federal Anti-trust Act.

The district judge undertook to pass upon the legality of the United Mine Workers of America under the Federal Anti-trust Act; but the question was not in issue in the case. It had not been raised in the bill or by answer. Evidence bearing upon the issue was properly objected to by defendants and should have been excluded.

Third: The alleged conspiracy against the West Virginia mines.

It was doubtless the desire of the United Mine Workers to unionize every mine on the American continent, and especially those in West Virginia, which compete directly with the mines of Western Pennsylvania, Ohio, Indiana, and other states already unionized. That desire and the purpose to effect it were not unlawful. They were part of a reasonable effort to improve the condition of workmen engaged in the industry by strengthening their bargaining power through unions, and extending the field of union power. No conspiracy to shut down or otherwise injure West Virginia was proved, nor was there any averment in the bill of such conspiracy, or any issue otherwise raised by the pleadings

which justified the consideration of that question by the district court.³

Fourth: "Unionizing plaintiff's mine without plaintiff's consent."

The fundamental prohibition of the injunction is against acts done "for the purpose of unionizing plaintiff's mine without plaintiff's consent." Unionizing a shop does not mean inducing the employees to become members of the Union.⁴ It means inducing the employer to enter into a collective agreement with the Union governing the relations of the employer to the employees. Unionizing implies, therefore, at least formal consent of the employer. Both plaintiff and defendants insisted upon exercising the right to secure contracts for a closed shop. The plaintiff sought to secure the *closed nonunion shop* through individual agreements with employees. The defendants sought to secure the *closed union shop* through a collective agreement with the Union. Since collective bargaining is legal, the fact that the workmen's agreement is made not by individuals directly with the employer, but by the employees with the Union and by it, on their behalf, with the employer, is of no significance in this connection. The end being *lawful*, defendant's efforts to unionize the mine can be illegal only if the methods or means pursued were unlawful; unless, indeed, there is some special significance in the expression "unionizing without plaintiff's consent."

It is urged that a union agreement curtails the liberty of the operator. Every agreement curtails the liberty of those who enter into it. The test of legality is not whether an agreement curtails liberty, but whether the parties have agreed upon something which the law prohibits or declares otherwise to be inconsistent with the public welfare. The operator, by the union agreement, binds himself: (1) To employ only members of the Union; (2) to negotiate with the union officers instead of with employees individually the scale of wages and the hours of work; (3) to

³ This alleged conspiracy not being in issue, the district court improperly allowed the introduction, and considered, a mass of documents referring to various mine workers' conventions, and joint conventions of miners and operators, held years previous to the filing of the bill. Judge Dayton laid great stress on reported declarations of the delegates to these conventions, although the declarations of alleged co-conspirators were obviously inadmissible, there being no foundation for the conspiracy charge.

⁴ A witness for the defendants testified as follows:

"There is a difference between unionizing

treat with the duly constituted representatives of the Union to settle disputes concerning the discharge of men and other controversies arising out of the employment. These are the chief features of a "unionizing" by which the employer's liberty is curtailed. Each of them is legal. To obtain any of them or all of them men may lawfully strive and even strike. And, if the Union may legally strike to obtain each of the things for which the agreement provides, why may it not strike or use equivalent economic pressure to secure an agreement to provide them?

It is also urged that defendants are seeking to "coerce" plaintiff to "unionize" its mine. But coercion, in a legal sense, is not exerted when a union merely endeavors to induce employees to join a union with the intention thereafter to order a strike unless the employer consents to unionize his shop. Such pressure is not coercion in a legal sense. The employer is free either to accept the agreement or the disadvantage. Indeed, the plaintiff's whole case is rested upon agreements secured under similar pressure of economic necessity or disadvantage. If it is coercion to threaten to strike unless plaintiff consents to a closed union shop, it is coercion also to threaten not to give one employment unless the applicant will consent to a closed nonunion shop. The employer may sign the union agreement for fear that *labor* may not be otherwise obtainable; the workman may sign the individual agreement, for fear that *employment* may not be otherwise obtainable. But such fear does not imply coercion in a legal sense.

In other words, an employer, in order to effectuate the closing of his shop to union

labor, may exact an agreement to that effect from his employees. The agreement itself being a lawful one, the employer may withhold from the men an economic need—employment—until they assent to make it. Likewise an agreement closing a shop to nonunion labor being lawful, the union may withhold from an employer an economic need—labor—until he assents to make it. In a legal sense an agreement entered into, under such circumstances, is voluntarily entered into; and as the agreement is in itself legal, no reason appears why the general rule that a legal end may be pursued by legal means should not be applied. Or, putting it in other words, there is nothing in the character of the agreement which should make *unlawful* means used to attain it, which in other connections are recognized as *lawful*.

Fifth: There was no attempt to induce employees to violate their contracts.

The contract created an employment at will; and the employee was free to leave at any time. The contract did not bind the employee *not* to join the Union; and he was free to join it at any time. The contract merely bound him to withdraw from plaintiff's employ if he joined the Union. There is evidence of an attempt to induce plaintiff's employees to *agree* to join the Union: but none whatever of any attempt to induce them to violate their contract. Until an employee actually joined the Union he was not, under the contract, called upon to leave plaintiff's employ. There consequently would be no breach of contract until the employee both joined the Union and failed to withdraw from plaintiff's employ. There was no evidence that any employee

a mine and unionizing the employees in a mine; unionizing the employees is having the men join the organization; unionizing a mine is creating joint relations between the employers and employees; a mine cannot be unionized unless the employer enters into contractual relations with the union; it is not the policy or purpose of the United Mine Workers as an organization to coerce a man into doing a thing against his will; this distinction between unionizing a mine and unionizing the employees of a mine has existed since the organization came about, and this method of unionizing a mine existed in 1906 and 1907."

A witness for the plaintiff testified that "the term 'union,' when applied to mining, means the United Mine Workers, and a union mine is a mine that is under their jurisdiction and so recognized. . . ." The contrary is "nonunion or open shop." And further: "The men might be unionized at a mine and the mine owners not recognize the Union. That would in effect be an open shop. When I said 'unionize the employees,' I meant practically all of the em-
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employees; but a union mine, as I understand it, is one wherein the closed shop is practically enforced." In such case, the witness explained, the operator would be practically in contract relation with the organization.

It was also testified: "The difference between organizing the men at the mine and organizing the mine is that when the miners are organized the work of organizing the mine is only just started. They next proceed to meet with the operator who owns the mine, or operates it, for the purpose of making contracts or agreements. Under the constitution and methods of the United Mine Workers a mine cannot be organized without the consent of the owner, and it is not the object or purpose of the United Mine Workers to do so, and never has been: it has never been attempted as far as witness knows. After a mine has been organized, the agreement between the employer and the organization is paramount. The constitution of the organization has nothing to do with the workings afterwards: that agreement does not take away from the operator the control of his men."

was persuaded to do that, or that such a course was contemplated. What perhaps was intended was to secure agreements or assurances from individual employees that they would join the Union when a large number of them should have consented to do so; with the purpose, when such time arrived, to have them join the Union together and strike—unless plaintiff consented to unionize the mine. Such a course would have been clearly permissible under the contract.

Sixth: Merely persuading employees to leave plaintiff's employ, or others not to enter it, was not unlawful.

To induce third persons to leave an employment is actionable if done maliciously and without justifiable cause, although such persons are free to leave at their own will. *Truax v. Raich*, 239 U. S. 33, 38, 60 L. ed. 131, 134, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; *Thacker Coal & Coke Co. v. Burke*, 59 W. Va. 253, 5 L.R.A.(N.S.) 1091, 53 S. E. 161, 8 Ann. Cas. 885. It is equally actionable so to induce others not to enter the service. The individual contracts of plaintiff with its employees added nothing to its right in this connection, since the employment was terminable at will.

As persuasion, considered merely as a means, is clearly legal, defendants were within their rights if, and only if, their interference with the relation of plaintiff to its employees was for justifiable cause. The purpose of interfering was confessedly in order to strengthen the Union, in the belief that thereby the condition of workmen engaged in mining would be improved; the bargaining power of the individual workingman was to be strengthened by collective bargaining; and collective bargaining was to be insured by obtaining the union agreement. It should not, at this day, be doubted that to induce workingmen to leave or not to enter an employment in

order to advance such a purpose is justifiable when the workmen are not bound by contract to remain in such employment.

Seventh: There was no "threat, violence, or intimidation."

The decree enjoined "threats, violence, or intimidation." Such action would, of course, be unlawful though employed in a justifiable cause. But there is no evidence that any of the defendants have resorted to such means. The propaganda among plaintiff's employees was conducted almost entirely by one man, the defendant Hughes, a district No. 6 organizer. His actions were orderly and peaceable, consisting of informal talks with the men, and a few quietly conducted public meetings⁵ in which he argued the benefits of organization and pointed out to the men that, although the company was then paying them according to the Union scale, there would be nothing to prevent a later reduction of wages unless the men united. He also urged upon the men that if they lost their present jobs, membership in the Union was requisite to obtaining employment in the Union mines of the neighboring states. But there is no suggestion that he exceeded the moderate bounds of peaceful persuasion, and indeed, if plaintiff's witnesses are to be believed, men with whom Hughes had talked, his argument made no impression on them, and they expressed to him their satisfaction with existing conditions at the mines.

When this suit was filed no right of the plaintiff had been infringed and there was no reasonable ground to believe that any of its rights would be interfered with; and, in my opinion, the Circuit Court of Appeals properly reversed the decree of the District Court, and directed that the bill be dismissed.

Mr. Justice Holmes and Mr. Justice Clarke concur in this dissent.

⁵ Following is a notice of one of Hughes's meetings which was torn from a telegraph pole in the street by the plaintiff's mine superintendent:

"Notice to the miners of the Hitchman mine. There will be a mass meeting Friday

evening at 6:30 P. M. at Nick Heil's Base Ball Grounds, for the purpose of discussing the principles of organization. President Wm. Green will be present. All miners are cordially invited to attend."

VIRGINIA SUPREME COURT OF APPEALS.

C. B. HARPER et al., Appts.,
v.

HENRY S. WALLERSTEIN.

(— Va. —, 94 S. E. 781.)

Specific performance — contract to convey lot by number.

1. A contract to convey certain property L.R.A.1918C.

situated in a particular city with a certain number on a certain street, and all improvements thereon, covers all the property shown by the records to belong to the numbered lot, and not merely the portion of the lot covered by buildings.

For other cases, see *Contracts*, II. d, 2, a, in *Dig. 1-52 N. S.*

Note. — As to description of land in deed or contract by reference to street number, see annotation following this case, post, 520.

Vendor and purchaser — sufficiency of description of property.

2. The description of a lot to be conveyed as a certain number on a certain street in a city having a known system of notation, regulated by municipal laws and acted upon by everyone, is sufficient.

For other cases, see Specific Performance, I. a, in Dig. 1-52 N. S.

(January 24, 1918.)

A PPEAL by defendants from a decree of the Chancery Court of the City of Richmond in favor of plaintiff in a suit to compel specific performance of a written contract made by him with defendants for the purchase of certain real property. Affirmed.

The facts are stated in the opinion.

Messrs. Daniel Grinnan and John B. Gayle, for appellants:

A court of equity will not enforce a contract between parties except where the contract is complete in every detail.

Fry, Spec. Perf. of Contr. § 722; Halsey v. Monteiro, 92 Va. 589, 24 S. E. 258; Smith v. Mullen, 113 Va. 675, 75 S. E. 130; Shield v. Adkins, 117 Va. 623, 85 S. E. 492; Pom. Spec. Perf. of Contr. 2d ed. §§ 152, 159, 229; Graham v. Hendren, 5 Munf. 185; Grayson Lumber Co. v. Young, 118 Va. 122, 86 S. E. 826; Mathews v. Jarrett, 20 W. Va. 415; Hall v. Cotton, 167 Ky. 464, L.R.A. 1916C, 1124, 180 S. W. 779; Bates v. Harris, 144 Ky. 390, 36 L.R.A. (N.S.) 154, 138 S. W. 276; Clinchfield Coal Co. v. Powers, 107 Va. 393, 59 S. E. 370; Creecy v. Grief, 108 Va. 320, 61 S. E. 769; Van Dyke v. Norfolk S. R. Co. 112 Va. 835, 72 S. E. 659; Reger v. McAllister, 70 W. Va. 52, 73 S. E. 48; Smith v. Peterson, 71 W. Va. 364, 76 S. E. 804.

Messrs. Arden Howell and Samuel A. Anderson, for appellee:

There is no ambiguity in the description of the property because the description is applicable only to the lot in controversy, which has been easily identified, the identification being unquestioned. The contract being certain and definite in all other respects, the decree of the chancery court enforcing its performance was plainly right.

Virginia Iron, Coal & Coke Co. v. Crane's Nest Coal & Coke Co. 102 Va. 405, 46 S. E. 393; Hardin v. Kelley, 89 Va. 332, 15 S. E. 894; Trout v. Norfolk & W. R. Co. 107 Va. 576, 17 L.R.A. (N.S.) 702, 59 S. E. 394; Holston Salt & P. Co. v. Campbell, 89 Va. 396, 16 S. E. 274; Williamson v. Payne, 103 Va. 551, 49 S. E. 660; Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 S. E. 232; Lennig v. White, 1 Va. Dec. 875; Warren v. Syme, 7 W. Va. 474; Thorn v. Phares, 35 W. Va. 772, 14 S. E. 399; Tallman v. Franklin, 14 N. Y. 584; Engler v. Garrett, 100 Md. 387, 59 Atl. 648; Fowler v. Fowler, 204 L.R.A. 1918C.

Ill. 82, 68 N. E. 414; Scheible v. Slagle, 89 Ind. 324; Pittsburgh, C. C. & St. L. R. Co. v. Beck, 152 Ind. 421, 53 N. E. 439.

Whittle, P., delivered the opinion of the court:

From a decree of the chancery court of the city of Richmond, granting to the appellee specific performance of a written contract of sale between appellants and appellee of "that certain property situated in the city of Richmond, Virginia, 'No. 504 East Marshall street and all improvements thereon,'" which the court ascertained fronted 26 feet on East Marshall street, and extended back at a right angle and between parallel lines 98.70 feet, this appeal was granted.

The sale was negotiated by an employee of real estate brokers, agents for appellants, and the contract was prepared in their office. The sole question is: What property is embraced by the description, ". . . the following property, to wit, No. 504 East Marshall street and all improvements thereon?"

The entire property owned by appellants was L-shaped, one end of which fronted on East Marshall street, and the other end on North Fifth street. The former was improved with a store building 66 feet and 3 inches in length; the latter with a brick stable extending entirely across the lot from the North Fifth street front. There is a vacant space in rear of the storehouse, which runs back to a temporary wooden shed attached to the side of the stable toward its rear end.

Appellants admit the execution of the contract of sale, but say that they had in mind and only intended to sell the 66 feet and 3 inches of the lot fronting on East Marshall street actually covered by the building; but they did not disclose that fact to appellee. Appellee, on the other hand, examined the land books and records to identify the property designated No. 504 East Marshall street. On the land books he found it charged to appellants as No. 504, containing 26 feet by 98.70 feet. He moreover inspected a partition deed dated February 18, 1880, between T. H. Ellett and Mary Etta Brown, in which reference was made to a plat drawn by Bates and Bolton January 30, 1880, which papers, and the deed from Ellett, trustee, and Mary Etta Brown and her husband, to appellants, also described lot 504 as having a depth of 98.70 feet. These records and the testimony of J. S. Clark, a civil engineer, fully and plainly identify the property described in the contract of sale and fix its dimensions as understood by appellee and established by the decree under review. Indeed, appellants

themselves must so have regarded it, at least for purposes of taxation, since it was their duty to cause it to be correctly entered on the land books, where, as observed, the foregoing dimensions appear. Code, § 634. These, then, being the established facts, the controlling principles of law are not difficult of application.

The case of Virginia Iron, Coal, & Coke Co. v. Crane's Nest Coal & Coke Co. 102 Va. 405, 410, 46 S. E. 393, holds that "a conveyance of all the coal underlying the grantor's tract of land known as the 'Sandy Ridge tract,' adjoining the lands of certain named owners, though not a complete description, will convey the coal underlying the tract as it has been known for twenty years prior to the conveyance, although the grantor may have intended to except a portion of the tract the coal under which he had previously contracted to sell to another, and although the description would have been equally as accurate if the excepted land was not included. A grantor will not be allowed to change the effect of his conveyance by a statement that he did not intend to include this or that parcel of land therein, when such intention was not made known to his grantee at the time and acquiesced in by him."

In Trout v. Norfolk & W. R. Co. 107 Va. 576, 583, 17 L.R.A.(N.S.) 702, 59 S. E. 397, the court quotes with approval from Melton v. Watkins, 24 Ala. 433, 60 Am. Dec. 481, as follows: "It [the parol evidence] varied by parol the legal effect of the deed and took from the grantee an interest which the deed conveyed to him. The rule is too well settled to require the citation of authority that all previous or contemporaneous parol agreements or understandings between the parties materially altering or varying by adding to or subtracting from the written agreement must be considered as merged in that agreement, and the writing must be regarded as the evidence and sole expositor of the contract of the parties when it is clear and unambiguous."

In Warren v. Syme, 7 W. Va. 474, it is said: "Intrinsic certainty in a deed relative to specific property is simply impossible. The description can be made certain only by proof or recognition of the identity of the subjects to which it refers, or other objects or things that more or less directly and distinctly indicate and determine it. And in the application of deeds and other documents to lands and lots extensive latitude is allowed for the discovery and proof, not only of visible monuments or objects mentioned, but of mathematical lines of other lands and lots, and various classes of facts to which the description or suggestions in the deed may apply. . . . The cer-

tainty of a deed is determined by the principles of the common law. The recordation is regulated by the statutes alone."

In Thorn v. Phares, 35 W. Va. 772, 14 S. E. 399, it is held: "The main object of a description of the land sold or conveyed, in a deed of conveyance, or in a contract of sale, is not in and of itself to identify the land sold—that it rarely does or can do without helping evidence—but to furnish the means of identification; and when this is done it is sufficient. That is certain which can thus be made certain."

With respect to the sufficiency of the description of lot No. 504:

In Flanigen v. Philadelphia, 51 Pa. 491, syllabus, it is said: "In a city having a known system of notation, regulated by municipal laws and acted upon by everyone, the description of premises in ejectment by a number is sufficiently definite."

That the city of Richmond has such a system, see City Code, § 35, p. 312.

So in Tallman v. Franklin, 14 N. Y. 584, 592, it is said: "Nor do I think there was such an uncertainty in the . . . lots as to render the contract incapable of execution, and therefore void. They are described as building lots on One Hundred Thirty-second and One Hundred Thirty-third streets, between the Fifth and Sixth avenues. The numbers of the lots are given."

So also in Engler v. Garrett, 100 Md. 387, 397, 59 Atl. 648, 650, the court says: "Nor do we think there can be any objection to the contract on the ground of uncertainty. It describes the property as No. 2035 North Fulton avenue, and further designates it as the property occupied by Samuel S. Linthicum. This certainly is quite as definite and certain as the description we held good in the case of Kraft v. Egan, 76 Md. 252, 25 Atl. 469, where it is said that a decree for specific performance will not be refused merely because the contract does not state in what county or state the lands agreed to be conveyed lie, provided the description of the premises is not thereby rendered altogether indefinite."

In Scheible v. Slagle, 89 Ind. 324, syllabus, it is said: "The office of a description in a deed is not to identify the land conveyed, but to furnish the means of identification; and, when there is a general designation of the property intended to be conveyed, parol evidence is competent to show what property the description covers."

And in the opinion, at pages 330 and 331 of 89 Ind., it is said: "The rule prohibiting the contradiction of written instruments by oral evidence is not invaded by permitting testimony of the declarations of the grantor as to the character and condition of the property in cases where there is a mere gen-

eral description of the real estate which the grantor assumes to convey. Where there is a general designation of the property intended to be conveyed, it is competent to show by parol what property the description covers."

In *Pittsburgh, C. C. & St. L. R. Co. v. Beck*, 152 Ind. 421, 53 N. E. 439, it is said: "Uncertainty in the description in a deed is immaterial, if the premises intended to be conveyed can be identified by means of the description, in connection with other conveyances, plats, lines, or records, well known in the neighborhood, or on file in public offices."

The latest pronouncement of this court on the subject will be found in the case of *As-*

berry v. Mitchell, 121 Va. —, L.R.A. 1918A, 785, 93 S. E. 638.

We think the cases relied on by appellants, of which *Grayson Lumber Co. v. Young*, 118 Va. 122, 86 S. E. 826, is a type, are distinguishable from the case in judgment. In that case it was sought by extrinsic evidence to supply defects and omissions in the terms of the written contract; not, as in this case, merely to apply the contract to its subject-matter.

Upon the whole case, we are of opinion that the decree appealed from is without error, and should be affirmed.

Burks, J., absent.

Annotation—Description of land in deed or contract by reference to street number.

As to description of property by local appellation as sufficient to satisfy the Statute of Frauds, see notes to *Bates v. Harris*, 36 L.R.A.(N.S.) 154; and as to description of property by ownership or acreage, without other particular description, as sufficient to satisfy the Statute of Frauds, see annotation to *Hall v. Cotton*, L.R.A.1916C, 1124.

The present annotation, like that above referred to, is confined to the general question whether or not land is sufficiently described when reliance must be placed principally upon the fact that the property is described by street and number, and excludes cases where a full description is given.

The general rule (see, for extended general discussion, note in 36 L.R.A.(N.S.) 154) is that the description of land in a deed or contract, to satisfy the Statute of Frauds, while it need not itself fully and definitely identify the property, must contain sufficient particulars to afford or point out the means whereby identification may be completed by parol evidence. Applying this rule to the specific question under discussion, the decided weight of authority is to the effect that, for the purpose of the Statute of Frauds, land to be conveyed is sufficiently described when designated by a certain number on a certain street, provided the place in which the street is located is also identified, the theory being that when all of these elements are present the description given can be applied, by the aid of extrinsic evidence, to the exact property as to which the minds of the parties met, and its identity thus established. This has been the position taken with respect to the following descriptions: "No. 48 Angier L.R.A.1918C.

avenue in the city of Atlanta, Fulton county, Georgia" (*Boney v. Cheshire* (1917) — Ga. — 92 S. E. 636); "house No. 35 Center street, Woodbury, New Jersey" (*Claphan v. Barber* (1903) 65 N. J. Eq. 550, 56 Atl. 370); "two double houses on Carmine place, and known as 15 and 25 Carmine place in the city of Buffalo, New York" (*Forsyth v. Leslie* (1902) 74 App. Div. 517, 77 N. Y. Supp. 826); "building and lot known as No. 20 South Saginaw street Pontiac, Michigan" (*Hilberg v. Greer* (1912) 172 Mich. 505, 138 S. W. 201).

But in a few instances the courts have added a seeming qualification by ruling that a description by street and number and place is sufficient where there is a known system of notation, regulated by law and acted upon by everyone. This was the case in *HARPER v. WALLERSTEIN*, ante, 517, wherein the property was described as "No. 504 East Marshall street" in the city of Richmond, Virginia, and in *Flanigen v. Philadelphia* (1866) 51 Pa. 491, the pertinent headnote of which is quoted in *HARPER v. WALLERSTEIN*, and which was an ejectment suit for the "premises situated No. 136 South Third street in the city of Philadelphia."

And many other descriptions have been declared sufficiently definite to satisfy the Statute of Frauds although they were far from complete and definite in themselves, and the main reliance was put upon the fact that the place, street, and street number were given. Thus, in *Kempner v. Gans* (1908) 87 Ark. 221, 111 S. W. 1123, rehearing denied in (1908) 87 Ark. 228, 112 S. W. 1087, it was held that the description, "property Nos. 207, 209, 211 West Second street,

Little Rock, Arkansas, being 70 ft. front by 75 ft. deep," was sufficiently definite to identify the property and warrant a decree of specific performance. So, in *Fuller v. Wood* (1911) 137 Ga. 66, 72 S. E. 504, the description, "lots Nos. 181-179 Fraser street in the city of Atlanta, county of Fulton, state of Georgia, the same land and houses are located at the northwest corner of Fraser and Fulton streets, the same being properly deeded or conveyed jointly to Nelson Wood and Lizzie Fuller and held fully described on the deed books of Fulton county records," was held not void on its face, but rather sufficiently definite so that, since the evidence applied the description to the subject-matter, it was error to submit the question of the sufficiency to the jury with a direction to cancel the contract if they found it void for want of sufficient description. And again, in *Tallman v. Franklin* (1856) 14 N. Y. 584, quoted in *HARPER v. WALLERSTEIN*, where the contract described the land as Harlem building lots on One Hundred Thirty-second and One Hundred Thirty-third streets between Fifth and Sixth avenues, numbered 132, 133, 134, 135, 154, 155, 156, 157, and made reference to a previous sale in which the property was minutely described and a map thereof specifically referred to, it was held that evidence competent to show what the description fitted at the time the language was used was admissible. And in *Ochs v. Kramer* (1908) 32 Ky. L. Rep. 762, 107 S. W. 260, rehearing denied in (1908) 32 Ky. L. Rep. 1205, 108 S. W. 235, a contract reading as follows: "The following described real estate, to wit, situate in the city of Newport, county of Campbell and state of Kentucky, and being Anna Kramer and heirs' property located at 116 East Eighth street, Newport, Kentucky," was declared to contain a description sufficient to authorize enforcement of the contract. And again in *Wettersten v. Fisher* (1916) 79 Or. 473, 154 Pac. 534, where the contract described the land as "lot eight (8), block seven (7) in Central Albina [an] addition to the city of Portland, Multnomah county, Oregon, which property is familiarly known and described as 889 Berthwick street in said city," and stated that such lot was the only real property belonging to a certain estate, and was occupied by a named person, it was held that there was a description sufficient for the purpose of an ejectment suit. And, in connection with the point that the name of the

occupant of the premises aids the description, see *Engler v. Garrett* (1905) 100 Md. 387, 59 Atl. 618, as set out *infra*.

It seems to be practically unquestioned that in addition to the street and street number the city or town must be identified by the writing, and considerable controversy has been had as to what constitutes a sufficient designation of the name of the place where the street is located. Upon this point the weight of authority is to the effect that the place named in the heading or date line may be considered in locating the situs of the mentioned street, the courts proceeding upon the theory that in the absence of anything appearing to the contrary the inference is that the property is located in such place. Applying this rule, it was held in *Murray v. Mayo* (1892) 157 Mass. 248, 31 N. E. 1063, that a contract dated at "Springfield, Massachusetts," for the sale of a house described as "house and lot 343 Worthington street," was sufficient,—the house at 343 Worthington street, Springfield, being well known and the lot well defined by monuments, consisting of fences,—to form the basis for an action for breach of contract within the rule that any description in a deed or contract of sale of real estate from which the property can be exactly located is sufficient, although parol evidence is necessary to apply the description to the land and fix the boundaries. So, in *Kilday v. Schanecupp* (1916) 91 Conn. 29, L.R.A.1917A, 151, 98 Atl. 335, a contract of sale reading, "Nos. 38-40 Emmett avenue three tenement house and lot 50 front by 150 deep, and one empty lot 50 by 150 next to second house," and dated at "Derby, Connecticut," was held sufficiently definite as to locality, on the ground that the fact that the agreement was dated at Derby, Connecticut, showed where the property was located. And the description, "the western portion of lot forty-one (41) Flannery ward, together with all improvements thereon . . . seller is to occupy residence No. 221 Thirty-Sixth street, West" for a certain time, in a contract headed and dated at "Savannah, Georgia," was held in *Singleton v. Close* (1908) 130 Ga. 716, 61 S. E. 722, to sufficiently identify the property sold so as to allow extrinsic proof to apply the contract to the subject-matter, for the purpose of enforcing the same by specific performance. And an acknowledgment of a lien on "building at 5420 to 5428 Indiana avenue," and dated at Chi-

cago, was held in *Gage v. Cameron* (1904) 212 Ill. 146, 72 N. E. 204, to identify the property sufficiently for the purpose of identifying the building upon which the lien was acknowledged. So, a contract describing property as "lot twenty-seven, block 3/929 and better known as No. 126 McKinnon street," and dated at "Dallas, Texas," was held in *Frazier v. Lambert* (1909) 53 Tex. Civ. App. 506, 115 S. W. 1174, to sufficiently identify the lot so that an action for breach of the contract might be maintained. And in *Bush v. Black* (1914) 142 Ga. 158, 82 S. E. 530, a contract describing property as "No. 401 Spring, known as the Cob home, 50x160 more or less," and headed "Atlanta, Georgia," was held sufficient under the Statute of Frauds, it being said that the description could be applied to its subject-matter by proper allegation and proof. Likewise the description, "26 Ponce de Leon avenue, 70x185 and 15 foot alley included," in a contract dated at "Atlanta, Georgia," was held sufficiently full and definite to form the basis for the recovery of damages for breach of the same, in *King v. Brice* (1916) 145 Ga. 65, 88 S. E. 960. And in *Tobin v. Larkin* (1903) 183 Mass. 389, 67 N. E. 340, a contract of sale reading "house and land No. 10 Howard street, belonging to Bridget Larkin . . . lot 100 by 210 feet," and dated "Lawrence, Massachusetts," was held sufficient to warrant enforcement by specific performance, although Bridget Larkin was only one of three tenants in common, the court taking the view that the phrase, "belonging to Bridget Larkin," could be discarded as immaterial and still leave a "complete designation" of the property whose boundaries and dimensions could be ascertained by reference to the deeds. And a memorandum made in the attempted execution of a power of sale, dated at "Newburyport," and reading "a quarter interest in store No. 32 Market square which I own and relinquish," was held sufficient under the Statute of Frauds in *Coates v. Lunt* (1911) 210 Mass. 314, 96 N. E. 685; but there was no discussion of the fact that no place of location was named in the body of the memorandum. And in *Engler v. Garrett* (1905) 100 Md. 387, 59 Atl. 648, quoted in *HARPER v. WALLERSTEIN*, ante, 517, it was held that a contract of sale describing the property as the "house No. 2035 N. Fulton avenue," and dated at "Baltimore, Maryland," and giving the name of the tenant, was sufficiently definite to warrant

enforcement by specific performance, although it did not designate the county or state in the body of the instrument, since the tenant, being named, could be found and identified and his local habitation ascertained.

But it has been held that a deed or contract which merely describes the land in question by street and number is insufficient, under the Statute of Frauds, where the body of the instrument does not designate the place in which the street is located. Thus, in *Broadway Hospital & Sanitarium v. Decker* (1907) 47 Wash. 586, 92 Pac. 445, an option contract which was dated at Seattle, Washington, and described the property as "house No. 322 Broadway," was held too indefinite to satisfy the Statute of Frauds, the court saying that the description could be referred to any city in the world where a street named Broadway might exist, and seemingly ignoring the rule laid down in some of the foregoing cases in which the date line or heading was looked to as prima facie establishing the place where the property was located. And again in *Ross v. Allen* (1891) 45 Kan. 231, 10 L.R.A. 835, 25 Pac. 570, it was held that a memorandum of an alleged contract for the sale of certain city lots in Leavenworth, Kansas, described as follows: "property number 617 and 619 Delaware street, block 74, city proper," and dated at "Leavenworth,"—was vague, indefinite, and insufficient, under the Statute of Frauds, so that it could not be enforced, the court arguing that the memorandum did not show whether the property was realty or personality, or that it was located in any certain state, county, or city, and therefore that the case did not fall within the rule that any designation is sufficient where the description given can, with the aid of extrinsic evidence, be applied to the exact property intended to be sold. G. J. C.

ALABAMA SUPREME COURT.

STANDARD CHEMICAL & OIL COMPANY, Appt.,

v.

CITY OF TROY.

(— Ala. —, 77 So. 383.)

Municipal corporation — jurisdiction — exaction of license taxes outside limits.

1. Municipal corporations may exact a license tax from businesses such as the pro-

duction of fertilizers and the operation of oil mills outside their boundaries, but within territory to which their police jurisdiction extends, for defraying the expenses of the police administration.

For other cases, see License, II. b, in Dig. 1-52 N. S.

Same — discriminatory ordinance — proof.

2. An ordinance imposing a license tax on manufacturing establishments outside the city limits, but within its police jurisdiction, which maintain offices within the city, cannot be held to be discriminatory for not imposing the tax upon establishments so located which do not maintain offices within the city, in the absence of anything to show the existence of such establishments. *For other cases, see License, II. d, in Dig. 1-52 N. S.*

License — amount of fee — expenses of supervision.

3. A license tax upon a business under the police power may include the expense of municipal supervision over the particular business at the place where licensed in addition to the expense of issuing the license. *For other cases, see License, II. e, in Dig. 1-52 N. S.*

(December 20, 1917.)

APPEAL by defendant from a judgment of the Circuit Court for Pike County in favor of plaintiff in a suit to recover certain business license taxes alleged to be due by defendant to plaintiff. **Affirmed.**

The facts are stated in the opinion.

Mr. John H. Wilkerson, for appellant:

The privilege license claimed is a license for revenue only, and not for police regulation; and even if a license tax for police regulation were authorized here, the laws of Alabama cannot be made the basis for a recovery.

Montgomery v. Kelly, 142 Ala. 556, 70 L.R.A. 209, 110 Am. St. Rep. 43, 38 So. 67.

By defendant's plea it is shown that person selling fertilizers within the police jurisdiction are charged a license of only \$10. This is a discrimination allowing a person or corporation to sell fertilizers within the city for \$10 where they have no factory, and requiring one with a factory to pay a license tax of \$100.

Montgomery v. Kelly, 142 Ala. 552, 70 L.R.A. 209, 110 Am. St. Rep. 43, 38 So. 67.

Mr. C. C. Brannen for appellee.

Note. — As to power of city to extend exercise of taxing or licensing power beyond the corporate limits, see annotation following this case, post, 528.

Questions as to the amount of license fees exacted of the public are treated in notes cited in the L.R.A. Indexes, under the title, "License," subtitle, "Amount; grading of fee."

L.R.A.1918C.

Thomas, J., delivered the opinion of the court:

The trial was had by the court without a jury on an agreed statement of facts. The suit was predicated on ordinances of the city of Troy, being instituted by the municipality, appellee, against appellant, the Standard Chemical & Oil Company, a corporation, and sought to recover of the defendant certain business license taxes claimed to be due by it to the municipality under said ordinances, for the carrying on of the business of manufacturing or mixing fertilizers, and the business of an oil mill.

Count 2 was for license taxes claimed to be due for carrying on the business of manufacturing or mixing fertilizers outside of the corporate limits of Troy, "but within the police jurisdiction thereof." The defendant having an agency or office in the city of Troy for the sale of fertilizers, and for which business plaintiff had, by an ordinance duly and legally adopted, imposed a license or privilege tax, the ordinance being set out as a part of each count. Count 3 was of like tenor, though it claimed the designated sum as due plaintiff from defendant as license taxes for the carrying on of "the business of an oil mill . . . outside of the corporate limits of the city of Troy, but within the police jurisdiction thereof." To each count defendant's demurrer was overruled.

The question for decision is, May the city, under a valid ordinance and in the reasonable exercise of its police power, impose a license on a manufacturing business of the nature here dealt with, operated without the city limits, but within its police jurisdiction? That is to say, does the right to reasonably enforce police and sanitary regulations embrace the right to license and tax businesses carried on without the corporate limits of a city, but within its police jurisdiction, having due regard to the cost to the city of furnishing police protection in the indicated zone, and to the value of the same to the business concerns affected?

Mr. Dillon observes of the exercise of the police power: "The natural and appropriate, although not the exclusive, function of ordinances is in legislation by the people of the locality, or their duly constituted representatives, for the conduct or government of the municipality and its inhabitants. Such legislation usually relates to the exercise of the police power delegated to the municipality by the legislature, and is the means by which the municipality exercises the powers of restraint over the inhabitants and the use of property within the territorial limits, which are confided to the municipal government for the general good of the city and its inhabitants. The suppression of nuisances, the preservation of

the public health, the prevention of fires, the regulation of trades and occupations and of the use and storage of dangerous articles, the establishment and control of markets, the suppression of disorderly conduct and breaches of the peace, and other similar matters, when regulated, controlled, or directed by ordinances, are the result of the exercise by the municipality of the police power of the state under a delegation thereof by statute or by charter. The limitations of the police power have never been defined, and it is probable that no general limit can be placed upon it other than the requirement that its exercise must be confined to those matters which have a real and substantial relation to the public welfare." *Mun. Corp.* 5th ed. vol. 2, § 660.

Treating of paramount police power, Mr. Justice Field expressed the doubt that the legislature, by any contract with an individual, could restrain the power of a subsequent legislature "to legislate for the public welfare, and to that end suppress any and all practices tending to corrupt the public morals." *Boyd v. Alabama*, 94 U. S. 645, 24 L. ed. 302. And Mr. Justice Bradley thus defined the power: "The plaintiff in error boldly takes the ground that, being a corporation, it has a right, by contract, to manufacture and sell beer forever, notwithstanding and in spite of any exigencies which may occur in the morals or the health of the community, requiring such manufacture to cease. We do not so understand the rights of the plaintiff. The legislature had no power to confer any such rights. Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, '*Salus populi suprema lex*;' and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the [police] power itself." *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 33, 24 L. ed. 989, 992.

This definition of the police power was adopted by our court in *American U. Teleg. Co. v. Western U. Teleg. Co.* 67 Ala. 26, 32, 42 Am. Rep. 90, where the supremacy of the police power of the state was maintained as to the terms on which foreign corporations may prosecute their business within the state. *Van Hook v. Selma*, 70 Ala. 361, 45 L.R.A. 1918C.

Am. Rep. 85; *Birmingham Mineral R. Co. v. Parsons*, 100 Ala. 662, 27 L.R.A. 263, 46 Am. St. Rep. 92, 13 So. 602; *Louisville & N. R. Co. v. Baldwin*, 85 Ala. 619, 7 L.R.A. 266, 5 So. 311.

Concerning the exercise of the police power of regulation by license, and its distinction from the exercise of the power to the end of raising revenue, the supreme court of New Jersey observes: "A power to license is of the same nature as a power to regulate. Under a charter authorizing the regulation of a business or occupation, an ordinance compelling persons engaged in such business or occupation to take out licenses may be adopted, if a license is an appropriate method of regulating the prosecution of the business. *Burroughs, Taxn.* 302. And if the power to license is given in express words, it nevertheless is included in the classification of police powers. . . . The distinction between the power to license as a police regulation, and the same power when conferred for revenue purposes, is of the utmost importance. If the power be granted with a view to revenue, the amount of the tax, if not limited by the charter, is left to the discretion and judgment of the municipal authorities; but if it be given as a police power for regulation merely, a much narrower construction is adopted; the power must then be exercised as a means of regulation, and cannot be used as a source of revenue. *Cooley, Taxn.* 408; *Cooley Const. Lim.* 201; *State, North Hudson County R. Co., Prosecutors, v. Hoboken*, 41 N. J. L. 71, 79, 81.

That wide discretion is conceded by the courts to the legislative authority in respect of the ground of classification has been recognized by this court. In *Mobile v. Orr*, 181 Ala. 308, 314, 45 L.R.A. (N.S.) 575, 61 So. 922, Mr. Justice Sayre, speaking for the court in this connection, observes that courts "must be reluctant to disturb even a municipal ordinance enacted in pursuance of a comprehensive grant of power, and designed presumably to promote the public health and comfort, but the power to condemn is more freely exercised in such cases, for, as to municipal ordinances, it was an ancient jurisdiction of judicial tribunals to pronounce upon their reasonableness and consequent validity. It was always the doctrine of the courts that every ordinance or by-law must be reasonable, and not inconsistent with the general principles of the law of the land, particularly those having relation to the liberty of the citizen and the rights of private property *Yick Wo v. Hopkins*, 118 U. S. 371, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064."

The subjects and purposes of regulation, with the manner of the exercise of the pow-

er, under the police powers of the state and of municipalities, have been often discussed by the courts. For example, the police power has been held to extend to the regulation of slaughtering cattle and of market places (*Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 752, 28 L. ed. 587, 4 Sup. Ct. Rep. 652; *Petz v. Detroit*, 95 Mich. 181, 54 N. W. 644); to the prohibiting of combinations between connecting lines of railway (*Louisville & N. R. Co. v. Kentucky*, 161 U. S. 700, 40 L. ed. 859, 16 Sup. Ct. Rep. 714); to declaring liability as for fires caused by engines (*St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 23, 41 L. ed. 619, 17 Sup. Ct. Rep. 243); to prescribing the manner in which railway crossings shall be kept in repair (*Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 74, 42 L. ed. 954, 18 Sup. Ct. Rep. 513); to the regulation of the killing and exportation of game (*Magner v. People*, 97 Ill. 336); to the regulation of telephone rates (*Hockett v. State*, 105 Ind. 256, 259, 55 Am. Rep. 201, 5 N. E. 178); to the regulation of the transportation of natural gas (*Jamieson v. Indiana Natural Gas & Oil Co.* 128 Ind. 566, 12 L.R.A. 656, 660, 3 Inters. Com. Rep. 613, 28 N. E. 76); to the requiring of street railways to sprinkle their tracks (*State v. Canal & C. R. Co.* 50 La. Ann. 1205, 56 L.R.A. 287, 24 So. 271); to quarantine (*Davock v. Moore*, 105 Mich. 133, 28 L.R.A. 788, 63 N. W. 424); to the regulation of the construction of sewers from adjoining townships (*State, Millburn Twp., Prosecutor, v. South Orange*, 55 N. J. L. 262, 26 Atl. 75); to prescribing the method of the use of land for burial purposes (*Newark v. Watson*, 56 N. J. L. 673, 24 L.R.A. 843, 29 Atl. 487); to the regulation of the storing of gunpowder within designated limits (*Davenport v. Richmond*, 81 Va. 642, 59 Am. Rep. 694); to the requiring of property owners to keep sidewalks free of ice and snow (*Carthage v. Frederick*, 122 N. Y. 277, 10 L.R.A. 178, 19 Am. St. Rep. 497, 25 N. E. 480); to requiring the maintenance of safe cattle guards and crossings (*Birmingham Mineral R. Co. v. Parsons*, 100 Ala. 665, 27 L.R.A. 263, 46 Am. St. Rep. 92, 13 So. 602); to the requiring of foreign corporations to appoint a resident agent (*American U. Teleg. Co. v. Western U. Teleg. Co.* supra); to the regulation of traffic at and about depots, including the soliciting of patronage by cab drivers (*Ex parte Bizzell*, 112 Ala. 210, 21 So. 371); to the regulation of the sale of cottonseed (*Davis v. State*, 68 Ala. 63, 44 Am. Rep. 128); and of the sale of milk (*Ridge-way v. Bessemer*, 9 Ala. App. 470, 64 So. 189; *Birmingham v. Goldstein*, 151 Ala. 473, 12 L.R.A. (N.S.) 568, 125 Am. St. Rep. 33, 44 So. 113); to the prevention of stock

running at large (*Folmar v. Curtis*, 86 Ala. 354, 5 So. 678); to the licensing of occupations generally (*Van Hook v. Selma*, 70 Ala. 363, 45 Am. Rep. 85; 2 Dill. Mun. Corp. §§ 660, 731).

Some of the foregoing authorities dealt with constructions of city ordinances regulating businesses that of necessity extended beyond the corporate limits, through not beyond the police jurisdiction of municipalities. See also 2 McQuillin, *Mun. Corp.* 657; 13 Am. & Eng. Ann. Cas. 137; 28 Cyc. 266, 703.

The *Van Hook Case*, supra, by Mr. Justice Somerville, involved the construction of an ordinance of the city of Selma requiring a license of all persons engaged in selling goods, wares, and merchandise without the corporate limits of the city and within the limits of its police jurisdiction, and the ordinance was held to have been passed in valid exercise of the police power invested under the charter of that city. Appellant here insists that the authority of the city of Selma to license within its corporate limits and within its police jurisdiction was granted by the act of February 12, 1879 (*Acts* 1878-79 p. 454), and that like express authority is not contained in the charter of the city of Troy, nor in the general statutes having application to municipalities of the class to which Troy belongs by reason of its population. Code, §§ 1046-1460.

It is true that the charter of Selma, under which the ordinance construed and upheld in the *Van Hook Case* was adopted, contained the following provisions: "The corporate authorities of the city of Selma shall have and exercise all the police powers and jurisdiction conferred by the charter of the city, outside of the corporate limits on the west to valley creek, and north and east of the corporate limits over an area extending outward from the corporate limits one-half mile, and from Valley creek on the west to Beech creek on the southeast of said city; to arrest, try, and punish all persons guilty of violations of the ordinances and by-laws of said city; for the arrest, trial, and commitment of persons charged with violations of the laws of the state of Alabama; for regulating and licensing the sale of malt, vinous, and spirituous liquors, goods, wares, and merchandise; for regulating, licensing, and establishing markets and slaughter-houses; for the abatement of nuisances; and for regulating and licensing shows, theaters, and all exhibitions for amusement." *Acts* 1878-79, p. 454, § 1.

It is conceded that the original charter of the city of Troy contained no such provisions. However, the ordinance in question, of date December 27, 1916, was ordained pursuant and subject to the several

provisions contained in the Municipal Code having application. Code, §§ 1046 et seq. By statute the police power of the state is conferred on cities of the class to which the city of Troy belongs. Full power to adopt ordinances to the ends defined by the statute, and "not inconsistent with the laws of the state, to carry into effect or discharge the powers and duties conferred by this chapter, and to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of the inhabitants of the municipality, and to enforce obedience to such ordinances," is the ample grant to such municipalities of the police power of the state. Code, § 1231: *Borok v. Birmingham*, 191 Ala. 75, 67 So. 389, Ann. Cas. 1916C, 1061; *Herbert v. Demopolis School Bd. of Edu.* — Ala. —, 73 So. 321.

It has been held that it is no objection to a municipal ordinance not in contravention of a state law that it affords additional regulation "complementary to the end state legislation would effect." *Turner v. Lineville*, 2 Ala. App. 454, 56 So. 603; *Borok v. Birmingham*, supra. The extent of the police jurisdiction of cities of the class of Troy has been thus defined: This power shall be extended to and "cover all adjoining territory within 3 miles of the corporate limits; and in cities having less than 6,000 inhabitants, and in towns, such police jurisdiction shall extend also to the adjoining territory within a mile and a half of the corporate limits of such city or town. Ordinances of a city or town enforcing police or sanitary regulations, and prescribing fines and penalties for violations thereof, shall have force and effect in the limits of the city or town and in the police jurisdiction thereof, and on any property or rights of way belonging to the city or town." Code 1907, § 1230.

It will be observed that the exercise of the police power is thus extended to adjoining territory within $1\frac{1}{2}$ and 3 miles, as the case may be, of the corporate limits, and to and over any property or rights of way belonging to the city, wherever situate, to the end that the municipality may "provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of the inhabitants of the municipality." This manifold governmental end of the municipality is as clearly indicated in the foregoing statute as it was in the charter construed in *Van Hook's Case*.

That such manufacturing establishments sought to be regulated by the ordinance in question enjoy police protection maintained at the expense of the city of Troy, and that the inhabitants residing and being within the municipal limits and the police juris-

diction of the city, or within reasonable proximity to the plant in question, may need the reasonable protection of such ordinance, as it affects their safety, health, comfort, and convenience, cannot be gainsaid. And it is but reasonable that such manufacturing business should be made to bear its proportionate share of the burden of maintaining the police administration in that vicinity. Ordinances imposing a regulatory privilege tax on manufacturing plants, enacted under the police power to conserve the general substantial public welfare of the immediate community where they have application, and which are reasonably necessary to promote that end, will be held to have been adopted in the proper exercise of the police power for the purpose of regulation, and not for the purpose of taxation. 2 Dill. Mun. Corp. 4th ed. 768; 2 Dill. Mun. Corp. 5th ed. 665; 3 McQuillin, Mun. Corp. 2200, 2203, 2205; 28 Cyc. 744, 745.

The important distinction pointed out by the text-writers, and the one on which the foregoing decisions rest, is between the exercise of the power to license, merely as a reasonable police regulation, and its exercise for the purpose of raising revenue, and it is a test to be applied in determining the validity of municipal ordinances adopted for such governmental ends. *State, North Hudson County R. Co. Prosecutors, v. Hoboken*, 41 N. J. L. 71. This power to regulate may be expressed as well in ordinances imposing privilege taxes as in measures dealing with sanitation and nuisances, or with the disposition, maintenance, and duties of the municipal constabulary, within the confines of the police jurisdiction. And as there can be no efficient enforcement of any character of police regulation without the incurring of a reasonable expense, the necessary outlay may be provided, in part at least, by a reasonable license imposed solely for such purpose. *Van Hook v. Selma*, 70 Ala. 363, 45 Am. Rep. 85; *Davis v. Petrinovich*, 112 Ala. 654, 36 L.R.A. 615, 21 So. 344; *Louisville & N. R. Co. v. Baldwin*, 85 Ala. 619, 7 L. R.A. 286, 5 So. 311; *Ex parte Sikes*, 102 Ala. 173, 24 L.R.A. 774, 15 So. 522.

Of this power Mr. Justice Sharpe says: "As auxiliaries to the state government, municipalities have from time immemorial been accustomed to have and to exercise legislative authority in matters properly pertaining to local government. The regulation of such matters may be shared in by or left wholly to the discretion of local law-makers, because they are presumed to have knowledge of local needs. The bestowal of such authority is not a delegation of the discretion which the Constitution either impliedly or expressly restricts to the general assembly, and therefore that body may

grant or withhold the authority. The power to impose privilege taxes within reasonable limits is among those usual and necessary to be conferred both for defraying expenses of the local government and as a means of regulating the conduct of business, and is classed as a police power, even though it be not for protection against harmful occupations." *Southern Exp. Co. v. Tuscaloosa*, 132 Ala. 326, 329, 330, 31 So. 461.

Since both sides appear to find comfort in the Van Hook Case, it may be well to say that the learned circuit judge trying this case, in his opinion, correctly pointed to the fact that in Van Hook's Case it was emphasized that the exercise of the police power of regulation by the imposition of a privilege tax was under general municipal police powers, rather than under the peculiar charter powers of the city of Selma.

In *Ridgeway v. Bessemer*, 9 Ala. App. 470, 64 So. 189, discussing privilege taxes, it was said that it made no difference that the dairyman lived and kept his cows outside of the corporate limits of the city, for by his sales he was doing business within the city and therefore was subject to such tax. The ordinance there considered enacted a schedule of licenses for the "various businesses, professions, or vocations carried on or engaged in in the city of Bessemer, Alabama," and imposed a privilege tax on the business of "dairying" of \$1 for each cow up to twenty cows, and 50 cents for each cow above the number of twenty. Thus the application of the police power, through regulation by license, was extended to affect cows kept at the home of the dairyman and beyond the corporate limits of the city. See also *Birmingham v. Goldstein*, 151 Ala. 473, 12 L.R.A.(N.S.) 568, 125 Am. St. Rep. 33, 44 So. 113.

The judgment of conviction under the second count of the complaint is supported by evidence showing that the city, in the adoption of the ordinance, was in the proper exercise of its police power.

It is settled law that one who assails a statute or an ordinance on the ground that it is discriminatory and unreasonable has the burden of showing such to be the case. *Denson v. Alabama Fuel & Iron Co.* — Ala. —, 73 So. 525, 530; *Briggs v. Birmingham R. Light & P. Co.* 188 Ala. 262, 66 So. 95, 7 N. C. C. A. 466. The appellant company has failed to discharge this burden by showing that there were other like manufacturing establishments located within the police jurisdiction of the city of Troy and without the city limits, with offices not maintained within the city limits, but within the police jurisdiction of the municipality. The maintenance of police administration without the city, but within its

police jurisdiction, as affected by the existence and operation of such manufacturing plants, would not be affected by the fact that the owner or operating company did not maintain an office within the city for the sale of its products. In the absence of such proof, we cannot say that the ordinance here in question is unreasonable and discriminatory against such manufacturing companies with sales offices within the city limits, but with plants or manufacturing businesses maintained and operated without the city limits though within the police jurisdiction of the city.

In the case of *Montgomery v. Kelly*, 142 Ala. 552, 70 L.R.A. 209, 110 Am. St. Rep. 43, 38 So. 67, the ordinance was declared void because the basis for the discrimination in license fees was the fact that trading stamps were given by some to their customers. This was merely a method of advertising, a feature in the conduct of business, and for such reason the ordinance was arbitrary and discriminatory in favor of those conducting like businesses but not so advertising. The case of *Montgomery v. Kelly* condemned the tax there imposed because it was not a police tax, levied to regulate or afford police protection to the business taxed, but was an occupation license tax, and which discriminated against Kelly, as it did not apply to merchants of his general class, but only applied to those who issued trading stamps. It is true that there is an expression on page 556 of 142 Ala. of the opinion, which would indicate that a tax for police purposes could not be levied against useful lines of trade and business, but this expression is in conflict with the case of *Van Hook v. Selma*, supra, 70 Ala. pages 364, 365, 45 Am. Rep. 85, wherein the true rule is set out as follows: "We declare the true rule to be, in the case of useful trades and employments, and a fortiori in other cases, that, as an exercise of police power merely, the amount exacted for a license, though designed for regulation, and not for revenue, is not to be confined to the expense of issuing it; but that a reasonable compensation may be charged for the additional expense of municipal supervision over the particular business or vocation at the place where it is licensed. For this purpose the services of officers may be required, and incidental expenses may be otherwise incurred in the faithful enforcement of such police inspection or superintendence. *Ash v. People*, 11 Mich. 347, 83 Am. Dec. 740; *Carter v. Dow*, 16 Wis. 298; *Tenney v. Lenz*, 16 Wis. 566; *State v. Herod*, 29 Iowa, 123; *Cooley*, Const. Lim. 4th ed. 245 [201], and note 1 on page 246, with cases cited; *Ex parte Marshall*, 64 Ala. 266."

We therefore hold that the said Kelly Case must be qualified and overruled in so far as it conflicts with the above-quoted rule.

Under the agreed statement of facts, there is a practical, substantial reason for the different basis of privilege taxation for police purposes only, in the case of manufacturing plants located without the city, but within its police jurisdiction, and maintaining sales offices within the city. And

the fact that the ordinance is directed to such manufacturing plants, so located, and so maintaining offices within the city for the sale of their products, in the absence of proof that there are like plants, similarly located, which do not maintain such offices within the city, leaves it free of the charge of being discriminatory and unreasonable.

The judgment of the Circuit Court is affirmed.

All the Justices concur.

Annotation—Power of city to extend exercise of taxing or licensing power beyond the corporate limits.

This note supplements the note to *Robinson v. Norfolk*, 15 L.R.A.(N.S.) 294, on the above question.

As to power of municipality over interurban vehicles used for hire, see the note to *Argenta v. Keath*, L.R.A.1918B, 891.

As to applicability to vehicles owned by nonresidents, of city ordinance imposing a license upon the use of vehicles, see the note to *Pegg v. Columbus*, 23 L.R.A.(N.S.) 453, and the earlier note there referred to.

It will be noticed that in *STANDARD CHEMICAL & OIL CO. v. TROY*, ante, 523, where the police power of the city was by statute extended to adjoining territory for a certain distance beyond its boundaries, it was held authorized to exact a license tax from a concern producing fertilizer and operating oil mills outside the city boundaries, but within the territory to which its police jurisdiction extended, for the purpose of defraying the expenses of police administration.

In other cases legislation giving a municipality authority to exercise its licensing power for police purposes outside its boundaries, and ordinances passed in pursuance thereof, have been sustained.

Thus, in *Van Hook v. Selma* (1881) 70 Ala. 361, 45 Am. Rep. 85, it was held that it was within the power of the legislature to confer on a municipality power over a specified territory outside the limits of a city, and an ordinance passed in pursuance of such power, providing for the payment of a license fee by persons selling goods within such territory, was sustained.

And statutes giving municipalities power to regulate and license the sale of intoxicating liquor within a certain number of miles of their limits have been held constitutional and valid. *Jordan v. Evansville* (1904) 163 Ind. 512, L.R.A.1918C.

67 L.R.A. 613, 72 N. E. 544, 2 Ann. Cas. 96; *Lutz v. Crawfordsville* (1886) 109 Ind. 466, 10 N. E. 411; *Toledo v. Edens* (1882) 59 Iowa, 352, 13 N. W. 313; *State v. Shroeder* (1879) 51 Iowa, 197, 1 N. W. 431; *Centerville v. Miller* (1879) 51 Iowa, 712, 2 N. W. 527.

And ordinances requiring licenses for the sale of intoxicating liquor within the extraterritorial limits fixed by such statutes, and prohibiting its sale without obtaining a license from the municipality, have been sustained, and convictions had for a violation thereof. *Jordan v. Evansville* (Ind.) supra; *Lutz v. Crawfordsville* (1886) 109 Ind. 466, 10 N. E. 411, supra; *Centerville v. Miller* (1879) 51 Iowa, 712, 2 N. W. 527, supra; *Toledo v. Edens* (1882) 59 Iowa, 352, 13 N. W. 313, supra.

And in *Fredericktown v. Fox* (1884) 84 Mo. 59, a town incorporated under a statute giving it the power to provide for licensing and regulating dramshops and tippling houses "in and to the distance of one-half mile from the corporate limits" was held to have ample power to adopt an ordinance forbidding any person engaging in keeping a dramshop, tippling house, or any other kind of liquor saloon within the corporate limits of the town, or within half a mile thereof, without procuring a license therefrom.

And under a similar statute a town has been held to have authority to prohibit or license and regulate dramshops in territory situated in another county, but within a half mile of the town limits. *Gower v. Agee* (1908) 128 Mo. App. 427. The court referred to *Fredericktown v. Fox* (Mo.) supra, and other cases, and said: "The interpretation placed on the statute in the above cases supports the conclusion that police power may be delegated by the legislature to a municipality over territory immediately adjacent to its limits, where an

exercise of such authority is necessary to the preservation and protection of the peace and good order of the town and its inhabitants, and that, as the statute under which such authority may be enjoyed, provides no exception in cases where the protecting belt may lap over into territory located in another county or municipality, it cannot be said with reason that the legislature intended to place such restriction on the exercise of the power. Counsel for defendant imagines a situation with respect to which he propounds this question: 'If this town can reach over the county line and control a part of Buchanan county, what would be the status should the Buchanan county court, under the same statute as the Clinton county court acted in incorporating the town of Gower, establish and create a town or village with like powers, on the Buchanan county side of the line and opposite the town of Gower?' He concludes that 'there would be an irreconcilable conflict of jurisdiction of two villages, both of which with like power and authority over the same territory to an extent that would include every foot of ground and every inhabitant of the other,—a condition unheard of and almost unimaginable in a practical sense, and absolutely intolerable and impossible in a legal sense.' The very situation supposed is to be found in the case of the *Chicago Packing & Provision Co. v. Chicago* (1878) 88 Ill. 221, 30 Am. Rep. 545. There, under a statute which authorized cities and towns 'to direct the location and regulate the management and construction of packing houses, renderies, tallow chandleries, bone factories, soap factories, and tanneries within the city or village, and within the distance of 1 mile without the city or village limits,' the city of Chicago adopted an ordinance 'prohibiting any person or corporation within the city or within 1 mile of the city limits' from engaging in such business. Under a license issued by the town of Lake, which adjoined the city of Chicago, a packing house was established within 1 mile of the limits of the latter city. The supreme court of Illinois saw no difficulty in the way of the conclusion that the prosecution of the business in this territory was subject to the police regulations of each municipality. 'To accomplish this purpose (i. e., the protection of the inhabitants of cities and villages against the maintenance of intolerable nuisances), the power was conferred upon cities and villages to regu-

late these establishments for the distance of 1 mile beyond their corporate limits, even if that should lap over and embrace a portion of territory included in the boundaries of another municipality. Each, to that extent, has the right to protect its inhabitants, and such establishments, located in such territory, are subject to police power of both corporate bodies. This is within the letter, and we have no doubt the spirit, of the law. Nor does the fact that appellant is liable to pay a fee to each municipality for the privilege of pursuing a vocation the general assembly regards of such a character as to require regulation and control militate against the grant or exercise of the power.' Had the town of Gower been bisected by the county line, and each part incorporated by the county court of the county in which it was located, a dramshop could not be maintained in either town within a half mile of the line without licenses from both. To hold otherwise would be to say that towns situated on border lines cannot enjoy the protection of the statute, and are impotent against the corrupting and demoralizing influence of nuisances set up at their very doors. A construction of the statute so harsh and narrow manifestly was not within the contemplation of the legislature which enacted it, and does not receive our sanction."

And the right of the legislature to confer power on towns to regulate and license the sale of intoxicating liquors beyond their limits, and beyond the limits of a particular county, was upheld in *Meskew v. Highlands* (1897) 9 Colo. App. 255, 47 Pac. 846, where a conviction was sustained for selling intoxicating liquor within 1 mile of a town in violation of an ordinance, although the place where the sale was made was in a different county from the town passing the ordinance, and also within a mile of other incorporated towns.

And in *Emerieh v. Indianapolis* (1888) 118 Ind. 279, 20 N. E. 795, a conviction for selling liquor outside the corporate limits of a city, but within 2 miles of its boundaries, in violation of an ordinance requiring a license, was sustained against one who was a resident of, and whose place of business was located in, a township other than that in which the municipality passing the ordinance was situated, and was within 2 miles of the corporate limits of another town, the court recognizing the power of the legislature to deter-

mine over what territory the jurisdiction of municipalities should extend, and also the validity of the ordinance involved.

The case of *Nebraska Teleph. Co. v. Lincoln* (1908) 82 Neb. 59, 28 L.R.A. (N.S.) 221, 117 N. W. 284, although not directly in point in this note, is of interest in this connection. In that case a city under its charter was held au-

thorized to enact an ordinance imposing upon telephone companies a business or occupation tax measured by the gross receipts within the city, and the fact that tolls and rentals collected within the city were in part for messages over lines lying in part beyond the city limits was held not to invalidate the tax.

J. T. W.

TEXAS CRIMINAL COURT OF APPEALS.

WILL MCGLOTHLIN, Appt.,

v.

STATE OF TEXAS.

(— Tex. Crim. Rep. —, 198 S. W. 784.)

Assault — resisting entry upon real estate.

One in possession of real estate under claim of title is not liable for assault in using merely the necessary force to resist an entry by one who has secured a lease from another also claiming title to the property.

For other cases, see Assault and Battery, II. in Dig. 1-52 N. S.

(Prendergast, J., dissents.)

(November 7, 1917.)

APPEAL by defendant from a judgment of the Criminal District Court for Dallas County convicting him of aggravated assault. Reversed.

The facts are stated in the opinion.

Mr. A. S. Baskett for appellant.

Mr. E. B. Hendricks, Assistant Attorney General, for the State.

Davidson, P. J., delivered the opinion of the court:

Appellant was convicted of aggravated assault, his punishment being assessed at a fine of \$50. He is charged with having committed an assault upon a woman. Without going into specific detail of the matter, and the charges given and refused, we are of opinion the evidence is not sufficient to justify the verdict.

Substantially and briefly stated, appellant and Gregory claimed ownership in 4 acres of land upon which a small house was situated, and it seems both claimed title from a party who until recently occupied it, but had moved to Haskell county. Appellant obtained possession from the seller, who had moved to Haskell county and had

placed a Mexican as his renter in charge of the house. The Mexican was occupying it. Gregory was desirous of getting possession of the property, and undertook to put Mrs. Welch, the alleged assaulted party, and her husband, in possession of the house, and get the Mexican out, who was holding it under McGlothlin, or at least to take charge of the house, so as to put Gregory in possession, thus giving him an advantage in any litigation that might arise. Appellant was notified of that at his home in Ft. Worth and at once came upon the scene. When he reached the place, he found Welch had moved some of his personal effects into the house, and was unloading more of such effects with a view of putting those in the house. Mrs. Welch came in a hack with this load of goods, and undertook to go in the house. Appellant was standing in the door. During their interview she undertook to enter the room. He had his hands across the door, and she claims that he had his fist up and it came down and struck her on the breast. We suppose that she was undertaking to convey the idea that he intentionally struck her; however, she does not say that. If there was any assault it was committed by this act. There was an effort on her part to enter, and by appellant to prevent the entry of Welch and his wife. Mrs. Welch did not succeed in entering the house. They then went around to the opposite side of the house and sat down and had a conversation—the various parties, Gregory, Welch, and appellant. The occurrence at the door came up, and appellant denied striking the woman, and said, if he did, it was unintentional; that he had no purpose to injure her or in any way hurt her.

These matters resulted ultimately in litigation, which seems to be now pending, between Gregory and appellant, as to the ownership of the property. Appellant, through his Mexican tenant, was in possession of the house, and Gregory was undertaking to get possession through Welch and his wife's occupancy. This was prevented by the act of appellant, and if there was any assault, or his hand or fist struck her during the *mélée*, he says it was unintentional; but, whether or not, it all came up in this way.

Note. — As to use of force to protect possession of real property by one not in actual possession, see annotation following this case, post, 532.
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She was trying to enter, and he was preventing her as best he could, he says, without assaulting her, or without any intent to injure. Under this showing, we are of opinion that appellant ought not to have been convicted.

The bills of exception with reference to charges are not discussed. Appellant had the right, we think, to use reasonable force to prevent the intrusion upon his possession of the property. There seems to be, even from the standpoint of the state, no contention that he used any more force than was necessary, if he used any. That has been sufficiently stated, however.

The judgment will be reversed, and the cause remanded.

Prendergast, J., dissenting (December 5, 1917):

Mrs. Lucy Welch, the woman whom appellant was convicted of committing an aggravated assault and battery upon, swore that when she attempted to go in the house appellant's fist "came down and struck me, it struck me right here [on the breast]. When he did that, I asked him to consider my condition. I was in the family way. The baby I have in my lap right here now."

She further said everything was quiet for a few minutes, and Mr. Gregory tried to reason with him. She swore that, when she attempted to get in the house again, his fist "came down again. I mean that he hit me. . . . When he hit me, his hand was closed."

Mr. Gregory, who was present and saw and heard it all, swore: "Mrs. Welch started in, and he took his hand and hit her and shoved her back. He struck her somewhere right along here [on her breast] on the front part of her body. . . . I told him he ought to be ashamed of himself for striking a lady like he did her in the condition she was in. I don't remember that he opened his mouth. I took hold of his hand, and I turned around to Mr. Welch, and asked him he didn't want an officer, and he said he did, and just about that time he [defendant] reached around and struck her again." Then he got in a buggy and went off after an officer. Mr. Welch, the husband of Mrs. Welch, who was present and saw and heard it all, swore: "She told him [appellant] that her things were there, told him that was her home, and started in, and Mr. McGlothlin knocked her back with his hand, and she started in the second time, and he also knocked her back."

On cross-examination, he swore: "I saw Mr. McGlothlin strike my wife. I was about 8 feet from her at that time. . . . He struck her in the breast. It was hard enough to stagger her back. She staggered

back something like a step. It was just a short time, not over a quarter of a minute or something like that, after he struck her the first time, until he struck her again. She started in the second time, and he knocked her back." Mr. Welch further testified that he did not resent this beating of his wife by appellant, because he was a law-abiding man, and sent for an officer.

Appellant himself swore on cross-examination that, when Mrs. Welch came up to the door to come in, he was standing there and had hold of the screen door with his left hand. "At the time she came up to me, I am not positive whether I had one or two hands on the door. She was insisting on getting in. She said she wanted to get in the house. I wasn't going to let her get in. I was determined she was going to stay out; no matter what force I took. I was going to keep her out. I did keep her out."

It is thus seen that three witnesses swore positively and unequivocally that appellant beat Mrs. Welch up with his fist; that he struck her in the breast with his fist two separate and distinct licks swearing, "I was determined she was going to stay out, no matter what force I took." He had no right to thus beat her up. That the evidence clearly justified his conviction there can be no particle of doubt.

Twelve fair and impartial jurors heard all this testimony, and saw the witnesses, and heard them when they testified. Upon their oaths they found that appellant had struck and beat her up, as she and the other two witnesses swore, and that in doing so he violated the law. An able, fair, and impartial judge, who also saw and heard all these witnesses, and heard this testimony, so held. The statute is clear and plain that the "jury are the exclusive judges of the facts in every criminal cause" (Code Crim. Proc. art. 734), and "the jury, in all cases, are the exclusive judges of the facts proved, and of the weight to be given to the testimony" (Code Crim. Proc. art. 786). That statute is just as binding on the judges of this court as any other plain and clear statutory law can be. The judges of this court cannot be as competent to determine the facts, not hearing or seeing the witnesses, as the jury and judge of the lower court can be. The law says the jury are the exclusive judges of the facts and of the weight to be given to the testimony. But two judges of this court, in effect, by their decision herein, say that the jury are not the exclusive judges of the facts, nor are the jury the exclusive judges of the weight to be given to the testimony; but that they, the judges, and not the jury, are the exclusive judges of the facts and the credibility of the witnesses.

The court gave a correct and full charge submitting every issue raised by the testimony in this case. There was no Mexican in the house, nor anywhere near the premises, at the time appellant beat up this woman. After appellant beat her up, she and her husband went around to some out-houses to protect themselves against the cold weather. It was very cold at the time. Appellant refused to let her in the house, where Mr. Gregory had built a fire for her. As soon as Mr. Gregory went off after an officer, appellant had all of her household and kitchen goods moved out of the house and off of the premises. He also moved off of the premises the vehicles in which a part of her goods were held, and in which

she rode at the time she went to the house, and put up the fence. Then he went around to where Mr. and Mrs. Welch were sheltering themselves, and attempted to show them a deed he claimed he had to this property. Gregory was not there at the time, but off after an officer, and, while he did not again beat her up there, she swore: "I told him right then that he hit me twice. He said if he did, he didn't know it."

He swore: "At the time I understood her to say I had hurt her. I told her, if I did, I didn't intend to. I am not positive whether she said I struck her or not. I understood her to say that I hurt her."

Undoubtedly this case should have been affirmed, and not reversed.

Annotation—Assault: use of force to protect possession of real property by one not in actual possession.

In connection with this question reference may be made to the following notes:

Homicide to prevent entrance of dwelling, *State v. Gray*, 45 L.R.A.(N.S.) 71.

Civil liability for assault committed in regaining possession of land by one entitled to possession, *Walker v. Chanslor*, 17 L.R.A.(N.S.) 455.

Criminal liability for assault committed in regaining possession of land by one entitled to possession, *Hickey v. United States*, 22 L.R.A.(N.S.) 728.

Right to employ force in retaking property sold conditionally, *W. T. Walker Furniture Co. v. Dyson*, 19 L.R.A.(N.S.) 607, and *Biggs v. Seufferlein*, L.R.A.1915F, 673; see also note to *Flaherty v. Ginsberg*, 13 L.R.A.(N.S.) 1132, as to liability for the abuse of the right to retake property sold conditionally.

Right to use force to recover possession of personal property, *Stanley v. Payne*, 3 L.R.A.(N.S.) 251, and *State v. Scott*, 9 L.R.A.(N.S.) 1148.

Right to use deadly weapon in resisting trespass, *Newcome v. Russell*, 22 L.R.A.(N.S.) 724.

Assault: resisting seizure of property under process, *State v. Selengut*, L.R.A. 1916B, 957.

There are numerous cases supporting the proposition that one in actual possession of real property may use all necessary force to protect his possession. It is the purpose of this note, however, as is indicated in the title, to bring together cases presenting some such similar situation as is presented in *McGLOTHLIN v. STATE*, ante, 530, where the person seeking to defend the property is

in possession under claim of title or through another person.

It is held in *McGLOTHLIN v. STATE*, that one in possession of a house through his tenant has the right to use reasonable force to prevent intrusion upon his possession, and is not liable for assault in the absence of a contention that he used more force than was necessary to resist an entry.

But it was stated in *Montgomery v. Com.* (1901) 99 Va. 833, 37 S. E. 841, that a landlord had no right to order a person off premises in possession of his tenant, although he was apparently an intruder; and where such intruder injured the landlord with a corn cutter after the latter had assaulted the former with it, the court reversed a conviction of the intruder for assault with intent to kill.

In *Suggs v. Anderson* (1853) 12 Ga. 461, holding that it was no justification of an assault and battery that the defendant was the owner of the house in which the plaintiff was at the time it was committed, the house was being occupied by another, and there was no unwarranted intrusion upon the property.

Where, in an action for assault and battery, the question as to who was in actual possession of a mill was in dispute, the court, in *Parsons v. Brown* (1853) 15 Barb. (N. Y.) 590, stated that, if the defendant had possession in fact, the law would justify him in using violence, if necessary, in order to defend his possession; but a right to possession would not justify him in committing an assault and battery upon another for the purpose of reducing his right to actual possession.

A person was convicted of breach of peace by assaulting and striking a road commissioner who was working over the line, the court refusing to let him justify on the ground of defense of property because there was no evidence tending to show that he had actual possession of the strip after the fence was removed, and constructive possession was not enough. This, said the court, reversing the judgment on appeal in *State v. Cleveland* (1909) 82 Vt. 158, 72 Atl. 321, was error, for, independently of whether constructive possession was enough or not, the accused had actual possession, as it was manifest from the tenor of his testimony that the fence was moved back merely for convenience in building, he all the time claiming to the true line, and therefore his possession of said strip was not thereby affected, but was thereafter just as actual as it was of the rest of the land, and that it was actual of that is not denied.

In *Taylor v. State* (1904) 47 Tex. Crim. Rep. 122, 122 Am. St. Rep. 675, 80 S. W. 378, an appeal from conviction for aggravated assault alleged to have been committed upon prosecutrix while she was attempting to untie a mule which accused persisted in tying to a tree on property claimed to be in the possession of prosecutrix, the court stated that there was no error in the refusal to give the following charge requested by accused: "Before prosecuting witness, Mrs. Radney, can justify an interference with defendant, or with his staking said mule to the tree, as testified before you in evidence, the state must show that the same was done in preventing or interrupting an intrusion upon property lawfully in her possession or under her control. Such possession, in order to authorize an interference on her part, must be of corporeal property, and not of a mere right; and the possession must be actual, and not merely constructive. Now, if you believe from the evidence that the complaining witness, Mrs. Radney, and her mother, owned the property upon which said tree was situated, but you further believe that they removed all fences therefrom and turned the same out on the public commons, and that said state of affairs had existed for some time, then you are charged that the said witness, Mrs. Radney, did not have actual possession of said property, but only constructive possession thereof, and that such possession could not justify any interference by her with defendant in staking his said mule to said tree upon the same." The court said L.R.A.1918C.

that, if the land in question was the property of prosecutrix, whether fenced or not, she had a right, under the statute authorizing the defense of property, to use whatever force was necessary to protect her property from the intrusion or trespass upon the same by anyone. The court, in this connection, should have defined the prosecutrix's right to defend her property under the statute, but it was not required to give the charge requested. The court further observes that defendant's insistence was that the tree where the difficulty occurred, and where he had the mule tied, was not on prosecutrix's land at all. If it was not, then she had no right whatever to interfere with his tying the mule to the tree.

Where accused shot and wounded prosecutor while the latter was attempting to change the position of a fence, the court, in *Roch v. State* (1907) 52 Tex. Crim. Rep. 48, 105 S. W. 202, on appeal from a conviction of assault with intent to murder, stated that, if accused's "testimony which was rejected be true, he had a right, under an agreement with prosecutor, to the land attempted to be taken in by the fence. Certainly, such being the case, he had a right to a charge on the law of the defense of property. Of course, if this testimony, as the prosecutor insists in his statement, is not true, then the converse of the law ought to be charged. We understand the law of this state to be that, where one is in lawful possession of property, he has a right by every means to prevent any invasion of same by a third party."

Generally, servants or agents in charge of property have the right to use necessary force to protect the property.

Thus, a servant in possession may use reasonable force in exercising his authority to prevent trespass upon his master's property. *Howe v. Oldham* (1893) 69 Hun, 615, 52 N. Y. S. R. 734, 23 N. Y. Supp. 700.

So a carpenter and a bricklayer in possession of a house in the course of its building have the right to order away all persons having no right to enter the building; and upon their refusal to depart they have a right to put them out without using any unnecessary violence. *United States v. Bartle* (1805) 1 Cranch, C. C. 236, Fed. Cas. No. 14,531.

A foreman who had received instructions to exclude all persons who had no business with the firm was, in *Woodman v. Howell* (1867) 45 Ill. 367, 92 Am. Dec. 221, held to have the right to use

the necessary force to put out of the office a person whom he had ordered to depart, but who had refused to do so. The court stated that such person knew that he had obtained no authority from anyone capable of granting it to go into or remain in the office, nor did he seem to have questioned the foreman's authority from his employer to exclude him from the office, but he seemed to have wilfully persisted in his wrongful occupancy of the room, as it unquestionably was after his being requested to depart.

So, where a servant had been convicted of assault and battery upon an employer, the court, in *Com. v. Ribert* (1891) 144 Pa. 413, 22 Atl. 1032, in reversing judgment, stated that defendant should have been allowed to testify as to an agreement claimed to have been made between him and his employers whereby he was to have exclusive possession of the room in which he was working, and the prosecutor was not to enter, since the question would then have been, not whether the assault was wanton, but whether more violence was used in ejecting the prosecutor than the occasion required.

In *Taylor v. Adams* (1885) 58 Mich. 187, 24 N. W. 864, a son acting as agent of his mother, the owner and possessor of real estate, was said to have the right to use such reasonable force as was necessary to expel a tortious intruder from the premises. The court considered erroneous a charge that, if the defendant "used a greater degree of force than was reasonably necessary,—if he used force in excess of what was reasonably necessary for the purpose of ejecting her,—then he is liable for the results that necessarily followed such excess, in actual damages to compensate her for the injuries which followed such excess of force," stating that it leaves out of consideration by the jury any contributory element by the plaintiff, which was wrongful, necessarily calculated to induce the very excess complained of, and which, if the jury found existed, would relieve the defendant of all the claimed liability.

In *Slingerland v. Gillespie* (1904) 70 N. J. L. 720, 59 Atl. 162, 1 Ann. Cas. 886, a man left his daughter, the plaintiff, in charge of his property, with directions to protect his land, and resist any attempts to enter upon it, either upon the right of way or otherwise, except by persons who should show to her the proper authority to do so. In attempting to prevent the servants of a water company from constructing a pipe

line on the land, the plaintiff was injured when the servants of such company rolled large pipes against her. In reversing a judgment for the defendants, the court said that the plaintiff was justified under her authority in resisting the defendants or their servants in any attempt to enter upon the land of her father outside the right of way, no matter what her motive in so doing may have been. The defendants had no right to enter upon the Slingerland land outside the right of way, for the purpose of moving the pipes upon the right of way. It would have been a trespass upon the land of Slingerland to have broken down a fence on his land adjacent to the right of way, while moving the pipes into position on the right of way, for which he could have recovered nominal damages at least. If the daughter was authorized to resist the defendants if they came upon the land of her father, she could use all the force necessary in so doing, and if, in exercising this lawful right, she was injured by the defendants while they were moving the pipes off the land of her father, and while she was where she had a lawful right to be, the defendants must answer for the damages. The fact that she had in mind at the same time a design, in exercising this lawful right, to hinder or delay the defendants in doing acts which, if they had been done on the right of way, would have been lawful, is of no concern. One may resist another in a trespass upon his land, whatever the motive in so doing may be. It is not the design of the resister, but the act of the trespasser, which is wrongful.

Where a son occupied a house merely as the servant and under the direction of the father, it was held, in *Comstock v. Dodge* (1869) 43 How. Pr. (N. Y.) 97, that the father, who owned the house, was in possession, so as to entitle him to use the necessary force to expel from the premises a guest of the son's wife who refused to depart when ordered to do so by the father.

It was held in *State v. Lockwood* (1897) 1 Penn. (Del.) 76, 39 Atl. 589, that, where a mere guest refused to go when ordered out of the house by the husband, the husband, as head of the family, had the right to eject him, using so much force as was necessary for the purpose, but no more; and this was so although the dwelling house occupied by the family was the property of the wife. The court said that, if they were dwelling in this house as man and wife, and this prosecuting witness was a mere

guest, and failed to go out of the house at the bidding of the husband, the latter had a right to use all the force necessary to eject him, but no more; that he had no right to use undue force; that, if a man is attacked in his own house or the house of another, he has a right to use so much force as is necessary for his own protection.

It was stated in *Cole v. Rowen* (1891) 88 Mich. 219, 13 L.R.A. 848, 50 N. W. 138, an action to recover damages for assault and battery, that a depot master acting under the direction of a railroad company had the right to enforce the rules and regulations of such company by ejecting, with no more force than was necessary, a hackman who persisted in occupying a place assigned to another hackman.

In affirming a judgment for plaintiff in *Liebstadter v. Federgreen* (1894) 80 Hun, 245, 29 N. Y. Supp. 1039, an action to recover damages for assault, the court stated that, when the plaintiff hired the store of the defendant, he took that store as it had been theretofore used and occupied by the defendant him-

self; that gave him the right to the use of the cellar; the defendant, by surreptitiously and wrongfully barring plaintiff's access to the cellar, did not thereby acquire a lawful possession thereof (within the meaning of *Bristor v. Burr* (1890) 120 N. Y. 431, 8 L.R.A. 710, 24 N. E. 937), which would entitle him to resist with force and violence the efforts of the plaintiff to enter thereupon. The mere actual physical possession of premises by a person is not alone sufficient to justify him in using force and violence either to prevent the entry of the lawful occupant thereon, or, to eject him therefrom after he has entered.

It is stated in *Wood v. Gale* (1839) 10 N. H. 247, 34 Am. Dec. 150, that, where a female of ill repute persists in associating with a ward, the guardian may remove her from the ward's premises on her refusal to go; and to protect his ward from a threatened return, a farther removal, under some circumstances, may be justifiable. In this case the removal of such a female to the nearest village half a mile distant was deemed justifiable. J. D. C.

UNITED STATES SUPREME COURT.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY OF TEXAS et al., Plffs.
in Err.,

v.

STATE OF TEXAS.

(245 U. S. 484, 62 L. ed. —, P.U.R.1918B, 602, 38 Sup. Ct. Rep. 178.)

Commerce — state regulation — starting time for interstate trains — connections.

As applied to through interstate trains originating outside the state on the lines of other carriers, an order of a state railway commission under which a railway company must start its passenger trains in the state at the point of origin and at local stations on schedule time, with an allowance of not more than thirty minutes for connections, is an unconstitutional regulation of interstate commerce,—especially where there is

sufficient accommodation for local traffic independent of the through trains.

For other cases, see Commerce, II. c, in Dig. 1-52 N. S.

(January 14, 1918.)

ERROR to the Court of Civil Appeals, Third Supreme Judicial District of the State of Texas, to review a judgment, a review of which was denied in the Supreme Court, imposing a fine upon defendant for violating an order of the State Railroad Commission requiring passenger trains to start on schedule time, with an allowance of not more than thirty minutes for connections. Reversed.

The facts are stated in the opinion.

Messrs. Alexander H. McKnight, C. S. Burg, Joseph M. Bryson, Alexander Britton, and Charles C. Huff, for plaintiffs in error:

Where a railroad company has provided

Note.—A question of collateral interest in connection with the point decided in *Missouri, K. & T. R. Co. v. Texas* is considered in the note to *St. Louis & S. F. R. Co. v. Langer*, 44 L.R.A.(N.S.) 478, and earlier notes there referred to, on "Power to compel stoppage of trains at stations," including interstate trains. More closely in point is *State ex rel. Caster v. Dickinson*, L.R.A.1918B, 534, in which the Kansas supreme court holds that a statute making it L.R.A.1918C.

the duty of the Public Utilities Commission to require interstate railroad companies to provide proper facilities and to stop all passenger trains a reasonable time at or near the state line casts an unwarranted burden on interstate railroad commerce, deprives interstate railroad companies of their property in lawfully established interstate passenger fares, and is unconstitutional and void.

ample facilities for the adequate accommodation of its local passenger business, a state statute or an order of a state commission requiring it to stop an interstate train at stations where it is not scheduled to stop is void under the commerce clause of the Federal Constitution.

Illinois C. R. Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; *Gladson v. Minnesota*, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; *Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; *Mississippi R. Commission v. Illinois C. R. Co.* 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121; *Herndon v. Chicago, R. I. & P. R. Co.* 218 U. S. 150, 54 L. ed. 977, 30 Sup. Ct. Rep. 633; *Chicago, B. & Q. R. Co. v. Railroad Commission*, 237 U. S. 220, 59 L. ed. 926, P.U.R.1915C, 309, 35 Sup. Ct. Rep. 560; *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; *Central of Georgia R. Co. v. Murphey*, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 Ann. Cas. 514; *McNeill v. Southern R. Co.* 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; *Southern R. Co. v. Reid*, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; *Southern R. Co. v. Reid*, 222 U. S. 444, 56 L. ed. 263, 32 Sup. Ct. Rep. 145; *South Covington & C. Street R. Co. v. Covington*, 235 U. S. 537, 59 L. ed. 350, L.R.A.1915F, 792, P.U.R.1915A, 231, 35 Sup. Ct. Rep. 158; *Seaboard Air Line R. Co. v. Blackwell*, 244 U. S. 310, 61 L. ed. 1160, L.R.A.1917F, 1184, 37 Sup. Ct. Rep. 640.

It has been the purpose of Congress constantly to promote, and often to require, the formation and operation of continuous lines of transportation.

Union P. R. Co. v. Chicago, R. I. & P. R. Co. 2 C. C. A. 174, 10 U. S. App. 98, 51 Fed. 309, affirmed in 163 U. S. 564, 41 L. ed. 265, 16 Sup. Ct. Rep. 1173; *The St. Louis*, 48 Fed. 312.

If the order was within the police power, the police power of the state does not give it the right to violate any provision of the Federal Constitution.

Central of Georgia R. Co. v. Murphey, 196 U. S. 206, 49 L. ed. 449, 25 Sup. Ct. Rep. 218, 2 Ann. Cas. 514; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Cotting v. Kansas City Stock Yards Co.* (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Kansas City Southern R. Co. v. Kaw Valley Drainage* L.R.A.1918C.

Dist. 233 U. S. 75, 79, 58 L. ed. 857, 859, 34 Sup. Ct. Rep. 564.

Messrs. B. F. Looney, Attorney General of Texas, and Luther Nickels, for defendant in error:

The power of the state to provide for the convenience of its citizens traveling in intra-state commerce stands upon the same ground as its power to provide for the public safety, health, etc.

Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; *South Covington & C. Street R. Co. v. Covington*, 235 U. S. 537, 548, 59 L. ed. 350, 354, L.R.A.1915F, 792, P.U.R.1915A, 231, 35 Sup. Ct. Rep. 158; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398.

There is nothing to condemn the order, even if an incidental effect upon commerce were admitted.

Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; *South Covington & C. Street R. Co. v. Covington*, 235 U. S. 537, 59 L. ed. 350, L.R.A.1915F, 792, P.U.R.1915A, 231, 35 Sup. Ct. Rep. 158; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit brought by the state of Texas to recover penalties for violation of an order of the State Railroad Commission. This order required passenger trains in Texas to start from their point of origin and from stations on the line in accordance with advertised schedule, allowing them not exceeding thirty minutes at origin or points of junction with other lines to make connection with trains on such other lines, and not exceeding ten minutes more if, at the end of the thirty minutes, the connecting trains were in sight. There were some other qualifications not necessary to be stated. The defendant's passenger trains concerned were numbers 9 and 209, and were parts of a train, also numbered 9, of the Missouri, Kansas, & Texas Railway, a different corporation, taken charge of by the defendant at Denison, Texas, about 5 miles south of the Texas and Oklahoma state line, under a contract with the Missouri, Kansas, & Texas. In pursuance of this contract they were forwarded via Dallas and Fort Worth to Hillsboro, thence as one train to Granger and

there again divided, the two parts going respectively to Galveston and San Antonio. There were similar arrangements for trains to the north. The cars received by the defendant came from St. Louis and Kansas, City, Missouri, uniting at Parsons, Kansas, and thence proceeding south to Denison. The court of civil appeals at first held that the movement must be regarded as a continuous one from Kansas City and St. Louis, and that the order did not apply to the train; but, on a rehearing, decided that, as the defendant took control at Denison with new crews and engines, and as the defendant could not go beyond the state line, the movement, so far as the defendant was concerned, was wholly within the state. Breaches of the order having been proved, it affirmed a judgment imposing a fine. A writ of error was refused by the supreme court of the state.

The supreme court gave up the manifestly untenable ground taken by the court of civil appeals, and recognized that the defendant's trains were instruments of commerce among the states, but it construed the order as applying to them none the less, and held it valid as so applied. The only question with which we have to deal is whether the State Commission could intermeddle in this way, especially when there was sufficient accommodation for local traffic independent of the through trains. The defendant in error attempts to open this last matter, because the opinion of the court of civil appeals in which the fact was stated was reversed by it for a different reason, and that of the court of first instance was the other way. But we regard the decision of the intermediate and the supreme court as proceeding upon the assumption that we have stated and that we see no reason to disturb. Again, the question is not what the State Commission might require of a road deriving its powers from the state, with

regard to local business (*Missouri P. R. Co. v. Kansas*, 216 U. S. 262, 288, 54 L. ed. 472, 481, 30 Sup. Ct. Rep. 330), but whether the order, if applied to this case, would not unlawfully interfere with commerce among the states.

On its face the order as applied was an interference with such commerce. It undertook to fix the time allowed for stops in the course of interstate transit. It was a serious interference, for it made the defendant liable for an interstate train not starting on schedule time, when the train did not come into the defendant's hands, from another company in another state, until too late. This, as we understand the facts, was the train to which the advertised schedule applied, and, if so, the mere statement of the result is enough to show that the burden imposed not only was serious, but was unwarranted as well as unjust. The suggestion that compliance with the order could have been secured by having an extra train ready to run if the regular one was not on time hardly is practical, and is not an adequate answer, even in form. For the defendant advertised, or at least had the right to advertise, the interstate train, and, if it did so, would not free itself from liability for a delay on the part of that train by offering another. We think it plain that this order was applied in a way that was beyond the power of the Commission and courts of the state. *Seaboard Air Line R. Co. v. Blackwell*, 244 U. S. 310, 61 L. ed. 1160, L.R.A.1917F, 1184, 37 Sup. Ct. Rep. 640; *Chicago, B. & Q. R. Co. v. Railroad Commission*, 237 U. S. 220, 226, 59 L. ed. 926, 930, P.U.R.1915C, 309, 35 Sup. Ct. Rep. 560; *South Covington & C. Street R. Co. v. Covington*, 235 U. S. 537, 548, 59 L. ed. 350, 354, L.R.A.1915F, 792, P.U.R.1915A, 231, 35 Sup. Ct. Rep. 158.

Judgment reversed.

ARKANSAS SUPREME COURT.

CHICAGO, ROCK ISLAND, & PACIFIC
RAILWAY COMPANY et al., Appts.,
v.

G. M. BUTLER.

(— Ark. —, 200 S. W. 144.)

Damages — loss of cattle — excess.

1. An allowance of \$100 as damages against a carrier for loss of five head of

Note. — The duty of a carrier of live stock to provide stock pens or yards is treated in the annotation following this case, post, 539.

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cattle and the injury to several others is not excessive.

For other cases, see Damages, III. d, in Dig. 1-52 N. 8.

Carrier — absence of stock pens — premature loading of cattle — liability.

2. A carrier which, in response to notification of intention to ship cattle, states the time they should be tendered at the station, is liable in case it becomes necessary to load them prematurely into cars because of inadequacy of stock pens, and they are injured by being compelled to stand in the cars an unnecessarily long time before the cars are put in motion.

For other cases, see Carriers, III. f, in Dig. 1-52 N. 8.

(January 14, 1918.)

A PPEAL by defendants from a judgment of the Circuit Court for Grant County in favor of plaintiff in an action brought to recover damages for injuries to a carload of cattle alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Thomas S. Buzbee and H. T. Harrison, for appellants:

There is nothing in the testimony that justifies a submission to the jury of the question of whether the defendant had exercised reasonable diligence in furnishing facilities to receive and transport the plaintiff's cattle.

St. Louis & S. F. R. Co. v. Vaughan, 84 Ark. 311, 105 S. W. 573.

Mr. J. C. Ross, for appellee:

Defendants were liable for the injury to plaintiff's cattle.

St. Louis & S. F. R. Co. v. Vaughan, 88 Ark. 138, 113 S. W. 1035.

Smith, J., delivered the opinion of the court:

This suit was brought to recover damages to a carload of cattle sustained by reason of the negligence of the railway company in having the cattle loaded and held for so long a time at Fordyce, Arkansas, the point of origin of the shipment, before moving, that seventeen head got down in the car, as a result of which one died and was removed from the car before it was moved, four others died subsequently, and several were badly crippled. Plaintiff sued for \$150, and recovered judgment for \$100. It is said that the verdict is excessive, and that under the undisputed evidence a verdict should have been directed in favor of the railway company upon the ground that no liability was shown.

Discussing these questions in the order stated it may be said that the verdict is not excessive, if there is any liability. The plaintiff testified that one cow died before the car was put in motion, and that four other head of cattle died from the injuries sustained while the car was standing at Fordyce, and several others were injured. The instructions given by the court were more favorable to the railway company than they should have been, and no exceptions were saved to any instructions given or refused, except upon the ground that a verdict should have been directed in favor of the railway company.

It is argued that the jury did not follow the instructions given, and that no liability is shown under the undisputed evidence. There does not appear to be any conflicts in the testimony, as the cause was submitted to the jury on the testimony offered in behalf of the plaintiff alone, and it may be L.R.A.1918C.

stated as follows: The plaintiff had made arrangements to ship two carloads of cattle on March 11th from Fordyce, Arkansas, to Leola, Arkansas, over defendant's road. On the morning that the cattle were to be shipped, a man by the name of Morgan called the plaintiff and told him that he had some cattle for him, and for the plaintiff to come to Fordyce and load them. The plaintiff went to the depot and made inquiry about cars, and was told, if he wanted the cattle shipped, he must get them down to the station so that they could be loaded when the train came. Plaintiff then put in the cattle pen certain cattle, referred to by the witnesses as the Morgan cattle, which he had bought that day, and he then told the agent of the railway company that he had two more carloads of cattle coming in, and the agent told him the train would be along about 6 P. M. and to get the cattle in by 5:30 P. M. This conversation occurred about 2:30 P. M. The plaintiff then went ahead and had the other two loads of cattle brought in, and when he reached the station with the cattle, about 5:30 P. M., he was informed by the agent that the train was late and would not arrive until about 9 or 10 o'clock. The stock pen was already filled up with the cattle that he had placed there earlier in the afternoon, so that there was no room in the stock pen for the cattle which plaintiff brought in at 5:30 P. M. The agent suggested to plaintiff that he get a lot in town to put his other cattle in, but plaintiff retorted that it was the railway's business to get the lot, whereupon the agent suggested, as a solution of the difficulty, that the plaintiff load the cattle which were already in the stock pen and make room for the cattle which he had just brought in. This was done, and the cattle were properly loaded between 5 and 6 o'clock P. M., after which the plaintiff went to his supper. Upon his return from supper, he found seventeen head of the cattle down in one car, and eight in the other. Plaintiff and four other men got into the cars and succeeded in getting the most of the cattle up before the train came. The train arrived about 9:30 P. M. when the cars were unloaded and all the cattle came out, except the one which was dead. They dragged this one out of the car and left it at Fordyce. The others were then reloaded into the cars, except one which sulked and could not be put in the car. This one, too, was left in Fordyce. The train then moved forward, and the cattle arrived at their destination without any other untoward incident at 2:30 A. M.

We need not decide whether plaintiff was correct in his assumption that it was the duty of the railway company, and not his own duty, to secure a lot in which to con-

fine the cattle which could not be accommodated in the cattle pen. The agent waived the point and received the cattle for shipment, and they were loaded in cars at his suggestion. It is true the plaintiff then knew the train was late, but the day was approaching its close, and something had to be done with the cattle. They had been brought to the station under the direction of the railway's agent. The railway company knew its facilities, and was charged with knowledge of the movement of its trains. In 4 R. C. L. 951, it is said that "where a common carrier accepts live stock for transportation, knowing at the time that the condition of its facilities is such that a loss will result to the shipper by reason of the shipment, such carrier will be responsible for the loss because of its negligence in undertaking the shipment under such conditions."

In support of the proposition stated, the author cites the case of *St. Louis Southwestern R. Co. v. Mitchell*, 101 Ark. 289, 37 L.R.A.(N.S.) 546, 142 S. W. 168. In that case the court approved the following instruction: "If you find from the evidence that the defendant railway company received two carloads of hogs from the Jonesboro, Lake City, & Eastern Railway Company for transportation to East St. Louis, knowing that its stock pens at Jonesboro were so overcrowded that said stock could not be unloaded, then the fact, if it be a fact, that said stock pens were so overcrowded, will not excuse the railway company, if it is otherwise liable."

The testimony in that case was to the effect that the defendant railway company had the custom of unloading hogs at Jonesboro which it received from the connecting railway for shipment to St. Louis, and that the hogs in question were not unloaded because of the overcrowded condition of its pens. Discussing the law of the case, the

court said: "It is the duty of a common carrier of live stock to furnish all necessary facilities for the proper rest, exercise, and refreshment of the animals received by it for transportation. The times when and places where rest and refreshment may be necessary must be left to the judgment of the carrier, and not the shipper. The shipper cannot arbitrarily demand of the carrier that it unload the live stock at any particular time or place; but, where the carrier has established a usage of unloading at a particular place for the proper care and necessary preservation of certain live stock, the shipper, in delivering his stock to the carrier for transportation without any notice of a change of usage, has the right to expect that such usage on the part of the carrier will be observed, and, if it is not observed, resulting in loss to the shipper, he may hold the carrier responsible for such loss. *Illinois C. R. Co. v. Peterson*, 68 Miss. 454, 14 L.R.A. 550, 10 So. 43; *Missouri, K. & T. R. Co. v. Clark*, 35 Tex. Civ. App. 189, 79 S. W. 827; *Nashville, C. & St. L. R. Co. v. Heggie*, 86 Ga. 210, 22 Am. St. Rep. 453, 12 S. E. 363; *McAlister v. Chicago, R. I. & P. R. Co.* 74 Mo. 351; *Hutchinson, Carr.* § 638, and cases cited in note.

So here we say that, when plaintiff was invited to tender his cattle for shipment, and when he did so pursuant to this invitation, he had the right to assume that the railway company had provided and would furnish the facilities needed, and if through the lack of them he was compelled to load his cattle into cars prematurely, and they were compelled to stand in the cars an unnecessarily long time before the cars were put in motion, he is entitled to recover damages to compensate the loss sustained thereby. *St. Louis & S. F. R. Co. v. Vaughan*, 88 Ark. 138, 113 S. W. 1085.

Judgment affirmed.

Annotation—Duty of carrier of live stock to provide stock pens or yards.

This note supplements a note on the same subject in 44 L.R.A. 289.

The duty of a common carrier with reference to the condition of stock pens is considered in the note in 10 L.R.A. (N.S.) 571.

The rule is well settled that it is the duty of a common carrier of live stock at the place both of receiving and delivering stock, or turning the same over to a connecting carrier, to exercise ordinary and reasonable care to provide reasonable means, including pens, inclosures, and chutes, to care for the live stock tendered it for trans-

portation, and also to feed, water, and care for such stock during transportation. *Covington Stock-Yards v. Keith* (1890) 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461; *St. Louis & S. F. R. Co. v. Cavender* (1910) 170 Ala. 601, 54 So. 54; *Atlantic Coast Line R. Co. v. Dothan Mule Co.* (1917) 161 Ala. 341, 49 So. 882 (failure to furnish proper chutes for loading and unloading stock and feeding and caring for them during transportation); *CHICAGO, R. I. & P. R. Co. v. BUTLER*, ante, 537 (failure to furnish pens sufficient in size); *Bush v. Altschul* (1917) 128 Ark.

103, 193 S. W. 280 (failure to furnish suitable yards and facilities for resting and feeding stock during transit); *St. Louis & S. F. R. Co. v. Crowder* (1907) 82 Ark. 562, 103 S. W. 172 (insufficient stock pens); *Colorado & S. R. Co. v. Breniman* (1912) 22 Colo. App. 1, 125 Pac. 855 (failure to furnish closed yards); *St. Louis, I. M. & S. R. Co. v. Keys* (1906) 6 Ind. Terr. 396, 98 S. W. 138 (failure to furnish sufficient yards in which to feed stock during transit); *Missouri, K. & T. R. Co. v. Byrne* (1899) 3 Ind. Terr. 740, 49 S. W. 41 (stating the rule); *Cincinnati, N. O. & T. P. R. Co. v. Greening* (1907) 30 Ky. L. Rep. 1180, 100 S. W. 825 (failure to furnish proper and sufficient yards in which to feed stock during transit); *Illinois C. R. Co. v. Eblin* (1903) 114 Ky. 817, 71 S. W. 919 (ground of liability same as preceding case); *Zakrzewski v. Great Northern R. Co.* (1915) 131 Minn. 175, 154 N. W. 966, prior appeal in (1914) 125 Minn. 125, 145 N. W. 801 (failure to furnish sufficient facilities to care for stock at shipping point); *Lackland v. Chicago & A. R. Co.* (1903) 101 Mo. App. 420, 74 S. W. 505 (liability for failure to provide a safe place for receipt and preservation of live stock at place of shipment); *Andrews v. McGill* (1915) — *Tex. Civ. App.* —, 179 S. W. 1087 (failure to furnish sufficient pens for use during transportation); *St. Louis, S. F. & T. R. Co. v. Drahn* (1912) — *Tex. Civ. App.* —, 143 S. W. 357 (insufficient pens for use during transportation); *San Antonio & A. P. R. Co. v. Chittim* (1911) — *Tex. Civ. App.* —, 135 S. W. 747 (failure to furnish reasonable facilities for watering stock during transportation); *Texas & P. R. Co. v. Isenhower* (1910) 62 *Tex. Civ. App.* 223, 131 S. W. 297 (failure to furnish sufficient pens); *Texas & P. R. Co. v. Slator* (1907) — *Tex. Civ. App.* —, 102 S. W. 156 (failure to furnish sufficient pens); *Ft. Worth & R. G. R. Co. v. Galton* (1907) 45 *Tex. Civ. App.* 67, 100 S. W. 166 (carrier liable for furnishing muddy and unsuitable pens at place for receiving stock); *Ft. Worth & R. G. R. Co. v. Cage Cattle Co.* (1906) — *Tex. Civ. App.* —, 95 S. W. 705 (failure to provide suitable pens or inclosures at place for receiving stock); *Texas & P. R. Co. v. Felker* (1905) 40 *Tex. Civ. App.* 604, 90 S. W. 530 (failure to maintain sufficient pens at connecting point with another road); *Casey v. St. Louis Southwestern R. Co.* (1904) 37 *Tex. Civ. App.* 49, 83 S. W. 20 (failure to furnish sufficient pens at place for receiving

stock); *Texas & P. R. Co. v. Farmbrough* (1900) — *Tex. Civ. App.* —, 55 S. W. 188 (failure to furnish suitable pens at place of shipment); *Reynolds v. Great Northern R. Co.* (1905) 40 *Wash.* 163, 111 Am. St. Rep. 883, 82 Pac. 161 (failure to furnish sufficient pens at place of destination).

Generally, the question as to whether or not facilities furnished by a carrier for caring for and feeding stock and keeping the same are reasonably sufficient is one for the jury. *Ft. Worth & R. G. R. Co. v. Galton* (1907) 45 *Tex. Civ. App.* 67, 100 S. W. 166; *Ft. Worth & R. G. R. Co. v. Cage Cattle Co.* (1906) — *Tex. Civ. App.* —, 95 S. W. 705; *Texas & P. R. Co. v. Slator* (1907) — *Tex. Civ. App.* —, 102 S. W. 156.

Open cattle pens in which to keep live stock during cold and inclement weather do not comply with the duties imposed upon the carrier. *Bush v. Altschul* (1917) 128 Ark. 103, 193 S. W. 280.

It has been held that a carrier of live stock must furnish facilities to care for the stock at the point of shipment, and that the pens must be so equipped that the shipper can, with a reasonable degree of safety and convenience, assemble and care for the stock. *Zakrzewski v. Great Northern R. Co.* (1914) 125 Minn. 125, 145 N. W. 801.

In supplying cattle pens to receive stock at designated points, it is the duty of the carrier to supply the same in accordance with the volume of business at the point to be supplied, and to anticipate and make suitable provision for the amount of stock that it will probably receive, but it need not furnish sufficient equipment to meet business tendered to it and also that of other carriers at that point. *Casey v. St. Louis Southwestern R. Co.* (1904) 37 *Tex. Civ. App.* 49, 83 S. W. 20.

Where the shipper abandoned his stock during transportation, and continued his journey without them and made no demand upon the carrier to furnish facilities for feeding the stock during transit, he cannot hold the carrier liable for injury to the stock due to lack of feed and care, on the ground that there were no sufficient facilities to be had for feeding and caring for them. *Weaver v. Southern R. Co.* (1912) 11 Ga. App. 355, 75 S. E. 447.

Where a shipper consented to transportation of cattle without unloading and feeding them, he thereby waived his right to hold the carrier liable for injury thereby resulting, although his consent was gained by the representations

of the agents of the carrier that there were no proper and sufficient facilities for feeding and caring for the stock within such time, and that, if he did not consent to the extension of time for unloading and feeding them, the carrier would unload them in inadequate pens, where there would be no facilities to feed and water them. *Kansas City, M. & O. R. Co. v. Graham* (1912) — **Tex. Civ. App.** —, 145 S. W. 432.

Shipment of live stock is usually made under a contract by which the shipper agrees to accompany the stock either in person or by an employee, and to feed and water them during transit at his own expense and risk. A contract of this character does not have the effect of relieving the carrier from liability for injury to stock during transit due to its failure to provide reasonable facilities for feeding, watering, and resting the stock during transit. *Atlantic Coast Line R. Co. v. Dothan Mule Co.* (1909) 161 **Ala.** 341, 49 So. 882; *Illinois C. R. Co. v. Eblin* (1903) 114 **Ky.** 817, 71 S. W. 919; *San Antonio & A. P. R. Co. v. Chittim* (1911) — **Tex. Civ. App.** —, 135 S. W. 747.

Where the contract of transportation provides that the stock shall be in charge of the shipper, the carrier furnishing free transportation for that purpose, and the shipper assuming the duty of

loading, unloading, and feeding the stock, the carrier is not liable for an injury to the stock due to the negligence of the shipper. *Grieve v. Illinois C. R. Co.* (1898) 104 **Iowa**, 659, 74 N. W. 192.

If the shipper of cattle enters into a contract by which, in consideration of a lower freight charge, he assumes the risk of injury to the animals, he cannot hold the carrier liable for injury to the stock from a defective cattle shed, unless the defect was due to the failure of defendant to exercise ordinary care. *Candee v. New York, N. H. & H. R. Co.* (1901) 73 **Conn.** 667, 49 **Atl.** 17.

Under an agreement by the carrier to provide the shipper of stock with all proper facilities on the train and at stations for taking care of the same, the carrier is liable for injuries to stock due to a want of food, water, and attention owing to its failure to furnish facilities for feeding and caring for them during transit. *Comer v. Stewart* (1896) 97 **Ga.** 403, 24 S. E. 845.

Where the shipper of cattle undertook to unload his own cattle without notice to the carrier or his agents, and in doing so used a chute he knew was defective, he cannot recover damages for injury to his cattle due to such defect. *Candee v. New York, N. H. & H. R. Co.* (**Conn.**) *supra*. A. G. S.

GEORGIA SUPREME COURT.

JULIUS WRIGHT et al., Plffs. in Err.,
v.

SARAH THREATT et al.

(146 Ga. 778, 92 S. E. 640.)

Contract — promise to pay another's debt — consideration.

A promise to answer for the default or miscarriage of another must be in writing and be supported by a consideration. A promise to pay an existing debt of another, which has only love and affection for a consideration, and which is executory, and from which no benefit accrues to the promisor or to the debtor, is nudum pactum, and cannot be enforced.

For other cases, see *Contracts*, I. c; I. c, 2, in *Dig.* 1-52 N. S.

(May 16, 1917.)

Headnote by HILL, J.

Note. — For love and affection as consideration for executory promise to pay existing debt of another, see annotation following this case, post, 543. L.R.A.1918C.

ERROR to the Superior Court for Bibb County to review a decree in favor of defendant Threatt, in an interpleader action for the determination of the respective rights and interests of the parties in the proceeds of a life insurance policy. Affirmed.

Statement by HILL, J.:

The American National Insurance Company brought an action against Sarah Threatt, W. F. Boddie, and Julius Wright, and alleged substantially as follows: On January 14, 1914, Willie Threatt applied for, and petitioner issued to him, a policy of insurance for the principal sum of \$320. Under the terms of the policy, in case of the death of the insured, the amount of \$320 was to be payable to Sarah Threatt, his sister, as the beneficiary. The insured kept up and paid his premiums under the policy, and died while it was in force. Sarah Threatt, as beneficiary, furnished to petitioner proper proofs of death, and under the terms of the policy the amount of \$320 became due and payable to her. On April 27, 1915, she gave a power of attorney to Dr. W. F. Boddie, authorizing him to col-

lect from petitioner the sum of \$48 out of the proceeds of the policy; and a copy of the power of attorney was delivered to petitioner. On April 30, 1915, she executed and delivered to petitioner what purports to be a revocation of the power of attorney. A similar power of attorney was given to Julius Wright, authorizing him to collect \$18.15 out of the proceeds of the policy, and was delivered to petitioner; and a similar revocation thereof was delivered to petitioner on April 30, 1915. Petitioner has been notified by all of the defendants that they claim their respective rights and interests in the proceeds of the policy; and they have refused to release petitioner upon the policy and powers of attorney, unless payment of the amounts they claim is made to them. Sarah Threatt claims the full amount of the policy. W. F. Boddie claims \$48, and Julius Wright claims \$18.15. By reason of these claims it is doubtful and dangerous for petitioner to act in the premises. It is not in collusion with any of the claimants of the fund, and has no interest therein. It prays that it be permitted to pay the fund into court and be discharged from any and all liability to each of the parties defendant upon the policy or the powers of attorney, and that the defendants be required to interplead and have their respective rights and interests in the proceeds of the policy determined in this cause.

An order granting the prayer of the petition was passed, with the provision that Sarah Threatt have the right to apply to the court to have the uncontested portion of the amount of the policy paid over to her, upon five days' notice to the other defendants. She answered, in substance, that the execution of the powers of attorney was procured by fraud upon her (in circumstances detailed), that they were never read to her, and that she was illiterate, unable to read or write. She was informed later by the agent in charge of the office and place of business of the insurance company that she had executed the powers of attorney. She immediately delivered to the insurance company a revocation of the powers of attorney, and has not revived them by act or conduct. No consideration existed for their execution. She prays that they be declared void and of no effect, that the entire proceeds of the policy be awarded to her, and that the other defendants be decreed to have no interest therein. Boddie and Wright by their answer admit most of the allegations of the petition. They do not deny that the purported revocations of the powers of attorney were filed with the plaintiff. They allege that they are entitled to the sums of money for which powers of attorney were given; that they were not procured by fraud, L.R.A.1918C.

but were entered into bona fide, and after full knowledge of every fact which they contain was fully explained and understood by Sarah Threatt before they were signed by her; that they are coupled with an interest, and are irrevocable; that they were given upon a good and valuable consideration, and form a contract of suretyship, for a debt, and the power in each instance is conferred for the purpose of effecting the security, and, whether coupled with an interest or not, is irrevocable; that, at the time and before the powers of attorney were given, Sarah Threatt executed and gave to each of these defendants a contract by which she agreed to answer for the debt or debts of her deceased brother, Willie Threatt, to wit, the expenses for medical services rendered and medicines furnished to him in his last illness by defendant Dr. Boddie in the sum of \$48, and the expenses incurred by Julius Wright in furnishing the burial outfit necessary to bury Willie Threatt; that Sarah Threatt is morally as well as legally responsible for the burial expenses of her brother, even if she had not voluntarily in writing made herself responsible for them; that she knew fully all about the writings, which she voluntarily signed, as they were read to her, and it was agreed by her to answer for the debts which respondents had against her deceased brother and his estate. They pray judgment against her for the amount of their claims. On motion, the answer and pleadings of Wright and Boddie were stricken, and the court entered a decree that Sarah Threatt recover the full amount of the policy, with interest. Boddie and Wright excepted.

Mr. H. W. Nalley for plaintiffs in error.
Messrs. Grady C. Harris and John R. L. Smith, for defendant in error Threatt:

A promise to answer for the debt, default, or miscarriage of another person has to be in writing and supported by a consideration.

Davis v. Tift, 70 Ga. 52; Strickland v. Farmers Supply Co. 14 Ga. App. 661, 82 S. E. 161; Johnson v. Rycroft, 4 Ga. App. 547, 61 S. E. 1062; Beach, Contr. 1896, § 505; Saul v. Southern Seating & Cabinet Co. 6 Ga. App. 843, 65 S. E. 1065; 29 Am. & Eng. Enc. Law, 910; Russell v. Smith, 97 Ga. 287, 23 S. E. 5.

While a good consideration may support an executed contract, it cannot support an executory contract.

Benjamin & M. Contr. 2d ed. § 19; 9 Cyc. 319; Davis v. Morgan, 117 Ga. 504, 61 L.R.A. 148, 97 Am. St. Rep. 171, 43 S. E. 732; Loudermilk v. Loudermilk, 93 Ga. 443, 21 S. E. 77.

Mr. R. K. Hines also for defendants in error.

Hill, J., delivered the opinion of the court:

Did the court err in sustaining the motion to strike, and in dismissing the joint answer of Boddie and Wright, and in entering the judgment to which exception is taken? It appears from the answer that Boddie held an account against the estate of Willie Threatt, for medical attention furnished during the lifetime of Threatt, and that Wright held an account against the estate of Threatt, for expenses incurred in connection with the burial of Threatt. It does not appear that these two accounts were incurred at the request of Sarah Threatt. The bills of particulars attached to the pleadings were made out against "Willie Threatt, Dr.," but it was averred that at the time and before the powers of attorney were given to Boddie and Wright by Sarah Threatt, she gave to each of them a contract in writing in which she agreed to answer for the debt or debts of her deceased brother, Willie Threatt. These writings bear date ten days after the date of the itemized accounts of Boddie and Wright. It is insisted that the written contracts were bona fide and voluntarily entered into by Sarah Threatt to answer for the debts of her brother which Boddie and Wright held against him and his estate, and were binding on her. The one given to Boddie was in part as follows: "I hereby agree to pay to Dr. W. F. Boddie the sum of forty-eight (\$48) dollars, the same being the amount due him by my deceased brother, Willie Threatt, late of Monroe county, Georgia, who died on the 17th day of April, 1915."

It seems clear from the facts in this case that Sarah Threatt was not originally liable for these accounts of the codefendants. It is

true she subsequently entered into a written promise to pay these claims, and gave powers of attorney authorizing the codefendants to collect certain sums due her by the insurance company, and to have such sums applied to their claims; but the powers of attorney were subsequently revoked by her. A promise to answer for the debt, default, or miscarriage of another, in order to be binding, must be in writing (Civ. Code, § 3222, ¶ 2), and be supported by a consideration. It is nudum pactum unless some benefit accrues to the debtor or to the promisor. Civ. Code, § 4241; Davis v. Tift, 70 Ga. 53 (2), 56; Russell v. Smith, 97 Ga. 287 (1), 23 S. E. 5; Johnson v. Rycroft, 4 Ga. App. 547 (2c), 61 S. E. 1052; Beach, Contr. (1896) § 505; 9 Cyc. 319; 29 Am. & Eng. Enc. Law, 2d ed. 910. The only consideration stated in the written contracts in this case was "the love and affection" which the promisor, Sarah Threatt, had for her deceased brother. It is insisted that this is a sufficient consideration to support the contracts. We think otherwise. While love and affection as a consideration for a written contract to answer for the debt, default, or miscarriage of another may bind the conscience of the maker, it cannot support an executory contract to answer for the debt, default, or miscarriage of another, unless some damage flows from the breach, or the contract is supported by a legal consideration in addition to the moral. Davis v. Morgan, 117 Ga. 504, 61 L.R.A. 148, 97 Am. St. Rep. 171, 43 S. E. 732; Loudermilk v. Loudermilk, 93 Ga. 443 (2), 21 S. E. 77. We think the court below was right in striking the answer of the codefendants, and in entering the judgment to which exception is taken.

Judgment affirmed.

All the Justices concur.

Annotation—Love and affection as consideration for executory promise to pay existing debt of another.

I. Love and affection; in general, 543.

II. Moral obligation due to relationship, 545.

III. Promise to pay debt of relative:

a. Relationship as consideration:

1. In general, 545.

2. Statute of Frauds, 545.

IV. New consideration:

a. Possession by promisor of debtor's property, 546.

b. Forbearance by promisee:

1. In general, 547.

2. As affected by Statute of Frauds, 547.

c. Novation of indebtedness, 548.

V. Miscellaneous, 548.

It is to be noted that this note is limited to cases considering the validity of agreements to pay the existing debt of a relative, where the consideration is love and affection, and it does not include cases involving this point where L.R.A.1918C.

the agreement is contemporaneous with the creation of a debt.

I. Love and affection; in general.

It is a general rule that love and affection is not a sufficient consideration

to support an executory promise, without reference to the character of the promise. Cases holding or applying this rule are not within the scope of this note. The following cases, however, are referred to as illustrative of this rule: *Kirkpatrick v. Taylor* (1867) 43 Ill. 207; *Schnell v. Nell* (1861) 17 Ind. 29, 79 Am. Dec. 453; *Duvoll v. Wilson* (1850) 9 Barb. (N. Y.) 487; *Fink v. Cox* (1820) 18 Johns. (N. Y.) 145, 9 Am. Dec. 191; *Kennedy v. Ware* (1845) 1 Pa. St. 445, 44 Am. Dec. 145; *Tweddle v. Atkinson* (1861) 8 Jur. N. S. 332, 1 Best & S. 393, 121 Eng. Reprint, 762, 30 L. J. Q. B. N. S. 265, 4 L. T. N. S. 468, 9 Week. Rep. 781; *Pennington v. Gittings* (1830) 2 Gill & J. (Md.) 208.

This rule also applies to an executory promise to pay another's existing debt, and such a promise is not binding because of the insufficiency of the consideration, and where it is not in writing it is also invalid under the Statute of Frauds.

In this connection it is to be noted that where the promise is oral, there is involved the question as to whether or not the consideration is of a sufficiency and character not only to support a contract, but to make the promise an original one; whereas, where the promise is in writing, the only question presented is whether or not the promise is sufficient to support a contract.

While the distinction between the two classes of cases is not always maintained, it is nevertheless a valid one.

It is, of course, a general rule that any consideration, either of benefit to the promisor or of detriment to the promisee, is sufficient to sustain a contract, but where the question is presented as to the validity of an oral promise to pay another's debt, a consideration which would be sufficient to sustain a contract is not necessarily sufficient to remove the promise from the operation of the Statute of Frauds.

In the majority of cases considering the matter, where the promise to pay the debt of a relative is an oral one, it does not clearly appear whether the relationship is held an insufficient consideration for the promise, on the ground that it would be insufficient to support an ordinary promise if in writing, or whether it is insufficient because of the operation of the Statute of Frauds. See further on this point, *infra*, III. a, 2, "Statute of Frauds."

As heretofore suggested, the consideration in such a case must be not only sufficient to sustain an ordinary con-

tract, but also of such character as to make the promise an original one. If it is a collateral promise, it is void within the Statute of Frauds without reference to the sufficiency of the consideration.

WRIGHT v. THREATT, *ante*, 541, is authority for the rule that, where the only consideration for an executory promise to pay the debt of another is love and affection, and no benefit accrues to the promisor, the agreement is nudum pactum and unenforceable.

Bret v. J. S. (1600) Cro. Eliz. pt. 2, p. 756, 78 Eng. Reprint, 987, holds that while love and affection is not, in and of itself, a sufficient consideration for an agreement by a widow to pay for past support furnished her minor son, the further agreement of the promisee to continue to furnish board and maintenance for such son constitutes a sufficient consideration for the entire promise.

It is, however, sufficient consideration for a note by a widow to show that it was given out of respect to the memory of her deceased husband, and to secure a debt lawfully due by him. *Ridout v. Bristow* (1830) 1 Crompt. & J. 231, 148 Eng. Reprint, 1404, 1 Tyrw. 84, 9 L. J. Exch. 48; *Nelson v. Searle* (1838) 3 Jur. 290, 4 Mees. & W. 795, 150 Eng. Reprint, 1643, 1 Horn & H. 456, 8 L. J. Exch. N. S. 305; *Searle v. Waterworth* (1838) 2 Jur. 745, 6 Dowl. P. C. 684, 4 Mees. & W. 9, 150 Eng. Reprint, 1321, 1 Horn & H. 281.

Ordinarily proof of relationship between the promisor and the debtor does not, per se, furnish evidence of that degree of moral obligation sufficient to maintain an action on an express promise to pay a debt. *Dodge v. Adams* (1837) 19 Pick. (Mass.) 429 (promise by father to pay for board theretofore furnished to minor children without his knowledge or request).

In this regard it has been held that for sentimental reasons, or from the very highest moral motives, a mother may have been moved to pay her son's debt, but the law does not enforce such a purely moral obligation, if she promised to pay the debt to induce the promisee to refrain from his announced intention to attach the son's property, no pecuniary benefit coming to her as a consideration for the promise, to remove the promise from the operation of the Statute of Frauds, although there was a consideration for the promise in the legal sense of that term, as such consideration may be either a benefit going to the promisor or a detriment to the promisee.



Where there was no benefit to the promisor, but there was a detriment to the promisee, in that he refrained from suing by attachment, by which means he might have collected all or part of his debt, his foregoing an intended suit, regardless of its results, may be taken as a relinquishment of such a valuable right as to constitute a valid consideration; but while the detriment or loss to the promisee is a good consideration, it is not a sufficient consideration to take a verbal promise to answer for the debt of another out of the Statute of Frauds. *Waggoner v. Davidson* (1915) 189 Mo. App. 345, 175 S. W. 232.

II. Moral obligation due to relationship.

The general question as to moral obligation being a consideration for a promise, including a promise to pay the existing indebtedness of a relative, is considered in notes appended to *Trimble v. Rudy*, 53 L.R.A. 353, and *Muir v. Kane*, 26 L.R.A.(N.S.) 520.

III. Promise to pay debt of relative.

a. Relationship as consideration.

1. In general.

The rule that love and affection is not, in and of itself, a sufficient consideration to support an executory promise to pay the existing debt of another, finds support not only in the few cases that specifically deal with the question from the standpoint of love and affection as a sufficient consideration, but it is also supported by the following cases, which, while not making a specific point of the love and affection one relative may be supposed to bear for another, nevertheless hold that an executory promise by one relative to pay another's indebtedness is not based upon a sufficient consideration, and hence is not binding: *Martin v. Black* (1852) 21 Ala. 721 (promise by mother to pay claim against estate of deceased son, where not beneficial to her); *Cook v. Bradley* (1828) 7 Conn. 57, 18 Am. Dec. 79 (promise by adult son to pay existing debt of indigent father for necessities if the father did not); *State Bank v. Livingston* (1913) 182 Ill. App. 529 (note given by a widow and heir in payment of claim against husband's estate, where the claim had not been filed against the estate within the prescribed period of time, it not appearing that the widow and heir had received any of the decedent's property); *Vehon v. Vehon* (1897) L.R.A.1918C.

70 Ill. App. 40 (note by son for amount of father's debt where the latter was not released or the time of payment extended); *Gilbert v. Wilbur* (1908) 105 Me. 74, 72 Atl. 868 (note by mother for existing indebtedness of a minor son, who was not released or the time of payment extended); *Schroeder v. Fink* (1883) 60 Md. 436 (agreement by son to become responsible for indebtedness of deceased father, who left no estate out of which the indebtedness could have been realized); *Beasten v. Hendrickson* (1876) 44 Md. 609 (agreement by wife to pay debt of husband); *Widger v. Baxter* (1906) 190 Mass. 130, 3 L.R.A.(N.S.) 436, 76 N. E. 509 (note of wife as security for her husband's debt); *Kircher v. Sprenger* (1895) 4 Pa. Dist. R. 144 (note given by widow for husband's debt).

2. Statute of Frauds.

Where promises to pay a relator's debt have been oral, in the following cases they have been held to be within the Statute of Frauds and void without apparently making any particular point of the relationship existing between the promisor and the debtor, although the existence of this relationship has been deemed of sufficient importance to be mentioned by the court. Cases of this kind, therefore, lend some, although perhaps doubtful, support to the rule that the relationship existing between the promisor and the debtor does not form a sufficient consideration to remove an oral promise to pay a relative's debt from the operation of the Statute of Frauds: *Connerat v. Goldsmith* (1849) 6 Ga. 14 (oral promise by husband to pay for goods theretofore purchased by wife); *Zwinge v. Scarlett* (1915) 88 N. J. L. 13, 96 Atl. 72 (oral promise by wife to pay debt of husband); *Youngs v. Shough* (1835) 15 N. J. L. 27 (oral promise by son to pay mother's funeral expenses); *Ellison v. Wisheart* (1867) 29 Ind. 32 (oral promise by son to pay mother's debt); *Chandler v. Davidson* (1843) 6 Blackf. (Ind.) 367 (oral promise by a widow to pay the debt of her husband is within the Statute of Frauds, even though there may have been a moral obligation resting upon her to pay the debt); *Thwaites v. Curl* (1846) 6 B. Mon. (Ky.) 472 (oral promise by widow to pay debt of husband contracted for erecting a house upon land in which she had a dower interest); *Miller v. Payne* (1885) 7 Ky. L. Rep. 296 (abstract) (promise by widow to pay husband's debt); *Lyell v. Walbach* (1910) 113 Md. 574, 33 L.R.A.(N.S.) 741, 77 Atl.

1111 (oral promise by wife to pay existing debt of husband); *Barker v. Thayer* (1914) 217 *Mass.* 13, 104 N. E. 572 (oral promise by wife to pay for repairs to property owned by her mother, which were charged to her husband, although subsequently to the promise she acquired an interest in the property); *Dexter v. Blanchard* (1865) 11 *Allen (Mass.)* 365 (oral promise by father to pay debt of minor son in consideration of forbearance by the promisee is within the Statute of Frauds); *Feist v. Root* (1915) 189 *Mich.* 595, 155 N. W. 491 (oral agreement by husband to pay debt of his wife); *Goodman v. Felcher* (1898) 116 *Mich.* 348, 74 N. W. 511 (oral agreement by wife to pay existing debt of husband, although it was a lien upon property upon which she held a second mortgage); *Buck v. Haynes* (1889) 75 *Mich.* 397, 42 N. W. 949 (oral promise by wife to pay for medical services rendered and to be rendered to her husband); *Speckmann v. Foote* (1912) 138 N. Y. Supp. 380 (oral promise by wife to pay for necessities for which her husband was primarily liable); *Bauer v. Ams* (1911) 144 App. Div. 274, 128 N. Y. Supp. 1024 (oral promise by wife to pay existing debt of her husband); *Ruhl v. Heintz* (1904) 97 App. Div. 442, 89 N. Y. Supp. 1031 (oral promise by wife to pay for board theretofore furnished for her husband and daughter); *Brennan v. Chapin* (1892; Com. Pl.) 46 N. Y. S. R. 768, 19 N. Y. Supp. 237 (oral agreement by husband to pay wife's debt); *Travis v. Scribia* (1877) 12 Hun (N. Y.) 391 (oral promise by wife to pay for trees bought by her husband and set out upon her land, where the trees were charged and the credit extended to her husband); *Lennox v. Eldred* (1873) 65 Barb. (N. Y.) 410 (oral promise by widow to pay husband's debt); *Felder v. Walker* (1886) 24 S. O. 596 (oral agreement by wife to pay debt of her husband); *Davenport v. Rutledge* (1916) — *Tex. Civ. App.* —, 187 S. W. 988 (oral promise by wife to pay debt of husband for medical services rendered their child); *Fletcher v. Puckett* (1914) — *Tex. Civ. App.* —, 170 S. W. 831 (oral agreement by father to pay debt of son); *Fisher v. Lutz* (1911) 146 *Wis.* 664, 132 N. W. 592 (oral promise of father to pay debt of minor son).

IV. *New consideration.*

a. *Possession by promisor of debtor's property.*

While no attempt has been made to L.R.A.1918C.

make this note exhaustive of the question as to the effect of other considerations to validate an agreement by one relative to pay the existing indebtedness of another, the following cases are referred to as illustrative of the extent of the rule that an agreement to pay the existing debt of a relative, where based upon other valuable considerations, is a valid and binding obligation to the same extent as though the promise were made by a stranger in blood.

For example, it has been held that where the promisor was in possession of property of a relative, his agreement to pay the indebtedness of such relative, whether to prevent the property from being used by the creditor to liquidate his claim, or where his agreement is based upon the fact of his possession and his duty to use the property for the benefit of the creditors of the owner, is sufficient consideration to support the promise: *Safe Deposit & T. Co. v. Wright* (1900) 44 C. C. A. 421, 105 *Fed.* 155 (note by heirs in payment of debt of their ancestor, although it was not a lien upon the estate); *Whelan v. Swain* (1901) 132 *Cal.* 389, 64 *Pac.* 560 (note by daughter to creditor of mother, who had conveyed property to the daughter when she was insolvent); *McIntire v. Schiffer* (1903) 31 *Colo.* 246, 72 *Pac.* 1056 (agreement by a wife to borrow money on land conveyed to her by her husband, and pay his note with the proceeds); *Harris v. Harris* (1899) 180 *Ill.* 157, 54 N. E. 180 (note by son at the request of his father, to cover a debt of the latter, where the son had in his custody a large amount of the father's property); *Coquard v. Union Depot Co.* (1881) 10 *Mo. App.* 261 (agreement by husband to pay debt of wife if her trunk were forwarded to him); *Rounsevel v. Osgood* (1896) 68 N. H. 418, 44 *Atl.* 535 (agreement to pay for medical services theretofore rendered the parents, where the promisor, in consideration of the conveyance to her of certain property, had theretofore contracted with her parents to support them); *Milburn Mfg. Co. v. Tucker* (1889) 3 *Tex. App. Civ. Cas.* (Willson) 552 (agreement by son to pay deceased father's debt for certain property, of which the son had taken possession, in consideration of the promisee permitting him to retain the property); *Roundy, P. & D. Co. v. Baldwin* (1915) 161 *Wis.* 342, 154 N. W. 364 (agreement by father to continue son's business which had been turned over to him, until all obligations of the son were liquidated).

An oral promise by a widow who received her husband's estate, to pay the latter's note if it was not filed as a claim against his estate, is valid and not within the Statute of Frauds. *Crawford v. King* (1876) 54 Ind. 6; *Templeton v. Bascom* (1860) 33 Vt. 132.

Compare with *Watson v. Reynolds* (1875) 54 Ala. 191, holding that a note by a widow for her deceased husband's debt, taken in payment thereof, or to secure forbearance, is not based upon a valid consideration, although the widow was in possession of the personal and real estate of the deceased, no administration having been granted upon his estate.

b. Forbearance by promisee.

1. In general.

It has been held that forbearance upon the part of the creditor is a sufficient consideration to support an agreement to pay the debt of a relative: *Rohrbacher v. Aitken* (1904) 145 Cal. 485, 78 Pac. 1054 (forbearance by creditor to prosecute claim against debtor's estate is a sufficient consideration to support a note by the widow and children of the deceased for the amount of the claim); *Emerson v. Sheffer* (1906) 113 App. Div. 19, 98 N. Y. Supp. 1057 (agreement by the creditor to forbear is a sufficient consideration to support a note by the wife and son to secure the payment of a draft owing by the husband); *Wicks v. Metcalf* (1917) 83 Or. 693, L.R.A.1918A, 493, 163 Pac. 988 (note executed by a wife for her husband's debt to secure an extension of time for its payment); *Galena Nat. Bank v. Ripley* (1909) 55 Wash. 615, 26 L.R.A.(N.S.) 993, 104 Pac. 807 (note by son in consideration of forbearance by promisee to prosecute claim against the promisor's father's estate).

2. As affected by Statute of Frauds.

It has been held that an oral promise by a father to pay a note of the son which was not surrendered or canceled is within the Statute of Frauds where no benefit accrued to the promisor, although forbearance was thereby procured. This holding is based upon the ground that where the collateral undertaking is not the inducement to the creation of the debt, there must be some further consideration shown having an immediate respect to such liability, for the consideration of the original debt will not attach to the subsequent promise. *Westheimer v. Peacock* (1856) 2 Iowa, 528. L.R.A.1918C.

To the same effect are: *Schaafs v. Wentz* (1897) 100 Iowa, 708, 69 N. W. 1022 (holding that an oral promise by a father to pay the debt of a deceased son-in-law if the creditor would not file his claim against the estate is collateral because not supported by a sufficient consideration where no benefit accrued to the promisor, and the promisee suffered no loss, since the son-in-law's estate was insolvent, and he would have obtained nothing on his claim had he filed it); *Frohardt Bros. v. Duff* (1911) — Iowa, —, 132 N. W. 31 (holding that an oral promise by a father-in-law to pay the debt of his son-in-law is within the Statute of Frauds, even though the promisee forbore to attach property of the promisor upon which the promisee had a lien, it not appearing that the lien was a valid one); *Waggoner v. Davidson* (1915) 189 Mo. App. 345, 175 S. W. 232 (holding to be invalid an oral promise by a mother to pay the debt of her son, to induce the creditor not to attach the son's property); *Beard v. Hardy* (1901) 17 Times L. R. (Eng.) 633 (holding that an oral promise by a wife to pay the existing debt of her husband is within the Statute of Frauds, where the only consideration was forbearance of legal proceedings against the husband).

An oral promise by a wife to pay the husband's debt in consideration of the forbearance of a levy of an attachment upon his property is not based upon a sufficient consideration, and is within the Statute of Frauds. *Mitchell v. Miller* (1898) 25 Misc. 179, 54 N. Y. Supp. 180.

And an oral promise by a wife to pay for goods sold her husband, in consideration of the promisee delivering the balance of the goods to the husband, is within the Statute of Frauds, and not based upon a sufficient consideration. *Jeffrey v. Alyea* (1916) 36 Ont. L. Rep. 391, 30 D. L. R. 341, 10 Ont. Week. N. 77.

Also an oral agreement by a widow to pay for goods theretofore furnished her husband in consideration of an agreement to furnish her with goods on credit is not based upon a sufficient consideration, and is within the Statute of Frauds. *Cardeza v. Bishop* (1900) 54 App. Div. 116, 66 N. Y. Supp. 408.

And it has been held that an oral promise by a father to pay for board furnished and to be furnished to his adult son is based upon a sufficient consideration, the consideration being the agreement to continue to furnish board, but it is nevertheless invalid under the

Statute of Frauds. *Loomis v. Newhall* (1833) 15 Pick. (Mass.) 159.

c. Novation of indebtedness.

Where the subsequent agreement to pay a relative's debt amounts to a novation and a substitution of the promisor's debt for that of the relative, this constitutes a sufficient consideration to support the promise: *Henderson v. Gilliland* (1914) 187 Ala. 268, 65 So. 793 (indorsement by a mother to her son of notes payable to herself, to enable him to use the same to secure the payment of his notes); *Vandeventer v. Davis* (1909) 92 Ark. 604, 123 S. W. 766 (note given for goods delivered to the children of the maker); *Lomax v. Colorado Nat. Bank* (1909) 46 Colo. 230, 104 Pac. 85 (note given in settlement of brother's defalcation); *Deering v. Veal* (1904) 25 Ky. L. Rep. 1809, 78 S. W. 886 (surrender of husband's note is a sufficient consideration to support a note of the wife, given in payment thereof); *Matthews v. Williams* (1873) 25 La. Ann. 585 (a note by a son in payment of notes of the father, barred by the Statute of Limitations, is based upon a sufficient consideration); *Cawthorpe v. Clark* (1912) 173 Mich. 267, 138 N. W. 1075 (note by a widow is based upon a sufficient consideration where it is given in payment of interest due on a note by her deceased husband, if it is accepted in payment of the interest and the amount is indorsed upon the note, and this is true although it does not appear that the husband left an estate, or that there was any forbearance granted by the creditor); *American Wire & Steel Bed Co. v. Schultz* (1904) 43 Misc. 637, 88 N. Y. Supp. 396 (agreement by a mother to pay the debt of her son, in consideration of the release of the claim against him); *Judy v. Louderman* (1891) 48 Ohio St. 562, 29 N. E. 181 (note by a father in payment of a note of his deceased son, which was surrendered, is based upon a sufficient consideration, although the estate of the son is insolvent); *Weber & Co. v. Bishop* (1899) 12 Pa. Super. Ct. 51 (agreement to pay debt of brother in order to secure advantage to promisor); *Davis v. Blum* (1916) 104 S. O. 218, 88 S. E. 465 (agreement to pay costs of suit brought by promisor's wife); *Reuter v. Sullivan* (1898) — Tex. Civ. App. —, 47 S. W. 683 (cancellation of note against husband is a sufficient consideration for note by L.R.A.1918C.

the widow); *Becker v. Noegel* (1917) 165 Wis. 73, 160 N. W. 1055 (note by a mother to pay a note of her son, indorsed as accommodation maker by the father, since deceased, is based upon a sufficient consideration where the note is surrendered and the estate of the father is released from liability thereon); *La Touche v. La Touche* (1865) 11 Jur. N. S. 271, 3 Hurlst. & C. 576, 159 Eng. Reprint, 657, 34 L. J. Exch. N. S. 85, 11 L. T. N. S. 773, 13 Week. Rep. 563 (note given by wife in renewal of note given by husband and wife for husband's debt is based upon a sufficient consideration).

A note by a widow to cover such of her husband's debts as the creditor is unable to collect from his estate has been held to be valid where based upon the agreement of the creditor to withdraw objections to the allowance to her and her children of a year's support from the husband's estate. *Golding v. McCall* (1908) 5 Ga. App. 545, 63 S. E. 706.

V. Miscellaneous.

A promise to pay a relative's debt may put the promisee in a worse position than he would be in if the promise had been by a stranger in blood; as, where the relation between the promisor and the debtor is such as to indicate that the debtor may have brought undue influence or duress to bear upon the promisor to secure the promise, the promise is void, although supported by a sufficient consideration. For example, a note by a wife and daughter for the husband's debt, secured by the husband through misrepresentation and coercion, is invalid. *Cox v. Adams* (1904) 35 Can. S. C. 393, 25 Can. L. T. Occ. N. 25. No attempt has been made to gather the cases bearing upon the validity of a note in payment of another's debt as affected by its being secured by duress or fraud.

Where the widow undertakes to escape responsibility on a note given in payment of notes against her deceased husband and one against herself, the burden of proof is upon her to show that there was no valid consideration for the note, by showing that she was not liable for the payment of the husband's indebtedness and had not received all of his property as distributee. *Vaughan v. Bass* (1914) 10 Ala. App. 388, 64 So. 543.

A. G. S.

NEW MEXICO SUPREME COURT.

MIRAMON LUCERO

v.

JOHN B. McMANUS, Superintendent of
New Mexico State Penitentiary.

(— N. M. —, 168 Pac. 713.)

**Criminal law — suspension of sentence
— notice of revocation.**

A convict is entitled to notice and an opportunity to be heard upon the question as to whether he has violated the conditions upon which the sentence against him has been suspended, where, as in this case, the suspension was during good behavior, which necessarily involves a question of fact. In proceedings to determine such a question, no particular formalities need be observed, and the convict is not entitled to a jury trial, except upon the question of his identity with the person originally sentenced, if such question is raised.

For other cases, see *Criminal Law*, II. b; IV. g; *Jury*, I. b, 2, in *Dig.* 1-52 N. S.

(November 12, 1917.)

APPPLICATION for a writ of habeas corpus to secure petitioner's release from custody to which he had been committed for larceny of a horse. Petitioner discharged.

The facts are stated in the opinion.

Mr. A. B. Renahan, for petitioner:

Breach of a condition of a suspended sentence cannot be arbitrarily adjudged, but the convict is entitled to be heard.

Alvarez v. State, 50 Fla. 24, 111 Am. St. Rep. 106, 39 So. 481, 7 Ann. Cas. 88; *People v. Moore*, 62 Mich. 496, 29 N. W. 80; 1 *Bailey*, *Habeas Corpus*, 199; *People v. Cummings*, 88 Mich. 249, 14 L.R.A. 285, 50 N. W. 310; *Conlon's Case*, 148 Mass. 168, 19 N. E. 164; *State ex rel. O'Connor v. Wolfer*, 53 Minn. 135, 19 L.R.A. 783, 39 Am. St. Rep. 582, 54 N. W. 1065, 9 Am. Crim. Rep. 487.

The conditions annexed to the pardon of a convicted criminal cannot be enforced after the expiration of his sentence.

Re Prout, 12 Idaho, 494, 5 L.R.A. (N.S.) 1064, 86 Pac. 275, 10 Ann. Cas. 199; *Ex parte Clendenning*, 19 L.R.A. (N.S.) 1041, note; *Ex parte Kelly*, 155 Cal. 39, 20 L.R.A. (N.S.) 337, 99 Pac. 368.

Mr. Harry S. Bowman, Assistant Attorney General, for the State:

Relator has shown no cause upon which his discharge should be ordered.

Re Lujan, 18 N. M. 310, 137 Pac. 587.

Headnote by PARKER, J.

Note. — As to power of court to suspend sentence or stay execution of sentence, see annotation following this case, post, 551. L.R.A.1918C.

In the absence of a showing to the contrary, it must be presumed that the court acted regularly and upon valid and legal grounds.

3 Cyc. 820; 12 Cyc. 887.

Parker, J., delivered the opinion of the court:

On April 29, 1913, the petitioner was sentenced to serve a term in the penitentiary of not less than two, nor more than three years, upon the plea of guilty under an indictment in Bernalillo county charging the larceny of a horse. The judgment of the district court was suspended during the good behavior of the defendant. Thereafter, on November 2, 1915, an indictment was returned in Lincoln county against the petitioner and others, charging them with the larceny of twelve horses. Thereafter, on May 18, 1916, a certified copy of the indictment in Lincoln county was filed in the original cause in Bernalillo county, and thereupon the court found that the petitioner had violated the conditions upon which the sentence theretofore pronounced against him was suspended, and ordered that said sentence be enforced against the petitioner, and that commitment be issued upon the judgment, which was done. The petitioner was arrested and brought to the penitentiary, where he now is confined. Petitioner thereupon sued out a writ of habeas corpus in this court, and the same has been argued and submitted.

Counsel for petitioner make two contentions in the case: First, upon the determination of the question as to the breach of the condition of a suspended sentence, the defendant is entitled to be heard; second, a suspended sentence cannot be enforced after the time for which the sentence was originally imposed has expired.

1. The second contention above stated is foreclosed by a previous holding of this court in *Re Lujan*, 18 N. M. 310, 137 Pac. 587. In that case the defendant was committed to the penitentiary after the time that his sentence would have expired had he served the same. We held that the fact that the time covered by the sentence had expired was immaterial, and that the sentence might be enforced at any time thereafter upon the breach of the conditions upon which it was suspended. We see no reason to depart from the holding in that case.

2. It appears that the proceedings leading to the issuance of the commitment against the petitioner were entirely *ex parte*. So far as it appears from the record he was not present in person or by counsel, and had no hearing as to whether he had breached the condition. Counsel on each side state that there is no precedent to be found in the

books touching this proposition. Counsel for petitioner likens a suspended sentence to a conditional pardon, and cites authority to the effect that where a man has been conditionally pardoned, and is alleged to have violated the conditions of his pardon, his guilt must be established in due form of law, and by the same processes as apply in other cases.

Alvarez v. State, 50 Fla. 24, 111 Am. St. Rep. 102, 39 So. 481, 7 Ann. Cas. 88, was a case of a conditional pardon. It appears that in that case the petitioner was arrested by the sheriff for having violated the conditions of his pardon upon the request of the state board of pardons. There was no authority in the state board of pardons to ascertain or determine whether or not there had been a violation of, or noncompliance with, the conditions of the pardon, or to rearrest the convict and order the execution of the original sentence. The court held that the order made by the board of pardons undertaking to judge of the violation of the conditions of the pardon and ordering the recommitment of the petitioner was a nullity. The conditional pardon granted to the petitioner, however, in express terms, authorized any sheriff of the state to rearrest him upon his violating the conditions of the pardon, and the court held, therefore, that it became the duty of the sheriff, notwithstanding the nullity of the order of the board of pardons, to arrest the petitioner and detain him until such alleged violation could be inquired into and determined by the proper authorities, and to bring such alleged violation promptly to the attention of some court of general criminal jurisdiction to be there disposed of. The case was heard in the lower court upon a writ of habeas corpus, and the Florida supreme court held that in that proceeding the court below should have instituted an inquiry as to the truth of the alleged violation of the conditions of the pardon. The inquiry not having been made, the case was reversed and remanded to the lower court with directions that in the habeas corpus proceedings it should make inquiry into the truth of the alleged violation of the conditions of the pardon, and if the violation was found to exist, that the petitioner be remanded to custody; or if such violation should not be established, he should be discharged; and that the defendant in the meantime remain in custody, unless he give a certain prescribed bond for his appearance before the court below. The court quotes from and relies upon 24 Am. & Eng. Enc. Law, 959 et seq.

In *People v. Moore*, 62 Mich. 496, 29 N. W. 80, it was held that a statute providing for the rearrest and remanding of the convict

without warrant upon the alleged violation by him of the conditions of his pardon, without a preliminary examination, was unconstitutional and void. The holding is based upon the proposition that such a proceeding is a violation of the constitutional guaranty against deprivation of liberty without due process of law. The court says: "When a person has been set at liberty under the pardon or the commutation of his sentence by the executive, he becomes once more a full citizen, clothed with all the rights, privileges, and prerogatives that belong to any other free man. He cannot be sent out half free and half slave. . . . And, in order to remand and confine him in prison again, the fact of the violation of such condition must be established by the due administration of the law, as in other cases of the violation of the penal statutes."

In *State ex rel. O'Connor v. Wolfer*, 53 Minn. 135, 19 L.R.A. 783, 39 Am. St. Rep. 582, 54 N. W. 1065, 9 Am. Crim. Rep. 487, the petitioner had been pardoned on condition that he immediately leave, and remain without, the state. After his release he directed his wife to dispose of his property and to join him. She sold the property as directed and met him for the purpose of leaving the state, and as they were about to take the train, she was stricken with paralysis. He gave her such attention as he could and concealed himself in the vicinity to avoid the public. Three days later, while endeavoring to reach a train and take passage out of the state, he was arrested and placed in confinement on the theory that he had forfeited the benefit of his pardon by noncompliance with its condition. The court, in an opinion by Mitchell, J., held that the uniform practice, both English and American, except where otherwise provided by statute, has been that, upon complaint that the prisoner has not performed the condition of his pardon, a warrant is issued, upon which he is arrested and committed to jail until he can be brought before the court for a hearing; that thereupon an order, rule, or some such process, the form of which is not very material, issues by the court in which he was convicted, or some superior court of criminal jurisdiction, and he is brought before the court to show cause why execution should not be awarded against him on his original sentence. On all matters touching the question whether he has failed to perform the condition of his pardon, the prisoner is entitled to be heard, just as he was entitled to be heard why sentence should not be passed upon him when he was originally brought before the bar for sentence. The court further held that it was competent for the prisoner in such cases to present facts constituting an

excuse for nonperformance of the strict terms of the condition. The court further held that the prisoner was not entitled to the verdict of a jury as a matter of right, except upon the question as to whether he is the same person who was convicted. The court criticizes *People v. Moore*, supra, in that it fails to distinguish in regard to some pertinent matters. In the Michigan case it is said that the convict must be arrested and tried in the same manner as in criminal cases, that is, upon an indictment and by a jury, before he can be recommitted. This, the Minnesota court points out, is erroneous. The court shows that, if the violation of the conditions of the pardon is a crime by statute, and if the person is charged with that crime, then he necessarily would have to be convicted the same as of any other crime. But the nonperformance of the condition of the pardon is not a criminal offense, and may be determined by the court itself. The court cites *People v. Potter*, 1 Park. Crim. Rep. 47, where the cases, both English and American, are cited and commented upon.

In *Ex parte Brady*, 70 Ark. 376, 68 S. W. 34, the petitioner brought habeas corpus on having been arrested and recommitted upon the proclamation of the governor revoking a conditional pardon. The condition attached to the pardon was that he should refrain from selling liquor without a license. He was tried and convicted of selling liquor without a license subsequent to the pardon. The court held that, while it was more regular to have first brought Brady before the circuit court to show cause why the judgment should not be enforced against him, still the failure to do so was an irregularity which furnished no ground for his discharge, because it appeared in the habeas corpus proceeding that the pardon had been annulled by his own acts; that is, it appeared by judicial determination that he had sold liquor without a license in violation of the condition.

In *People v. Burns*, 77 Hun, 92, 28 N. Y. Supp. 300, the court held that it was not competent for the warden to seize and recommit the defendant without a hearing on the question of his violation of the condition of his commutation, and discharged the defendant from the present custody of the warden, but made an order requiring him to show cause forthwith before the same

court why he should not be remanded to the state prison under his original sentence for violation of his conditional pardon. Upon the return day of the order, a jury was impaneled and found that the condition of the pardon had been violated. The court held that the court was not required to submit the question of fact to the jury, but its procedure in doing so was not open to objection. This case was affirmed in 143 N. Y. 665, 39 N. E. 21.

Upon principle it would seem that due process of law would require notice and opportunity to be heard before a defendant can be committed under suspended sentence. The suspension of the execution of the sentence gives to the defendant a valuable right. It gives to him the right of personal liberty, which is one of the highest rights of citizenship. This right cannot be taken from him without notice and opportunity to be heard without invading his constitutional rights. Of course, if the terms of the suspension of the sentence are such as to leave open no question of fact, as where it is provided that the sentence is suspended until the further order of the court in its discretion, it may be that no notice or hearing would be required. In such a case the court would retain the right to enforce the sentence at any time in its discretion, to which the defendant may be held to consent when he accepts the benefits of the court's leniency. Just how far, if at all, arbitrary action by the court might be inquired into even in such a case, it is not necessary or proper for us to decide, for we have no such case before us. Here the sentence was suspended during good behavior, which necessarily involves the determination of a question of fact, in which determination the defendant is entitled to be heard. In such a determination the defendant is not entitled to a jury trial any more than upon the allocution at the time of the original sentence, except in case he pleads want of identity of himself and the person originally sentenced, a state of affairs rarely arising.

It follows that the prisoner should be discharged from present custody, but without prejudice to any further action which may be taken in accordance herewith, in the matter of the enforcement of the sentence; and it is so ordered.

Hanna, Ch. J., and Roberts, J., concur.

Annotation—Power of court to suspend sentence or stay execution of sentence.

This note is supplementary to the notes to *State v. Abbott*, 33 L.R.A. (N.S.) 112; *Fuller v. State*, 39 L.R.A. (N.S.) 242; and *Re Hart*, L.R.A.1915C, 1169. L.R.A.1918C.

As to power to commit after expiration of term of sentence, see the note to *Ex parte Clendenning*, 19 L.R.A. (N.S.) 1041.

As to revocation for condition broken of conditional pardon or parole without notice or hearing, see the note to *Ex parte Patterson*, L.R.A.1915F, 541.

Power to suspend sentence—temporarily.

Supplementing notes in 33 L.R.A. (N.S.) 113; 39 L.R.A. (N.S.) 242; and L.R.A.1915C, 1169.

In *People ex rel. Hirschberg v. Seeger* (1917) 179 App. Div. 792, 166 N. Y. Supp. 913, following *People ex rel. Forsyth v. Court of Sessions* (1894) 141 N. Y. 288, 23 L.R.A. 856, 36 N. E. 386, 15 Am. Crim. Rep. 675, set out in the annotation in 33 L.R.A. (N.S.) 112, the power to suspend sentence was held to be inherent in the courts.

And the decision in *Ex parte Sparks* (1913) 9 Okla. Crim. Rep. 665, 132 Pac. 1118, set out in the annotation in L.R.A.1915C, 1169, was followed in *Beaublin v. State* (1917) — Okla. Crim. Rep. —, 165 Pac. 213, where it was held that judgment need not necessarily be pronounced at the same term of court at which a conviction was had.

In *State v. Burnette* (1917) — N. C. —, 91 S. E. 364, where one convicted of illegally importing intoxicants consented to waive his right of appeal, and also consented to a suspension of judgment upon the terms and condition that he appear every three months for one year and show that he had not violated the law regulating the importation and use of intoxicating liquors, he was held bound by his consent.

—indefinitely.

Supplementing notes in 33 L.R.A. (N.S.) 114; 39 L.R.A. (N.S.) 242; and L.R.A.1915C, 1170.

Attention may be called at this point to a decision of the United States Supreme Court, *Ex parte United States* (Killits) (1916) 242 U. S. 27, 61 L. ed. 129, L.R.A.1917E, 1178, 37 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 355, which, although it only actually decided that a Federal district court is without power to order that the execution of a sentence of imprisonment, imposed by it upon a plea of guilty, be suspended during good behavior upon conditions wholly extraneous to the legality of the conviction, in effect also apparently denies the right of Federal courts to indefinitely suspend the pronouncing of sentence. This case was relied upon in *Miner v. United States* (1917) — C. C. A. —, 244 Fed. 422, where the power of a Federal court to pronounce sentence several terms after the trial term was involved. The court, L.R.A.1918C.

after stating that the principle was not open to dispute that the imposition of a penalty by sentence is the function of the judicial department, and that relief therefrom by pardon is exclusively within the executive department, said that the questions are, When has the principle been invaded, and what is the effect of its invasion upon the further jurisdiction of the court over an offender? and further continued: "It is now very generally held that the principle is invaded when a court, by an act done either before sentence or after, attempts to pardon a convict, or to parole him when it is not vested with power of parole, or to parole him in a manner different from that provided by law. That such an act is beyond the jurisdiction of a Federal court, and therefore invalid, has lately been decided by the Supreme Court in the Killits Case. There the prisoner had been convicted and sentence had been imposed. The court then ordered 'that the execution of the sentence be, and it is hereby, suspended during the good behavior of the defendant, and for the purpose of this case the term of this court is kept open for five years.' The Supreme Court held the order invalid and directed that it be vacated. While it is no longer questioned that an order of suspension, either of sentence or of the imposition of sentence, in the exercise of a power of pardon or parole not possessed by a court, is invalid, the courts are divided upon the question of the legal effect of such an invalid order upon the continued jurisdiction of a court to impose or enforce a sentence after the term, some holding that jurisdiction is lost by the illegal act, others that it is retained."

—to suspend part.

Supplementing note in 33 L.R.A. (N.S.) 115.

In *State v. Burnett* (1917) — N. C. —, L.R.A.1918A, 955, 93 S. E. 473, where a plea of *nolo contendere* was entered and judgment continued on payment of costs, the court was held not precluded from pronouncing further sentence, but it was stated that, of course, notice should be given and the defendant allowed a hearing.

Statutes regulating suspension.

Supplementing notes in 33 L.R.A. (N.S.) 116; 39 L.R.A. (N.S.) 243; and L.R.A.1915C, 1170.

In *Ex parte Bates* (1915) 20 N. M. 542, L.R.A.1916A, 1285, 151 Pac. 698, a statute authorizing courts in their dis-

cretion to suspend any sentence imposed upon persons convicted of felony, upon such terms and conditions as they should deem proper, was held not to encroach upon the constitutional power of the executive to grant reprieves and pardons.

And a like result was reached in *Martin v. People* (1917) — *Colo.* —, 168 Pac. 1171, where a statute gave the court power to suspend sentence upon the giving of a bond in cases involving a conviction for nonsupport of children, and provided for enforcement of sentence in case of breach of the conditions of the bond.

In *Casper v. State* (1916) 100 Neb. 367, 160 N. W. 92, the Act of 1913, providing for suspension of sentence, was held not to extend to convictions for robbery and larceny from the person, and it was held that a court had no power in such cases to suspend sentence and place the defendant on probation.

It has been held that a statute which provides that judgment must be pronounced within not less than two days nor more than five days after the verdict or plea of guilty, but that, for the purpose of hearing and determining a motion for a new trial or in arrest of judgment, this time may be extended not more than ten days, and that the court may extend the time not more than twenty days to consider the question of probation, and that, if the question of the defendant's sanity is raised, the court may further extend the time until his sanity is determined, in effect provides that the court has no authority to fix the time for pronouncing judgment for a day later than five days after the verdict; that, if a motion for a new trial or in arrest of judgment is made, the court may, for the purpose of deciding the same, extend the time for ten days, and that, where the question of probation is considered, the court may for that purpose extend the time twenty days; but that the provisions are not cumulative, and that the latest date to which the court is authorized to extend the time for rendering judgment, where present sanity is not involved, is a day more than twenty-five days after the return of the verdict. *Rankin v. Superior Ct.* (1910) 157 Cal. 189, 106 Pac. 718; *People v. Creitsner* (1914) 25 Cal. App. 647, 145 Pac. 109; *People v. Okomoto* (1915) 28 Cal. App. 568, 147 Pac. 598.

In *Rankin v. Superior Ct.* (Cal.) supra, it was held that the purpose of the above provisions, and of another section providing that, if judgment is not rendered within the time fixed, or to which it

is continued as provided by the act, the defendant shall be entitled to a new trial, was to prevent delays which occurred in criminal cases between the time the verdict was rendered and the time of passing sentence, and that no intention was shown thereby that the lapse of time and failure to render judgment within the time fixed should oust the court of further jurisdiction to proceed in the case, but that it was implied that the court should retain authority to order a new trial and proceed therewith to final judgment; and that, if it should refuse a new trial and render judgment against the defendant after the authorized time had passed, its action would be erroneous, and the judgment would be reversed if an appeal should be taken.

But in *People v. Okomoto* (Cal.) supra, a judgment pronounced twenty-seven days after conviction was sustained where no objection was made at the time of pronouncing, and no demand was then made for a new trial upon the ground that the legal time limit had expired.

And a defendant is not entitled to a new trial because sentence was postponed beyond the statutory time, where the minutes of the court, as corrected on the defendant's motion, show that the postponement of the pronouncing of sentence was at the request of defendant. *People v. Vaughn* (1914) 25 Cal. App. 736, 147 Pac. 116, 117.

And it has been held that the fact that the court exceeded its authority by postponing sentence beyond the time limited by the statute, in a case in which the defendant had pleaded guilty, cannot be urged where the defendant subsequently withdrew his plea of guilty, and later entered another plea of guilty and waived time for pronouncing judgment, and the court at once pronounced sentence. *People v. Creitsner* (Cal.) supra.

Under the Texas Suspended Sentence Statute, providing that in no case shall sentence be suspended except when the proof shall show, and the jury shall find in their verdict, that the defendant has never been convicted of a felony, the court has no power to suspend sentence unless a plea for suspended sentence is filed prior to the beginning of the trial; and a recommendation of the jury for suspended sentence is properly ignored where such a plea was not filed, and the recommendation in such a case is mere surplusage. *Bessett v. State* (1915) 78 Tex. Crim. Rep. 110, 180 S. W. 249.

Under this law the court cannot sus-

pend sentence unless the jury recommend it to do so, and if they fail to agree as to whether sentence should be suspended, the verdict is incomplete and insufficient to support a judgment. *Mills v. State* (1914) 74 *Tex. Crim. Rep.* 137, 168 S. W. 88.

Under this statute the defendant must prove that he has never before been so convicted of a felony, and where he gives no proof of this fact the court should not submit the issue of suspended sentence to the jury. *Holland v. State* (1916) — *Tex. Crim. Rep.* —, 187 S. W. 944; *Waters v. State* (1917) — *Tex. Crim. Rep.* —, 196 S. W. 536.

Under this act the jury must first find whether the defendant has before been convicted of a felony, and if they find in the affirmative no further inquiry can be made; but if they find in the negative they should then consider whether the evidence justifies a suspension of sentence, and this question is not for the court, and it is not therefore error to submit it to the jury. *Coleman v. State* (1916) — *Tex. Crim. Rep.* —, 185 S. W. 13.

The Texas statute with reference to suspended sentence does not apply to convictions for murder, and in a case where the court does not submit the issue of manslaughter, but only that of murder, a refusal to submit a plea for suspension of sentence is proper. *Boyd v. State* (1915) 78 *Tex. Crim. Rep.* 28, 180 S. W. 230; *Rose v. State* (1916) — *Tex. Crim. Rep.* —, 186 S. W. 202.

In *State v. Fulco* (1915) 136 *La.* 843, 67 So. 925, a statute providing that, in case of a conviction of a misdemeanor, the court might suspend sentence if it should find that the defendant had never before been convicted of a felony or misdemeanor, and that it should permit testimony as to the general reputation of the defendant and as to whether he had been so convicted, was held to relate to the suspension of sentence, and not to the conviction or sentence, and it was held that the sentence of one convicted of a misdemeanor before the passage of the act might be suspended.

And under this act it has been held that a defendant is not estopped and precluded from obtaining the benefit of it by a failure to offer evidence of good reputation during the trial, but that there is no good reason why the judge should not be permitted to consider an application for a suspension of sentence after conviction, and hear evidence as to whether the defendant had ever before been convicted and as to his gener-

al reputation. *State v. Serio* (1916) 138 *La.* 678, 70 So. 609; *State v. Defatta* (1916) 138 *La.* 1092, 70 So. 195.

But under this act the court has no power to suspend sentence without having heard testimony as to the general reputation of the accused, or as to his having before been convicted of a felony or a misdemeanor. *State v. Garland* (1916) 140 *La.* 402, 73 So. 246.

Power to sentence after suspension.

Supplementing notes in 33 L.R.A. (N.S.) 117, and L.R.A.1915C, 1172.

The decision in *State v. Tripp* (1914) 168 N. C. 150, 83 S. E. 630, set out in the prior annotation, was regarded as controlling in *State v. Johnson* (1915) 169 N. C. 311, 84 S. E. 767, where a court which had continued the prayer for judgment "upon condition of good behavior" was held authorized to pronounce judgment and sentence upon breach of the condition.

And in *Ex parte Bates* (1915) 20 N. M. 542, L.R.A.1916A, 1285, 151 Pac. 698, it was held that a court having power to make an order suspending the execution of sentence in criminal cases necessarily, upon a violation of such order, has the power to revoke the same and commit the accused.

And in *State v. Greer* (1917) — N. C. —, 92 S. E. 147, a trial judge was held to have power to suspend sentence in a criminal case upon certain conditions, and to later give it effect upon breach of the conditions. And it was held that it was the judge's right to determine whether there had been a breach of a condition by reason of the defendant's having again violated the law, and that he was not bound by the verdict of a jury acquitting the defendant in another prosecution.

In *Com. v. Miller* (1916) 63 Pa. Super. Ct. 548, it was held within the power of the court to order the rearrest of a defendant whose sentence, after conviction of streetwalking, had been suspended and probation granted under the Act of June 19, 1911, P. L. 1055, for a failure to comply with the conditions of probation, and to impose sentence without a readjudication of the question whether the defendant was guilty of streetwalking, since the court was merely imposing the sentence which had been suspended at the time her guilt was adjudicated.

In *Neace v. Com.* (1915) 165 Ky. 739, 178 S. W. 1062, the court was held to have power to sentence at a term subsequent to that at which a conviction was

had, and the fact, in a case where the jury had found the defendant guilty and fixed punishment at life imprisonment, that through inadvertence the court failed to pronounce judgment at the trial term, or the clerk to enter it, was held not to materially prejudice the defendant's right where judgment and sentence were pronounced at the following term.

And in *Beaubien v. State* (1917) — *Okl. Crim. Rep.* —, 165 *Pac.* 213, a judgment and sentence entered over fifty days after a verdict was returned were sustained, it appearing that a motion for a new trial had been pending, and that on the day fixed for pronouncing judgment the defendant was a fugitive.

And in *Miller v. United States* (1913) 41 *App. D. C.* 52, where a rule of court provided that each term should, as to any particular case, be continued until the final disposition of any motion seasonably filed therein, it was held that the court, after a verdict of guilty on two indictments which were consolidated and tried together, and an appeal taken from a conviction on one, did not lose jurisdiction to act further with respect to the other by continuing the government's motion for sentence thereon.

In *Miner v. United States* (1917) — *C. C. A.* —, 244 *Fed.* 422, where the power of the court to sentence after postponing sentence for a number of terms was involved, it was held that, if the court's purpose in postponing sentence was incident to the administration of justice within its conceded powers, and its orders were unconditional and for definite periods, the court had jurisdiction to impose sentence at a term after the trial term, and where it appeared that sentence had been regularly postponed from term to term, and recognizances given and appearance made, and that the postponements were made upon application of the defendant, and against objection by the government, and there was nothing to show that the postponements were conditional, it was held that it should not be assumed that the court was actuated by unlawful considerations, but that it would be assumed that the postponements were made for a lawful purpose, and that, this being so, the order of postponement was valid, and that the court had jurisdiction to sentence at a subsequent term.

In *People ex rel. Valiant v. Patton* (1917) 221 *N. Y.* 409, 117 *N. E.* 614, a section of the Criminal Code providing that the court before whom one is convicted and placed on probation may

revoke such probation, and upon such revocation, "if the sentence has been suspended, pronounce judgment at any time thereafter within the longest period for which the defendant might have been sentenced," was held in conflict with another section providing that the period of probation in the case of one convicted of a misdemeanor should not exceed two years, and that the court, in case of violation of the probationary terms, might impose any penalties which might have been imposed before placing the defendant on probation; and the court was held not to have lost power to sentence one convicted of a misdemeanor, who could only have been sentenced for a term of one year, by reason of the fact that one year from the time of conviction had elapsed before the probation was revoked and sentence pronounced.

In *Ex parte Lawson* (1915) 76 *Tex. Crim. Rep.* 419, 175 *S. W.* 698, it was held that a trial court had a right to set aside a judgment suspending sentence only upon final judgment of conviction of a felony in another case, and that an order setting aside a judgment suspending sentence, made after a conviction of other offenses in the trial court, but pending appeals thereof, was unauthorized.

It will be noticed that in *LUCERO v. McMANUS*, ante, 549, it was decided that a convict whose sentence had been suspended during good behavior was entitled to notice and an opportunity to be heard upon the question whether he had violated the condition, as this involved a question of fact; but the court decided that no particular formalities need be observed in determining the question, and that the defendant was not entitled to a jury trial except upon the question of his identity, if this question was raised.

There appears to be little authority on the point involved in this case.

In *State v. Burnett* (1917) — *N. C.* —, *L.R.A.*1918A, 955, 93 *S. E.* 473, where the right to pronounce further sentence, after continuing judgment on payment of costs, was upheld, the court stated that of course notice should be given to the defendant and a hearing allowed.

It was held in *State v. Burnette* (1917) — *N. C.* —, 91 *S. E.* 364, that, under chap. 180 of the Public Laws of 1907, creating the criminal court of Pasquotank county, hearings as to compliance with the conditions of a suspended sentence were required to be had in open

court, and could not be held in the private law office of a justice of the court.

Power to stay execution of sentence.

Supplementing notes in 33 L.R.A. (N.S.) 119; 39 L.R.A. (N.S.) 244; and L.R.A.1915C, 1173.

In *Ex parte United States* (1916) 242 U. S. 27, 61 L. ed. 129, L.R.A.1917E, 1178, 37 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 355, a Federal district court was held to have no power, either inherent, at common law, or by statute, to order that the execution of a sentence to imprisonment, imposed by it upon a plea of guilty, be suspended indefinitely during good behavior, upon considerations wholly extraneous to the legality of the conviction.

The right of a trial court to suspend sentence was recognized in *Pensacola Lodge v. State* (1918) — Fla. —, 77 So. 613, but it was held to have no power to suspend the execution of a sentence already imposed, except for the purpose of giving effect to an appeal, or in cases where cumulative sentences are imposed, and in some cases of necessity or emergency.

And in *People v. Boehm* (1917) 176 App. Div. 401, 163 N. Y. Supp. 22, it was held that there was no authority in either the Code of Criminal Procedure or the Penal Law, or in any other statutes of New York, which authorized a court to indefinitely suspend the execution of a sentence after it had been pronounced. In this case an order revoking the suspension of execution of sentence, and directing its execution, was upheld, there being no limitation of time by statute within which such an order might be made.

And in *People ex rel. Hirschberg v. Seeger* (1917) 179 App. Div. 792, 166 N. Y. Supp. 913, the court was held to have no power to suspend the execution of sentence of one convicted of a violation on the Liquor Tax Law, and an order entered in (1917) 100 Misc. 51, 165 N. Y. Supp. 32, vacating an order suspending the sentence of imprisonment imposed, was affirmed.

And in *People v. Shattuck* (1916) 274 Ill. 491, 113 N. E. 921, it was held that the execution of sentence could not be indefinitely suspended.

And a judge of the superior court was held in *Cook v. Jenkins* (1917) 146 Ga. 704, 92 S. E. 212, to have no authority to suspend execution of a sentence imposed in a criminal case, except incidentally to a review of the L.R.A.1918C.

judgment under which the sentence was imposed.

In *People v. Von Den Corput* (1917) 177 App. Div. 682, 164 N. Y. Supp. 987, where a statute provided that no court or officer other than the governor can reprieve or suspend the execution of a defendant sentenced to the punishment of death, the appellate division was held to have no power to stay the execution of a sentence of one convicted of murder in the first degree.

In *People v. Kaiser* (1916) 95 Misc. 681, 159 N. Y. Supp. 322, however, the power of the court to suspend the execution of sentence was upheld, and where the execution of a penitentiary sentence was suspended, and no reference was made to a release on probation, the defendant was held to have had the benefit only of a common-law suspension of the execution of sentence, and not of a probation under the statute, and it was held that, upon revocation of the suspension of sentence, it remained only to carry out the terms of the original sentence.

— power to stay execution of part.

In *Cook v. Jenkins* (1917) 146 Ga. 704, 92 S. E. 212, where a defendant was convicted of a misdemeanor and a sentence was imposed directing that he be confined to the county jail for a term of six months, to be discharged on the payment of a certain fine, and also that he serve a stated time in the chain gang, but that this latter penalty be suspended on condition that the accused should leave the state, it was held that so much of the sentence as imposed the penalties was legal, but that that part which related to the suspension of the penalty of serving on the chain gang was illegal.

In *Williams v. State* (1916) 125 Ark. 287, L.R.A.1917B, 586, 188 S. W. 826, it was held that a court which sentenced one convicted of murder could not, after he had begun to serve his sentence, suspend it for the purpose of punishing him for contempt for refusal to testify in another case, the court stating that the court was without power to separate the sentence into parts for the purpose of giving time to punish for other crimes.

In *State v. Teal* (1918) — S. C. — 95 S. E. 69, a statute provided that the circuit judges should have power in their discretion to suspend sentences imposed by them, upon such terms and conditions as in their judgment might be fit and proper, and a suspension of execution of part of a sentence imposed in a prosecution for seduction, on condition that

the defendant pay a certain sum per year for the support of the child, was held within the power of the court, and was not invalid on the ground that it was an additional penalty, the court stating that if the condition named for suspension was too hard the defendant might accept the full term of sentence, and that if the condition for suspension was agreeable he might accept it; that in either event no larger penalty was put upon him, but that he had the advantage of election between the penalties.

In *State ex rel. Hallanan v. Thompson* (1917) — *W. Va.* —, 93 S. E. 810, a statute providing that trial courts or a justice before whom any person was convicted "might, for good cause shown, release such defendant from such imprisonment, and suspend the payment of fine and costs," taken in connection with other provisions requiring convicts to work on the road, was held to provide for a suspension of so much of a judgment only as required a prisoner to work on the public road, and not to authorize a release of any part of a jail sentence imposed as punishment for an offense. The court stated that it did not construe the statute as authorizing a court to suspend a jail sentence once imposed as a penalty for an offense, and that if this was its meaning it would be void as in conflict with the provisions of the Constitution limiting the power to remit fines and penalties and to grant pardons to the governor.

Power to enforce after stay of execution.

Supplementing notes in 33 L.R.A. (N.S.) 121; 39 L.R.A. (N.S.) 244; and L.R.A.1915C, 1174.

In *People v. Shattuck* (1916) 274 Ill. 491, 113 N. E. 921, where the court, after conviction and sentence imposing a fine and a term of imprisonment, delayed for six years to act upon the defendant's motion to vacate the order of jail sentence, it was held to have no power to enforce that part of the sentence, as it could not indefinitely suspend the execution of sentence. And in this case, where the defendant was also sentenced to pay a fine and his confinement in jail ordered until the fine was paid, the court was held to have no power to enforce this part of the sentence, it having delayed, as above stated, for six years to act upon the defendant's motion to vacate the order of jail sentence, and having failed to order execution to issue to collect the fine. L.R.A.1918C.

But in *People ex rel. Pasco v. Trombly* (1916) 173 App. Div. 497, 160 N. Y. Supp.-67, it was held that the court did not, by suspending the execution of sentence upon condition that the defendant leave the county within ten days and remain away therefrom for ten years, lose jurisdiction to enforce the original sentence, notwithstanding these conditions required proof to show a breach of them. The court stated that it was probably not a valid exercise of discretion to suspend sentence upon condition that the defendant take himself without the jurisdiction of the court, but that the fact that it erred in prescribing a condition did not operate to make the granting of the favor equivalent to a pardon for the offense, and that, the defendant being within the jurisdiction of the court, it was proper at any time to revoke the order suspending the execution of sentence.

In *State v. Jenness* (1917) — *Mo.* —, 100 Atl. 933, it was held that, under Rev. Stat. chap. 137, § 12, the court has authority to suspend the execution of sentence and place a defendant on probation, and if it finds that he has violated the terms of his probation, to decree the probation ended, and if the case has been continued for sentence, to impose sentence, and in other cases order compliance with the original sentence; but that in cases where sentence has been imposed the court is authorized, on declaring the probation ended, only to order the original sentence executed, and it cannot direct that a mittimus issue after the expiration of a sentence which the defendant is serving in another case.

In *State v. Charles* (1917) — *S. O.* —, 93 S. E. 134, where part of the fine and all the penalty of hard labor fixed by a sentence in a prosecution for violating the dispensary law was suspended during good behavior, and the defendant was subsequently convicted by a jury of disorderly conduct, and assault and battery, a judge other than the one which suspended the sentence was held to have jurisdiction to order the suspended portion of the sentence to be carried into effect. The court stated that there was no *ex parte* hearing; that the defendant was served with notice, and declined to take part in the hearing further than to plead to the jurisdiction; and that he had had his day in court and could not complain.

In *Ex parte Taggart* (1916) — *Okl.* Crim. Rep. —, 158 Pac. 288, the court held that, assuming that a police judge

has power to grant paroles or suspend sentence, yet that, before he can make conditions binding upon one convicted, the latter must consent to them, a defendant whose sentence to imprisonment was suspended without his application or consent, until he was convicted of another offense, could not, after the term of imprisonment fixed had expired, be imprisoned for a breach of the condition.

But where a defendant at his own request has obtained a suspension of the execution of his sentence as to imprisonment during his good behavior, he cannot object to an order that the sentence of imprisonment be enforced, although it was made after the period originally fixed had expired. *Hunt v. State* (1917) — Ind. —, 117 N. E. 856. J. T. W.

CALIFORNIA SUPREME COURT.
(In Banc.)

COUNTY OF SANTA BARBARA, Appt.,

v.

DOMENICA L. JANSSENS et al., Respts.

(— Cal. —, 169 Pac. 1025.)

Officer — increase of salary — payment of assistant.

1. Under a constitutional provision forbidding the increase of the salary of an officer during his term, the county cannot, when the legislature requires a sheriff whose salary is fixed by law to provide a woman caretaker for female prisoners, make appropriation for her compensation out of the public fund.

For other cases, see Officers, II. b, in Dig. 1-52 N. S.

Sheriff — salary — compensation of assistant.

2. A legislative requirement that the sheriff shall designate some suitable woman to have supervision of female prisoners does not affect the operation of a statutory requirement that the sheriff's salary shall be full compensation for all services rendered by him, his deputies, and assistants.

For other cases, see Officers, II. b, in Dig. 1-52 N. S.

Assumpsit — who liable for money paid.

3. Money illegally paid by a county to a sheriff's assistant cannot be recovered from the sheriff under a statute authorizing an action against the person or persons to whom money shall have been paid without authority of law, although the Constitution prohibits the increase of the sheriff's salary during his term of office.

For other cases, see Assumpsit, II. c, 8, in Dig. 1-52 N. S.

(December 31, 1917.)

APPEAL by plaintiff from a judgment of the Superior Court for Santa Barbara County in favor of defendants in an action brought to recover money paid to defendant

Note. — For provision for compensation of additional deputy or assistant as violation of constitutional inhibition of increase of officer's salary during term, see annotation following this case, post, 561. L.R.A.1918C.

Janssens, without authority of law, for services rendered by her as jail matron. Affirmed in part.

The facts are stated in the opinion.

Messrs. U. S. Webb, Attorney General, E. W. Squier, Fred H. Schauer, and G. H. Gould, for appellant:

The requirement of § 1616 of the Penal Code for the designation of a jail matron, whether she was regarded as a deputy or a paid employee, created an expense that should have been paid from the sheriff's salary under the existing law.

Crockett v. Mathews, 157 Cal. 157, 106 Pac. 575; *Miller v. Kister*, 68 Cal. 142, 8 Pac. 813; *State ex rel. Scott v. Trousdale*, 16 Nev. 357; *Calaveras County v. Poe*, 167 Cal. 519, 140 Pac. 23; *Dougherty v. Austin*, 94 Cal. 603, 16 L.R.A. 161, 28 Pac. 834, 29 Pac. 1092; *Humiston v. Shaffer*, 145 Cal. 195, 78 Pac. 651; *Elder v. Garey*, 19 Cal. App. 776, 127 Pac. 828; *Hanson v. Underhill*, 12 Cal. App. 546, 107 Pac. 1016; *Applestill v. Gary*, 18 Cal. App. 387, 123 Pac. 228; *Agard v. Shaffer*, 141 Cal. 725, 75 Pac. 343.

If it be assumed that § 1616, Penal Code, imposes additional duties upon the sheriff and that to allow him compensation for such additional duties would not work an increase in his compensation within the inhibition of the Constitution, still the county was not liable for the services of the matron, as such expense is not made by the statute a county charge.

State ex rel. Kranich v. Supple, 22 Mont. 184, 56 Pac. 20; *Mechem*, Pub. Off. 855, 856, et seq.; 29 Cyc. 1422, 1423; *Petersen v. Butte*, 44 Mont. 401, 120 Pac. 483, Ann. Cas. 1913B, 538; *Wight v. Meagher County*, 16 Mont. 479, 41 Pac. 271; *Humiston v. Shaffer*, 145 Cal. 195, 78 Pac. 651; *Irwin v. Yuba County*, 119 Cal. 686, 52 Pac. 35; *Jones v. Lucas County*, 57 Ohio St. 189, 63 Am. St. Rep. 710, 48 N. E. 882; *Johnson v. Black*, 103 Va. 477, 68 L.R.A. 264, 106 Am. St. Rep. 890, 49 S. E. 633.

The sheriff is liable for a misappropriation of public money in aiding to authorize the payment of these claims.

Huntington County v. Heaston, 144 Ind. 583, 55 Am. St. Rep. 192, 41 N. E. 457, 43

N. E. 651; Jones v. Lucas County, 57 Ohio St. 189, 63 Am. St. Rep. 710, 48 N. E. 882; Calaveras County v. Poe, 167 Cal. 519, 140 Pac. 23; Hartwell v. Waukesha County, 43 Wis. 311; Crossen v. Wasco County, 6 Or. 215.

Messrs. Canfield & Starbuck, for respondents:

Section 1616 of the Penal Code of California is not unconstitutional when interpreted as providing for the rendering by a new employee directly to the county, at the county's expense, of services that were formerly included among the duties of the sheriff.

Dougherty v. Austin, 94 Cal. 601, 61 L.R.A. 161, 28 Pac. 834, 29 Pac. 1092; Miner v. Solano County, 26 Cal. 115; Miller v. Kister, 68 Cal. 142, 8 Pac. 813; Pennie v. Reis, 80 Cal. 266, 22 Pac. 176; Crockett v. Mathews, 157 Cal. 153, 106 Pac. 575; State ex rel. Scott v. Trousdale, 16 Nev. 357; Newman v. Lester, 11 Cal. App. 577, 105 Pac. 785; Reals v. Smith, 8 Wyo. 159, 56 Pac. 690.

Section 1616 of the Penal Code of California, correctly interpreted, provides for the rendering by a new employee directly to the county, at the county's expense, of services that were formerly included among the duties of the sheriff.

Fernandez v. Winnebago County, 53 Wis. 247, 10 N. W. 447; Tulare County v. May, 118 Cal. 303, 50 Pac. 527; United States v. Maurice, 2 Brock. 96, Fed. Cas. No. 15,747; Patton v. Board of Health, 127 Cal. 388, 78 Am. St. Rep. 66, 59 Pac. 702; Lindsey v. Atty. Gen. 33 Miss. 508; Olmstead v. New York, 10 Jones & S. 481; United States v. Germaine, 99 U. S. 508, 25 L. ed. 482; People ex rel. Throop v. Langdon, 40 Mich. 673; Whits v. Alameda, 124 Cal. 95, 56 Pac. 795; Doyle v. Raleigh, 89 N. C. 133, 45 Am. Rep. 677; State ex rel. Lewis v. Board of Public Works, 51 N. J. L. 240, 17 Atl. 112; McDaniel v. Yuba County, 14 Cal. 444; People ex rel. Atty. Gen. v. Wheeler, 136 Cal. 652, 69 Pac. 435; Jones v. Lucas County, 57 Ohio St. 189, 63 Am. St. Rep. 710, 48 N. E. 882; Johnson v. Black, 103 Va. 477, 68 L.R.A. 264, 106 Am. St. Rep. 890, 49 S. E. 633; Irwin v. Yuba County, 119 Cal. 686, 52 Pac. 35; Kelley v. Multnomah County, 18 Or. 356, 22 Pac. 1110; San Juan County v. Tulley, 17 Colo. App. 113, 67 Pac. 346.

Sloss, J., delivered the opinion of the court:

Demurrers to the complaint as amended having been sustained, and the plaintiff declining to further amend, judgment was entered in favor of the defendants. From this judgment the plaintiff appeals.

The facts alleged, taken in connection with certain statutory provisions, present L.R.A.1918C.

this situation: The defendant Nat Stewart was sheriff of the county of Santa Barbara for a term commencing on the 2d day of January, 1912. The defendant the Title Guaranty & Surety Company was the surety on Stewart's official bond. When Stewart took office his salary as sheriff was fixed by the Political Code at \$6,000 per annum. Section 4246, subd. 2, amended 1909. Section 4290 of the same Code provided that "the salaries and fees provided in this title shall be in full compensation for all services of every kind and description rendered by the officers named in this title, . . . their deputies and assistants, . . . and all deputies employed shall be paid by their principals out of the salaries provided in this title, unless in this title otherwise provided."

There was no provision for payment by the county of any compensation to the deputies or assistants of the sheriff.

Section 1616 was added to the Penal Code by act approved April 15, 1911, after the commencement of Stewart's term. This section reads: "Whenever any female prisoner or prisoners are confined in any county jail in this state, and no regular jail matron has been appointed, there shall be designated by the sheriff some suitable woman who shall have immediate care of such female prisoner or prisoners. Such female prisoners shall be so kept that they cannot see or be seen by, or converse with, any male prisoners confined in said jail, and it shall be unlawful for any male officer or jailer to search the person of any female prisoner, or to enter into the room or cell occupied by any female prisoner, except in the company of such matron or woman having the care of such female prisoner."

During the years 1912, 1913, and 1914, there were female prisoners confined in the county jail of said county, and no regular jail matron had been appointed to have care of them. The defendant Stewart, as sheriff, designated the defendant Domenica L. Janssens to have the immediate care of said female prisoners, and she performed the required duties in reference to the female prisoners so confined. Thereafter she presented for payment claims against the county for her services, and said claims, which aggregated \$1,249, were passed and allowed by the board of supervisors. Warrants for the amount of such claims were drawn by the auditor of said county, and the amounts paid by the treasurer to Mrs. Janssens. Each of the claims was indorsed "O. K., R. D. Smith," or "O. K., R. D. Smith, undersheriff." It is alleged that Stewart, as sheriff, requested the board of supervisors to allow the claims, and that R. D. Smith was a deputy of Stewart,

and, as such deputy, approved in writing the claims as correct.

By the prayer of its complaint, the county seeks judgment against the defendants for \$1,240, the aggregate of such demands, together with 20 per cent damages for the use of said money, and for costs. Pol. Code, § 4005b.

We think the appellant is right in its contention that Mrs. Janssens had no valid claim against the county for the services rendered by her. The question turns, primarily, upon a determination of the legislative intent in enacting Penal Code, § 1616, but a glance at some of our decisions touching the effect of article 11, § 9, of the Constitution, may be of aid in the task of interpretation. The constitutional provision is that "the compensation of any county . . . officer shall not be increased after his election or during his term of office."

Where, as in the case of the sheriff of Santa Barbara county, the law allows a fixed salary which shall be in full compensation for all services rendered by the officer, and provides that all deputies employed shall be paid by the principal out of such salary, a statute authorizing the appointment of a new deputy to be paid out of the county funds works an increase of the principal's compensation. *Dougherty v. Austin*, 94 Cal. 601, 16 L.R.A. 161, 28 Pac. 834, 29 Pac. 1092; *Calaveras County v. Poe*, 167 Cal. 519, 140 Pac. 23. Such an increase would, it seems clear, be effected by § 1616, if that section had undertaken to put upon the county the burden of paying for the services of the woman to be designated. We may concede, as is claimed by the respondents, that the Constitution does not prohibit the diminution of the duties of any county officer and the transfer of a part of such duties to some other officer. But nothing of the kind was contemplated by § 1616. The statute does not create an independent office whose incumbent performs functions separate and distinct from those imposed upon the sheriff. The law had always provided that it was the duty of the sheriff, among other things, to "take charge of and keep the county jail, and the prisoners therein" (Pol. Code, § 4157, subd. 6), and that the sheriff is liable for the escape of prisoners in his charge (Pol. Code, § 4163). We cannot believe that the legislature intended to affect this duty or this liability by providing—as in substance it did provide—that actual contact between female prisoners and jailers should be through or in the presence of a woman. The policy of segregating female prisoners had found expression at the time the Codes were first enacted. Penal Code, § 1598, subd. 4, § 1599. Section 1616 L.R.A.1918C.

gave further protection to such prisoners, and was based upon considerations of propriety and decency too obvious to require explanation. The statute did not, however, assume to take such prisoners out of the custody of the sheriff. It merely regulated the manner in which he should perform that part of his duties which had to do with the care of females. We perceive no force in the argument of respondents based on the fact that the section provides that the sheriff shall "designate" some suitable woman. No different meaning could be given to the statute if it declared that the sheriff should "appoint" a woman. Whether "designated" or "appointed," the woman named is an assistant of the sheriff, performing a part of the duties imposed by law upon him.

Section 1616, as it read at the time of the transactions under consideration, was silent with respect to the compensation of the person thus put in charge of female prisoners. We cannot, therefore, assume that the legislature intended, if it had the constitutional power so to do, to take the case out of the operation of the statute (Pol. Code, § 4290) providing that the sheriff's salary shall be in full compensation of all services rendered by him, his deputies, and assistants. By an amendment recently made to § 1616 of the Penal Code (Stat. 1917, p. 240), it is provided that the woman designated shall be paid out of the general fund of the county. We are not called upon in the present proceeding to consider whether this amendment has any validity. It follows that the payments made to Mrs. Janssens were without authority of law and that they may be recovered by the county in this action.

We think, however, that the complaint does not state a cause of action against the sheriff or his surety. Section 4005b of the Political Code, on which this suit is founded, authorizes the district attorney of the county to bring an action against the person or persons to whom money shall have been paid without authority of law. The payments set forth in the complaint were made to Mrs. Janssens. They were not made to the sheriff. It is alleged that the sheriff approved the claims and requested the board of supervisors to allow them. But this is a very different thing from saying that he received the money. The opinion in *Calaveras County v. Poe*, supra, does contain an intimation that money thus paid to an assistant might be regarded as paid to the principal. The statement was not, however, made positively, and was not the ground upon which the decision was, in fact, based. The recovery in the case cited was held to be authorized by other provisions of law. If

there was no liability on the part of the sheriff it goes without saying that no cause of action was alleged against the surety.

The judgment in favor of the defendants Nat Stewart and the Title Guaranty & Surety Company is affirmed. The judgment

in favor of the defendant Janssens is reversed.

We concur: Angellotti, Ch. J.; Henshaw, J.; Melvin, J.; Victor E. Shaw, Judge pro tem.

Annotation—Provision for compensation of additional deputy or assistant as violation of constitutional inhibition of increase of officer's salary during term.

The question of the constitutional prohibition against change of salary during term as affecting fees is considered in note to *Gobrecht v. Cincinnati*, 23 L.R.A. 609.

As to applicability to nonconstitutional officer of constitutional provision against increase of salary of officer during his term of office, see note to *Richie v. Philadelphia*, 26 L.R.A.(N.S.) 289.

As to change of salary of deputy or other subordinate as violation of constitutional provision against change of salary of public officer during term of office, see note to *Muskogee County v. Hart*, 37 L.R.A.(N.S.) 388.

The general rule is that where the compensation of a public officer is, by statute, fixed at a lump sum which is to cover the expense of running the office, it is a violation of a constitutional provision prohibiting an increase of salary during such officer's term to authorize the appointment of a deputy or assistant where there was none before, and to provide that the compensation be met from the public fund.

This rule has been applied and a requirement that the services of a deputy or assistant, authorized after an officer's term began, be paid for from the public funds, held invalid as in effect an increase of such officer's salary, in *Dougherty v. Austin* (1892) 94 Cal. 601, 16 L.R.A. 161, 28 Pac. 834, 29 Pac. 1092 (deputy county clerk); *Welsh v. Bramlet* (1893) 98 Cal. 219, 33 Pac. 66 (assistant to district attorney); *Agard v. Shaffer* (1904) 141 Cal. 725, 75 Pac. 343 (assistant to recorder); *Humiston v. Shaffer* (1904) 145 Cal. 195, 78 Pac. 651 (dictum); *Calaveras County v. Poe* (1914) 167 Cal. 519, 140 Pac. 23 (copyist to assist county recorder); *SANTA BARBARA COUNTY v. JANSSENS*, ante, 558; *Hanson v. Underhill* (1910) 12 Cal. App. 545, 107 Pac. 1016 (deputy recorder); *Applestill v. Garv* (1912) 18 Cal. App. 385, 123 Pac. 228 (deputy sheriff); *Elder v. Garey* (1912) 19 Cal. App. 775, 127 Pac. 826 (deputy county clerk); *McFad-* L.R.A.1918C.

den v. Borden (1915) 28 Cal. App. 471, 152 Pac. 977 (deputy assessor); *Conklin v. Woody* (1917) 33 Cal. App. 554, 165 Pac. 973 (assistant district attorney); *Jefferson County v. Waters* (1902) 114 Ky. 48, 70 S. W. 40 (clerk hire); *Etsell v. Knight* (1903) 117 Wis. 540, 94 N. W. 290 (deputy county clerk and deputy county treasurer); see also *People use of Lawrence County v. Adams* (1896) 65 Ill. App. 283.

The court in *Dougherty v. Austin* (Cal.) supra, said that the sum allowed to any given officer being a lump sum, out of which he must pay for the services of all deputies and assistants necessary for the prompt and faithful discharge of all the duties of the office, it is evident that his own compensation consists of the residue remaining after payment of such deputies and assistants; and it is equally evident that, just so far as the county assumes the payment of such deputies and assistants, such residue is enlarged and the compensation increased.

As was said by Judge Garoutte in the above case, to construe the constitutional provision against an increase of officer's salary during his term so that such officer's salary could not be increased, but that an act of legislature would be valid which provided that all of his deputies,—men whom he was bound to employ and bound to pay in the absence of such an act,—should be paid by the county, independent of and in addition to his salary, would be to allow that to be done indirectly which could not be done directly, and would be establishing a medium for the practice of the very abuses which the constitutional provision was inserted to destroy.

In all of the above cases, with the exception of the *Dougherty* Case, the statute authorizing the appointment of a deputy or assistant was enacted during the term of office of the principal.

In the *Dougherty* Case, it was held that the order of the board of supervisors, made during the term of office of

the county clerk, allowing him a deputy whose salary was to be paid by the county, was void, although authorized by a statute in force prior to his election.

But in *Nelson v. Troy* (1895) 11 Wash. 435, 39 Pac. 974, it was held, disapproving the *Dougherty Case* (Cal.) supra, that the authorization of a deputy county clerk and providing for his com-

pensation out of the public fund was not a contravention of the constitutional provision against increasing an officer's salary during his term of office, as there was a valid statute in force and effect at the time he took office, authorizing the employment of necessary help who should receive just and reasonable pay for their services. J. H. B.

FLORIDA SUPREME COURT.

DAVE MILLER, Plff. in Err.,

v.

STATE OF FLORIDA.

(— Fla. —, 77 So. 669.)

Homicide — premeditation — necessity.

Premeditation is an essential element in the crime of murder under the statutes of this state. It should be alleged in the indictment and proved beyond a reasonable doubt at the trial. The mere fact of the killing does not raise a presumption of premeditation such as makes the offense murder in the first degree and casts upon the defendant the burden of showing that it was not. Something more than mere intention to kill must be shown; it is necessary that some circumstances admissible as evidence be shown from which may be legitimately inferred the fact of premeditation. For other cases, see *Homicide, I. in Dig. 1-52 N. S.*

(Whitfield and West, JJ., dissent.)

(January 23, 1918.)

ERROR to the Circuit Court for De Soto County to review a judgment convicting defendant of murder. Reversed.

The facts are stated in the opinion.

Messrs. George Leitner and W. D. Bell, for plaintiff in error:

The circumstances surrounding this entire shooting at the bridge were such as would induce a reasonable man to believe that the danger was actual and the necessity real,—sufficient to meet the most rigid law ever enunciated at any time by this court.

Smith v. State, 25 Fla. 517, 6 So. 482; *Pinder v. State*, 27 Fla. 370, 26 Am. St. Rep. 75, 8 So. 837; *Lovett v. State*, 30 Fla.

Headnote by ELLIS, J.

Note. — The question whether a finding of premeditation and deliberation essential to murder in first degree may rest upon evidence that, at the time, the defendant was fleeing from the scene of another crime, is discussed in the annotation following this case, post, 566. L.R.A.1918C.

142, 17 L.R.A. 705, 11 So. 550; *Alvarez v. State*, 41 Fla. 532, 27 So. 40; *Green v. State*, 43 Fla. 556, 30 So. 656; *Olds v. State*, 44 Fla. 452, 33 So. 296; *Morrison v. State*, 42 Fla. 149, 28 So. 97; *Lane v. State*, 44 Fla. 105, 32 So. 896.

The state failed to prove by any competent evidence that the alleged offense was perpetrated from a premeditated design to effect the death of the person killed, or any human being.

Baker v. State, 54 Fla. 12, 44 So. 719; *Chisolm v. State*, — Fla. —, 76 So. 329; *Savage v. State*, 18 Fla. 909; *Ernest v. State*, 20 Fla. 383; *Denham v. State*, 22 Fla. 664; *Barnhill v. State*, 56 Fla. 16, 48 So. 251.

Flight of the accused, while admissible for some purposes, does not tend to prove deliberation or premeditation in the act of the killing.

21 Cyc. 900; *State v. Foster*, 130 N. C. 666, 89 Am. St. Rep. 876, 41 S. E. 284.

When evidence of unpremeditated design is insufficient a death sentence will be reversed.

Ward v. State, 67 Fla. 174, 64 So. 750.

Messrs. Van C. Swearingen, Attorney General, and C. O. Andrews, Assistant Attorney General, for the State:

The existence of a premeditated design to effect death may be proved by circumstantial evidence alone, and proof of malice may not be direct and positive, but may be adduced from all the facts attending the killing.

Thomas v. State, 58 Fla. 122, 51 So. 410; *Yates v. State*, 26 Fla. 484, 7 So. 880.

The circumstances in this case, as brought out by the evidence, show a previously fixed design on the part of the defendant to evade arrest, and to kill, if necessary, anyone who attempted to arrest him.

Hall v. State, 70 Fla. 48, 69 So. 692; 1 Bishop, *Crim. Law*, 8th ed. § 328; 4 Bl. Com. 200; *Pinder v. State*, 27 Fla. 370, 26 Am. St. Rep. 75, 8 So. 837; *Seigel v. Long*, 169 Ala. 79, 33 L.R.A.(N.S.) 1070, 53 So. 753; *Whart. Homicide*, 3d ed. p. 602; *Miller v. State*, 31 Tex. Crim. Rep. 609, 37

Am. St. Rep. 836, 21 S. W. 925; McPhay v. State, 87 Miss. 456, 40 So. 17; Brooks v. State, 114 Ga. 6, 39 S. E. 877, 13 Am. Crim. Rep. 47; People v. Woods, 147 Cal. 265, 109 Am. St. Rep. 151, 81 Pac. 652.

Ellis, J., delivered the opinion of the court:

The plaintiff in error was convicted of murder in the circuit court for De Soto county, and seeks a reversal of the judgment on writ of error.

The assignments of error present the question whether the evidence was sufficient to support the verdict of murder in the first degree, an indispensable element of which was a "premeditated design to effect the death of the person killed, or any human being."

The facts briefly stated with reference to the particular point are, in substance, as follows: The deceased, Henry Wiggins, who was a deputy sheriff, and a negro named Ed Matthews, were, on the night of November 25, 1916, under instructions from the sheriff, guarding Peace river bridge east of Wauchula for the purpose of capturing a negro who had killed another at "Petteway's still," east of Wauchula, a short time before. Both men, Mr. Wiggins and Ed Matthews, were armed with shot-guns. Ed Matthews was the only witness who testified as to the details of the shooting. He said that he and Mr. Wiggins, at about 10 o'clock that night, were standing at the foot of the bridge on the Wauchula side. The witness heard some one walking on the bridge, coming from the east side, with something on his shoulder.

"About that time," the witness testified, "I said, 'That is somebody now.' I was standing just this way (indicating), and this fellow kept walking, and just as he came up and he said 'hold up' the gun fired."

Q. Who said hold up?

A. Mr. Wiggins, and the gun fired.

Q. Where did the gun fire from?

A. From the man that was coming on the bridge.

Q. How many times did he fire?

A. Once.

Q. What did Mr. Wiggins do? What was Mr. Wiggins doing the time the gun fired?

A. He fell. Just as the gun fired the man jumped over in the big ditch at the mouth of the big bridge.

Q. Could you tell who the man was?

A. No, sir.

Q. Do you know whether he was black or white?

A. No, sir; I could'n't tell.

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When the man who fired at Mr. Wiggins ran, Ed Matthews fired four times. The account of his shooting is given in the following words:

Q. How long after that shot—I believe you said that you fired some shots?

A. Yes, sir.

Q. How many?

A. I shot four times.

Q. How long after that?

A. The first shot, I guess, was about two minutes after Mr. Wiggins fell before I fired a gun.

Q. What did you fire at?

A. Just fired at the man that jumped off in the ditch.

Q. You think it was as much as two minutes before you did that?

A. I suppose so.

Q. Then you fired four times in that direction?

A. Four times, twice when he first jumped and then two more.

The defendant testified that he heard no one tell him to halt; that after he had crossed the bridge someone shot at him, and he "shot back that way;" that he was on his way to Wauchula to tell of the "shooting" which had occurred at the mill, and which, on cross-examination, he seemed to admit that he had done.

We think this evidence is insufficient to prove premeditation on the part of the defendant to kill Mr. Wiggins.

Premeditation is an essential element in the crime of murder in this state. In a long unbroken line of decisions this court has so held. At times there have been discussions as to what constitutes premeditation, but at no time has any doubt been expressed that the element of premeditation on the part of the accused to kill should be alleged and proved beyond a reasonable doubt. Since the case of *Dukes v. State*, 14 Fla. 499, this court has held that the fact of killing, merely, does not raise a presumption of premeditation such as makes the offense murder in the first degree and casts upon the prisoner the burden of showing that it was not. See also *Savage v. State*, 18 Fla. 909; *Ernest v. State*, 20 Fla. 383; *Adams v. State*, 28 Fla. 511, 10 So. 106; *Garner v. State*, 28 Fla. 113, 29 Am. St. Rep. 232, 9 So. 835; *Cook v. State*, 46 Fla. 20, 35 So. 665; *Keigans v. State*, 52 Fla. 57, 41 So. 886; *Barnhill v. State*, 56 Fla. 16, 48 So. 251. The language as used in the *Dukes Case* has many times received the approval of this court: "If every homicide shall be presumed to be murder until the perpetrator show that the act is not murder, this emasculates the statute; for the design of the

statute is to require that the degree or quality of crime shall be established by the proofs. The common law says the killing is murder; the statute says the unlawful killing is murder, manslaughter, or not criminal at all, according to the facts and circumstances. And so it is to be ascertained from all the facts and circumstances whether any crime has been committed, and it cannot, therefore, be allowed that a man shall be adjudged guilty of the highest crime upon proof of only one of the ingredients, the single act of killing being but one ingredient of the crime. The very terms of the classification of the different degrees of murder and manslaughter, and of justifiable and excusable homicide, require something more than the proof of the killing, because it cannot be determined without a consideration of all the 'facts and circumstances of each case' whether the act be murder or manslaughter, or the criminal intent be entirely wanting."

The statute referred to was the Statute of 1868 upon the subject of homicide, which, with very slight changes not in substance, is the law in this state to-day. See § 3205, Gen. Stat. 1906; Fla. Comp. Laws 1914.

In the case of *Cook v. State*, 46 Fla. 20, 35 So. 665, the court was divided on a charge given by the trial court defining premeditated design. The charge given was the following: "No specific time is required to constitute premeditation. If the mind of the accused was in a condition to form a purpose, and there was sufficient time for the forming of that purpose, and for the mind to be conscious of that purpose to kill, it is sufficient time to constitute premeditation; and if the jury believe from the evidence, beyond a reasonable doubt, that the defendant had fully formed a purpose to shoot and kill Smith, and that he was conscious of that purpose when he fired the shot, they will find the defendant guilty of murder in the first degree."

Chief Justice Taylor and Justices Schackelford and Hoeker thought that the charge did not afford a proper definition of premeditated design and was erroneous, while Justices Carter, Maxwell, and Cockrell thought it did. And in the case of *Stokes v. State*, 54 Fla. 100, 44 So. 759, this court said: "Premeditated design is more than an intent to kill."

Mr. Justice Whitfield, concurring, said: "The phrase 'a premeditated design to effect the death' means a design to effect the death that was thought upon for any

length of time, however short a time, before the act which effected the death from the premeditated design. The word 'premeditated' has reference to, and is descriptive of, the design that the statute makes an essential element of the crime. A premeditated design to effect the death of a human being is a design to kill a human being, which design was thought upon before the act that unlawfully effected the death. The killer must have thought upon the design to kill during some time, however short, before the fatal act."

Mr. Justice Cockrell prepared a concurring opinion in which he said: "It is admitted that design and intent are practically synonymous."

If so, then premeditated design means premeditated intention. So that something more than intention to kill is necessary to be proven to establish against one the charge of murder in the first degree.

In this case there appears to be no evidence whatsoever of the slightest relevancy that the defendant premeditated the design to kill the deceased, nor that he had any intention an instant before the fatal shot was fired to kill the deceased. The defendant was admittedly at a place where he had a right to be, a traveler on the public road. There is no evidence that the deceased had a warrant for the defendant's arrest, nor that the defendant knew that the deceased was an officer, nor that the deceased knew that defendant was the man whom the deceased was guarding the bridge to arrest, nor that the deceased or Matthews told the defendant that they were officers of the law. The defendant approached the bridge with his shotgun on his shoulder, it was in the nighttime; he was suddenly confronted by two men, both armed with shotguns, and one of them told him to "hold up." He could not tell whether they were white men or not, according to Matthews, the witness. Instantly upon being ordered to "hold up" he fired and ran. The shot happened to kill Mr. Wiggins (if that was the shot which killed him), but from what circumstances could the inference be drawn that the defendant had for any appreciable length of time, deliberated upon or premeditated the intent to kill Mr. Wiggins, assuming that when the shot was fired the defendant intended to kill the deceased? It is contended that the defendant was a fugitive from justice in the sense that he was running away from another crime perpetrated by him that very night at the "still" only a short time before, from which

circumstance it is inferred that he intended to kill anyone who attempted to stop him. A little reflection will convince one that the contention is more of an excuse than a reason. In the first place, there was no evidence that a crime had been committed. There was some evidence that a homicide had been committed at the "still" but whether it was murder, manslaughter, justifiable or excusable, does not appear. In the second place, the statement that the defendant was running away from it is purely gratuitous and made directly in the teeth of the only evidence upon the subject. But even if he was running away from crime just committed, is it permissible in law to infer therefrom that he could not, therefore, when accosted on the bridge by two unknown men armed with guns and by them told to hold up, have exercised the right to defend himself against an unlawful attack; that he might not, under circumstances, have thought the attack was an unlawful one, and that he shot to repel it, or that, in fright, he shot to make his escape? Must a man's conscience be void of offense toward God and man before he may insist upon the right of self-defense, or repel an unlawful attack upon him, or resist an attempt to hold him up upon a country road in the nighttime by unknown men armed with shotguns?

Mr. Chief Justice Fuller of the Supreme Court of the United States, in the case of *Starr v. United States*, 153 U. S. 614, 38 L. ed. 841, 14 Sup. Ct. Rep. 919, expressed the view that the defendant may lawfully repel an attack upon him, although made by an officer who tries to arrest him, if the defendant did not know that the person trying to make the arrest was an officer. In that case a Cherokee Indian named Starr had been arrested for crime, had forfeited his bail, and was fleeing from arrest. The deceased, an officer of the law, undertook to arrest the Indian who, when attacked by the officer, shot and killed him. Upon the question of the defendant's right to defend himself the learned and venerable judge said: "The intrinsic rightfulness of the occupation or situation of a party, having in itself no bearing upon or connection with an assault, [does not] impose a limitation on the right to repel it;" that a "conscience void of offense toward God and men is not an indispensable prerequisite to justification of action in the face of imminent and deadly peril."

We think that the attempt to infer premeditation on the part of defendant of an intent to kill Wiggins, from the fact that

the defendant was running away from a crime which he had a short time before committed, is unfounded in evidence and unauthorized in law, and to uphold a conviction of murder upon such evidence as was adduced in this case would be to tear down the barriers which the people in their sovereign power have raised against the passions of men for the protection of the innocent and the dignity of the law.

The judgment of the court below is reversed, and a new trial directed.

Browne, Ch. J., and Taylor, J., concur.

Whitfield and West, JJ., dissenting:

"The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed, or any human being, . . . shall be murder in the first degree, and shall be punishable with death." Gen. Stat. 1906, § 3205. Fla. Comp. Laws, 1914.

Premeditated design, in trials for murder, may be established by circumstantial evidence as contradistinguished from positive or direct evidence. *Pugh v. State*, 55 Fla. 150, 45 So. 1023; *Hicks v. State*, 25 Fla. 535, 6 So. 441; *Yates v. State*, 26 Fla. 484, 7 So. 880; *Roberson v. State*, 45 Fla. 94, 34 So. 294; *Thomas v. State*, 58 Fla. 122, 51 So. 410.

There is evidence that a homicide had been committed at a "still" not far away, and that the deceased had been directed by the sheriff to guard a bridge where the perpetrator of the homicide might pass. The accused testified that he did the shooting at the still "about half an hour after dark," and that he was going to Wauchula "to tell them about some trouble, shooting, was going on out to the still—tell them the matters about it," "I was intending to tell them about the trouble I had already been in," and that he "got down to the bridge between 8 and 9 o'clock, somewhere like that." The defendant did not tell anyone at Wauchula of the shooting at the still or of the subsequent shooting at the bridge. He escaped. This and other evidence in the transcript, in our opinion, clearly justified a finding by the jury that the defendant, while endeavoring to get away from the scene of his admitted shooting earlier in the evening, and while crossing the bridge, fatally shot the deceased, pursuant to a premeditated design to kill anyone who might intercept him. This would sustain a verdict of murder in the first degree.

Annotation—May finding of premeditation and deliberation essential to murder in first degree rest upon evidence that at the time defendant was fleeing from the scene of another crime.

It is not intended to include cases where the defendant killed one pursuing him in the immediate vicinity of the first crime.

It will be seen that in *MILLER v. STATE*, ante, 562, it is held that a finding of premeditation essential to murder in the first degree cannot rest upon an inference from the mere fact that at the time the defendant was accosted he was fleeing from the scene of another crime.

This note lies in narrow compass and but few cases have been found within its scope.

In *Starr v. United States* (1893) 153 U. S. 614, 38 L. ed. 841, 14 Sup. Ct. Rep. 919, referred to in *MILLER v. STATE*, Fuller, Ch. J., said of the accused: "This Cherokee, when riding across the country, was entitled to protect his life, although he may have forfeited a bail bond and been seeking to avoid arrest on that account."

It was held that a premeditated or deliberate killing was not shown where the accused, the day after committing a homicide, was walking towards the state line at night to escape from the state and, "at the time of the tragedy, she was being piloted through the dark night by one whom she supposed was her friend. She expected in a few moments to meet another friend, and with these men to go across the state line. The one with her calls out to the other friend, and someone answers. Expecting to meet this friend she is suddenly seized by the one who is with her, while someone reaches out from the intense darkness, as if to seize her, saying: 'I have got you at last.' Without knowing, without opportunity to know, who they are that assault her, or what their purpose is, she instantly jerks the pistol from her pocket, fires several times, and flees into the darkness." *Howard v. State* (1907) 82 Ark. 97, 100 S. W. 756.

Where, on information that a burglary had been committed the night before, a marshal and his posse, suspecting the defendant and his fellows, came upon them in a railway station and a fight ensued in which one of the posse was killed, the court said: "If the posse, even though acting in good faith and with no intention of violating the law, suddenly advanced upon the accused with loaded guns, presented in a

threatening manner, thereby impressing the latter as reasonable men, with the belief that they were about to suffer great bodily harm or be placed at the mercy of an angry mob, then they had the right to resist and employ such force as was reasonably adequate to defend themselves against the attack, without regard to their guilt of the charge upon which their arrest was sought. The language, 'Hands up! Hands up! or 'Hands up! We want you!' emphasized with rifles, shotguns, and revolvers, may, of course, be used with the idea that the party thus addressed is required to subject to arrest, but it must be admitted that to the average mind it ordinarily conveys a much more uncomfortable suggestion." In the same case the court said of an instruction: "The thought here expressed, if we correctly interpret it, is that the aiming and firing of a gun with fatal effect upon the person thus assaulted is, 'of itself,' evidence of an intent to kill, and 'therefore of a willful, deliberate, and premeditated killing,' or murder in the first degree. This, we think, cannot be the law." *State v. Phillips* (1902) 118 Iowa, 660, 92 N. W. 876.

On the other hand, in *People v. Pool* (1865) 27 Cal. 577, a conviction of murder in the first degree was affirmed where, some seven hours after the robbing of a stagecoach, the deceased, a deputy sheriff, with a constable, who were in pursuit of the robbers, came upon some of them at a house "where they were together in a room, and, finding a gun standing at the door of the room, the deceased took it into his possession, and then, opening the door, addressed the defendant and his companions, saying to them: 'You are my prisoners—surrender;' and at the same time pointing toward them the gun which he held in his hands, while they, on their part, instead of surrendering, drew their pistols and opened fire on the deceased. Several of the shots took effect upon a vital part of his body, causing his death in a few minutes. After the firing had been commenced by those in the room, the deceased shot the defendant, by which he was disabled."

In *Lewis v. State* (1859) 3 Head (Tenn.) 127, the defendants had attempted to pass a bill supposed to be

counterfeit, and the sheriff and his deputy, on being informed of the matter and of the road they had taken, set out in pursuit, all being on horseback. On coming up with the defendants, the sheriff laid his hand on the shoulder of one of them and said, "I take you as a state's prisoner;" whereupon the defendant so accosted began shooting and the sheriff and his deputy were both killed, the deputy being stabbed and the sheriff both shot and cut. It was claimed by the prisoners that the court erred in instructing the jury who had returned for further instructions, "that no time was required by the law for the deliberation and premeditation necessary to constitute murder in the first degree, so that the purpose and intent to kill accompany the act." As to which the court said, *inter alia*: "The distinctive characteristic of murder in the first degree is premeditation. This element is superadded by the statute to the common-law definition of murder. Premeditation involves a previously formed design or actual intention to kill. But such design or intention may be conceived and deliberately formed in an instant. It is not necessary that it should have been conceived or have pre-existed in the mind any definite period of time anterior to its execution. It is sufficient that it preceded the assault, however short the interval. The length of time is not of the essence of this constituent of the offense. The purpose to kill is no less premeditated, in the legal sense of the term, if it were deliberately formed but a moment preceding the act by which the death is produced, than if it had been formed an hour before. The mental state of the assailant at the moment, rather than the length of time the act may have been premeditated, is the material point to be considered. The mental process, in the formation of the purpose to kill, may have been instantaneous, and the question of vital importance is, Was the mind, at that moment, so far free from the influence of excitement or passion as to be capable of reflecting and acting with a sufficient degree of coolness and deliberation of purpose; and was the death of the person assaulted the object sought to be accomplished,—the end determined upon? . . . In this view of the law, that part of the charge excepted to is subject to but little criticism. All that can be said is, that the general expression 'no time' should have been qualified by adding, no definite time. But no prejudice or misapprehension could have resulted from L.R.A.1918C.

this omission, for the principle had been twice fully and correctly stated in the preceding part of the charge."

It was held that a verdict of murder in the first degree was justified, where there was evidence that six persons went to a place to commit burglary, that before they started five of the six armed themselves with loaded pistols, that, finding the place occupied and guarded, they abandoned the enterprise and started back to the city about midnight, that in their return to the city so armed, and with burglars' tools and dynamite in their possession, three of them attempted to hold up a man, that his loud outcry attracted the attention of a number of people and caused the trio to run, one of them firing a shot as he ran to intimidate any possible pursuer, that this attracted the attention of an officer in plain clothes who ran up to some of them, including the defendant, and said or did something which made them apprehensive that he would arrest or search them, and that he would discover the burglars' tools and dynamite, that this was one of the contingencies in view of which the defendants had armed themselves, and that, in order to avoid detection, they, or some of them, immediately opened fire on the officer, and that he returned the fire of the one who first fired upon him—the man with the .44-caliber pistol, the bullets of which caused his death. The court said: "It is claimed that the evidence does not warrant a verdict of murder in the first degree. We think it was clearly sufficient. It shows that the appellant made preparations to kill in connection with the projected burglary, and that when an officer approached him under circumstances indicating the probability that he would arrest him or search him he killed the officer. This is sufficient evidence of a deliberate purpose to kill, and if such purpose existed the killing was murder in the first degree." *People v. Woods* (1905) 147 Cal. 265, 109 Am. St. Rep. 151, 81 Pac. 652.

While without the scope of this note, reference may be had to *People v. Morse* (1909) 196 N. Y. 306, 89 N. E. 816, where a man who had committed robbery on the street and was being pursued shot a policeman approaching him from the opposite direction. It was claimed that the evidence was not sufficient on which to find, as a fact, that the defendant shot the policeman from a deliberate and premeditated design to effect his death. The court, in affirming a conviction of murder in the first degree, called

attention to the defendant's possession of the revolver and said: "Where a person commits highway robbery or other crime in such a deliberate, intentional, and premeditated manner as shown by the circumstances in this case, and then uses a revolver carried by him with fatal effect in his effort to avoid arrest, it presents a question for the determination of a jury whether the person so killed was not killed by the deliberate and premeditated intention of the one firing the shot. . . . There are in this case, however, further facts which were proper to leave to the jury upon the question of intent, deliberation, and premeditation, and they are that the defendant was running in a public street where the approach of an officer in the opposite direction must have been seen by him for an appreciable space of time, and his firing the revolver directly at the officer, when the result would necessarily or probably be fatal, is, of itself, some evidence from which the jury might rightfully find the facts as found by them."

In this connection reference may be made to *Brooks v. State* (1901) 114 Ga. 6, 39 S. E. 877, 13 Am. Crim. Rep. 47, where it was held that "if a policeman at a late hour of the night hear a pistol shot within two blocks of his beat, and immediately thereafter discover a man

running from the direction of the shot and towards him, he has a right to arrest him without a warrant. Where, under such circumstances, the officer attempts to make the arrest and is shot and killed by the person whom he is seeking to arrest, the offense is murder and not manslaughter; especially where the slayer has, in fact, fired the shot first heard, and has thereby wounded another." The court said: "When an officer is shot and killed by one whom he is seeking legally to arrest, the offense is murder and not manslaughter. All the cases and textbooks, so far as we know, lay this down as the law. It is especially true in a case like the present, where it appears that the fugitive had actually shot another and was running away from the place of the shooting. It was, therefore, not error to fail or refuse to charge upon the subject of manslaughter in this case."

For elements of deliberation and premeditation as affected by the brevity of the period elapsing between the resolution to kill and the homicide, see the note to *Com. v. Tucker*, 7 L.R.A.(N.S.) 1056. For homicide in resisting arrest, see the notes in 66 L.R.A. 353, and 33 L.R.A.(N.S.) 143. For homicide in the commission of an unlawful act, see the note in 63 L.R.A. 353. B. B. B.

KENTUCKY COURT OF APPEALS.

M. F. EMERY, Appt.,

v.

MANHATTAN LIFE INSURANCE COMPANY.

(179 Ky. 76, 200 S. W. 19.)

Insurance — assignment — right to convert policy into term insurance.

One holding a life insurance policy as collateral security cannot, without foreclosure or the written assent of the insured, exercise the option to convert the policy into a paid-up term policy, and in case he attempts to do so without such consent, he can, if no further premiums are paid, recover only the paid-up value of the policy. For other cases, see *Insurance*, IV. a, in *Dig. 1-52 N. S.*

(February 1, 1918.)

APPEAL by plaintiff from a judgment of the Circuit Court for McCracken County in her favor for less than the amount

claimed, and from an order denying a new trial, in an action brought to recover the amount alleged to be due on a life insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. Bradshaw, Nichols, & MacDonald for appellant.

Mr. W. A. Berry for appellee.

Settle, Ch. J., delivered the opinion of the court:

This case was decided in the court below upon an agreed statement of facts. By agreement of the parties a jury was waived, and the law and facts submitted to the court. The appellant recovered a judgment against the appellee for \$998, with interest from the date of the judgment and her costs expended in the action. Appellant's complaint of the rejection by that judgment of the larger part of the claim for which she sued, and the refusal of the circuit court to grant her a new trial, led to this appeal.

The agreed facts show that on October 1, 1891, one W. M. Clyne executed to Hobson & Company, of Paducah, his promissory

Note. — As to right of assignee of policy of life insurance to exercise options, see annotation following this case, post, 570. L.R.A.1918C.

note for \$1,845.65, due one day after date. This note, on October 1, 1902, was sold and assigned by Hobson & Company to L. W. Emery, who later died testate, and whose will was duly admitted to probate by the McCracken county court. By his will the testator bequeathed the above note to his daughter, M. F. Emery, who by reason thereof became the owner and obtained possession of the note. When it came to her hands the note contained this indorsement:

I hereby promise that this policy No. 127025 in the Manhattan Life Insurance Company may be used by the estate of L. W. Emery to pay this debt; but any proceeds arising from said policy above the debt shall be paid to my family.

This February 9th, 1906. W. M. Clyne
Attest: Geo. F. Emery.

The above policy, which was for \$2,500, was issued by the Manhattan Life Insurance Company upon the life of W. M. Clyne, March 5, 1902, and on March 12, 1902, was assigned to the appellant, M. F. Emery, by the following writing, viz.:

In consideration of debt evidenced by note for \$1,800 and interest, I hereby sell and assign unto M. F. Emery, of Paducah, county of McCracken, state of Kentucky, the annexed policy No. 127025 on the life of W. M. Clyne, near Wandville, McCracken county, issued by the Manhattan Life Insurance Company of New York; and I do also, for myself, my executors and administrators, guarantee the validity and sufficiency of the foregoing assignment to the above-named assignee, his executors, administrators, and assigns, and their title to the said policy will forever warrant and defend. And I hereby appoint the said assignee my true lawful attorney to collect the amount of said policy and receipt therefor as fully as she could do, if these presents were not made.

Witness my hand and seal this 12th day of March, 1902. William M. Clyne.

All the premiums on this policy were paid down to and including March 5, 1912. No part of the note owing by Clyne to M. F. Emery had been paid when the above assignment of the policy was made, and there was then due thereon \$2,891.39, which thereafter increased until at the time of the institution of this action it amounted to \$4,503.17.

Within thirty days after the payment of the annual premium March 5, 1912, on the policy in question, the appellant offered to surrender it to the Manhattan Life Insurance Company for a nonparticipating, paid-up term policy on the life of the insured, Clyne, for \$2,500, to run for a period of five L.R.A.1918C.

years and seven months, beginning on the date of the payment of the last premium, viz., March 5, 1912, which the insurance company was requested by appellant as assignee of the present policy to issue, but refused to issue without a written request from Clyne, the insured, in addition to the request from the assignee, which request from Clyne was never made. At the time the request for the issuance of the nonparticipating, paid-up policy for \$2,500 on the life of Clyne was made, there were no notes, loans, or indebtedness against the policy due the Manhattan Life Insurance Company. After Clyne's death, which occurred April 16, 1916, appellant furnished the insurance company proper proofs thereof, and was thereupon tendered by it \$998 in settlement of its indebtedness on the policy; the latter claiming that this amount was its automatic cash value as a paid policy at the date of the death of the insured. Appellant refused to accept the \$998 tendered, and demanded of the insurance company \$2,500 as the amount due thereon, and upon the refusal of the latter to pay same brought this action seeking to compel its payment.

By the terms of the assigned policy certain options were given the insured. Among these was one entitling him, within thirty days after the payment of the last annual premium, to make a "legal surrender" of the policy to the insurance company and demand of it a nonparticipating, paid-up term policy on his life for \$2,500, to run for a period of five years and seven months beginning on the date of the payment of the last premium, provided that at the time of the demand for the issuance of the nonparticipating, paid-up policy there were no notes, loans, or indebtedness against the policy due the insurance company. So the question presented for our decision by this appeal is, Did this state of facts entitle the appellant, as the assignee of the insured, to the nonparticipating, paid-up policy demanded of the company? We think not. It is admitted that the policy on the life of the insured was received by appellant as collateral security for the note she held against him. Its assignment, therefore, did not divest him of all interest in the policy. He retained, at least, the right to obtain its restoration to him at any time during the existence of the note by paying the note; while, on the other hand, the assignee had such legal title as conferred upon her the right of foreclosure, which right she might have exercised at any time after the maturity of the note, and the exercise of which would have divested the insured of all interest in the policy. 7 Cyc. 83. But this right was never exercised by her, and when she demanded of appellee the nonparticipating

pating policy for \$2,500, the insured was still owing her the note for which she held the existing policy, and still had such an interest in that policy as entitled appellee to demand that he unite in its surrender and in the demand or request for the new nonparticipating policy. Appellee could not then know that the insured before his death and before the maturity of the nonparticipating policy would not pay the appellant's note, and thereby entitle himself to the return of the policy. By the terms of the existing policy it was entitled to a "legal surrender" of it, which could be effected only by the written request from the insured for the issuance of the new nonparticipating, paid-up \$2,500 policy, as required by the provision of the existing policy. Therefore the failure of appellant to obtain the written request or consent of the insured in support of her demand upon appellee for the nonparticipating, paid-up \$2,500 policy justified its refusal to issue such policy. So, as it is admitted that at the time of appellant's demand for the nonparticipating, paid-up policy, and also at the date of the death of the insured, the existing policy on his life had a cash surrender value of \$998, to only that amount was appellant entitled. If the amount of the note had been less than the cash surrender value of the policy, the surplus, after paying the amount of the note, by the terms of the assignment under which appellant obtained the policy, must have been paid to the family of the insured. But, as such cash surrender value of the policy was far less than the amount of the note, appellant was, of course, entitled to the whole of it.

By the only policy that was in force on the life of the insured, the option of applying its cash surrender value to the purchase of the extended paid-up insurance of \$2,500 that might have been given by the nonparticipating policy, which appellant complains was not issued to her by appellee, was an option that was personal to the insured, which could not have been made available by his assignee before his death, in the manner attempted, without his written consent.

Although this fact was made known to appellant by the refusal of appellee to issue to her the nonparticipating policy four years before the death of the insured, as no such written consent was ever procured of him by her, the conclusion is inevitable that its cash surrender value of \$998 was all that she had a right to claim.

All that passed by the assignment of the policy from the insured to appellant was the right to collect whatever of its proceeds he might have been entitled to be paid, by way of its cash surrender value, before his death, or that the appellee was liable for at his death, in the absence of an exercise of the option with respect to the extended, paid-up, nonparticipating insurance given by the assigned policy, which was and could have been no more than the \$998, for which she obtained judgment.

The case of *Mutual Ben. L. Ins. Co. v. First Nat. Bank*, 160 Ky. 538, 169 S. W. 1028, cited by counsel for appellant, does not conflict with the conclusions we have expressed. There was in that case no controversy as to the amount to which the assignee of the policy was entitled. Indeed, only the cash surrender value of the policy was claimed by the assignee, and the insurance company resisted its recovery by the assignee upon the ground that the right to receive it was confined by the terms of the policy to the insured alone. In rejecting this contention we held that, where a note is secured by the assignment to the payee by the obligor and his wife of an insurance policy on the life of the former having a cash surrender value, the insurance company issuing such policy cannot, when sued with the obligor by the payee, resist the recovery by the latter of the cash surrender value of the policy, unless such assignment of the policy is forbidden by a provision of the policy, or by its terms the privilege of surrendering the policy and receiving its cash surrender value is confined to the insured alone, which in that case the policy did not do.

We find no error in the judgment of the Circuit Court. Hence it is affirmed.

Annotation—Right of assignee of policy of life insurance to exercise options.

As to right of beneficiary to exercise option upon default in payment of premium, see notes to *New York L. Ins. Co. v. Noble*, 45 L.R.A.(N.S.) 391, and *McDonald v. Columbian Nat. L. Ins. Co.* L.R.A.1916F, 1244.

Generally, as to right of creditors to reach option of insured to receive cash surrender value of policy, and their L.R.A.1918C.

right to reach policies having a cash surrender value, see note to *McCutchen v. Townsend*, 16 L.R.A.(N.S.) 316.

As to effect of loan as working forfeiture of options under policy, see note to *Algoe v. Pacific Mut. L. Ins. Co.* L.R.A.1917A, 1237.

It will be noticed that it was decided in *EMERY v. MANHATTEN L. INS. CO.*

ante, 568, that one to whom a life insurance policy had been assigned as collateral could not without foreclosure or the written assent of the insured, exercise the option given by the policy to convert it into a paid-up term policy, and that, where he attempted to do so without foreclosure or the insured's consent, and no further premiums were paid, he could recover only the paid-up value of the policy.

While the decision is not without support, it is not in harmony with some of the other cases subsequently dealt with in this note. Others, however, may be reconciled with it because of express authority given the assignee by the assignment to exercise the option.

In *Mutual L. Ins. Co. v. Twyman* (1906) 122 Ky. 513, 121 Am. St. Rep. 471, 92 S. W. 335, 97 S. W. 391, where a paid-up policy was assigned to the insurer as collateral by an agreement providing that the policy was "assigned and surrendered to said company for cancellation in satisfaction of this note and in settlement of the cash surrender value of said policy, it was held that, on default in payment of the loan, the company could not, at its own option and without the consent of the insured, cancel the policy by calculating its cash surrender value as of the date of default, but that it should, like any other creditor holding a debt secured by a lien, resort to a court of equity for the enforcement of its rights, and that a court in such a case might decree a cancellation of the policy, allowing to the insured its full cash surrender value less the assignee's debt.

And in *Grossman v. Lindemann* (1910) 67 Misc. 437, 123 N. Y. Supp. 108, where a paid-up policy was deposited as collateral security for the payment of a note, it was held that, as the policy was an instrument for the payment of money, its deposit as collateral, in the absence of a distinct provision permitting its sale, gave the pledgee only the right to collect, and not to sell or surrender it.

It is clear that an assignment by one having no right to exercise the options given by a policy will not confer such right on the assignee. Thus, where a wife to whom a policy on her husband's life was payable in case she survived him agreed with a creditor of the husband to send the policy as collateral and to assign it, and she forwarded the policy with an agreement to collect the amount due her on it and pay it to the creditor, it was held that the latter did not acquire any right to an absolute as-

signment of the policy which would include the right to surrender the policy and receive its surrender value; that the husband did not join in the agreement, and that the wife had no right to surrender the policy, but had only the right to receive the insurance in case she survived her husband. *Rathborne v. Hatch* (1904) 90 App. Div. 161, 85 N. Y. Supp. 775, affirmed in (1905) 181 N. Y. 584, 74 N. E. 1125.

In some cases the assignments involved expressly conferred authority to exercise the options given by the policies.

Thus, in *Du Brutz v. Bank of Visalia* (1906) 4 Cal. App. 201, 87 Pac. 467, 469, where a husband whose life was insured in favor of his wife joined her in executing an instrument to a creditor providing that the parties assign the policy and all their rights thereunder, and all benefits accrued or to accrue under and by virtue of the terms, covenants, or conditions thereof, and authorizing the assignee to receive and collect and receipt for any money or thing of value which was or might become due by virtue of the policy or the terms, covenants, or conditions thereof, as fully and completely as the assignors or either of them could do if the assignment had not been made,—it was held that the assignee was thereby empowered to exercise the option given in the policy to take a paid-up policy.

And in *Palmer v. Mutual L. Ins. Co.* (1902) 38 Misc. 318, 77 N. Y. Supp. 869, where a policy was assigned to the insurer as collateral for a loan, by an instrument authorizing the assignee on default to cancel the policy and apply the surrender value to the payment of the debt, it was held that the assignee had the right, as in the case of any pledge, upon default of the payment of the debt, to dispose of or realize upon the pledge, and its right to surrender the policy and take its cash value upon default was upheld.

And in *Planters' State Bank v. Willingham* (1901) 111 Ky. 64, 63 S. W. 12, where the insured, by a written assignment of policies to a creditor as collateral, authorized the assignee on default in payment of the premiums to surrender the policies, it was held that he had exercised the option claimed for him as a personal privilege, and had thereby given the assignee a right to demand at least a paid-up policy.

And the right of an assignee to exercise the options given has been upheld although the assignment, so far as ap-

pears, did not expressly confer such right.

Thus, where an insured assigned a policy as collateral to a creditor his heirs and assigns, as his interest might appear, and the assignment stated that it was made to protect and pay certain notes, it was held that on default by the insured in the payment of premiums the assignee was entitled to convert the policy into its cash surrender value or into a paid-up policy. *Bush v. Block* (1916) 193 Mo. App. 704, 187 S. W. 153.

And in *Dungar v. Mutual Ben. L. Ins. Co.* (1877) 46 Md. 469, where a policy was assigned by the insured and his wife, the beneficiary, to secure the payment of money advanced by the insurance agent to pay the premium, it was held that the agent, holding the policy as mortgagee, might surrender it for its reserve or equitable value as an advantageous mode of foreclosure, but that notice should be given to redeem before the surrender takes place, and that the insurer, accepting the surrender without such notice, acquires only the interest of the mortgagee, and holds it subject to the right of redemption, as the mortgagee held before the surrender.

It also appears in *Keeble v. Jones* (1914) 187 Ala. 207, 65 So. 384, that the assignee of a life insurance policy, upon the assignor's failure to keep up the payment of his annual premiums, surrendered the policy and received in lieu thereof a paid-up policy; but there was no question raised as to his right to do this and no discussion of the question.

And in *Re Davison* (1910) 179 Fed. 750, where certain policies having no surrender value were assigned by straight assignments as security for the payments of notes, and others were assigned by instruments assigning all money and benefits due or to become due subject to the terms and conditions of the policies, it was apparently assumed that the assignee might exercise the options for paid-up policies, etc., given by the policies. The question at issue in that case was the correctness of the finding of the referee in bankruptcy as to the valuation of the policies.

In *Feliciana Bank & T. Co. v. Union Cent. L. Ins. Co.* (1915) 137 La. 674, 69 So. 91, where a policy payable to the insured's executors, administrators, or assigns was assigned as collateral by an agreement giving the pledgee the right, in event of nonpayment, to sell the policy, and after the default it was sold at public auction and purchased by the assignee, it was held that the latter was

entitled to be recognized as owner, and as such to exercise the privilege of loan and of surrender for paid-up value conferred by the policy upon the owner, and that it was not necessary that the transfer and ownership be first decreed by a judgment.

In some cases the right to exercise the options has been held a right personal with the insured which he could not assign.

Thus, where a policy payable to the insured's wife and children, and containing a provision that at the end of a certain period the insurer would pay to the person or persons designated in the application a cash surrender value, and the insured was designated in the application as the person entitled to the cash surrender value, it was held that a mere power to take the surrender value was given to the insured which he could not transfer to another, and that an assignee of the policy therefore could not exercise the option. *Moser v. Connecticut Mut. L. Ins. Co.* (1909) 134 Ky. 215, 119 S. W. 792.

And in *Townsend v. Townsend* (McCutchen v. Townsend) (1907) 127 Ky. 230, 16 L.R.A. (N.S.) 316, 105 S. W. 937, it was held that one who had insured his life for the benefit of his children by a policy giving him an option after a certain period to surrender the policy for its cash surrender value could not assign the option to a creditor. And it was also held in this case that a general assignment for creditors would not carry the right of the assignor to exercise such option, given by a policy paid up while he was in affluent circumstances, which he had taken for the benefit of his children.

In *Mutual Ben. L. Ins. Co. v. First Nat. Bank* (1914) 160 Ky. 538, 169 S. W. 1028, where the insured and his wife assigned as collateral a policy payable to the wife if she survived him, otherwise to him, and providing for a cash surrender value to be paid on a surrender of the policy fully receipted, it was held that the assignee was entitled to obtain the cash surrender value. With respect to the *Townsend* and *Moser* Cases (Ky.) supra, the court said: "The difference between the *Townsend* and *Moser* Cases and the instant case can readily be seen and understood. The beneficiaries in the *Townsend* and *Moser* Cases were the wives and children of the insured, the interests of the latter being contingent upon their surviving the mother. Each of the policies by its provisions excluded the beneficiaries or

others from demanding or receiving the cash value of the policy by its surrender, by confining to the insured alone the right to terminate the policy by taking in cash its surrender value, thereby making the surrender privilege one purely personal to the insured, which could not be assigned to or vested in another. Here, however, while the wife of the insured is named in the policy as a beneficiary, her right to the proceeds of the policy is made to depend upon her surviving the insured, and there is a further provision of the policy which declares that, in the event the wife does not survive the insured, the policy shall be payable to the estate of the insured. Moreover, the policy does not in words, or by implication, vest in the insured alone the right to terminate the policy and take its surrender value. The policy merely provides for a cash value to be paid by the company on a surrender of the policy fully receipted. This makes the privilege of surrendering the policy for cash one which may be exercised by a creditor who received the policy by assignment from the insured as security for his debt. Obviously, Bettie Garvin, the wife of Ed. L. Garvin, had an interest in the amount of insurance that would have been payable on the policy at the death of her husband, if she survived him, but the policy does not confer upon her a right to receive its cash surrender value any more than another to whom it might be assigned by the insured; and by joining with the insured in the assignment of the policy to the latter's creditor as security for a debt owing by the insured, she voluntarily put it in the power of the creditor to obtain its cash value by surrendering the policy for the payment of the debt secured to the appellant, which, when done, would necessarily divest her of the amount she otherwise would have been entitled to receive on the policy at the death of the insured, if she survived him."

And in *Wheeler v. Connecticut Mut. L. Ins. Co.* (1880) 82 N. Y. 543, 37 Am. Rep. 594, where a policy provided that if, after the payment of two or more premiums, the policy should cease by reason of default in the payment of premiums, the company would grant a paid-up policy for such amount as the then present value of the policy would purchase, providing the policy should be transmitted to the insured and application made for such paid-up policy within a stated time, it was held that, although the insured was dead, the right

to a paid-up policy or its value remained in his assignee where application was properly made.

The question whether the interests of persons other than the insured in the policy prevented an exercise of the options by an assignee has been involved in some cases.

Thus, in *Eisenbach v. Mutual L. Ins. Co.* (1914) 162 App. Div. 595, 147 N. Y. Supp. 962, affirmed without opinion in (1914) 212 N. Y. 593, 106 N. E. 1033, where the holder of a paid-up endowment policy, having the right to surrender it, executed an assignment transferring to his wife, "if living, if not to my child or children, all my right, title, and interest in the policy," and subsequently delivered the policy to her, together with a second assignment particularly giving her the right to surrender the policy and receive its cash value, and the insured and his wife delivered the policy to the insurer and demanded the cash value,—it was held that the wife was entitled thereto; that the children had no contingent interest by virtue of the first assignment, as their mother was living at the time the right to receive the cash value accrued; and that the assignment of the policy was not a waiver of the cash surrender provisions, and that, as the insured had a right to exercise the option to surrender, his assignee had the same right.

And in *Entwistle v. Travelers Ins. Co.* (1901) 17 Pa. Super. Ct. 180, where a policy on the life of a husband was payable to his wife, or in the case of her prior death to his children, but if he should survive both his wife and children to his legal representatives, and there was a provision that the policy might be converted into cash at the option of "the holder" after the expiration of a certain period and the payment of a specified number of premiums, it was held, where the insured, his wife, and children were all living at the time, and one to whom the insured and his wife had executed an assignment of the policy demanded the surrender value, that the wife was "the holder" of the policy within the meaning of its provisions, and that the insurer could not under the circumstances refuse the assignee's demand on the ground that the children had an interest in the policy and had not joined in the assignment, since their only right was to take in the event of the wife's death.

And in *Blinn v. Dame* (1911) 207 Mass. 159, 93 N. E. 601, 20 Ann. Cas. 1184, where a policy provided for the

payment of a stated sum to the insured, his executors, administrators, or assigns, on a specified date, or if he should die before that time for the payment of a like sum to his children if they survived him, with power to the insured to surrender the policy at any time, it was held that the right to surrender the policy for its surrender value was a valuable property right to which the children's rights were subject, and that it passed under a general assignment for the benefit of creditors, and that it was the insured's duty to execute any written surrender that might be necessary to enable the assignees to collect the surrender value.

In *Cornell v. Mutual L. Ins. Co.* (1914) 179 Mo. App. 420, 165 S. W. 858, where a policy provided that it might be surrendered at the end of twenty years and a certain amount collected, and expressly provided that the interest of the beneficiary was subject to the right of the insured to surrender the policy for its cash value, it was held that one to whom the insured had delivered the policy as collateral security could, after the expiration of the twenty-year period, without the insured's assent, exercise the right conferred by the policy and surrender it for its cash value; but it was stated that the insured in this case did consent to such surrender.

In *Mutual L. Ins. Co. v. Hagerman* (1903) 19 Colo. App. 33, 72 Pac. 889, where a policy was payable to the insured's wife provided she survived him, if not, to her children, it was held that the wife's interest was contingent upon her surviving her husband, and that with her death her interest ceased and all rights under the policy vested in her children, and that one to whom she had

assigned the policy had no right, after her death, to exercise the option for a paid-up policy.

In *State Nat. Bank v. United States L. Ins. Co.* (1909) 238 Ill. 148, 87 N. E. 396, where continuous term policies were assigned as collateral, and before the expiration of the term period the assignee, who had paid all but the first two annual premiums, consulted the insurer's agent, who advised him to continue the policies in the same form, and stated that after five premiums were paid the assignee might change the policies for endowment policies, and an application for continuing the term insurance was accordingly made, signed by the insured and the assignee, and policies were issued payable to the assignee, its successors or assigns, providing that the policies might be changed to any participating plan issued by the insurer,—it was held that it was not necessary that the insured acquiesce in the assignee's election to convert the policies into endowment policies, as the second term policies were rightfully made payable to the assignee, and the options to exchange them for other policies were properly vested in the assignee alone.

In *Davidson v. Heath* (1908) — Ky. —, 113 S. W. 891, a judgment for a lien on the proceeds of a policy to secure the payment of a debt for which the policy had been assigned as collateral was affirmed, although it did not adjudge to the assignee the right to surrender the policy at the time an option given by the policy became available, such time not having arrived, but it was stated that it was assumed that the court would, after the maturity of the option, adjudge the assignee this right. J. T. W.

MISSOURI SUPREME COURT. (Division No. 2.)

STATE OF MISSOURI

v.

MITCHELL HEDRICK, Appt.

(— Mo. —, 199 S. W. 192.)

Larceny — hog — stealing carcass — guilt.

One cannot be convicted of stealing a hog on evidence that he stole a carcass of a hog. For other cases, see *Evidence*, XIII. b, in Dig. 1-52 N. S.

(December 4, 1917.)

Note — For killing animal and carrying away part of the carcass as larceny of the animal, see note to *Flowers v. State*, L.R.A. 1915E, 848.
L.R.A.1918C.

APPEAL by defendant from a judgment of the Circuit Court for Reynolds County convicting him of stealing hogs. Reversed.

Statement by Roy, C.:

Defendant was charged in Reynolds county, jointly with Ritchey and Strickland, with the theft of four black hogs, the property of Bill Grant. He was convicted and sentenced to the penitentiary for three years, and has appealed.

The state's evidence very clearly shows that the hogs were stolen and killed in Dent county, near the line between the two counties, and that, after they were killed, the defendant went in his wagon with the other two persons charged and hauled the hogs

into Reynolds county, where they were cleaned and divided among them. There is a question on the evidence as to whether this appellant was a party to the transaction prior to the death of the hogs. At the close of the state's evidence the defendant demurred thereto, and the demurrer was overruled.

The defendant asked this instruction, which was refused: "You are instructed that the word 'hog' in law means a live animal, and not the mere carcass of an animal."

He also asked an instruction as to petit larceny in case the jury should find that he had stolen the carcasses of hogs in value less than \$30. It was refused.

Messrs. C. R. Wadlow and Buford & Chittwood, for appellant:

Upon a general statement that a party stole an animal, it is to be intended that he stole it alive, except where it has the same name, whether dead or alive.

Whart. Crim. Ev. 9th ed. § 124; 2 Cyc. 304.

Instructions as to defendant's guilt were broader than the allegation in the indictment, and should not have been given.

State v. Kyle, 177 Mo. 659, 76 S. W. 1014.

The jury must find that the hogs were feloniously taken before they would be warranted in returning a verdict of guilty.

State v. Sparks, — Mo. —, 177 S. W. 346; State v. Richmond, 228 Mo. 362, 128 S. W. 744.

There was a failure to instruct on all the law as required by statute.

State v. Swain, 239 Mo. 723, 144 S. W. 427.

There was a failure of proof of the offense charged.

State v. Ballard, 104 Mo. 634, 16 S. W. 525.

Messrs. Frank W. McAllister, Attorney General, Henry B. Hunt, Assistant Attorney General, and C. P. LeMire, for the State:

The indictment is sufficient. It contains all the substantial allegations required by the statute.

State v. Sparks, — Mo. —, 195 S. W. 1031.

As there was substantial evidence of guilt and the punishment prescribed was within the limits set by the statute, objections that the verdict is against the evidence, the weight of the evidence, and against the law are groundless.

State v. Kapp, — Mo. —, 187 S. W. 1178; State v. Scott, 214 Mo. 261, 113 S. W. 1069; State v. Chenault, 212 Mo. 132, 110 S. W. 696; State v. Barton, 214 Mo. 316, 113 S. L.R.A.1918C.

W. 1111; State v. Maurer, 255 Mo. 158, 164 S. W. 551, Ann. Cas. 1915C, 178.

Objections to instructions must be specifically and definitely set out in the motion for a new trial to entitle appellant to a review of the same in this court.

State v. Snyder, 263 Mo. 668, 173 S. W. 1078; State v. Bowen, 263 Mo. 279, 172 S. W. 367; State v. Finkelstein, 289 Mo. 612, 191 S. W. 1002; State v. Levy, 262 Mo. 181, 170 S. W. 1114; State v. McBrien, 265 Mo. 594, 178 S. W. 489; State v. Taylor, 267 Mo. 41, 183 S. W. 301; State v. Kapp, — Mo. —, 187 S. W. 1178.

Even though the hogs had been killed and appellant had had no connection with the matter until he consented to aid in hauling said hogs from where they were killed to the place where they were concealed, that act alone is sufficient to designate him as an aider and abetter in the whole scheme, and rendered him equally guilty with the other parties.

State v. Dockery, 243 Mo. 592, 147 S. W. 976; State v. Valle, 164 Mo. 550, 65 S. W. 232; State v. Miller, 263 Mo. 335, 172 S. W. 385, Ann. Cas. 1916A, 1099; State v. Sykes, 248 Mo. 708, 154 S. W. 1130; State v. Alcorn, 137 Mo. 121, 38 S. W. 548.

Roy, C., filed the following opinion:

There was a total failure of proof. Defendant was charged with stealing hogs in Reynolds county. The proof was that they were dead before they were taken into that county. It may be that defendant could be convicted of stealing the hogs in Dent county. It may be possible to convict him of stealing the carcasses of hogs in either Dent or Reynolds county. He cannot be convicted of stealing hogs in Reynolds county, because the hogs, as hogs, were never in that county. He cannot, in this case, be convicted of stealing the carcasses of hogs, because he is not charged with such an offense. The carcass of a hog, by whatever name called, is not a hog. The dictionary says that a "hog" is an animal, and that an animal is a living being. A person charged with stealing wheat in value more than \$30 may be convicted of grand or petit larceny, in accordance with the proof as to value. But a person charged as in this case cannot be convicted of stealing mere carcasses of any value, great or small. The English cases on this subject are as follows:

In *Rex v. Edwards, Russ, & R. C. C.* 497, decided in 1823, the defendants were charged with stealing live turkeys. They were stolen alive and then killed in one county, and then carried into another county. It is there said: "In Hilary term, 1823, the case was considered by the judges, who held that the

word 'live,' in the description, could not be rejected as surplusage, and that, as the prisoners had not the turkeys in a live state in Herefordshire, the charge as laid was not proved, and that the conviction was wrong. And Holroyd, J., observed that an indictment for stealing a dead animal should state that it was dead; for upon a general statement that a party stole the animal it is to be intended that he stole it alive."

In the same year there were two cases against one Halloway, decided at nisi prius and reported in 1 Car. & P. at pages 127 and 128. In the first he was charged with stealing a "brass furnace" in the county of Hereford. The proof showed that he stole the furnace in the county of Radnor, and broke it into pieces, which he carried into the county of Hereford. The report of that case states: "Hullock, B., directed an acquittal, and said: Though a prisoner may be indicted for larceny in any county into which he takes stolen property, the present indictment must fail, as he never had the 'brass furnace' in Herefordshire or within 500 yards of its boundaries; he merely had there certain pieces of brass."

In the other case Halloway was charged with stealing two turkeys. The proof showed that they were dead, and were stolen from a larder. It was held that the indictment meant live turkeys, and that the charge should have been that he stole dead turkeys.

In *Rex v. Puckering*, 1 Moody, C. C. 242, decided in 1829, the defendant was charged with feloniously receiving a stolen lamb knowing that it had been stolen. The lamb had been killed before he received it. It was there said: "It appeared to the learned judge that, whatever may be the case as to many animals, perhaps there might be a different rule as to animals the stealing of which is a capital offense, and it might be a question whether, at all events as to them, when an animal is mentioned it does not mean a live animal. He therefore respited the judgment, in order that the opinion of the learned judges might be taken. This case was considered at a meeting of the judges in Michaelmas term, 1829, and they all agreed that the conviction was good, it being immaterial as to the prisoner's offense whether the lamb was alive or dead, his offense and punishment for it being in both cases the same."

Com. v. Beaman, 8 Gray, 497, a Massachusetts case decided in 1857, discussed the English cases, and held that, where the stealing of an animal is charged, it means

a live animal. *State v. Donovan*, Houst. Crim. Rep. (Del.) 43, was decided in 1858. The report of that case contains the following: "The court stopped the attorney general, and Gilpin, Ch. J., remarked that there were three decisions on the point in the English reports, the last of which had ruled that, where the animal is called by the same name, either dead or alive, it is competent under such an indictment as this to prove the stealing of them in a dead state; and *shad*, he believed, had but that one name, whether dead or alive."

It should be noted that none of the above cases involved a statute such as we have here. Indeed, the *Puckering* Case above mentioned, which is the leading one on that side, expressly bases its ruling on the ground that the offense and its punishment were the same whether the animal stolen were alive or dead.

If we concede that the *Puckering* Case is right, the question arises: Is the punishment in this state for stealing dead hogs the same as that for stealing live ones? In other words, does our statute make it grand larceny to steal either live or dead hogs, regardless of value? That statute (Rev. Stat. 1909, § 4535) makes it grand larceny to steal any "horse, mare, gelding, colt, filly, ass, mule, hog, or neat cattle." On its face it is not capable of being construed to cover those animals when dead. Bishop on Statutory Crimes, 3d ed. § 426, note 13, says that such statutes apply to live animals. All the decided cases we can find in any of our sister states hold the same thing. *Golden v. State*, 63 Miss. 466; *People v. Smith*, 112 Cal. 333, 44 Pac. 663; *Hunt v. State*, 55 Ala. 138; *Thompson v. State*, 30 Tex. 356; *Ballow v. State* (two cases), 42 Tex. Crim. Rep. 261, 263, 58 S. W. 1022, 1023. In the first of the last two cases it was held that, where hogs were stolen and killed in one county and then carried into another county, there could be no conviction for stealing hogs in the latter county.

In this case the instruction in the nature of a demurrer to the state's evidence should have been given.

The judgment is reversed, and the cause is remanded.

White, C., concurs.

Per Curiam:

The foregoing opinion of Roy, C., is adopted as the opinion of the court.

All the Judges concur.

OKLAHOMA CRIMINAL COURT OF APPEALS.

D. C. CLARK, Plff. in Err.,
v.

STATE OF OKLAHOMA.

(— Okla. Crim. Rep. —, 170 Pac. 275.)

Larceny — impounded water.

1. Water impounded in the mains and pipes of a city's water system is the personal property of the city, and, as such, is the subject of larceny.

For other cases, see *Larceny*, in *Dig.* 1-52 N. 8.

Same — avoiding meter.

2. A water consumer who, by false connections, carries water around his meter and consumes it on his property, without the consent of the owner and without having it registered, and with intention thus to deprive the owner thereof without payment therefor, is guilty of larceny.

For other cases, see *Larceny*, in *Dig.* 1-52 N. 8.

Water — surrender of possession.

3. There is no surrender of possession of water by the owner of a water system until the water has passed through the meter, where the consumer is paying for the water used according to the amount registered by the meter.

For other cases, see *Waters*, III. in *Dig.* 1-52 N. 8.

(October 20, 1917.)

ERROR to the Washita County Court to review a judgment convicting defendant of petit larceny. Affirmed.

The facts are stated in the opinion.

Messrs. **Massingale & Duff**, for plaintiff in error:

Water furnished or supplied by a municipality within the state of Oklahoma is not personal property, and therefore is not the subject of larceny.

Okla. Rev. Laws, § 2652.

The evidence adduced fails to prove the offense of larceny, if we concede that water is personal property, owned by the city of New Cordell, and had a value.

State v. Will, 49 La. Ann. 1337, 22 So. 378; 2 Bishop, Crim. Law, 6th ed. p. 447; *Devore v. Territory*, 2 Okla. 562, 37 Pac. 1092.

Messrs. **S. P. Freeling**, Attorney General, and **R. McMillan**, Assistant Attorney General, for the State:

The information in this case is good.

Caído v. State, 7 Okla. Crim. Rep. 140,

Headnotes by **MATSON, J.**

Note. — For water, gas, and electricity as subjects of larceny, see annotation following this case, post, 580.
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122 Pac. 734; *Ritchie v. State*, 7 Okla. Crim. Rep. 189, 122 Pac. 944; *Hoyl v. State*, 7 Okla. Crim. Rep. 343, 123 Pac. 700; *Bayless v. State*, 9 Okla. Crim. Rep. 29, 130 Pac. 520; 25 Cyc. 10.

Water is property and a commodity.

40 Cyc. 796; 1 *Wiel*, Water Rights, 658; *Provident Inst. for Savings v. Jersey City*, 113 U. S. 514, 28 L. ed. 1105, 5 Sup. Ct. Rep. 612; *Young v. Boston*, 104 Mass. 101; *Silkman v. Water Comrs.* 71 Hun, 37, 24 N. Y. Supp. 806; *Alter v. Cincinnati*, 56 Ohio St. 67, 35 L.R.A. 737, 46 N. E. 60; *Jones v. Water Comrs.* 34 Mich. 274; *Wagner v. Rock Island*, 146 Ill. 139, 21 L.R.A. 519, 34 N. E. 545; *St. Louis Brewing Asso. v. St. Louis*, 140 Mo. 419, 37 S. W. 527, 41 S. W. 911; *Twitchell v. Spokane*, 55 Wash. 86, 24 L.R.A. (N.S.) 292, 133 Am. St. Rep. 1021, 104 Pac. 150.

Water is subject to larceny.

25 Cyc. 136; 2 *Bishop*, Crim. Law, 765, 1098; *Whart. Crim. Law*, §§ 1162, 1320.

Matson, J., delivered the opinion of the court:

D. C. Clark, one of the managers of the Cordell Ice & Fuel Company, was convicted of the crime of petit larceny in Washita county, Oklahoma, in that he caused a pipe to be attached to the water pipe in which the city of Cordell had stored, and was distributing, certain water to the Cordell Ice & Fuel Company for a certain price or rental, and by means of such attached pipe the said water was diverted so that it flowed around the meter, through which it was to be measured, to said Ice & Fuel Company and into the pipes running into said plant, by means of which trick the city of Cordell was defrauded or deprived of said water and the value of the same unlawfully.

There is no conflict as to the guilt of this defendant if the facts proved constitute the crime of larceny under our statute. There was no defense interposed. The defendant relies solely upon the insufficiency of the evidence to constitute the crime of petit larceny.

First. It is contended that, by reason of the provisions of our statute (Rev. Laws 1910, art. 4, chap. 10), that a city or town acquires no ownership in the water which it may impound in its pipes for the purpose of distribution to consumers, but that only a privilege is created which permits the city to acquire by condemnation, purchase, rental, lease, etc., certain lands or water districts from which a supply of water may be obtained for distribution to consumers under fixed rates or taxes, and that if a person taps the mains or pipes in which the city has impounded its water and diverts it to a use for which the city

did not intend it, or diverts it so that it would not pass through the regular meter which the city uses for the purpose of measurement, the person so diverting such water and converting it to his own use without the knowledge and consent of said city has only deprived the city of its regular rental charge or taxes, and is not guilty of stealing its property.

With this contention we cannot agree. The fact that the state has seen fit to permit a city or town to establish a water-works system, and to serve the citizens of such city or town with water for private consumption, and to charge a fixed rate for such service, does not change the water, which the city has taken into its possession and under its control by impounding it within the confines of its mains and pipes, of its character as property. That water so confined is personal property, capable of ownership, cannot be disputed. The courts have so held practically without dissent. The rule is stated in Cyc. vol. 40, p. 552, as follows: "In the character of personal property, water, separated from its source or from the body of which it constituted a part, may be bought and sold like other commodities, as when it is supplied through artificial conduits for domestic use, or irrigation, or when it is solidified in the form of ice."

Wiel, in his work on Water Rights in the Western States, 3d ed. vol. 1, § 31, states the proposition as follows: "In the civil law it is said: 'Upon these principles, running waters are held by the Roman juris-consulti to be common to all men. But it also follows that this decision does not apply to waters, the appropriation of which (to the exclusion of the common enjoyment) is necessary for a certain purpose, as water included in a pipe or other vessel for certain uses.' Vinnius says, in commenting on the passage in the Institutes above quoted, regarding air, running water, and the sea: 'First of all, these things are in their nature suited to the common use of all; and next, in case any of these things is such that in its nature it can be taken into possession, it belongs to the possessor so far as he does not injure the general use by such occupation.' And, commenting upon the same passage in the Institutes, a Scotch case says: 'Water drawn from a river into vessels or into ponds becomes private property.' No one owns the air, but the inventor who liquefies it owns so much as is liquid in his laboratory; it is his private property while in his possession.

"Pothier illustrates it as follows: 'One may put the case, for example, where I go to dip water from a river. I acquire the

ownership of the water which I have taken, and with which I have filled my pitcher, by title of occupancy; for this water, being a thing which belonged to no person, to which no person had any exclusive right whatever, I have been able, on taking it into my possession, to acquire the ownership of it by right of capture. This is why, in case, on returning from the river, I have for some purpose left my pitcher standing on the road with the intention of returning later to fetch it where I left it—if, in the meantime, a passer-by, having found my pitcher, proceeds (to save himself the trouble of going to the river) to pour into his pitcher the water that was in mine, he has committed against me an actual theft of that water, which water was a thing of which I was actually the proprietor, and of which I retained the possession through the intention I had of returning for it at the place where I left it. Note that the flow of the stream must not be confounded with the running water itself, which is designated *aqua profluens*.'

"The common law is stated in identical terms: 'None can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream, and take into his possession, and that during the time of his possession only.' In a well-known case in the House of Lords, it is said that no one can have any property in the running water of the stream 'which can only be appropriated by severance, and which may be lawfully so appropriated by everyone having a right of access to it' (the riparian proprietors). Lord Campbell declared that water in a cistern is private property, and in a very recent case in House of Lords, the Chancellor said that water in an artificial pond is 'water with somewhat of a proprietary right.' In a New York case it is laid down: 'Water, when reduced to possession, is property, and it may be bought and sold and have a market value, but it must be in actual possession, subject to control and management. . . .'

Running water has, oftentimes been compared to wild animals, birds, and fishes, which before capture and confinement belong to no one, but after capture belong to him who captures them.

Nor can it be successfully contended that water confined within the mains and pipes of the city's water system may not be the subject of larceny. It was such at common law. *Ferens v. O'Brien*, L. R. 11 Q. B. Div. 21, 15 Cox, C. C. 332, 52 L. J. Mag. Cas. N. S. 70, 31 Week. Rep. 643, 47 J. P. 472, 4 Am. Crim. Rep. 611; 25 Cyc. p. 13, note 11. Neither is there anything in the contention that because by

§ 2665, Revised Laws 1910, the legislature provided a special act making it a misdemeanor for any person to pipe gas so that it may be consumed without passing through a meter, so as to avoid paying therefor, that the general larceny statute does not cover an offense of this kind. A similar contention was made in the case of *Firens v. O'Brien*, supra, where counsel for the respondent submitted that water was not the subject of larceny when so confined because, by special Waterworks Clauses Acts (10 & 11 Vict. chap. 17, § 59, and 26 & 27 Vict. chap. 93, § 20), penalties were enacted for the abstraction of water from the company's mains or pipes without agreement with the company. But it was held that such sections of the Waterworks Clauses Acts did not take away the remedy under the larceny acts.

Also in the case of *Woods v. People*, 222 Ill. 293, 7 L.R.A.(N.S.) 520, 113 Am. St. Rep. 415, 78 N. E. 607, 6 Ann. Cas. 736, it was held: "A gas consumer who, by false connections, carries gas consumed on his premises around the meter so that it is not registered, may be prosecuted for larceny, notwithstanding a statute providing for the punishment of persons tampering or making false connections with gas pipes so that gas might be consumed without being registered by a meter."

Neither is there anything in the contention that the state failed to prove that the water so fraudulently consumed had any value. The state did prove that the rate charged at the time for water consumption was from 20 to 35 cents a thousand gallons, and the evidence shows that the Cordell Ice & Fuel Company, during the time this cut-off was in existence, consumed in the neighborhood of 50,000 gallons of water. In the absence of any contrary showing this proof was sufficient, as it will not be presumed by this court that the reasonable market value of such commodity was less than the rate charged by said city at that time, nor will it be presumed that said commodity was of no value whatever. The selling and not the cost price controls as to value. *Woods v. People*, supra.

Finally, it is contended that the proof was insufficient to warrant a conviction, even if it be admitted that the water was personal property owned by the city of New Cordell, and had a value. Counsel state their proposition thus:

"It is in evidence that the city had put in a meter, or meters, for measuring the value of water from the city mains into the plant of the Cordell Ice & Fuel Company, of which the defendant was an officer, and that under the directions of the defendant a by-pass was made around this meter

so that the water would be conducted from the mains into the ice plant without being taken through the meter for registering, and in fact this is the whole case.

"It is a self-evident proposition that, by placing the meters at the defendant's property, the city yielded to him or the Cordell Ice & Fuel Company, of which he was manager, the possession and ownership of all water that the ice plant could use or might use, in so far as it lay within the power of the city to part with the ownership of water. The only requirement the city made was that such water as was used in the ice plant should be conducted through pipes leading through meters where the quantity of water consumed was registered, so that the city authorities might be able to determine exactly the water rent or tax which the defendant and his ice plant would be expected to pay.

"It is also self-evident that after water had passed into the ice plant from the city mains that the city had no claim of ownership in this water, and the defendant might use said water as he chose to use it.

"In the instant case there can be no question but that the city parted with both the possession and whatever ownership it had, if any, in the water. It had no right or claim of right to any water after it left its main, and if the defendant appropriated the water in the manner charged in the information, the city having yielded to him its right of possession to the water, and not having an ownership therein, and not reserving any right of ownership in the water, then the defendant could not be held for the crime of larceny."

The facts do not warrant nor support the argument aforesaid. The city of New Cordell had contracted to supply the Cordell Ice & Fuel Company with water at a certain meter rate. It had connected its water main with the place of business of the Cordell Ice & Fuel Company by a pipe which ran through a meter, and only surrendered possession of the water to the Cordell Ice & Fuel Company so long as the same was measured in accordance with the contract. The city did not part with the possession of the water until after it had passed through the meter. When the defendant, by means of the trick of placing a pipe in front of the meter to run around it and connect with the pipe behind the meter and shut off the cock in front of the meter so that water could not run through the same, he obtained possession of the city's water by fraud and stealth, and will not be heard to say in this court, under such circumstances, that the city parted with the possession and ownership of its water voluntarily.

After a careful examination of the record and due consideration of all the points urged by counsel for defendant in error as grounds for reversal of this judgment, we are convinced that the alleged errors are wholly technical, and without substantial foundation in law; that justice has been meted out to this defendant who, by trickery, would deprive his fellow citizens of property which they had acquired and were

maintaining, in part, by general taxation. The punishment provided is inadequate for the offense committed. The judgment is affirmed.

Doyle, P. J., and Armstrong, J., concur.

Petition for rehearing denied February 9, 1918.

Annotation—Water, gas, and electricity as subjects of larceny.

This note treats the question whether water and gas in pipes, or electricity, may be the subjects of larceny. Other questions incidental or usual thereto are also considered, such as whether the offense is continuous and the effect of statutory penalties. It is well settled, as is shown by the cases cited herein, that water and gas in pipes, as well as electricity, may be subjects of larceny.

On the question of real property or things savoring of realty as the subject of larceny, see note in 49 L.R.A.(N.S.) 965.

In general — gas.

The following cases support the rule that illuminating gas may be the subject of larceny: *Woods v. People* (1906) 222 Ill. 293, 7 L.R.A.(N.S.) 520, 113 Am. St. Rep. 415, 78 N. E. 607, 6 Ann. Cas. 736; *Com. v. Shaw* (1862) 4 Allen (Mass.) 308, 81 Am. Dec. 706; *State v. Wellman* (1885) 34 Minn. 221, 25 N. W. 395; *Reg. v. White* (1853) 3 Car. & K. (Eng.) 363, 22 L. J. Mag. Cas. N. S. 123, 6 Cox, C. C. 213, 17 Jur. 536, 1 Week. Rep. 418, 1 C. L. R. 489, Dears. C. C. 203; *Reg. v. Firth* (1869) L. R. 1 C. C. (Eng.) 172, 11 Cox, C. C. 234, 19 L. T. N. S. 746, 17 Week. Rep. 327, 38 L. J. Mag. Cas. N. S. 54; *Phoenix G. L. & C. Co. v. Shillito*, 19 Gas J. 848; *Rapalje, Larceny*, p. 47.

In *Com. v. Shaw* (1862) 4 Allen (Mass.) 308, 81 Am. Dec. 706, supra, the gas company, on nonpayment of the gas rates, removed the meter and shut off the gas by closing a stopcock in the service pipe on the premises of the defendant; after which she, without the consent or knowledge of the company, made a connection between the service pipe and the house, opened the stopcock, and received and consumed gas belonging to the company. It was held that if she took the gas with a felonious intent she was guilty of larceny; and that the offense was not embezzlement instead of larceny, on the theory that the gas was intrusted to her possession by the com- L.R.A.1918C.

pany and that at the time of the taking she was the bailee thereof, since the pipe from which the gas was taken was on her premises. The court said: "There is nothing in the nature of gas used for illuminating purposes which renders it incapable of being feloniously taken and carried away. It is a valuable article of merchandise, bought and sold like other personal property, susceptible of being severed from a mass or larger quantity and of being transported from place to place. In the present case it appears that it was the property of the Boston Gas Light Company; that it was in their possession by being confined in conduits and tubes, which belonged to them; and that the defendant severed a portion of that which was in a pipe of the company by taking it into her house and there consuming it. All this, being proved to have been done by her secretly, and with an intent to deprive the company of their property and to appropriate it to her own use, clearly constituted the crime of larceny."

In *State v. Wellman* (1885) 34 Minn. 221, 25 N. W. 395, supra, the person convicted of larceny of illuminating gas from the pipes of a gas company was an inmate of a boarding house in which the gas was consumed. After the meter was removed by the gas company, he purchased, it was admitted, pipe to connect the service pipe at the place where the meter had been detached. But he denied that he had placed the pipe in position or suggested to anyone to do so, claiming that he had abandoned his purpose after the purchase, and had nothing to do with making the connection or turning on the gas. And the court said that if this evidence were accepted as true he was, of course, not guilty of larceny. But the evidence showing that he purchased the pipe for the purpose for which it was used, taken in connection with all the circumstances of the case, was held sufficient to sustain the con-

viction. On the question as to the parties who might be guilty of the offense of larceny in such a case, the court said: "The commission of the offense included a series of successive acts, viz., procuring the connecting pipe, making the connection with it, turning the stopcock in the service pipe in the cellar, and, finally, turning on the gas at the burners and lighting it; and, of course, until this last act the commission of the larceny was not consummated. But this being a misdemeanor in which there are no accessories, anyone who sustained the relation to the offense which would, in case of a felony, have made him an accessory before the fact, would be a principal. A person who procured this lead pipe with which to make the connection, for the purpose and with the intent of effecting the larceny, would be equally guilty with his confederates or associates who made the connection or turned on or lighted the gas, although he might not in person have actually assisted in doing these latter acts."

It was held also in *State v. Wellman* (Minn.) supra, that the fact that the gas was taken for the use of the proprietor of the boarding house of which the defendant was an inmate would not be a defense to a prosecution for the larceny, on the theory that he had not taken it for his own use. On this point it was said: "We think it is enough to constitute larceny if the property is taken with the felonious intent to convert it to the use of a person other than the owner. But even if it were necessary that it be taken with intent to convert it to the taker's own use, this is sufficiently established in this case by the fact that it was taken with the intent to use it in the house of which defendant was an inmate, and where he would enjoy the benefit of it in common with others."

In *Reg. v. White* (1853) 3 Car. & K. (Eng.) 363, 22 L. J. Mag. Cas. N. S. 123, 6 Cox, C. C. 213, 17 Jur. 536, 1 Week. Rep. 418, 1 C. L. R. 489, Dears. C. C. 203, supra, a conviction for larceny of gas was sustained, where it appeared that the defendant owned the entrance pipe by which the gas was admitted to the meter and also the exit pipe by which it passed from the meter to the burner on his premises, that he had the control of the stopcock by which the gas was admitted into the meter, and that he inserted a connecting pipe around the meter and in this way obtained and consumed gas which did not pass through the meter. It was contended that as

the defendant owned the entrance pipe he was lawfully in possession of the gas by the consent of the company as soon as it was permitted to enter that pipe out of the gas main, and therefore was not guilty of larceny. But in overruling this contention the court took the position that, although the gas was in a pipe belonging to the defendant, it was still in the possession of the gas company until it passed through the meter; and that causing the gas to pass through the connecting pipe, thereby separating it from the gas in the entrance pipe, was a sufficient asportation to sustain a conviction for larceny if the taking was with fraudulent intent. In this connection, see note in 29 L.R.A.(N.S.) 38, as to circumstances sufficient to show asportation.

The principle that gas is the subject of larceny is assumed apparently in the case of *Reg. v. Mitchell*, 22 Gas J. (Eng.) 137, Greenough's Dig. of Gas Cases, 88, where the defendant, who had taken gas from the service pipe of a gas company, pleaded guilty of larceny and was sentenced to one month at hard labor.

In *Reg. v. Jenkins*, 5 Gas J. (Eng.) 214, Greenough's Dig. of Gas Cases, 89, the defendant was charged with having "laid or caused to be laid" a certain pipe to communicate with a pipe belonging to a gas company without their consent, and was found guilty, the statutory penalty being imposed.

In *United States v. Carlos* (1911) 21 Philippine, 553, the court cites decisions of the Supreme Court of Spain of January 20, 1887, and April 1, 1897, as holding that illuminating gas may be the subject of larceny, under a statute defining as guilty of larceny those who, with intent of gain, take another's personal property without his consent.

—water.

Water in pipes may be the subject of larceny. *Ferens v. O'Brien* (1883) L. R. 11 Q. B. Div. (Eng.) 21, 15 Cox, C. C. 332, 52 L. J. Mag. Cas. N. S. 70, 47 J. P. 472, 31 Week. Rep. 643, 4 Am. Crim. Rep. 611 (holding that water in pipes of consumer of water company may be the subject of larceny); *Rex v. Hutton* (1911) 24 Can. Crim. Cas. 212, 19 West. L. R. 907 (where water in pipes of municipal corporation, which delivered it to consumer at a flat rate, was taken by a third party after consumer had refused him permission to do so); *CLARK v. STATE*, ante, 577.

In *Rex v. Hutton* (Can.) supra, the court sustained a conviction for larceny

on a charge of theft of water belonging to the city, but stated that if there had been a meter and the water was taken from the consumer after it had passed through the meter, it would be the property of the consumer and not of the city.

— **electricity.**

It was held, in *United States v. Carlos (Philippine)* supra, that electric current may be a subject of larceny. The court said: "Counsel for the appellant insists that only corporeal property can be the subject of the crime of larceny, and in support of this proposition cites several authorities for the purpose of showing that the only subjects of larceny are tangible, movable chattels, something which could be taken in possession and carried away, and which had some, although trifling, intrinsic value, and also to show that electricity is an unknown force and cannot be a subject of larceny. . . . It is true that electricity is no longer, as formerly, regarded by electricians as a fluid, but its manifestations and effects, like those of gas, may be seen and felt. The true test of what is a proper subject of larceny seems to be not whether the subject is corporeal or incorporeal, but whether it is capable of appropriation by another than the owner. It is well settled that illuminating gas may be the subject of larceny, even in the absence of a statute so providing. . . . Electricity, the same as gas, is a valuable article of merchandise, bought and sold like other personal property, and is capable of appropriation by another. So, no error was committed by the trial court in holding that electricity is a subject of larceny."

It was held also in *United States v. Carlos (Philippine)* supra, that mere passive submission on the part of the electric light company, which was under contract to furnish the defendant with electricity, in continuing to furnish electricity for about a year after it knew that the defendant was misappropriating the current, would not be a defense to a prosecution for larceny, on the theory that the company thereby consented to the taking of the electricity within the rule that larceny is not committed when property is taken with the owner's consent.

In *Rex v. Sperdakes* (1911) 24 *Can. Crim. Cas.* 210, 40 N. B. 428, the defendant was convicted of fraudulently abstracting electricity from the wires of a railway company, contrary to a provision of the Criminal Code; but the only

point considered on the appeal was as to whether the sentence imposed was erroneous.

It is said in 9 *Laws of England* (Halsbury) 644, that, by the *Electric Lighting Act of 1882*, everyone is guilty of simple larceny who maliciously or fraudulently abstracts, causes to be wasted or diverted, consumes or uses, and electricity.

Continuous transaction.

See, in this connection, note in 7 *L.R.A.(N.S.)* 520, on the question as to when larceny is deemed continuous.

In *Woods v. People* (1906) 222 *Ill.* 293, 7 *L.R.A.(N.S.)* 520, 113 *Am. St. Rep.* 415, 78 N. E. 607, 6 *Ann. Cas.* 736, it was held that to determine the degree of the crime of one who, by means of false connections, conveyed gas around his meter and consumed it upon his property without having it measured, the taking during each day is not to be regarded as a separate offense, but the value of the gas wrongfully consumed during the period during which the false connection is in use at any one time will be considered.

And the fact that the "jumper" by means of which the defendant deflected the current did not remain in place continuously, but was put on and taken off at least monthly, and perhaps daily, in order to avoid detection, was held in *United States v. Carlos* (1911) 21 *Philippine*, 553, supra, not to render the defendant guilty of a series of offenses instead of a single offense as charged, especially where there was no demurrer to the complaint on this ground and it did not appear that the defendant was prejudiced by the single charge for the entire period.

And, on an indictment for larceny charging the taking on a certain day of a stated quantity of gas, it was held that a series of acts, rather than a continuous transaction constituting a single offense, was not shown by evidence that the abstraction covered a period of several years, and that the gas, which was consumed in a factory, was turned off each night at the burners, where it appeared that the gas was obtained through a connection made with the gas main so that the gas could enter the building without passing through a meter, and that the connecting pipe was always full of gas. *Reg. v. Firth* (1869) *L. R. 1 C. C. (Eng.)* 172, 11 *Cox, C. C.* 234, 19 *L. T. N. S.* 746, 17 *Week. Rep.* 327, 38 *L. J. Mag. Cas. N. S.* 54.

Effect of statutory penalties.

See *CLARK v. STATE*, ante, 577.

In *Woods v. People* (Ill.) supra, it was held that a gas consumer who, by false connection, carries gas consumed on his premises around the meter, so that it is not registered, may be prosecuted for larceny, notwithstanding a statute providing for the punishment of persons tampering or making false connections with gas pipes so that gas may be consumed without being registered by a meter.

It was held also in *Reg v. White* (1853) 3 Car. & K. (Eng.) 363, 6 Cox, C. C. 213, 17 Jur. 536, 1 Week. Rep. 418, 1 C. L. R. 489, Dears. C. C. 203, cited also supra, that a statute providing a penalty for the fraudulent use of gas by laying pipes communicating with any pipe belonging to a gas company, without its consent, did not prevent an indictment for larceny of gas by means of a connecting pipe through which the gas passed around the meter.

And in *Ferens v. O'Brien* (1883) L. R. 11 Q. B. Div. (Eng.) 21, 15 Cox, C. C. 332, 47 J. P. 472, 3 Week. Rep. 643, 52 L. J. Mag. Cas. N. S. 70, 4 Am. Crim. Rep. 611, the court held that water in pipes may be the subject of larceny at common law, although one of the arguments that it could not be was that the legislature had deemed it necessary to impose statutory penalties for the taking of water from pipes belonging to

water companies. The point, however, was not discussed.

An indictment substantially in the words of the New York Statute of 1854 for the protection of gaslight companies, making it a misdemeanor for any person, with intent to injure or defraud any gas company, to connect any pipe with another pipe for conducting or supplying illuminating gas, in such manner as to connect with and be calculated to supply illuminating gas to any burner at which such gas is consumed without passing through the meter provided for registering the gas, was held insufficient in *People v. Wilber* (1857) 4 Park. Crim. Rep. (N. Y.) 19.

The note does not cover such cases as *United States v. Genato* (1910) 15 Philippine, 170, passing merely on the validity of an ordinance or statute enacted to protect gas, water, or electric light companies by imposing penalties for wrongful connection or interference with the companies' properties. For instance, the ordinance, the validity of which was sustained in that case, prohibited any person from using any device by means of which he might fraudulently obtain a current of electricity, and provided that the existence in any building or premises of any such device should, in the absence of satisfactory explanation, be deemed sufficient evidence of such use by the person benefited thereby.

R. E. H.

**WASHINGTON SUPREME COURT.
(In Banc.)**

L. H. ROGERS, Respt.,

v.

CHARLES H. LIPPY and Wife, Appts.

(— Wash. —, 169 Pac. 858.)

Contracts — employing broker — description of land.

Describing land to be sold as "my stock ranch" located in a particular section is not sufficient to satisfy a statute making void a contract employing a broker to sell real estate unless in writing signed by the party to be charged.

For other cases, see Contracts, I. e, 5, a, in Dig. 1-52 N. S.

(Ellis, Ch. J., and Morris, Main. and Holcomb, JJ., dissent.)

(January 9, 1918.)

Note. — For description of property by ownership or acreage, without other particular description, as satisfying the Statute of Frauds, see annotation following *Hall v. Cotton*, L.R.A.1916C, 1127. L.R.A.1918C.

APPEAL by defendants from a judgment of the Superior Court for King County in favor of plaintiff in an action brought to recover compensation for services alleged to have been rendered by plaintiff under a written contract with defendants. Reversed.

The facts are stated in the opinion.

Mr. Edward R. Taylor, for appellants:

The commission agreement of March 4th is void because of defective description of the real estate.

Thompson v. English, 76 Wash. 23, 135 Pac. 664; *Cushing v. Monarch Timber Co.* 75 Wash. 678, 135 Pac. 660, Ann. Cas. 1914C, 1239; *Swartwood v. Naslin*, 57 Wash. 287, 106 Pac. 770; *Goodrich v. Rogers*, 75 Wash. 212, 134 Pac. 947; *Baylor v. Tolliver*, 81 Wash. 257, 142 Pac. 678; *Salin v. Roy*, 81 Wash. 261, 142 Pac. 679; *Reed*, Stat. Fr. § 398.

It is also void because the price to be paid by a buyer and the terms on which he might buy are not given.

Keith v. Smith, 46 Wash. 131, 89 Pac. 473, 13 Ann. Cas. 975.

Mr. H. D. Allison for respondent.

Parker, J., delivered the opinion of the court:

The plaintiff Rogers seeks recovery from the defendants Lippy and wife of compensation for services which he alleges were rendered by him under the following written contract:

Commission Agreement.

Seattle, Wash., March 4, 1916.

It is hereby understood and agreed by C. H. Lippy and L. H. Rogers: That in case said L. H. Rogers furnishes a buyer or a party who will exchange for my stock ranch located in sections 9, 17, and 21, township 3 south, range 13 east, Sweetgrass county, Mont., for properties presented by him, I hereby agree to pay the said L. H. Rogers a commission of \$1,250, on the valuation of \$40,000. This particularly refers to the Espanola apartments and land occupied by said apartment on the west side of Eleventh avenue between Pike and Union streets, 80x128 feet. The present owners are Mr. and Mrs. W. S. Craig. Settlement and adjustments to be made when deeds are passed to said property.

C. H. Lippy,
Mrs. C. H. Lippy.

Trial in the superior court without a jury resulted in findings and judgment in favor of the plaintiff, from which the defendants have appealed to this court.

Respondent was, at the time in question, engaged in the real estate brokerage business in Seattle. Mr. Lippy made known to respondent his desire to sell or exchange his Montana stock ranch for Seattle property. Respondent, knowing that Mr. and Mrs. Craig desired to dispose of their property in Seattle, known as the "Espanola apartments," suggested to Mr. Lippy the possibility of an exchange of their ranch for the apartment property; it appearing that there was not a great difference in the respective values of the properties, which difference, it was thought, could be adjusted satisfactorily. Thereupon the commission contract above quoted providing for respondent's compensation was executed. Mr. and Mrs. Lippy were introduced to the Craigs by respondent, were shown over the apartment property, and on March 6, 1916, entered into a contract with Mr. and Mrs. Craig for an exchange of the Montana ranch for the apartment property. This contract was in writing, duly signed and acknowledged by the Craigs and Lippys. It became a binding obligation on the part of all parties to make the exchange by the execution of conveyances for the respective properties. The Craigs were able and willing to consummate the exchange according to the terms of the exchange contract, but the Lippys refused to

do so. Thereupon respondent commenced this action to recover his compensation for services rendered under the commission contract, resulting in judgment in his favor as above noticed. By the provisions of section 5289, Rem. Code, contracts of this nature must be evidenced in writing to render them enforceable, that section being, in effect, a statute of frauds with reference to such contracts. We are confronted with the question of the sufficiency of the description in this commission contract, of the land owned by appellants to be so exchanged. The only words of the description are "my stock ranch located in Sections 9, 17, and 21, township 3 south, range 13 east, Sweetgrass county, Mont."

In *Cushing v. Monarch Timber Co.* 75 Wash. 678, 135 Pac. 660, Ann. Cas. 1914C. 1239, reviewing at some length the question of the necessity of such contracts containing a description of the property with reference to which they are made, Judge Ellis, speaking for the court, observed: "To avoid the uncertainty against which the statute is directed, it is obviously as necessary that the subject-matter of the sale be sufficiently described as that the amount of the commission be sufficiently stated. . . . The employment, the description of the real estate, and the agreement to pay the commission are all essentials to any writing meeting the terms of the statute. . . . The description being essential, it follows that it must be such a description as would meet the requirements of a sufficient description under any other phase of the Statute of Frauds, as, for instance, when invoked in actions for specific performance."

It is true the description there involved was more deficient than that here in question. We call attention to the rule thus stated by Judge Ellis, however, to show that the description is as much a necessary part of such a contract, to be evidenced in writing, as any other portion of the contract.

In *Thompson v. English*, 76 Wash. 23, 135 Pac. 664, holding a somewhat similar description insufficient to satisfy the statute, Judge Main, speaking for the court, said: "The description of the property as contained in the contract was 'seventy-nine acres in section 30, township 2 N., range 3 E., W. M., Clarke Co. Wn. Owner, A. E. English.' It will be observed that this description does not specify which 79 acres in section 30 was intended. To ascertain this fact, resort must be had to oral testimony. The description given cannot be applied to any definite property."

It will be noticed that the description there involved was limited to land in one named section, while this description is even more general, being limited to land in three

named sections. It was accompanied by the name of the owner, as this description is.

In the late case of *Gilman v. Brunton*, 94 Wash. 1, 161 Pac. 835, there was involved the following description, which was challenged as not being sufficient to support specific performance: "Whereas, W. B. Brunton and Opal M. Brunton, parties of the first part, are the owners in fee simple of the following bounded and described property, situated in the county of Clarke, state of Washington: 48 acres, more or less, bounded on the north by Cedar creek and situated about one mile east of Etna, Wash., said property being the same property conveyed to the party of the first part by W. Tate and wife in 1912."

This description not only has the owners' names in connection therewith, but a reference therein to the property as being the same as that conveyed by named parties to named parties in a certain year. Yet it was held insufficient upon the authority of *Thompson v. English*, *supra*. We think the manner of mentioning the owners' names in connection with or, as we might say, as a part of the description in *Thompson v. English* and *Gilman v. Brunton*, means in substance the same as the words "my stock ranch" in the description here in question, and furnished as much aid to the descriptions in those cases as does the manner of designating the owner of the property, in connection with this description. Our decisions in *Baylor v. Tolliver*, 81 Wash. 257, 142 Pac. 678, and *Salin v. Roy*, 81 Wash. 261, 142 Pac. 679, are in harmony with *Thompson v. English*, and were rested principally upon the rule as therein announced, though Judge Morris in *Baylor v. Tolliver* makes some observations and citations of authority which may seem to indicate that the decision in *Thompson v. English* is not in harmony with the weight of authority elsewhere.

There are, we think, no decisions of this court dealing with the sufficiency of land descriptions in commission contracts out of harmony with the views expressed in *Thompson v. English*, or those decisions following the one rendered in that case. However, turning to those cases decided by this court having to do with the sufficiency of land descriptions in deeds and other contracts affecting interests in real property, there are one or two which can hardly be harmonized with the views expressed in these later commission contract cases. In *Langert v. Ross*, 1 Wash. 250, 24 Pac. 443, a contract of sale showing upon its face that it was executed in Tacoma was involved, wherein the description was, "Lots No. 1 and 2 in block 1806," no addition, city, or state being named in the description. This

description was held to be good upon its face, so that the identity of the lots could be shown by oral evidence. This holding, it must be admitted, is seemingly out of harmony with our later decisions in commission contract cases. In *Hartigan v. Hoffman*, 16 Wash. 34, 47 Pac. 217, there was involved a description in a deed reading, "East half northeast quarter and northwest quarter of northeast quarter of § 13, in town 35, range 8 east." This description was held insufficient to render the deed effective because no state, county, or meridian was mentioned. It appeared upon its face to have been executed in Nebraska, and it was claimed to have conveyed land in this state. This decision seems to be in harmony with our later ones. In *Broadway Hospital & Sanitarium v. Decker*, 47 Wash. 586, 92 Pac. 445, in a receipt for rent containing an option to purchase the property, the description read, "House No. 322 Broadway," mentioning no town, city, or state. It was held insufficient to satisfy the statute. This decision is also in harmony with our later ones. In *Wetzler v. Nichols*, 53 Wash. 285, 132 Am. St. Rep. 1075, 101 Pac. 867, there was involved a description in a deed reading, "Lots 7 and 8 in Cove addition to the city of Seattle, Wash." This description was held sufficient upon its face to admit parol evidence to identify the lots, it appearing by extrinsic evidence that there were blocks in the addition containing other lots of these numbers. We think this holding can be harmonized with our later ones upon the theory that the description was a perfect one upon its face. Looking to its language alone, the court would presume that there were no other lots of those numbers in the addition. Manifestly the defect was latent, and did not appear until it was shown that there were other lots of those numbers in the addition. Hence, the evidence was admissible only to identify the lots intended to be conveyed, after it appeared from extrinsic evidence that there were more than two lots to which the description could be applied. It was not a question of the sufficiency of the description upon its face. We all know that the description of a tract by lot number and addition name is supposed to have reference to something that has an official existence evidenced by record. "My stock ranch located in §§ 9, 17, and 21" fails to show certainty upon its face. It may mean any number of acres of any sort or description of land in those sections.

We are of the opinion that our early decisions having to do with descriptions in deeds or real property contracts, in so far as they may be regarded as out of harmony with our later decisions above noticed, are

not of controlling force in the present controversy. It is possible that, if the problem here presented were a new one in this state, we might now reach a different conclusion from that which was reached in *Thompson v. English* and the decisions following the law there announced. We now, however, feel constrained to hold that the settled law of this state makes the attempted description of the land in this contract insufficient to render it enforceable.

After all it seems to us that, where land is sought to be described in a contract coming under the Statute of Frauds, which is located within an official government survey, so that it can readily be described with reference to such survey with certainty, the necessity of the former very liberal rule of construing land descriptions in such contracts, which necessity seems to have been the principal reason for its existence before the coming of our system of official government surveys, has almost wholly disappeared. The law as announced in our later decisions makes for certainty, and modern conditions render it easy to follow in the vast majority of cases.

Being of the opinion that respondent cannot recover because of the invalidity of the contract upon which he sues, we find it unnecessary to notice other questions presented.

The judgment is reversed, and the action dismissed.

Mount, Fullerton, Webster, and Chadwick, JJ., concur.

Morris, J., dissenting:

I am unable to concur in the rule announced in the majority opinion, and inasmuch as this and the following case of *Nance v. Valentine*, — Wash. —, 160 Pac. 862, have settled adversely to my conception of the law a question upon which the court has sharply divided, I desire as briefly as possible to express my reasons for my dissent.

We are agreed, as stated in the case of *Cushing v. Monarch Timber Co.* 75 Wash. 678, 135 Pac. 660, Ann. Cas. 1914C, 1239, that the contract here involved is enforceable if the description of the real property is sufficient to meet the requirements of the Statute of Frauds if contained in a deed or other contract relating to real estate. The question then is: If a contract relating to this real estate contained the description given in this contract, would such a description be sufficient under the requirements of the Statute of Frauds?

The majority opinion proceeds upon a wrong conception of the question here propounded. This is manifest from the quotation and reference to the *Cushing Case* to the effect that parol testimony is not admissible to add to the description contained in a contract relating to real property. That such is the law cannot be denied, and, so far as I know, no court of late years has ever attempted to write a contrary rule. But this is not the question here involved. Respondent is not attempting to add anything to the description contained in his contract. His position is that the description is sufficient. What he is maintaining, and in this, in my opinion, the law supports him, is that, while parol testimony is not admissible to add to the description of the property, it is admissible to identify the description with its location upon the ground, and thus apply it to a definite piece of property. That this is permissible is clearly pointed out in the *Cushing Case*, where it is said: "Parol evidence may be resorted to for the purpose of applying the description contained in a writing to a definite piece of property and to ascertain its location on the ground, but never for the purpose of supplying deficiencies in a description otherwise so incomplete as not to definitely describe any land. The description must be in itself capable of application to something definite before parol testimony can be admitted to identify any property as the thing described. 'Parol evidence may be resorted to for the purpose of identifying the description contained in the writing with its location upon the ground, but not for the purpose of ascertaining and locating the land about which the parties negotiated and supplying a description thereof which they have omitted from the writing.'"

The same distinction is pointed out in *Baylor v. Tolliver*, 81 Wash. 257, 142 Pac. 678, citing the *Cushing Case*, and attempting to show the distinction between those cases where it is sought to add to the description by parol and those where there is "a description capable of definite ascertainment sufficient, with the aid of parol testimony, to identify the description with its location on the ground." In the *Baylor Case* it is pointed out that the case falls within the first class as being an attempt to add to the description given; it being necessary, in order to support the contract, to admit parol testimony of the meaning of the words used, which comes within the inhibition stated in the *Cushing Case*. These two cases, in my opinion, correctly announce the rule as supported by the great weight of authority and should be adhered to.

That in real estate contracts it is permissible to show by parol the circumstances of possession, ownership, and situation of the parties and their relation to each other and to the property at the time of the negotia-

tions is, in my opinion, a rule of such universal recognition that I shall make but little reference to authorities in its support. In *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580, it is said: "A deed or other written contract is not void for uncertainty in a description of the land sold or conveyed, if, from the words employed, the description can be made certain by extraneous evidence of physical conditions, measurements, or monuments referred to in the deed."

In *Fish v. Hubbard*, 21 Wend. 651, it is said: "A location or application of the description of parcels must always be made by evidence aliunde."

In *Murray v. Mayo*, 157 Mass. 250, 31 N. E. 1064, it is said: "Any description in a deed or contract of sale of real estate from which the property can be exactly located is sufficient, although parol evidence is necessary to apply the description to the land and fix the boundaries."

In *Baker v. Hall*, 158 Mass. 361, 33 N. E. 612, the same rule is thus stated: "For the purpose of interpreting the document, we may put ourselves in the position of the parties, and ascertain by oral evidence their relations to any property which would satisfy the terms of the memorandum."

Ryder v. Loomis, 161 Mass. 161, 36 N. E. 836, announces the same rule and says it is well settled. 2 Wharton on Evidence, 943, makes this familiar illustration in support of the rules. When an estate is granted by the designation of Blackacre, parol testimony is admissible to identify the premises known by that name.

Ranney v. Byers, 219 Pa. 332, 123 Am. St. Rep. 669, 68 Atl. 971, refers to the rule as "a well-settled doctrine supported alike by the text-writers and decided cases," and adds: "It is not proving an essential part of the declaration by parol—that cannot be done—but simply identifying or locating the subject."

In *Gould v. Lee*, 55 Pa. 99, the court says: "Parol evidence is not admissible to alter or contradict what is written, upon the very obvious principle that the writing is the best evidence of the intentions of the parties; but parol evidence has many times been received to explain and define the subject-matter of written agreements. Herein is no contradiction."

The distinction between these two rules is pointed out in *Pearl v. Brice*, 152 Pa. 277, 25 Atl. 537, in this language: "A contract for the sale of land in which the description lacks the certainty necessary to locate it is, without doubt, void. Neither words which do not describe nor descriptive language which is equally applicable to any one of several tracts of land can be supplemented

by parol evidence as to what tract was intended. But parol evidence to describe the land intended to be sold is one thing, and parol evidence to apply a written description to land is another and very different thing, and for that purpose is admissible."

In order to sustain the majority rule it must be held that the maxim, "That is certain which can be made certain," is not applicable to cases of this character. This maxim is pointed to in many of the authorities as a sustaining reason for the admissibility of oral testimony in cases of this character. *Hurley v. Brown*, 98 Mass. 545, 96 Am. Dec. 671; *Hodges v. Kowing*, 58 Conn. 12, 7 L.R.A. 87, 18 Atl. 979; *Smith's Appeal*, 69 Pa. 474; *Mead v. Parker*, 115 Mass. 413, 15 Am. Rep. 110; *Robeson v. Hornbaker*, 3 N. J. Eq. 60.

There is nothing new or strange about this rule. I have never known it to be questioned but that, under the rules of evidence, contracts in writing may be explained by parol evidence so far as to identify the subject-matter and apply the writing to it. 10 R. C. L. 1080, 1081; 17 Cyc. 724. Such a rule has always been recognized by this court. In *Newman v. Buzard*, 24 Wash. 225, 64 Pac. 139, it is said: "Parol evidence is and must of necessity be always admissible to identify the property described in and conveyed by a deed, to ascertain to what property the particulars of description in the deed apply."

The same rule is announced in *Schultz v. Simmons Fur Co.* 46 Wash. 555, 90 Pac. 917; *Wetzler v. Nichols*, 53 Wash. 285, 132 Am. St. Rep. 1075, 101 Pac. 867; *Robinson v. Taylor*, 68 Wash. 351, 123 Pac. 444. *Ann. Cas.* 1913E, 1011; *Old Republic Min. Co. v. Ferry County*, 69 Wash. 600, 125 Pac. 1018.

The majority opinion cites many of our own cases. Bearing in mind the rule we have attempted to point out, there is no conflict in them. In so far as an attempt has been made to add to the description by parol, it has been denied, but when it was sought to identify the property, it has been permitted; the only exception is *Thompson v. English*, 76 Wash. 23, 135 Pac. 664, and *Gilman v. Brunton*, 94 Wash. 1, 161 Pac. 835. These two cases are wrong and, in my opinion, should be overruled. *Salin v. Roy*, 81 Wash. 261, 142 Pac. 679, referred to by the majority, does not follow the *Thompson Case*, but is bottomed upon the *Baylor Case*, as an attempt to add to the description in the contract by explaining the meaning of the words used. If the distinction I have attempted to point out is recognized, there will be no confusion; if not, confusion must necessarily arise.

Much more might be said in support of

my views, but the foregoing is sufficient to indicate my reasons for dissenting, which is all that need be said.

Ellis, Ch. J., and Main and Holcomb, JJ., concur in the opinion written by Morris, J.

NORTH CAROLINA SUPREME COURT.

W. M. SMITH, Admr., etc., of Grover Cleveland Hann, Deceased,
v.

DR. CHARLES EDWIN WOODING, Appt.

(— N. C. —, 94 S. E. 404.)

Discovery — examination of defendant — killing patient by X-ray burn.

Plaintiff, in a suit against a physician for causing death by an X-ray burn, may have an order for examination of defendant to enable him to frame his complaint under a statute providing for such examination at any time before trial, where he shows that his information with respect to the matter is not specific enough for a full and accurate preparation of a complaint, and that the facts essential for that purpose are within the knowledge of defendant alone.

For other cases, see *Discovery and Inspection*, 1, in *Dig. 1-52 N. S.*

(November 28, 1917.)

APPEAL by defendant from an order of the Superior Court for Mecklenburg County dismissing an appeal from an order for his examination before trial of an action brought to recover damages for injuries causing the death of plaintiff's intestate, alleged to have resulted from the negligence of defendant in the use of the X-ray. Affirmed.

Statement by Walker, J.:

This action was brought to recover damages for injuries to plaintiff's intestate, alleged to have resulted from the negligence of the defendant in the use and application of the X-ray in treating the intestate, which so burned the patient as to cause his death. Plaintiff moved before the clerk of the court for an order requiring the defendant to be examined before a commissioner, in order that plaintiff may obtain such knowledge and information as is necessary for him to have in order to prepare his complaint and make proper and sufficient allegations therein of his cause of action; such knowledge and information being in the possession of the defendant. An order was

Note. — The right under statute to an order for the examination of an adverse party to enable one to frame his pleadings is discussed in the annotation following this case, post, 590.
L.R.A.1918C.

entered for such examination, and a commission issued to Fred M. Parrish, Esq., of Winston-Salem, North Carolina, to take the examination, and for that purpose that defendant appear before him at such time and place as he may appoint. The order was based upon an affidavit filed by the plaintiff, setting forth generally the nature of the action, and alleging that there are certain facts, stated therein, which are peculiarly within the knowledge of the defendant, and which are necessary to be known by the plaintiff in order that he may frame his complaint, and that he cannot obtain the facts from any other source. The defendant excepted to the order of the clerk, and appealed to the superior court. The judge dismissed the appeal, and defendant then appealed to this court, and assigned these errors:

"(1) That the court erred in holding that the statute was sufficient to require the examination of the defendant for the purpose of obtaining information upon which to file the complaint, and in dismissing the appeal of defendant from the order of the clerk.

"(2) In dismissing the appeal, for that the affidavit shows on its face that plaintiff had information sufficient to file his complaint."

Messrs. Manly, Hendren, & Womble, F. M. Shannonhouse, and W. S. Beam, for appellant:

The order compelling defendant to be examined was invalid.

Bailey v. Matthews, 156 N. C. 78, 72 S. E. 92; Fields v. Coleman, 160 N. C. 14, 75 S. E. 1005.

Even if it should be held that the statute gives plaintiff the right to examine defendant before trial to obtain information upon which to file his complaint, it not only appears upon the face of plaintiff's affidavit itself that he already has sufficient information to enable him to draw his complaint, but the information sought to be elicited is immaterial, unnecessary, and irrelevant.

Bailey v. Matthews, 156 N. C. 78, 72 S. E. 92; Tanenbaum v. Lindheim, 54 App. Div. 188, 66 N. Y. Supp. 376; Burnett v. Mitchell, 26 Misc. 547, 57 N. Y. Supp. 474; Hunt v. Sullivan, 79 App. Div. 119, 79 N. Y. Supp. 708.

Messrs. E. T. Cansler and Thaddeus A. Adams, for appellee:

Plaintiff had a right to examine the

defendant under §§ 865 et seq. of the Revisal, either before or after pleadings were filed.

Walker, J., delivered the opinion of the court:

The first assignment of error, we suppose, is intended to raise the question whether a party to an action, as, for instance, the defendant in this case, may be examined under the statute (Revisal, §§ 864, 873) for the purpose of enabling the other party to file his pleading, or whether the provision of the statute is confined in its operation to evidence merely to be used or not at the trial, and to be taken after the pleadings are filed, or, at least, after the complaint has been filed, showing what is the cause of action. Section 866 of the Revisal provides that the examination "may be had at any time before the trial," and this court has held that these words, construed in connection with what precedes and follows them, authorize an examination of a party for the purpose of aiding him in filing his complaint. We refer to *Holt v. Southern Finishing & Warehouse Co.* 116 N. C. 486, 21 S. E. 919, where the court discusses the question quite at length. The defendants in that case, and the parties designated for the examination, raised the point that would require of them disclosures as to the act of fraud charged in the affidavit of the plaintiff, but the court rejected this objection and said: "Very cogent reasons must be shown this court before it will conclude that such a right does not belong to the plaintiff. The plaintiff has commenced a civil action in the superior court of Alamance against the defendant for the purpose of setting aside an alleged pretended transfer by the defendant corporation. . . . To enable him to draw his complaint with greater certainty, the plaintiff desires to examine Neil Ellington, E. T. Garset, and J. W. Lindau, stockholders and directors of the company, under §§ 580 and 581 of the Code. He has as much right to examine [them] before the trial as at the trial, and they are subject to the same rules of examination as prevail in the examination of witnesses on the trial of actions before the courts, and they are compelled to answer all pertinent and material questions put to them, except such as the Constitution and laws relieve them from answering. We know of no such exemption, except a man may not be compelled to give evidence against himself, which is found in article 1, § 2, of the Constitution, which section, by judicial construction, has been extended to witnesses in civil actions. *Bradley Fertilizer Co. v. Taylor*, 112 N. C. 141, 17 S. E. 69. It makes no difference whether the answer will result in

pecuniary injury to the witnesses or not; they must answer the questions as they would be required to do before the courts."

The court therefore affirmed the orders for the examination made by Judge Green, upon writs of certiorari, and also held that they were not appealable, citing, for this ruling, *Helms v. Green*, 105 N. C. 251, 18 Am. St. Rep. 893, 11 S. E. 470; *Vann v. Lawrence*, 111 N. C. 32, 15 S. E. 1031, and *Bradley Fertilizer Co. v. Taylor*, supra; to which we add *Pender v. Mallett*, 122 N. C. 164, 30 S. E. 324, and same case, 123 N. C. 60, 31 S. E. 351. In the last case, *Pender v. Mallett*, 123 N. C. 60, 31 S. E. 351, the court said that, "under the Code, § 581, the defendant may be examined before pleadings filed to procure information in framing the complaint, as was the case in *Holt v. Southern Finishing & Warehouse Co.* supra, where it is held that an appeal from such order [for an examination] was premature and would be dismissed; or the defendant may be examined, after answer filed to procure evidence in the cause,"—citing *Helms v. Green* and *Vann v. Lawrence*, supra.

In *Bailey v. Matthews*, 156 N. C. 81, 72 S. E. 92, and *Fields v. Coleman*, 160 N. C. 11, 75 S. E. 1005, the applications for the examinations were denied, and this court affirmed the judgments upon other grounds, and the question as to the right to examine before the pleading is filed, for the purpose of aiding in preparing it, was not directly presented. We find that in *Blossom v. Ludington*, 32 Wis. 212, the court, when construing a statute substantially, if not literally, the same as ours, has held that the examination may be ordered before the pleading is filed. The court then said: "The practice in regard to the examination of a party in a case like the one before us does not seem to be regulated by statute, nor by any general rule of court. It is enacted that no action to obtain discovery under oath in aid of the prosecution or defense of another action shall be allowed; but that a party to an action may be examined as a witness at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled to give testimony in the action in the same manner and subject to the same rules of examination as any other witness. Rev. Stat. § 54, chap. 137. This provision was obviously adopted for the purpose of abolishing the bill of discovery, and to provide a substitute therefor. By § 55 it is enacted that the examination provided for in the previous section may be had either on the trial of the action or at any time before trial, at the option of the party claiming it, before a judge of the court or county

judge, on a previous notice to the party to be examined and any other adverse party, of at least five days, unless for good cause shown the judge order otherwise. . . . In this case the order for the examination was made upon the affidavit and complaint, and was designed to aid the plaintiff in determining whether any amendment to the complaint was necessary."

The court held that the examination should proceed, so that plaintiff might acquire information necessary to amend his complaint, but that the right to examine was not an absolute and unrestricted one, and then said, if it were so: "It is plain this statute may become the means of the greatest abuse and oppression. For an unscrupulous party has but to commence his action, and then insist upon the examination of the adverse party for the purpose of discovery, and compel the disclosure of matters wholly impertinent to his case, and in which he has no interest, merely to gratify his malice or curiosity. And so much injustice might be done by such an unrestricted, roving examination of a party that we have earnestly endeavored to so interpret the statute as to secure the object of its enactment, and at the same time give the court in which the action is pending some power to restrict the examination within proper limits."

It was said in *Simmons v. Vanderbilt*, 59 How. Pr. 411, that, "where a proper case has been made for it, a party has an undoubted right to examine his adversary to enable him to prepare his pleadings."

Referring to the form and substance of the affidavit upon which the application was based, it further said: "The plaintiff's affidavit is entirely defective. It states no fact whatever, except that the defendant admitted 'the receipt of the money sued for.' The relations between the parties are undisclosed. The plaintiff gives us no insight into his real position; no clue to the averment that the moneys were received 'for his use.' Something should at least have transpired to justify the bringing of the suit and the framing of a general averment. So far the court should have been taken into the plaintiff's confidence. As it is, this

affidavit is entirely blind. It seems studiously to avoid a frank disclosure of what induced the plaintiff to proceed. The order was therefore very properly vacated. It would be intolerable were parties to be subjected to inquisitorial examinations upon such papers.

We refer to these cases merely to show the clear and decided trend of judicial opinion in regard to the nature of this kind of proceeding, and not because they are directly applicable to this case, for they are not in all respects. Here the plaintiff has alleged sufficiently that, while he has general information of the matter, it is not specific enough for a full and accurate preparation of his complaint, and that the facts essential for this purpose are within the knowledge of the defendant alone. The application appears to be perfectly fair and bona fide, and not made for the purpose of vexing or harassing the defendant, or from any ulterior motive, or from any other motive than that of protecting his rights. There is reason why he has no knowledge or information of the facts, which is that the person who was treated at the defendant's hospital, or who was under his care as a surgeon, has since died, and his evidence therefore is not available. The case is more like that of *Howe v. Learey*, 62 Hun, 241, 16 N. Y. Supp. 736, where it was said by the court: "The rigid rule that, if a party do not actually know the facts which make the defense, no order to examine can be granted, would render the section of the case in question of little practical use. The section should have a broader scope. Where facts and circumstances are shown which justify an examination of a party so that a pleading may be framed for the trial of the issue, the order should be granted."

See also *Frothingham v. Broadway & S. Ave. R. Co.* 9 N. Y. Civ. Proc. Rep. 304; *Farmer v. National Life Assn.* 73 Hun, 523, 26 N. Y. Supp. 126.

As the court dismissed the appeal from the clerk, we merely affirm that order, which results, of course, in the same way here.

Annotation—Right under statute to an order for the examination of an adverse party to enable one to frame his pleadings.

In general.

This note is confined to cases involving the right to an examination of an adverse party for the purpose of securing facts upon which to base pleadings, under statutes taking the place of the old bill or discovery in equity. L.R.A.1918C.

For the right to discovery by a bill in equity, where the statute provides for examination of a party before trial, see *Cargill v. Kountze Bros.* 24 L.R.A. 183.

Most of the cases involving the question under consideration have arisen

under the New York Code, which provides for the taking of the deposition of a party to an action pending in a court of record, or of a person who expects to be a party to an action, at the instance of an adverse party or of a complainant or codefendant, at any time before or during the trial, but which does not specifically authorize the holding of such an examination for the purpose of enabling the party to frame his pleadings.

Under the bill for discovery in equity, a suitor could procure the precise information, if it lay in the mind of his adversary, on which he might frame his pleadings in his action for relief; could select the persons whom he should make defendants, and secure the facts which would qualify him to come to trial well prepared, and the only substantial restriction placed upon the breadth of the former practice is that the discovery must be sought in the same action in which relief is asked. *Glennay v. Stedwell* (1876) 64 N. Y. 120.

Where the state practice provides for the examination of a defendant to enable the plaintiff to frame his complaint, such examination may be had in the Federal court, in the absence of a Federal statute covering the subject. *Anderson v. Mackay* (1891) 46 Fed. 105.

In Wisconsin the statute provides that an examination may "be taken before issue joined . . . to enable the party to plead," and under this provision the term "plead" is not limited to a complaint, answer, or reply, but may extend to a claim instituted by either party in aid of an action or defense, which may be put in issue and tried; so a defendant in a proceeding for inspection of books is entitled to an examination of the plaintiff before the matter of inspection is fully determined by the court. *Ellinger v. Equitable Life Assur. Soc.* (1905) 125 Wis. 643, 104 N. W. 811.

Under this statute, if a plaintiff is entitled to an examination to enable him to plead, it should be allowed without reference to his ulterior motives, as the other party has ample means of protection against improper examination. *Ibid.*

Complaint — in general.

Under the New York statute above referred to, which, like the statute involved in *SMITH v. WOODING*, ante, 588, does not specifically provide for such a result, examination of a defendant will be granted when it is necessary to enable plaintiff properly to frame his com-

plaint. *Glennay v. Stedwell* (1876) 64 N. Y. 120; *O'Reilly v. Western U. Tele. Co.* (1877) 12 Hun (N. Y.) 124; *Dreyfus v. Bernhard* (1898) 31 App. Div. 628, 55 N. Y. Supp. 6; *Re Darling* (1900) 31 Misc. 543, 64 N. Y. Supp. 793; *Re Sayre* (1902) 70 App. Div. 329, 75 N. Y. Supp. 286; *Churchill v. Loeser* (1895) 89 Hun, 613, 69 N. Y. S. R. 754, 35 N. Y. Supp. 310; *Thompson v. Haigh* (1909) 134 App. Div. 614, 119 N. Y. Supp. 331; *Re Erie Malleable Iron Co.* (1895) 90 Hun, 62, 35 N. Y. Supp. 597; *Re Sands* (1904) 98 App. Div. 148, 90 N. Y. Supp. 749; *Mendelson v. Newborg* (1913) 155 App. Div. 892, 139 N. Y. Supp. 1052; *Havemeyer v. Ingersoll* (1871) 12 Abb. Pr. N. S. (N. Y.) 301; *Frothingham v. Broadway & S. Ave. R. Co.* (1886) 9 N. Y. Civ. Proc. Rep. 304; *Heishon v. Knickerbocker L. Ins. Co.* (1879) 13 Jones & S. (N. Y.) 34. See also *Holt v. Southern Finishing & Warehouse Co.* (1895) 116 N. C. 486, 21 S. E. 919; *SMITH v. WOODING*.

And it has been specifically held that an examination of defendant would be granted because such examination was necessary to enable plaintiff to frame his complaint, under the following circumstances:

—where plaintiff was an assignee for creditors, and defendant had rendered to plaintiff's assignor reports of stock transactions which all the facts adduced tended to show were false, but as to which the only statements of actual transactions were contained in defendant's books, and defendant was the only person acquainted with the precise facts, as he had acted in a confidential and discretionary relation to plaintiff's assignor, *Judah v. Lane* (1887) 14 Daly, 308, 12 N. Y. S. R. 130;

—where plaintiff desired to declare on a written instrument which was as much his property as defendants' and to ascertain the precise terms and wording, though he might recollect the general tenor of the instrument, *Perrow v. Lindsay* (1889) 52 Hun, 115, 4 N. Y. Supp. 795;

—where a suit was brought against parties as stockholders in a corporation on unpaid subscriptions and plaintiff's information as to defendant's stock ownership was based purely on hearsay, *Thayer v. Humphreys* (1893) 69 Hun, 343, 23 N. Y. Supp. 531;

—where plaintiff was suing for compensation for services, which was to be a percentage of the profits of the business, and was not a partner so as to be entitled to an accounting, *Veiller v. Op-*

penheim (1894) 75 Hun, 21, 26 N. Y. Supp. 1051;

—where an action was brought to establish a will claimed to be lost, and it was necessary that the complaint set forth its provisions, which were not definitely known to plaintiff, but were known to defendant, *Blatchford v. Paine* (1897) 24 App. Div. 140, 48 N. Y. Supp. 783;

—where, in an action to foreclose a mortgage of which the plaintiff was the assignee, an amended complaint was necessary because of an answer alleging payment and discharge, *Jerrells v. Perkins* (1898) 25 App. Div. 348, 49 N. Y. Supp. 597;

—where, in an action by a temporary administrator to recover assets, it appears that defendant, a daughter of decedent, had possession of considerable of his property during his life, and that it is still in her possession, and she alleges that it belongs to her without showing the source of her title, and plaintiff has no knowledge concerning the matter nor other means of obtaining it, *Butler v. Richardson* (1898) 31 App. Div. 281, 52 N. Y. Supp. 756;

—where the allegations were to the effect that the lease sued upon was executed in duplicate, and that plaintiff had lost his copy, though defendants denied that they had possession of the lease, *Brown v. Georgi* (1899) 26 Misc. 128, 56 N. Y. Supp. 923, dismissing appeal from (1898) 56 N. Y. Supp. 851;

—where suit was brought upon a contract with plaintiff's assignors to employ them exclusively as insurance brokers, and it was alleged that defendant had failed to employ plaintiff's assignors, and had employed others, plaintiff desiring to find what other brokers were employed and such knowledge being peculiarly with defendant, *Tanenbaum v. Hilborn* (1899) 44 App. Div. 89, 60 N. Y. Supp. 406;

—Where representatives of a deceased partner sought to examine the surviving members to secure a disclosure of intestate's interests in order that they might frame a complaint in accounting, *Kastner v. Kastner* (1900) 53 App. Div. 293, 65 N. Y. Supp. 756;

—where one having an action merely for royalties on the sale of a book needed only to learn the wholesale price of the books and the number sold to enable him to frame a complaint, there being no necessity for an accounting, *Karst v. Prang Educational Co.* (1909) 132 App. Div. 197, 116 N. Y. Supp. 1049;

—where plaintiff's testator conveyed

real estate to a corporation, and plaintiff did not know, and had been unable to learn, in what way testator was to be compensated, and therefore did not know whether to frame a complaint for specific performance, money damages, or an accounting, *Oppenheim v. Abbott* (1916) 160 N. Y. Supp. 438;

—where the state instituted a suit to recover interest money on state funds deposited in banks by a state treasurer during his term, and it appeared that, while the state knew the aggregate amount deposited during each quarter, it did not know the banks in which it was deposited, the rates of interest, the date, duration, or term of the deposits, although it could frame some sort of complaint without the examination, but it would be entirely indefinite as to the amounts, and would have to be framed in a most general way, *State v. Baetz* (1893) 86 Wis. 29, 56 N. W. 329;

—where plaintiff in an action for the wrongful death of her husband while in the employ of defendant was presumptively without knowledge as to the circumstances of his death, although, upon the facts already known, a complaint might be framed which might or might not present the real merits of her case, *Schmidt v. Menasha Wooden Ware Co.* (1896) 92 Wis. 529, 66 N. W. 695.

And in *Hill v. McKane* (1906) 115 App. Div. 537, 101 N. Y. Supp. 411, it was held not to be an answer to an application for an examination of defendant to enable plaintiff to frame his complaint, that he had been able to frame a complaint in an action for an accounting in another state, where such proceeding had been futile and had terminated.

And in *Livingston v. Curtis* (1877) 12 Hun (N. Y.) 121, 54 How. Pr. 370, where plaintiff's deceased husband, while in feeble condition, made a partnership settlement with defendant, and afterwards stated that an important credit had been overlooked, and defendant refused to permit an examination of the books to verify the matter, an application for examination of the books was granted, and an order refusing an application for the examination of the defendant was modified to permit its renewal if it should prove necessary after examination of the books.

See also *SMITH v. WOODING*, in which the court regarded the examination of defendant as being proper to enable plaintiff to make a full and accurate statement of his case, though he had general information of the matter forming the basis of his cause of action.

Where, however, it appears from the affidavit that plaintiff has all the information that is necessary to enable him to frame his complaint, an examination will be denied. *Sanger v. Seymour* (1886) 42 Hun (N. Y.) 641; *Martin v. Clews* (1888) 23 Jones & S. (N. Y.) 552; *Dalzell v. Fahys' Watch Case Co.* (1890) 26 Jones & S. 136, 9 N. Y. Supp. 713; *Bloom v. Patten* (1890) 26 Jones & S. 225, 10 N. Y. Supp. 228; *Nathan v. Whitehill* (1893) 67 Hun, 398, 22 N. Y. Supp. 63; *Green v. Carey* (1894) 81 Hun, 496, 31 N. Y. Supp. 8; *Lewisohn Bros. v. Muller* (1896) 6 App. Div. 459, 39 N. Y. Supp. 570; *Kessler v. Levy & L. Co.* (1896) 7 App. Div. 142, 40 N. Y. Supp. 271; *Schmerber v. Reinach* (1899) 38 App. Div. 622, 58 N. Y. Supp. 84; *Cutting v. Baltimore & O. R. Co.* (1900) 51 App. Div. 628, 64 N. Y. Supp. 258; *Bloodgood v. Slayback* (1900) 54 App. Div. 634, 66 N. Y. Supp. 610; *Clark v. Ennis* (1901) 65 App. Div. 164, 72 N. Y. Supp. 581; *Butler v. Duke* (1902) 39 Misc. 235, 79 N. Y. Supp. 419; *Elmes v. Duke* (1902) 39 Misc. 244, 79 N. Y. Supp. 425; *Snow v. Snow-Church Surety Co.* (1903) 80 App. Div. 40, 80 N. Y. Supp. 512; *Fischer v. American Exchange Nat. Bank* (1908) 128 App. Div. 268, 112 N. Y. Supp. 668; *Re La Grave* (1909) 132 App. Div. 108, 116 N. Y. Supp. 465; *Thompson v. Haigh* (1909) 134 App. Div. 614, 119 N. Y. Supp. 331; *Hillis v. Ferguson* (1915) 158 N. Y. Supp. 613; *De Martini v. McCaldin* (1917) 163 N. Y. Supp. 484; *Ellinger v. Equitable Life Assur. Soc.* (1909) 138 Wis. 390, 120 N. W. 235.

And the conclusion of the affiant that an examination is necessary to enable him to plead is not binding on the court. *Badger Brass Mfg. Co. v. Daly* (1909) 137 Wis. 601, 119 N. W. 328; *Ellinger v. Equitable Life Assur. Soc.* (1909) 138 Wis. 390, 120 N. W. 235.

Nor will an examination be allowed to enable plaintiff to frame his complaint, where it appears that he has failed to exhaust the ordinary means of obtaining the desired information. *Nathan v. Whitehill* (1893) 67 Hun, 398, 22 N. Y. Supp. 63; *Tanenbaum v. Lindheim* (1900) 54 App. Div. 188, 66 N. Y. Supp. 375.

So, to secure the examination of defendants in an action by a stockholder against the directors of a corporation, it must appear that the information desired is peculiarly within the knowledge of defendants whose examination is sought, and is not accessible to plaintiff, L.R.A.1918C.

and that the desired information has been demanded and refused. *Elmes v. Duke* (1902) 39 Misc. 244, 79 N. Y. Supp. 425.

And an examination will be denied where the information could be obtained by a bill of particulars to defendant's counterclaim. *Jiminez v. Ward* (1897) 21 App. Div. 387, 47 N. Y. Supp. 557.

Nor will examination be allowed to enable plaintiff to frame an unnecessary allegation. *Diefendorf v. Fenn* (1908) 125 App. Div. 651, 110 N. Y. Supp. 68.

In *Andersen v. Beston* (1910) 140 App. Div. 301, 125 N. Y. Supp. 81, where plaintiff avoided a dismissal by obtaining leave to move for an amendment, of which leave he did not avail himself, he was not entitled, two years thereafter, to an order for the examination of defendant on the ground that it might develop facts showing an amendment to be unnecessary, or that it might determine the character of the pleading required upon such amendment, as he had had his day in court on the original complaint and could not now have an examination to support it.

An examination will not be allowed to enable plaintiff to plead to a counterclaim which is susceptible of a denial, in one of the forms provided in the Code, which denial, with a bill of particulars, would amply safeguard plaintiff. *McNamara v. Keene* (1902) 37 Misc. 864, 76 N. Y. Supp. 992.

And where it does not appear necessary that a complaint be made more definite and certain, and it was not attacked for uncertainty by defendant, an examination will not be ordered to enable plaintiff to amend. *Williams v. Western U. Teleg. Co.* (1881) 15 Jones & S. (N. Y.) 380.

But in *Drake v. Weinman & Co.* (1895) 12 Misc. 65, 33 N. Y. Supp. 177, it was held that an examination would be allowed where a fiduciary relation, or the relation of principal and agent, exists, and the facts are peculiarly within the knowledge of the person sought to be examined, though the affidavit shows that plaintiff is in possession of ample material to prepare a complaint.

—when party is entitled to an accounting.

An examination of defendant will be denied as being unnecessary to enable plaintiff to frame his complaint, where he is entitled to an accounting. *Pierce v. McLaughlin Real Estate Co.* (1907) 121 App. Div. 501, 106 N. Y. Supp. 28;

Boskowitz v. Sulzbacher (1907) 121 App. Div. 878, 106 N. Y. Supp. 865; *Boskowitz v. Sulzbacher* (1907) 121 App. Div. 886, 106 N. Y. Supp. 872; *Boskowitz v. Ulmann* (1907) 121 App. Div. 887, 106 N. Y. Supp. 870; *Hutchinson v. Simpson* (1902) 73 App. Div. 520, 77 N. Y. Supp. 197; *Re Gardner* (1908) 124 App. Div. 654, 109 N. Y. Supp. 95; *Rosenthal v. Jackson* (1908) 125 App. Div. 895, 110 N. Y. Supp. 786; *Riley v. McGee* (1915) 165 App. Div. 768, 152 N. Y. Supp. 485.

But where the existence of a confidential relationship, which is the basis of the accounting, is admitted in the pleading, an application for an examination will be granted. *Murphy v. Keenan* (1917) 101 Misc. 443, 167 N. Y. Supp. 55.

And in *Raymond v. Brooks* (1879) 59 How. Pr. (N. Y.) 383, it was held that, where plaintiff was suing as administrator for an accounting, he was entitled to an examination of defendant as to matters within his knowledge of which the plaintiff may well be supposed to have been ignorant, such examination being necessary to enable plaintiff to frame his complaint.

—necessity for showing that cause of action exists.

In some cases the broad statement is made that a party is not entitled to an examination to enable him to ascertain whether he has a cause of action. See *Rosenthal v. Jackson* (1908) 125 App. Div. 895, 110 N. Y. Supp. 786; and *Lathrop v. Brown* (1884) 5 N. Y. Civ. Proc. Rep. 101.

Other cases couple such statement with a statement that mere fishing expeditions will not be permitted to enable the party to discover whether possibly a cause of action exists in his favor. *Brownell v. National Bank* (1880) 20 Hun (N. Y.) 517; *De Leon v. De Lima* (1884) 66 How. Pr. (N. Y.) 287; *Nathan v. Whitehill* (1893) 67 Hun, 398, 51 N. Y. S. R. 457, 22 N. Y. Supp. 63; *Dobyns v. Commercial Trust Co.* (1900) 31 Misc. 829, 64 N. Y. Supp. 554.

Such general statements must be taken with some qualification inasmuch as in many of the cases in which examination is allowed it may be said that the matter sought is essential to determining whether or not the party has a cause of action. While the precise line demarking the cases in which an examination will be allowed from those in which it will be denied because of their being merely fishing expeditions is rather illusive, it may be said in general that, to entitle

a party to an examination, he should be able to convince the court that *prima facie* he has a cause of action, or that there is a reasonable basis for a belief that a cause of action exists in his favor.

Thus, in *Walsh v. Press Co.* (1900) 48 App. Div. 333, 62 N. Y. Supp. 833, an application for the discovery of books and papers, the court said: "The party applying must show to the satisfaction of the court the materiality and necessity of the discovery or inspection sought, the particular information which he requires, and in the case of books and papers that there are entries therein as to the matter of which he seeks a discovery. . . . A discovery will not be ordered to enable a party to find out whether he has a cause of action, or whether there may not be some entries or papers that will be pertinent. . . . A *prima facie* case, or at least facts pointing directly to that result, must be shown before a discovery in aid thereof will be ordered."

And in *Frowein v. Lindheim* (1890) 35 N. Y. S. R. 604, 12 N. Y. Supp. 526, a petition for an inspection of plaintiff's books of account to enable defendant to set up a counterclaim, it was objected that the petition did not state facts sufficient to warrant the court in arriving at a conclusion that a cause of action was set up; the court said: "Whether the defendant has or has not a cause of action which he can maintain cannot be investigated on affidavits. . . . It is only necessary, therefore, in that respect, for it to appear that there is sufficient in the petition, assuming the facts stated to be true, to warrant the conviction that a cause of action has been stated. . . . The cases affecting the question of discovery are numerous, each one of them having some distinct feature differing from others, indeed from all of them, but none of them interfering with the general rule that, when a *prima facie* case is made out and a reason apparently just assigned and sufficiently established is presented in seeking to enforce the right to an inspection, it is granted without reference to the merits of the controversy; and particularly when the application is made for the purpose of enabling the party to frame his pleading."

In *Churchman v. Merritt* (1889) 21 N. Y. S. R. 743, 4 N. Y. Supp. 245, a suit to reform a written instrument, there was held not to be sufficient compliance with the Code to entitle the party to an examination of defendant.

where the affidavit merely stated that the purpose of the action was to reform a mortgage, without indicating the grounds upon which relief was sought with reasonable certainty; the court saying: "From the statements which have been mentioned, and others contained in the moving papers, it would seem that the plaintiff's real purpose in the examination of the defendant is not to obtain knowledge of facts which will facilitate the statement of a known and ascertained cause of action, but is rather to find out whether any cause of action whatever really exists in her behalf against these defendants or any of them."

In *O'Reilly v. Western U. Teleg. Co.* (1877) 12 Hun (N. Y.) 124, an examination of defendant was permitted to enable plaintiff to frame her complaint, where it appeared from the affidavit that plaintiff had a probable cause of action, and that the examination was necessary to enable her to obtain the requisite information to frame her complaint.

And in *Glen Cove Mfg. Co. v. Sutro* (1889) 53 Hun, 636, 24 N. Y. S. R. 1005, 6 N. Y. Supp. 384, where it appeared that plaintiff in a slander action was merely dealing with a rumor which, by discovery, he hoped to convert into a reality by evidence to be obtained from defendant, and thus create a cause of action, the application for an examination was held to present all the elements of a fishing expedition, and was denied.

And in *Boyle v. Municipal Gas Co.* (1916) 96 Misc. 578, 161 N. Y. Supp. 991, an order for the examination of two defendants, so that plaintiff could ascertain who owned the electric wires upon which an injury was received, and the exact cause of the accident, in order to enable him to allege the negligence which caused the injury, was held to be erroneous, as the application was merely an effort to learn whether the plaintiff had a cause of action, though an order for the examination of defendants as to the ownership of the equipment, if presented alone, would be valid.

In *Kaufman v. Herzfeld* (1885) 1 How. Pr. N. S. (N. Y.) 444, the court says that the want of knowledge on the part of plaintiff as to whether he has a cause of action is no justification for an order for an examination, but he should know before commencing his action the true cause thereof, and its substance should be set out.

In *Re Anthony* (1899) 42 App. Div. 66, 58 N. Y. Supp. 907, an application for the

examination of the secretary of a corporation before an action was commenced to enable plaintiff to ascertain whether the corporation had succeeded to the business and assets of another corporation with which plaintiff had a contract, the court denied the application on the ground that the applicant had not stated a single fact tending to show that it had a cause of action against the succeeding corporation, but had stated only its suspicions or facts indicating a mere possibility of a cause of action, and that the examination was not to enable it to frame its complaint, but to ascertain whether it had any cause of complaint, the court saying that the proposed defendant must be definitely, and not tentatively, named in the affidavit, and it must also be made to appear that the applicant had a cause of action against such specific person.

In *Sage v. Culver* (1892) 65 Hun, 621, 47 N. Y. S. R. 890, 19 N. Y. Supp. 936, an examination was denied where no facts were alleged which showed that a cause of action existed.

So, where plaintiff sued on an agreement for compensation out of profits of defendant, and made no allegation of breach of the agreement or of any profits being earned during the time in question, the examination was denied. *Muller v. Levy* (1889) 52 Hun, 123, 5 N. Y. Supp. 118.

In *Marrone v. New York Jockey Club* (1891) 60 Hun, 577, 37 N. Y. S. R. 936, 14 N. Y. Supp. 199, and *New York State Bkg. Co. v. Van Antwerp* (1898) 23 Misc. 38, 51 N. Y. Supp. 653, application for examination was denied, it appearing that plaintiff had no cause of action.

And in *Tanenbaum v. Whiffen* (1899) 43 App. Div. 194, 59 N. Y. Supp. 317, an examination was denied where the facts sought, together with those known, would make grounds for no more than nominal damages.

An applicant for an order for the examination of an adverse party, to enable the applicant to frame his pleadings, should at least show something to justify the bringing of the suit and the framing of a general averment, and where he apparently studiously avoids a frank disclosure of what induced him to proceed, the order is properly vacated. *Simmons v. Vanderbilt* (1880) 59 How. Pr. (N. Y.) 411.

But while plaintiff must show the existence of an actionable grievance, the affidavit need not state the complete cause of action, but it will be sufficient if

it shows that plaintiff is entitled to some relief and that he lacks the substantive matter required to be stated in the complaint. *Butler v. Duke* (1902) 39 Misc. 235, 79 N. Y. Supp. 419.

It is sufficient to state the nature of the action and the substance of the judgment demanded. *Frothingham v. Broadway & S. Ave. R. Co.* (1886) 9 N. Y. Civ. Proc. Rep. 304.

Allegations of an affidavit based upon information and belief only, are insufficient as a basis for an order for an examination of the adverse party. *Jiminez v. Ward* (1897) 21 App. Div. 387, 47 N. Y. Supp. 557; *Tanenbaum v. Lindheim* (1900) 54 App. Div. 188, 66 N. Y. Supp. 375. At least this is the case where all the allegations are on information and belief without showing grounds for the belief. *Boskowitz v. Sulzbacher* (1907) 121 App. Div. 878, 106 N. Y. Supp. 865; *Boskowitz v. Ullmann* (1907) 121 App. Div. 887, 106 N. Y. Supp. 870.

As indicated in the cases last cited, an affidavit based upon information and belief, which discloses the ground for the belief, may be sufficient as a basis for an examination. Thus, in *Leach v. Haight* (1898) 34 App. Div. 522, 54 N. Y. Supp. 550, where plaintiff sued brokers for misappropriation of funds deposited as margin on stock deals, and disclosed the grounds on which she based the belief that there was a misappropriation, the examination was allowed.

And in *Rosenbaum v. Rice* (1901) 36 Misc. 410, 53 N. Y. Supp. 714, where, in an action by a minority stockholder of a corporation to prevent officers and directors from fraudulently diverting assets into another corporation of which they were also officers and directors, the essential allegations were on information and belief, and plaintiff sought to disclose sources and grounds for such belief, and in the only particulars in which he failed to do so, his failure was because the knowledge was necessarily and peculiarly with those he sought to examine, the application was granted.

And in *Re Sayre* (1902) 70 App. Div. 329, 75 N. Y. Supp. 286, an examination was allowed where substantially all the allegations were made on knowledge and those made on belief were connected with them.

In Wisconsin an examination of a defendant will not be denied merely because it does not affirmatively appear that plaintiff has a cause of action, but it will be denied where it affirmatively appears from plaintiff's affidavit that he

has no cause of action. *Madison v. Madison Gas & E. Co.* (1906) 129 Wis. 260, 8 L.R.A.(N.S.) 529, 116 Am. St. Rep. 944, 108 N. W. 65, 9 Ann. Cas. 819; *State v. Milwaukee Electric R. & Light Co.* (1908) 136 Wis. 179, 18 L.R.A.(N.S.) 672, 116 N. W. 900.

Thus, where the affidavit showed that the matter sought to be discovered consisted of the statements of defendant made before the grand jury or district attorney in his official capacity, and was needed for the purpose of filing a complaint for slander, the examination was denied, because statements made under such circumstances would be privileged. *Schultz v. Strauss* (1906) 127 Wis. 325, 101 N. W. 1066, 7 Ann. Cas. 528.

But while, if it affirmatively appears from the affidavit that the plaintiff has no cause of action, an examination will be refused, it is not necessary that plaintiff know that he has a cause of action, and the examination may be had even though the affidavit shows affirmatively that plaintiff does not know that he has a cause of action, as the object of the examination is to enable him to secure information to frame his complaint, and if the necessary facts were at hand they could be as well set out in the complaint as in an affidavit. *Gratz v. Parker* (1908) 137 Wis. 104, 118 N. W. 637; *Heckendorn v. Romadka* (1909) 138 Wis. 416, 120 N. W. 237.

So, in *Richards v. Allis* (1892) 82 Wis. 513, 52 N. W. 593, it was held that, if a party does not know whether another owes him or has collected any money belonging to him, and therefore cannot make an affidavit to that effect in a complaint, he may bring his action by service of summons, and then proceed to examine the defendant under the statute and obtain such discovery as will enable him to plead.

And in *Schmidt v. Menasha Wooden Ware Co.* (1896) 92 Wis. 529, 66 N. W. 695, where plaintiff in an action for the wrongful death of her decedent while in the employ of defendant was presumptively without knowledge as to the circumstances of his death, it was held that she should be allowed the means of ascertaining whether any breach of duty or negligence on the part of defendant was the cause of his death, and if so in what it consisted, and all the material facts having relation thereto, and that it was no answer to the application that upon facts already known a complaint could be framed which might or might not present the real merits of her case.

It is sufficient to show that plaintiff

may be entitled to recover against defendant, and that discovery is necessary to enable him to plead. *Sullivan v. Ashland Light, P. & Street R. Co.* (1913) 152 Wis. 574, 140 N. W. 316.

And where a party shows by his affidavit that he has a cause of action against defendant which may be pursued by either of several different remedies, a statement in the affidavit that "the general nature and object of the action is for the rescission" of the contract and recovery of money paid upon it does not amount to an election of remedies so as to limit him in framing his complaint, and he may adopt another remedy if the examination makes it advisable. *Heckendorn v. Romadka* (Wis.) supra.

— parties.

In New York the courts of different departments have adopted different rules as to whether an examination may be had to enable plaintiff to determine whom to make parties defendant, the courts generally taking the position that an examination may be had for this purpose. *Glenney v. Stedwell* (1876) 64 N. Y. 120; *Baas v. Pain* (1893) 71 Hun, 612, 54 N. Y. S. R. 80, 24 N. Y. Supp. 583; *Re Nolan* (1893) 70 Hun, 536, 24 N. Y. Supp. 238; *Re Weil* (1898) 25 App. Div. 173, 49 N. Y. Supp. 133; *Re Darling* (1900) 31 Misc. 543, 64 N. Y. Supp. 793; *Muldoon v. New York C. & H. R. R. Co.* (1904) 98 App. Div. 169, 91 N. Y. Supp. 65; *Watt v. Feltman* (1906) 111 App. Div. 314, 97 N. Y. Supp. 737; *Re Besch* (1910) 137 App. Div. 888, 121 N. Y. Supp. 769, affirmed without opinion in (1910) 139 App. Div. 922, 124 N. Y. Supp. 1110.

And in *Blossom v. Ludington* (1873) 32 Wis. 212, it was held that under the statute the plaintiff was entitled to examine one of defendants to enable him to amend the complaint and to judge of the necessity for adding new parties defendant.

The courts of the first department of the appellate division, however, take the opposite view and refuse to permit examination for the purpose of enabling plaintiff to determine whom to sue. *Bloom v. Patten* (1890) 26 Jones & S. 225, 10 N. Y. Supp. 228; *Britton v. MacDonald* (1893) 3 Misc. 514, 23 N. Y. Supp. 350; *Ziegler v. Lamb* (1896) 5 App. Div. 47, 40 N. Y. Supp. 65; *Re White* (1899) 44 App. Div. 119, 60 N. Y. Supp. 702; *Re Anthony* (1899) 42 App. Div. 66, 58 N. Y. Supp. 907; *Bloodgood v. Slayback* (1900) 54 App. Div. 634, L.R.A.1918C.

66 N. Y. Supp. 610; *Re Schoeller* (1902) 74 App. Div. 347, 77 N. Y. Supp. 614; *Re Singer* (1903) 40 Misc. 561, 82 N. Y. Supp. 870; *Ellett v. Young* (1904) 95 App. Div. 417, 88 N. Y. Supp. 661; *Re Moto Bloc Import Co.* (1910) 140 App. Div. 532, 125 N. Y. Supp. 427. This rule was followed in Albany county in *Boyle v. Municipal Gas Co.* (1916) 96 Misc. 578, 161 N. Y. Supp. 991.

In *Byrnes v. Ladew* (1896) 15 Misc. 413, 25 N. Y. Civ. Proc. Rep. 194, 36 N. Y. Supp. 1048, an application for an examination of defendant made apparently after the complaint was filed, for the purpose of ascertaining whether defendant or somebody else was responsible for the injury to the plaintiff, the court refused the examination on the ground that it amounted to an effort on the part of plaintiff to ascertain whether he had a cause of action against defendant.

So, in *Tenoza v. Pelham Hod-Elevating Co.* (1900) 50 App. Div. 581, 64 N. Y. Supp. 99, an action for the wrongful death of plaintiff's intestate while working on a building, an examination of one of defendants to ascertain its relation to the building to enable plaintiff to discontinue as to such defendant, or to amend the complaint so as to recover against it, was denied as being merely for the purpose of ascertaining whether a cause of action existed.

And in *Opdyke v. Marble* (1864) 44 Barb. (N. Y.) 64, under an early statute providing that the court is required to prescribe rules regulating proceedings for discovery, the courts to be governed by the principles and practice of the court of chancery in compelling discovery, an examination was refused, where the facts which were the basis of the action were known to plaintiff and he sought only to discover whom he might sue.

— amount.

Ordinarily, an examination will not be allowed to enable plaintiff to frame his complaint, where the only thing lacking is the amount to claim, as plaintiff may state an arbitrary amount and recover within it. *Taylor v. American Ribbon Co.* (1899) 38 App. Div. 144, 56 N. Y. Supp. 667; *Brunner v. Cohen* (1900) 47 App. Div. 470, 62 N. Y. Supp. 241; *Stanton v. Friedman* (1900) 47 App. Div. 621, 62 N. Y. Supp. 291; *Butler v. Duke* (1902) 39 Misc. 235, 79 N. Y. Supp. 419; *Elmes v. Duke* (1902) 39 Misc. 244, 79 N. Y. Supp. 425; *Boeck v. Smith* (1903) 85 App. Div. 575,

83 N. Y. Supp. 428; *Martin v. New Trinidad Lake Asphalt Co.* (1903) 87 App. Div. 472, 84 N. Y. Supp. 711; *Brick v. Shaff* (1908) 128 App. Div. 264, 112 N. Y. Supp. 642; *Cohn v. Hubert* (1910) 140 App. Div. 507, 125 N. Y. Supp. 834; *Re Rich* (1916) 175 App. Div. 969, 161 N. Y. Supp. 1103.

And in *Hutchinson v. Simpson* (1902) 73 App. Div. 520, 77 N. Y. Supp. 197, it was held that an examination would not be allowed where the information sought related to the amount of damages only, which could be ascertained on an accounting.

But in *Hofman v. Seixas* (1895) 12 Misc. 3, 33 N. Y. Supp. 23, an examination was allowed to enable plaintiff to learn the amount of purchases made by defendant upon which he was entitled to sue for commissions.

Answer.

An examination of plaintiff will be allowed when it is necessary to enable the defendant to frame his answer. *Hadley v. Fowler* (1872) 12 Abb. Pr. N. S. (N. Y.) 244; *Howe v. Learey* (1891) 62 Hun, 240, 16 N. Y. Supp. 736; *Lewisohn Bros. v. Muller* (1896) 6 App. Div. 459, 39 N. Y. Supp. 570.

Thus, an examination to enable defendant to prepare his answer will be allowed where it appears that it is not a fishing expedition, but that his defense is founded upon the meritorious presentation of facts which, if true, form a material allegation in the defense. *New York, L. E. & W. R. Co. v. McHenry* (1887) 9 N. Y. S. R. 148.

So, where the defense to an action upon a promissory note is that the plaintiff is not a bona fide holder, defendant will be entitled to an examination of plaintiff for the purpose of ascertaining the facts as to how he became possessed of the note. *Haynes v. Creighton* (1890) 58 Hun, 140, 11 N. Y. Supp. 490; *Vernon v. Creighton* (1890) 11 N. Y. Supp. 492; *Koppel v. Hatch* (1906) 50 Misc. 626, 98 N. Y. Supp. 619.

In an action by an assignee of a life insurance policy, an examination was granted to enable defendant to obtain information as to plaintiff's insurable interest, and as to whether there was an intention that the policy should be issued to insured and assigned to plaintiff. *Farmer v. National Life Asso.* (1893) 73 Hun, 522, 26 N. Y. Supp. 126.

In *Farmers' Nat. Bank v. Underwood* (1896) 6 App. Div. 373, 39 N. Y. Supp. 596, a suit on the note of a partnership of which defendant had been a member,

but from which he had retired, the new firm taking assets and liabilities of the old, where it appeared that the note had been renewed and payment extended without defendant's knowledge, and that his codefendant was hostile, an examination of an officer of plaintiff was held necessary to enable defendant to frame his answer.

And in *Fox v. Miller* (1897) 20 App. Div. 333, 46 N. Y. Supp. 837, an examination of plaintiff was granted where the defense was usury, and defendant was ignorant of the details of the transaction and of the facts necessary to be pleaded, and had no other means of ascertaining them.

But an examination of plaintiff for the purpose of enabling defendant to frame his answer will be denied where it appears that the answer may be framed without such examination. *Winston v. English* (1873) 14 Abb. Pr. N. S. (N. Y.) 119, affirming (1873) 44 How. Pr. 398; *Earle v. Beman* (1896) 1 App. Div. 136, 36 N. Y. Supp. 833; *Leach v. Haight* (1896) 4 App. Div. 613, 38 N. Y. Supp. 886; *Waitzfelder v. A. Moses Sons & Co.* (1907) 120 App. Div. 144, 104 N. Y. Supp. 796; *Loughlin v. Wocker* (1911) 146 App. Div. 434, 131 N. Y. Supp. 176; *Slattery v. Slattery* (1911) 145 N. Y. Supp. 966; *Sothman v. Ward* (1915) 168 App. Div. 826, 154 N. Y. Supp. 449; *Badger Brass Mfg. Co. v. Daly* (1909) 137 Wis. 601, 119 N. W. 328.

Thus, where the matters concerning which information is sought by defendant would be put in issue by a general denial, discovery will be denied. *Lathrop v. Brown* (1884) 5 N. Y. Civ. Proc. Rep. 101; *Golin v. Mooers* (1889) 54 Hun, 639, 28 N. Y. S. R. 213, 8 N. Y. Supp. 12; *Immig v. Hoesloop* (1891) 38 N. Y. S. R. 490, 14 N. Y. Supp. 638; *Rycroft v. Green* (1891) 62 Hun, 622, 43 N. Y. S. R. 228, 17 N. Y. Supp. 9. So an examination will be denied where defendant avers that the alleged agreement asked to be discovered was never made by him. *Watts v. Knevals* (1888) 24 Jones & S. 592, 3 N. Y. Supp. 548.

And in *Strakosch v. Press Pub. Co.* (1889) 53 Hun, 503, 6 N. Y. Supp. 246, an examination was denied to a defendant in a libel suit to enable it to frame an answer by way of justification, where it appeared that a correspondent in its employ was able to supply it with all the information necessary.

Discovery will not be allowed to enable defendant in a libel action to plead

justification, as in such a plea no facts and circumstances may be employed except such as were known and believed to be true at the time of publication, and as to these there could be no necessity for an examination of plaintiff. *Strakosch v. Press Pub. Co.* (N. Y.) supra; *Miller v. Brooks* (1892) 65 Hun, 624, 48 N. Y. S. R. 146, 20 N. Y. Supp. 359; *Gray v. Barker* (1893) 69 Hun, 84, 23 N. Y. Supp. 387, affirmed without opinion in (1893) 140 N. Y. 636, 35 N. E. 892.

And an examination will not be allowed on behalf of defendant where it is manifest that it is sought not to enable him to frame his answer, but to give him an opportunity to ascertain whether he has any defense. *Govin v. DeMiranda* (1892) 63 Hun, 629, 44 N. Y. S. R. 386, 17 N. Y. Supp. 816; *Lathrop v. Brown* (1884) 5 N. Y. Civ. Proc. Rep. 101.

Nor can it be said to be necessary for defendant to have an examination of plaintiff to prepare his answer until the complaint has been served, so that he knows what the alleged cause of action is and what he will have to answer. *Winston v. English* (1873) 44 How. Pr. (N. Y.) 498.

Bill of particulars.

An examination will be allowed where it is necessary to enable a party to frame a bill of particulars which has been demanded by the adverse party. *Prince v. Currie* (1846) 2 How. Pr. (N. Y.) 119; *Ball v. Evening Post Pub. Co.* (1888) 48 Hun (N. Y.) 149, reversing (1886) 12 N. Y. Civ. Proc. Rep. 4.

Thus, in *Campbell v. Brock's Commercial Agency* (1899) 38 App. Div. 137, 56 N. Y. Supp. 540, an action against a commercial agency for libel, plaintiff was held to be entitled to an examination of defendant's officers to ascertain to what customers defendant sent the libelous report, though plaintiff knew of some of them, as he was entitled to show delivery to any of them and to put their names in a bill of particulars demanded by defendant.

In *Chittenden v. San Domingo Improv. Co.* (1909) 132 App. Div. 169, 116 N. Y. Supp. 829, a suit by an executrix against a corporation for services of her testator, in which a bill of particulars was demanded, which, because of testator's death plaintiff was unable to furnish, she was entitled to an examination of

the former officers of defendant to get facts for such bill.

In *Pring v. Thorp* (1915) 168 App. Div. 887, 152 N. Y. Supp. 469, an action for slander, it was held that defendant was entitled to a bill of particulars as to the times and places of utterance of the slander, and if plaintiff was unable to furnish the bill of particulars asked, he was entitled to examine defendant and prove by him the time and places he used the words complained of.

And in *Larrere v. Morris Dry Dock & Repair Co.* (1916) 97 Misc. 388, 161 N. Y. Supp. 877, an examination was allowed to enable plaintiff to furnish a bill of particulars demanded by defendant as to negligent acts, the action being for damage to his automobile by a collision in which it was struck at night from the rear by defendant's vehicle, and the particulars of defendant's negligence being peculiarly within his own knowledge.

But in *Tanenbaum v. Lindheim* (1900) 54 App. Div. 188, 66 N. Y. Supp. 375, where it appeared that the facts stated in the affidavit, together with other facts within the knowledge of plaintiff, were sufficient to enable him to frame his bill of particulars, the examination was denied.

Incriminating or degrading answers.

The fact that an examination may require incriminatory or degrading testimony by the party examined is not a sufficient ground for refusing to grant the order, as an objection to a particular question on that ground may be made if the situation arises, and the court may then pass upon it and properly protect the party. *Campbell v. Brock's Commercial Agency* (1899) 38 App. Div. 137, 56 N. Y. Supp. 540; *Ryan v. Reagan* (1900) 46 App. Div. 590, 62 N. Y. Supp. 39; *Re Sayre Co.* (1902) 70 App. Div. 329, 75 N. Y. Supp. 286.

But where, in an action for libel, the defense was justification, defendant was not entitled to an examination of plaintiff, it being apparent that any question asked would be such that plaintiff would be privileged from answering because the answer would call for incriminating or degrading matter. *Miller v. Brooks* (1892) 65 Hun, 624, 48 N. Y. S. R. 146, 20 N. Y. Supp. 359; *Kinney v. Roberts* (1882) 26 Hun (N. Y.) 166, appeal dismissed in (1882) 89 N. Y. 601.

R. L. S.

NORTH DAKOTA SUPREME COURT.

MARY MONTAIN, Appt.,

v.

CITY OF FARGO, Resp't.

(38 N. D. 432, 166 N. W. 416.)

Municipal corporation — garbage removal — independent contract.

1. One who performs services for a city in the matter of removing garbage under a written contract which contains a provision that he is to furnish teams and men or such number thereof as in the judgment of said city may be necessary, and that the entire work is to be done in a good and substantial manner, with the approval and acceptance of the city, and under the supervision and direction of the commissioner of health, and that his teams and equipment shall be acceptable and satisfactory to said health commissioner, is held to be an independent contractor, and not a servant of said city. *For other cases, see Master and Servant, III. b, 3, in Dig. 1-52 N. S.*

Same — supervision — governmental duty.

2. A city health commissioner while supervising the removal of garbage, and a city commissioner while authorizing and providing for its removal, are held to have been acting in a public and governmental, and not in a private or corporate, capacity. *For other cases, see Municipal Corporations, II. g, 2, in Dig. 1-52 N. S.*

(Grace, J., dissents.)

(November 1, 1917.)

APPEAL by plaintiff from an order of the District Court for Cass County sustaining a demurrer to the complaint in an action brought to recover damages for the death of plaintiff's intestate alleged to have been caused by defendant's negligence. Affirmed.

Statement by Bruce, Ch. J.:

This is an appeal from an order sustaining a demurrer to a complaint which, in substance, alleged that the plaintiff's intestate, one Mons Montain, met his death by being struck by a runaway team drawing a

Headnotes by BRUCE, Ch. J.

Note. — The question as to who is an independent contractor is treated in the notes to *Richmond v. Sitterding*, 65 L.R.A. 446, and *Knically v. West Virginia Midland R. Co.* 17 L.R.A.(N.S.) 370, and other notes referred to in the later note. For later cases on this question see the L.R.A. Digests under the title "Master and Servant," subtitle, "Who are independent contractors."

The question whether the removal of garbage is a public and governmental function within the rule exempting a municipality L.R.A.1918C.

garbage sled, which sled was being used for the purposes and under the conditions intended and detailed in a certain written agreement between the city of Fargo and one Nels Johnson for the collection and disposal of kitchen garbage and which contained the following provisions:

"Whereas, said Nels Johnson did agree in writing to furnish four teams and eight men or any number of said teams, at the rate of \$147 per month for each team, and two men to haul said garbage, during the said year 1915, at the said prices set out in said bid, now, therefore, the said party of the second part covenants and agrees to furnish to said city, at his own cost and expense, not to exceed four teams, fully equipped, and eight men or any number of said teams and men at the rate of \$147 per month for each team and two men to perform the work necessary under the provisions of the ordinance commonly known as the garbage ordinance, to the full satisfaction and acceptance of the said city, and to perform not less than ten hours' work each day. The entire work to be done in a good and substantial manner, with the approval and acceptance of the city, and under the supervision and direction of the commissioner of health or such agent or agents as he may appoint for that purpose. Such teams and equipment and men to be acceptable and satisfactory to said health commissioner. The said city reserving the right to cancel this agreement upon ten days' notice if the said second party fails to comply in all respects with the terms and conditions of this contract, and the provisions of the ordinance heretofore referred to."

Messrs. Pfeffer & Pfeffer, for appellant:

Nels Johnson was a servant of the city of Fargo, and not an independent contractor.

Hedge v. Williams, 131 Cal. 455, 82 Am. St. Rep. 368, 63 Pac. 721, 64 Pac. 106; *Messmer v. Bell & C. Co.* 133 Ky. 19, 117 S. W. 346, 19 Ann. Cas. 1; *Madisonville, H. & E. R. Co. v. Owen*, 147 Ky. 1, 143 S. W. 421; *Mason & H. Co. v. Highland*, — Ky. —, 116 S. W. 320; *Majors v. Connor*, 162 Cal. 131, 121 Pac. 371; *Perkins v. Blauth*, 163 Cal. 782, 127 Pac. 50; *Quayle v. Sewerage &*

from liability is considered in the notes to *Haley v. Boston*, 5 L.R.A.(N.S.) 1005, *Pass Christian v. Fernandez*, 39 L.R.A.(N.S.) 649, and *Consolidated Apartment House Co. v. Baltimore*, L.R.A.—, —, on the general subject of the liability of a municipality for injury inflicted upon an employee engaged in removing refuse.

For throwing garbage on surface as nuisance, see note to *Louisville v. Hehemann*, L.R.A.1915C, 747.

Water Bd. 131 La. 26, 58 So. 1021; Cunningham v. Penn Bridge Co. 131 La. 196, 59 So. 119; McCarthy v. Clark, 115 Md. 454, 81 Atl. 12; Beal v. Champion Fiber Co. 154 N. C. 147, 69 S. E. 834; Harmon v. Ferguson Contracting Co. 59 N. C. 22, 74 S. E. 632; Charles T. Derr Constr. Co. v. Gelruth, 29 Okla. 538, 120 Pac. 253; Moore v. Koplin, — Tex. Civ. App. —, 135 S. W. 1033; James v. Pearson, 64 Wash. 263, 116 Pac. 852; Nelson v. American Cement Plaster Co. 84 Kan. 797, 115 Pac. 578; Johnson v. Carolina, C. & O. R. Co. 157 N. C. 382, 72 S. E. 1057; Swanson v. Schmidt-Gulack Elevator Co. 22 N. D. 563, 135 N. W. 207; Solberg v. Schlosser, 20 N. D. 307, 30 L.R.A.(N.S.) 1111, 127 N. W. 91; Singer Mfg. Co. v. Rahn, 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175; Sacchi v. Bay-side Lumber Co. 13 Cal. App. 72, 108 Pac. 885; Atlantic Transport Co. v. Coneys, 28 U. C. A. 388, 51 U. S. App. 570, 82 Fed. 177; Campbell v. Lunsford, 83 Ala. 512, 3 So. 522, 13 Am. Neg. Cas. 164; Giacomini v. Pacific Lumber Co. 5 Cal. App. 218, 89 Pac. 1059; Linnehan v. Rollins, 137 Mass. 123, 50 Am. Rep. 287; Potter v. Seymour, 4 Bosw. 140; Hawke v. Brown, 28 App. Div. 37, 50 N. Y. Supp. 1032; Goldman v. Mason, 18 N. Y. S. R. 376, 2 N. Y. Supp. 337; Baldwin v. Abraham, 171 N. Y. 677, 64 N. E. 1118; Pickens v. Diecker, 21 Ohio St. 212, 8 Am. Rep. 55; Smith v. Humphreyville, 47 Tex. Civ. App. 140, 104 S. W. 495; Kniceley v. West Virginia Midland R. Co. 64 W. Va. 278, 17 L.R.A.(N.S.) 370, 61 S. E. 811; Lacour v. New York, 3 Duer, 406; New Orleans, M. & C. R. Co. v. Hanning, 15 Wall. 649, 21 L. ed. 220; Jensen v. Barbour, 15 Mont. 582, 39 Pac. 906; St. Paul v. Seitz, 3 Minn. 297, Gil. 205, 74 Am. Dec. 753; De Palma v. Weinman, 15 N. M. 68, 24 L.R.A.(N.S.) 423, 103 Pac. 782; Penny v. Wimbledon Urban Dist. Council [1898] 2 Q. B. 212, 67 L. J. Q. B. N. S. 754, 62 J. P. 582, 78 L. T. N. S. 748, 14 Times L. R. 477; Cincinnati v. Stone, 5 Ohio St. 38; Scott v. Springfield, 81 Mo. App. 312.

The removal of garbage by a city in the state of North Dakota is a private or corporate function, and is not a public or governmental duty.

Denver v. Porter, 61 C. C. A. 168, 126 Fed. 288; Barney Dumping-Boat Co. v. New York, 40 Fed. 50; Denver v. Davis, 37 Colo. 370, 6 L.R.A.(N.S.) 1013, 119 Am. St. Rep. 293, 86 Pac. 1027, 11 Ann. Cas. 1013, 20 Am. Neg. Rep. 498; Quill v. New York, 36 App. Div. 476, 55 N. Y. Supp. 889, 5 Am. Neg. Rep. 423; Missano v. New York, 160 N. Y. 123, 54 N. E. 744, 6 Am. Neg. Rep. 652.

The mere running away of a team of horses implies negligence on the part of the L.R.A.1918C.

owner, and the doctrine *res ipsa loquitur* applies.

Cleveland, C. C. & St. L. R. Co. v. Hadley, 170 Ind. 204, 16 L.R.A.(N.S.) 527, 82 N. E. 1025, 84 N. E. 13, 16 Ann. Cas. 1; Peck v. St. Louis Transit Co. 178 Mo. 617, 77 S. W. 736; Orcutt v. Century Bldg. Co. 201 Mo. 424, 8 L.R.A.(N.S.) 929, 99 S. W. 1062; 34 Cyc. 1665; Kahn v. Burette, 42 Misc. 541, 85 N. Y. Supp. 1047; Griffen v. Manice, 166 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925, 9 Am. Neg. Rep. 336; Maus v. Broderick, 51 La. Ann. 1153, 25 So. 977; Gorsuch v. Swan, 109 Tenn. 36, 97 Am. St. Rep. 836, 69 S. W. 1113, 12 Am. Neg. Rep. 632; Strup v. Edens, 22 Wis. 432; Gannon v. Wilson, 1 Sadler (Pa.) 422, 18 W. N. C. 7, 5 Atl. 381; Kokoll v. Brohm & B. Lumber Co. 77 N. J. L. 169, 71 Atl. 120; Francois v. Hanff, 77 N. J. L. 364, 71 Atl. 1128; Unger v. Forty-second Street & G Street Ferry R. Co. 51 N. Y. 497; Hummell v. Wester, Brightly (Pa.) 133; Tolhausen v. Davies, 59 L. T. N. S. 436, 57 L. J. Q. B. N. S. 392, 52 J. P. 804; Thane v. Douglass, 102 Tenn. 307, 52 S. W. 155.

Messrs. Spalding & Shure, for respondent:

Johnson was an independent contractor and not a servant of the city.

26 Cyc. 1546; Taute v. J. I. Case Threshing Mach. Co. 25 N. D. 102, 141 N. W. 134, 4 N. C. C. A. 365; Harrison v. Collins, 86 Pa. 153, 27 Am. Rep. 699; Smith v. Simmons, 103 Pa. 32, 49 Am. Rep. 113; Richmond v. Sitterding, 65 L.R.A. 445, and note, 101 Va. 354, 99 Am. St. Rep. 879, 43 S. E. 562, 13 Am. Neg. Rep. 616; Bailey v. Troy & B. R. Co. 57 Vt. 252, 52 Am. Rep. 129; Butler v. Townsend, 126 N. Y. 105, 26 N. E. 1017; Humpton v. Unterkircher, 97 Iowa, 509, 66 N. W. 776, 14 Am. Neg. Cas. 595; Carlson v. Stocking, 91 Wis. 432, 65 N. W. 58; Blake v. Farris, 5 N. Y. 48, 55 Am. Dec. 304; Smith v. Simmons, 103 Pa. 32, 49 Am. Rep. 113; Foster v. Wadsworth-Howland Co. 168 Ill. 514, 48 N. E. 163; Barg v. Bousfield, 65 Minn. 355, 68 N. W. 45, 16 Am. Neg. Cas. 188; Pickens v. Diecker, 21 Ohio St. 212, 8 Am. Rep. 55; Scammon v. Chicago, 25 Ill. 424, 79 Am. Dec. 334; Hexamer v. Webb, 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755; Hughbanks v. Boston Invest. Co. 92 Iowa, 267, 60 N. W. 640; Hardy v. Shedden Co. 37 L.R.A. 33, 24 C. C. A. 261, 47 U. S. App. 362, 78 Fed. 610, 2 Am. Neg. Rep. 669; Uppington v. New York, 165 N. Y. 222, 53 L.R.A. 550, 59 N. E. 91, 9 Am. Neg. Rep. 115; Vosbeck v. Kellogg, 78 Minn. 176, 80 N. W. 957, 7 Am. Neg. Rep. 86; Callan v. Bull, 113 Cal. 593, 45 Pac. 1017; Harding v. Boston, 163 Mass. 14, 39 N. E. 411; Foster v. Chicago, 197 Ill. 264, 64 N. E. 322; Kelly v. New York, 11 N. Y. 432;

Frassi v. McDonald, 122 Cal. 400, 55 Pac. 139; Indian Iron Co. v. Cray, 19 Ind. App. 565, 48 N. E. 803; Saunders v. Toronto, 26 Ont. App. Rep. 265, reversing 29 Ont. Rep. 273; Erie v. Caulkins, 85 Pa. 247, 27 Am. Rep. 642; Hardaker v. Idle Dist. Council [1896] 1 Q. B. 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196; Blumb v. Kansas, 84 Mo. 112, 54 Am. Rep. 87; Cuff v. Newark & N. Y. R. Co. 35 N. J. L. 17, 10 Am. Rep. 205; Kuehn v. Milwaukee, 92 Wis. 263, 65 N. W. 1030; Ash v. Century Lumber Co. 153 Iowa, 523, 38 L.R.A.(N.S.) 973, 133 N. W. 888. 2 N. C. C. A. 494; Stewart v. California Improv. Co. 131 Cal. 125, 52 L.R.A. 205, 63 Pac. 177, 724; Huff v. Ford, 126 Mass. 24, 30 Am. Rep. 645; Morris v. Trudo, 83 Vt. 44, 25 L.R.A.(N.S.) 33, 74 Atl. 387; Howard v. Ludwig, 171 N. Y. 507, 64 N. E. 172; Prest-O-Lite Co. v. Skeel, 182 Ind. 593, 106 N. E. 365, Ann. Cas. 1917A, 474, 7 N. C. C. A. 724.

In disposing of the garbage hauled to the dumping ground the employee of the city was exercising governmental functions.

Savannah v. Jordan, Ann. Cas. 1916C, 240, and note, 142 Ga. 409, L.R.A.1915C, 741, 83 S. E. 109; Love v. Atlanta, 95 Ga. 129, 21 Am. St. Rep. 64, 22 S. E. 29; Watson v. Atlanta, 136 Ga. 370, 71 S. E. 664; Haley v. Boston, 191 Mass. 291, 5 L.R.A.(N.S.) 1005, 77 N. E. 888; State v. Howard, 72 Me. 459; Re Vandine, 6 Pick. 187, 17 Am. Dec. 351; Kuehn v. Milwaukee, 92 Wis. 263, 65 N. W. 1030; Condict v. Jersey City, 46 N. J. L. 157; Nicholson v. Detroit, 129 Mich. 246, 56 L.R.A. 601, 88 N. W. 695; Gillespie v. Lincoln, 35 Neb. 34, 16 L.R.A. 352, 52 N. W. 811; Ogg v. Lansing, 35 Iowa, 495, 14 Am. Rep. 499; Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302; Russell v. Tacoma, 8 Wash. 156, 40 Am. St. Rep. 895, 35 Pac. 605; Kies v. Erie, 135 Pa. 144, 20 Am. St. Rep. 867, 19 Atl. 942; Evans v. Sheboygan, 153 Wis. 287, 45 L.R.A.(N.S.) 98, 141 N. W. 265; Kempster v. Milwaukee, 103 Wis. 421, 79 N. W. 411; Bruhnke v. La Crosse, 155 Wis. 485, 50 L.R.A.(N.S.) 1147, 144 N. W. 1100; Gregg v. Hatcher, 94 Ark. 54, 27 L.R.A.(N.S.) 138, 125 S. W. 1007, 21 Ann. Cas. 982; Bolster v. Lawrence, 225 Mass. 387, L.R.A.1917B, 1285, 114 N. E. 722; Tindley v. Salem, 137 Mass. 171, 50 Am. Rep. 289.

The main fact of the running away of the team, unsupported by any evidence of other facts through which negligence might be inferred, does not raise presumption of negligence on the part of the owner or driver.

Rowe v. Such, 143 Cal. 573, 66 Pac. 862, 67 Pac. 760; Creamer v. McIlvain, 89 Md. 343, 45 L.R.A. 531, 73 Am. St. Rep. 186, 43 Atl. 935, 6 Am. Neg. Rep. 547; McGahie v. L.R.A.1918C.

McClennen, 86 App. Div. 263, 83 N. Y. Supp. 692; Gray v. Tompkins, 40 N. Y. S. R. 546, 15 N. Y. Supp. 953; Coller v. Knox, 222 Pa. 362, 23 L.R.A.(N.S.) 171, 71 Atl. 539; O'Brien v. Miller, 60 Conn. 214, 25 Am. St. Rep. 320, 22 Atl. 544; Button v. Frink, 51 Conn. 342, 50 Am. Rep. 24; Patton-Worsham Drug Co. v. Drennon, 104 Tex. 620, 133 S. W. 871, 3 N. C. C. A. 859.

Bruce, Ch. J., delivered the opinion of the court:

Two propositions are advanced in support of the demurrer to the complaint: (1) That the garbage collector was an independent contractor and, being such, the city was not liable for his negligence. (2) That even if the said collector was not an independent contractor, the city was acting in a public and governmental capacity and was therefore not liable.

And, first, was the said Nels Johnson an independent contractor? Is or is not the appellant correct in his contention that "one who performs services for a city in the matter of removing garbage under a written contract which contains a provision that he is 'to furnish said teams and men or such number thereof as in the judgment of said city may be necessary for the delivery and disposal of said garbage,' and which contains this further provision; viz., 'The entire work to be done in a good and substantial manner with the approval and acceptance of the city, and under the supervision and direction of the commissioner of health or such agent or agents as he may appoint for that purpose. Such teams and equipment to be acceptable and satisfactory to said health commissioner,'—is a servant of the city and not an independent contractor."

We are satisfied that the said Nels Johnson was an independent contractor and not a servant of the defendant city. According to § 6134 of the Compiled Laws of 1913: "A servant is one who is employed to render personal service to his employer, otherwise than in pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master."

This definition of a servant, where it is sought to distinguish between a servant and an independent contractor, affords by inference a definition of an independent contractor, an independent contractor being considered a person employed to execute work, who is not within the definition of a servant. "The question whether the employee is an independent contractor," says the supreme court of Kentucky, "may be determined by answering the following questions: Who has the general control of the work? Who has the right to direct what shall be done,

who shall do it, and how it shall be done?" See *Mason & H. Co. v. Highland*, — Ky. —, 116 S. W. 322; *Madisonville, H. & E. R. Co. v. Owen*, 147 Ky. 1, 5, 143 S. W. 423. "An 'independent contractor' is one who is independent of his employer in the doing of his work, and may work when and how he prefers. A 'servant' is one who is employed by another and is subject to the control of his employer." *Messmer v. Bell & C. Co.* 133 Ky. 19, 25, 117 S. W. 348, 19 Ann. Cas. 1. "The right to control the conduct of another implies the power to discharge him from the service or employment for disobedience: and, accordingly, the power to discharge has been regarded as the test by which to determine whether the relation of master and servant exists." 1 *Thomp. Neg.* §§ 579, 629. "The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done as well as the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done.'" *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175; *Huffcut, Agency*, 9; *Taute v. J. I. Case Threshing Mach. Co.* 25 N. D. 102, 141 N. W. 134, 4 N. C. C. A. 365, notes in 65 L.R.A. 445, and 17 L.R.A. (N.S.) 371. "The test is very much this, viz., whether the person charged is under the control and bound to obey the orders of another." *Reg. v. Negus*, L. R. 2 C. C. 37, 42 L. J. Mag. Cas. N. S. 62, 28 L. T. N. S. 646, 21 Week. Rep. 687, 12 Cox, C. C. 492, 1 Am. Crim. Rep. 150.

There can be no doubt that under these general tests the relation of master and servant did not exist, and the mere fact that the contract stated that the collector was "to furnish said teams and men or such number thereof as in the judgment of the health commissioner of said city may be necessary for the delivery and disposal of garbage," and that the contract further provides that the work shall be done "under the provision of the ordinance known as the garbage ordinance, to the full satisfaction and acceptance of the city . . . and under the supervision and direction of the commissioner of health . . . and that such teams and equipment and men shall be acceptable and satisfactory to said health commissioner"—does not change the situation. It is true that the men and the teams and the work were required to be satisfactory to the health commissioner but this was for the purpose of the public health, and the health commissioner would have had a voice in the matter even though the contract and ordinance under which it was let had not so provided. The health commissioner had no power to discharge men; he had no power

to say how hard they should work; he had no power to say what their wages should be, nor did the contract itself dictate in these matters. His supervision was for the protection of the public health and for that purpose alone.

The city health officer or commissioner, indeed, exercises a public and not a private or municipal function. His office is provided for by the statutes, and in cities which, like Fargo, are under the commission form of government, he has all the power and authority which are conferred by the general statutes upon city boards of health. He represents the state and the city in their governmental, and not in their corporate or property owning, capacities. He would have possessed the powers given to him by the contract even if the instrument had been silent upon the subject. See §§ 3820 and 411 to 433, *Compiled Laws of 1913*.

We are also satisfied that in disposing of its garbage and in letting the contract in question the city of Fargo was acting in its governmental, and not in its private or corporate, capacity. There is only one purpose for our municipalities entering so largely into this work as they do to-day, and that is the preservation of the public health, and in every enlightened land this aid and protection always has been and always will be considered a primary duty which devolves upon the state in its sovereign power. *Savannah v. Jordan*, Ann. Cas. 1916C, 240, and note 243, 142 Ga. 409, L.R.A.1915C, 741, 83 S. E. 109; *Love v. Atlanta*, 95 Ga. 129, 51 Am. St. Rep. 64, 22 S. E. 29; *Watson v. Atlanta*, 136 Ga. 370, 71 S. E. 664; *Haley v. Boston*, 191 Mass. 291, 5 L.R.A. (N.S.) 1005, 77 N. E. 888; *Re Vandine*, 6 Pick. 187, 17 Am. Dec. 351; *Kuehn v. Milwaukee*, 92 Wis. 263, 65 N. W. 1030. See also *Nicholson v. Detroit*, 129 Mich. 246, 56 L.R.A. 601, 88 N. W. 695; *Ogg v. Lansing*, 35 Iowa, 495, 14 Am. Rep. 499; *Bolster v. Lawrence*, 225 Mass. 387, L.R.A. 1917B, 1285, 114 N. E. 722.

If, indeed, as has generally been held, the protection of the lives and property of its citizens from loss by fire is a governmental function, and to such an extent that the city is not liable for the negligence of its firemen either in putting out or failing to put out a fire, or for accidents while the engines and carts are going to and from fires, or of its servants in removing ashes and inflammable material, how much less should the city be held liable for acts done in seeking to protect its citizens from dangers which are much more insidious and extensive. See 28 Cyc. 1303; *State v. Howard*, 72 Me. 459; *Re Vandine*, 6 Pick. 187, 17 Am. Dec. 351; *Condict v. Jersey City*, 46 N. J. L. 157; *Gillespie v. Lincoln*, 35 Neb. 34, 16 L.R.A. 352,

52 N. W. 811; *Kies v. Eric*, 135 Pa. 144, 20 Am. St. Rep. 867, 19 Atl. 942.

We realize that there are some decisions of the courts of New York and Colorado which seem to hold to a contrary view than that expressed by us, but we are not persuaded thereby.

The judgment of the district court is affirmed.

Grace, J., dissenting:

The appeal in this case is from an order sustaining a demurrer to the complaint. The complaint alleges in substance that Mons Mountain came to his death by being struck by a garbage sled which, at the time, was drawn by a runaway team. Mons Mountain, at the time he met his death, was in the employ of the city of Fargo, he being superintendent of the garbage or dumping ground.

It appears that the city of Fargo had entered into an agreement with one Nels Johnson, in writing, whereby the said Johnson was to furnish four teams and eight men, or any number of teams at the rate of \$147 a month for each team and two men, to haul said garbage from the city of Fargo during the year 1915. According to the agreement the work was to be done under the provisions of the ordinance of such city known as the garbage ordinance, and was to be performed to the full satisfaction and acceptance of said city, and to be done in a good and substantial manner, and in such manner as to meet the approval and acceptance of the city, and all such work to be done under the supervision and direction of the commissioner of health, or such agent or agents as he might appoint for that purpose. Such agreement also provided that the teams, equipment, and men should be acceptable and satisfactory to the health commissioner. The city reserved the right to cancel the agreement upon ten days' notice, upon Johnson's failure to comply in all respects with the terms and conditions of the contract and the provisions of the ordinance.

The city of Fargo, the defendant, seeks to escape liability for its negligence upon two theories: First, that Johnson was an independent contractor and, being such, the city was not liable for his negligence. Second, that even if Johnson was not an independent contractor, and even if he was the agent of the city, so that the city would be liable for his negligent acts in and about performing the work for the city for which he was employed, the city would not be liable, notwithstanding such facts, for the reason that in disposing of such garbage it claimed to be acting in a governmental capacity, and

claimed for this reason to be immune from liability.

Upon investigation and analysis of the first legal proposition it is perfectly clear that Johnson was not an independent contractor, but merely a servant of the city of Fargo. The relation between the city of Fargo and Johnson was one of master and servant, and not the relation of independent contractor. Under the very terms of the written agreement which Johnson had with the city of Fargo, when such contract is examined in the light of the law of master and servant, there remains no doubt of the fact that Johnson was a servant of the city. The term "independent contractor" is one difficult of definition. It is difficult to distinguish the line of demarcation by which independent contractors may be separated from servants. It appears to us there may be such a person as an independent contractor. A contract may be made in which one of the contracting parties would and could be an independent contractor. The great difficulty appears to be in the efforts so often resorted to by endeavoring to make a relationship which is purely one of master and servant fit into the relationship of that of independent contractor for the purpose of avoiding liability which, in case of injury or damage, would naturally flow from the relationship of master and servant, thus seeking security under the protecting principle upon which the relationship of independent contractor is founded. Where the law of master and servant is for our consideration there is no difficulty in applying the law. The relationship of the master to his servant is well understood, and his duties and liabilities are easily discernible. If the master is negligent in the execution of his duties, and his servant is injured through the negligence of such master in the performance of his plain duties towards the servant, liability of the master towards the servant naturally follows. It is different with the law of independent contractor. It seems that the relationship or principle of independent contractor and the law relating thereto are somewhat shadowy and uncertain. The relationship is not a common one, except that it has been made more common in recent years in an effort to shift or avoid liability. When an independent contract is made, it is made by a person who contracts to have a certain job of work done, who is called a contractor, with a person who contracts to do the job of work, who is called an independent contractor. Why the invention of this comparatively new term "independent contractor?" The answer is, It is a means by which, in a proper case, a person for whom the work is to be done, or, in other words, the contractor, may avoid

his liability for any damages to any person who may be engaged in assisting in the performance of the work to be done. As before indicated, there are conditions and certain quantities of work to be done to which the principle is applicable. To the application of the principle in a proper case there can be no objection. The abuse of the principle is in seeking to apply it in cases and to conditions to which it is not germane.

Without following any particular set definition which we have found and examined in different authorities concerning the relationship of independent contractor, but taking such definitions into consideration, and applying also other language which we think may throw some light upon the relationship of independent contractor, we find the meaning of "independent contractor" to be as follows: An independent contractor may be defined as one exercising an independent employment in which he is skilled, who, having entered into a contract to do certain work, does his work according to his own way and method, independent of any methods submitted by another, and who is not subject to the control of any person in the execution of his work, being responsible only for the result of his work, doing all the work at his own risk and cost in the first instance, and furnishing all means and power by which such work is done, and who contracts to do a complete quantity or job of work at a stated price for the whole of such work, which is to be considered as the price for which the whole work is to be done, and not as wages, and who cannot be discharged at the will of the person with whom the contract is made, or because the person with whom the independent contractor has made the agreement is dissatisfied with the work. Measured by this definition, and by the terms of the written contract between Johnson and the city of Fargo, Johnson was merely a servant of such city. It will be noticed from a consideration of such written contract that all work performed by Johnson for the city was to be supervised and controlled by the city. The city reserved certain power in such contract whereby it could supervise and direct the means and the method of doing such work, for the contract specifically says, "such teams, equipment and men to be acceptable and satisfactory to the health commissioner." And again, the entire work was to be done in a good and substantial manner, and this means they could determine the quality of the work and the manner in which it was performed. The contract further says that the work shall be done in such a manner as to meet the "approval and acceptance of the city." We can easily understand that if the city did not approve of L.R.A.1918C.

any work done, the so-called independent contractor would have to do the work in a different manner so as to merit the approval of the city, and thus we see the city really directed the doing of the work. The city could enforce all these demands, directions, and requirements in what way? The answer is in the contract itself—by discharging the independent contractor upon ten days' notice. Or, in other words, by canceling the contract upon ten days' notice, which is, in fact, a discharge of the independent contractor. These are not the rights and remedies of one who contracts with an independent contractor. Where one contracts with an independent contractor for a complete job of work at a certain price, he permits such independent contractor to do such work according to his own manner and method of performing such work, but if the work is not satisfactory to the person with whom the independent contractor has made the agreement, such person cannot discharge the independent contractor; but, if the work which the independent contractor agreed to do is not done in such a manner as to bring about the result which was contracted to be brought about, the one who made the contract with the independent contractor has a complete remedy in refusing to pay the price stated in the contract by reason of the failure of the independent contractor to bring about the result he contracted to bring about. In the case of *Schular v. Hudson River R. Co.* 38 Barb. 653, the court said: "Perhaps the most usual test by which to determine whether the person doing the injury was a servant or an independent contractor is to consider whether he was working by the job or at stated wages—so much per day, week, or month. . . . A person who works for wages, whose labor is directed and controlled by the employer, either in person or by an intermediate agent, is a servant, and the master must answer for the wrong done by him in the course of his employment. A person who, for a stated sum, engages to perform a stated piece of labor in which he is skilled, the proprietor of the work leaving him to his own methods, is an independent contractor. The proprietor does not stand in the relation of superior to him, and is not answerable for the wrongs done by him or his servants in the prosecution of the work, unless special circumstances exist making him so. . . . The fact that the employee was hired not for a definite time, but to perform a particular job, does not, however, of itself negative the relation of master and servant, for under such a contract the employer may well retain full control over him; and it must be constantly borne in mind that the power to control on the part of the employer

is the essential fact establishing the relation."

See *Jensen v. Barbour*, 15 Mont. 582, 39 Pac. 906; *Bibb v. Norfolk & W. R. Co.* 87 Va. 711, 14 S. E. 163; *Fink v. Missouri Furnace Co.* 82 Mo. 276, 52 Am. Rep. 376; *Norfolk & W. R. Co. v. Stevens*, 97 Va. 631, 46 L.R.A. 367, 34 S. E. 525; *Waters v. Pioneer Fuel Co.* 52 Minn. 474, 38 Am. St. Rep. 564, 55 N. W. 52; *Indiana Iron Co. v. Cray*, 19 Ind. App. 565, 48 N. E. 803; *Majors v. Connor*, 162 Cal. 131, 121 Pac. 371; *Perkins v. Blauth*, 163 Cal. 782, 127 Pac. 50; *Nelson v. American Cement Plaster Co.* 84 Kan. 797, 115 Pac. 578; *Johnson v. Carolina, C. & O. R. Co.* 157 N. C. 382, 72 S. E. 1057; *Swanson v. Schmidt-Gulack Elevator Co.* 22 N. D. 563, 135 N. W. 207; *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175; *Sacchi v. Bayside Lumber Co.* 13 Cal. App. 72, 108 Pac. 885; *Atlantice Transport Co. v. Coneys*, 28 C. C. A. 388, 51 U. S. App. 570, 82 Fed. 177; *Campbell v. Lunsford*, 83 Ala. 512, 3 So. 522; *Giacomini v. Pacific Lumber Co.* 5 Cal. App. 218, 89 Pac. 1059; *Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287; *De Palma v. Weinman*, 15 N. M. 68, 24 L.R.A. (N.S.) 420, 103 Pac. 782; *Potter v. Seymour*, 4 Bosw. 140; *Goldman v. Mason*, 18 N. Y. S. R. 370, 2 N. Y. Supp. 337; *Hawke v. Brown*, 28 App. Div. 37, 50 N. Y. Supp. 1032; *Baldwin v. Abraham*, 171 N. Y. 677, 64 N. E. 1118; *Pickens v. Diecker*, 21 Ohio St. 212, 8 Am. Rep. 55; *Smith v. Humphreyville*, 47 Tex. Civ. App. 140, 104 S. W. 495; *Kniceley v. West Virginia Midland Co.* 64 W. Va. 278, 17 L.R.A. (N.S.) 370, 61 S. E. 811; *Lacour v. New York*, 3 Duer, 406; *New Orleans, M. & C. Co. v. Hanning*, 15 Wall. 649, 21 L. ed. 220.

In the light of the language of the written contract, the authorities cited by the majority opinion sustained our contention that in this case Johnson was a servant of the city of Fargo and not an independent contractor. The majority opinion contains the following, citing 1 Thompson on Negligence, §§ 579, 629: "The right to control the conduct of another implies the power to discharge him from the service or employment for disobedience, and accordingly, the power to discharge has been regarded as the test by which to determine whether the relation of master and servant exists."

Keeping in mind that the written contract in question between Johnson and the city of Fargo provides that the city may, upon ten days' notice, cancel the contract, if the second party fails to comply with the terms and provisions thereof and the provisions of the ordinance, it simply means that the city can, for such causes, discharge Johnson upon ten days' notice by cancellation of L.R.A.1918C.

his contract; his relation to the city of Fargo is that of servant and not an independent contractor, when measured even by the authorities relied upon by the majority. The majority opinion further says: "The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done as well as the result to be accomplished."

Then follows in the majority opinion numerous authorities in support of this point. We accept the law contained in the quotation, and believe, when the language of the contract is carefully examined, our interpretation thereof is sustained by all of the law cited by the majority in relation to defining master and servant. The city in this case had the right to decide the manner in which the work was done, for it had to be done in a manner which suited them and which met with their approval. And the city also not only had the authority by the contract to decide the manner in which the work was to be done by refusing to accept it until it was done to suit them, but thus they determined the result to be accomplished. When we add to this the right to discharge Johnson by giving him ten days' notice and canceling his contract, all the elements by which we determine when one is a master are supplied.

The second question to be considered in this case is, Was the city acting in a governmental capacity in causing the removal and disposition of the garbage? We are clear, so far as the facts of this case are ascertained from the pleadings, that the city, when removing and disposing of such garbage, was not acting in a governmental capacity, but was merely engaged in the performance of a ministerial duty. It is a well-settled rule that where it is the duty of a municipal corporation, by statute or implication of law, to keep its streets in a reasonably safe condition for public travel, such duty cannot be delegated to another so as to relieve the municipal corporation from liability for injury sustained by another on account of the neglect or failure of the municipal corporation to observe its duty. This principle is established in a long line of authorities. *Sterling v. Schiffmacher*, 47 Ill. App. 141; *Springfield v. Scheevers*, 21 Ill. App. 203; *Anna v. Boren*, 77 Ill. App. 408; *Louisville City R. Co. v. Louisville*, 8 Bush, 415; *Birmingham v. McCary*, 84 Ala. 469, 4 So. 630; *Jacksonville v. Drew*, 19 Fla. 106, 45 Am. Rep. 5; *Betz v. Limingi*, 46 La. Ann. 1113, 49 Am. St. Rep. 344, 15 So. 385; *Baker v. Grand Rapids*, 111 Mich. 447, 69 N. W. 740, 1 Am. Neg. Rep. 90; *Blake v. St. Louis*, 40 Mo. 569; *Welsh v. St. Louis*, 73 Mo. 71; *Russell v. Columbia*,

74 Mo. 480, 41 Am. Rep. 325; *Davis v. Omaha*, 47 Neb. 336, 66 N. W. 859; *Beatrice v. Reid*, 41 Neb. 214, 59 N. W. 770; *Omaha v. Jensen*, 35 Neb. 68, 37 Am. St. Rep. 432, 52 N. W. 833; *Scanlon v. Watertown*, 14 App. Div. 1, 43 N. Y. Supp. 618; *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *McAllister v. Albany*, 18 Or. 426, 23 Pac. 845; *Williams v. Tripp*, 11 R. I. 447; *Watson v. Tripp*, 11 R. I. 98, 23 Am. Rep. 420; *Nashville v. Brown*, 9 Heisk. 1, 24 Am. Rep. 289; *Patterson v. Austin*, — Tex. Civ. App. —, 29 S. W. 1139; *Morris v. Salt Lake City*, 35 Utah, 474, 101 Pac. 373; *McCull v. Manchester*, 85 Va. 579, 2 L.R.A. 691, 8 S. E. 379; *Drake v. Seattle*, 30 Wash. 81, 94 Am. St. Rep. 844, 70 Pac. 231.

The duty of a city to keep its streets in a reasonably safe condition for public travel, and to keep them in repair and in proper condition, is mostly for the benefit of the city itself, and such duty extends to and includes keeping the streets cleaned and the removal of garbage. The removal of garbage, ashes, rags and papers, and other debris which may accumulate upon the streets is to be classified and comes under the duties incumbent upon the city to keep its streets and alleys in a safe and good condition of repair, and the removal of the garbage and debris from the streets is part of the duty of repair and care of streets and alleys. *Missano v. New York*, 160 N. Y. 123, 54 N. E. 744, 6 Am. Neg. Rep. 652.

Dillon on Municipal Corporations says that such corporations are possessed of dual power—the one governmental, legislative, or public, and the other proprietary or private. That the care of the streets is within the latter classification. See Dill. Mun. Corp. 4th ed. § 980 and § 66. This principle is also sustained in *Conrad v. Ithaca*, 16 N. Y. 158.

The liability of municipalities as to the care of streets has been recognized in a great number of cases, among which are found *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440, and *Barney Dumping-Boat v. New York (C. C.)* 40 Fed. 50. In the latter case Judge Wallace, referring to the commissioner of street cleaning, says: "His duties, unlike those of the officers of the departments of health, charities, fire and police, although performed incidentally in the interest of public health, are more immediately performed in the interest of the corporation itself, which is charged with the obligation of maintaining its streets in fit and suitable condition for the use of those who resort to them."

So, in the case at bar, Johnson, even though under the contract he was to work under the direction of the health commissioner, nevertheless the work he did do was L.R.A.1918C.

performed more particularly in the interest of the city itself than that of the public. While the removal of the garbage and debris of all kinds from the streets may incidentally be for the public health, the greater benefit is to the city, and the removal thereof is a part of the duty of such city of keeping the streets in repair, and the duty is purely ministerial and principally for the benefit of the city. There is a distinction between the liability of municipal corporations who have accepted a city charter, and such corporations as counties and townships. The former—the municipal corporations—are always under greater liability.

In the case of *Circleville v. Sohn*, 59 Ohio St. 285, 69 Am. St. Rep. 777, 52 N. E. 788, 5 Am. Neg. Rep. 704, we find the following in the syllabus: "The duty, enjoined by statute on municipal corporations, to keep their public ways open and in repair, and free from nuisance, is ministerial and mandatory, and requires the removal from such ways of all dangerous defects and obstructions, from whatever cause arising."

We are of the opinion that it is the ministerial duty also of the city to keep its streets clean, to remove garbage therefrom, and to keep them in a sanitary condition, and the removal of such garbage is a ministerial duty principally in the interest of the city itself, and the duty to so keep its streets clean is a ministerial and not a governmental function. The test which has generally been applied is: "If the duty in respect to which there has been a wrongful act or omission is one resting primarily upon municipalities, and is not a mere governmental duty, the performance of which has been delegated to the municipality by competent legislative authority, then the liability of the municipality is substantially that of a private corporation. We are convinced that the duty of cleaning the streets, removing garbage and debris therefrom in the city, is a duty connected with the care and repair of such streets, and is a duty resting primarily upon the municipality for its own convenience and benefit principally, although the general public may be benefited to some extent incidentally."

Up to this point we have been discussing more particularly the duties of a municipality with reference to the care and repair of its streets and alleys, and also its liability when negligent in performing such duties. The removal of garbage and other accumulations, such as ashes, etc., from its streets and alleys, so as to keep them in a safe and clean condition, is without question a municipal ministerial duty. The garbage contract in question relates more particularly to the removal of garbage from private property, such as the removal of scraps of

meat, and other refuse which is thrown away after meals, also papers, rags, and other waste material which a private owner discards. It is plain to us that the disposition of all of such material and refuse in a proper manner is a duty which primarily belongs to the owner of the private property. It is the duty of every owner of private property, whether the same is in use or not, to keep it in a clean, sanitary condition, and in such a condition that no nuisance will be maintained thereon which would be offensive to other persons within said municipality, or which would endanger the comfort and health of the community, or result in the interference to others with the full enjoyment and pleasure of their rights and property. The municipality, therefore, could require every owner of private property to so maintain his premises and keep it in a clean and sanitary condition.

The defendant in this case is under the commission form of government, and has the right, power, and authority by the law under which it is organized, which fully sets forth all its powers and duties, to inspect all private premises and cause to be removed therefrom and abated any condition thereon maintained in the nature of a nuisance, and which would tend to interfere with the comfort of the inhabitants of the municipality, or which could in any manner be offensive to the inhabitants of such municipality. This would include the power, therefore, to cause to be removed all refuse of every kind and description found upon said private premises by the inspector or overseer who may be appointed by the municipality. Such refuse accumulated upon private property is usually, but not always, placed in receptacles with proper covers thereto, which receptacles are placed in a convenient manner near the alley or other convenient place for removal.

We have seen that it is the primary duty of the private owner of such property to remove all such refuse. If the municipality, therefore, undertakes to perform this private duty for the convenience, comfort, protection, and health of the municipality, and considers it can do it in a better way and manner than the private property owner could do, in the removal of such refuse the municipality is acting and doing such work mostly in behalf and for the convenience and comfort of the inhabitants of such city, and the public at large can receive only very slight individual benefit, and hence the performance of such service by the city is not a governmental but a ministerial duty. If the city in the performance of such ministerial duty does the same in a negligent manner so as to cause an injury to some

person, it cannot escape liability any more than the private owner of the property from which such refuse is removed could escape liability if he had removed the refuse and, in the course of such removal, acted so negligently as to cause injury to another.

Our court, in the case of *Ludlow v. Fargo*, 3 N. D. 485, 57 N. W. 506, said in the syllabus of such case: "Cities which have been organized or reorganized under the general law of this state . . . are charged with full power and responsibility in the matter of the streets, sidewalks, and crossings within their limits, and the duty of establishing streets and removing obstructions therefrom is a duty expressly enjoined by the statute. In performing such duties, cities are liable in a civil action to persons who, in the exercise of due care, receive injuries caused by negligent acts done either by the city officials or others who are acting for the city and under its authority. The cities so organized and governed are impliedly liable for damages caused by their wrongful or negligent acts, and no express statute making them liable is necessary. Accordingly held, that the following instruction, given by the trial court to the jury, is not error: 'The general rule is that, in the case of a highway, a municipal corporation is answerable in damages for the lack of ordinary and reasonable care, and is held to the same rule of negligence which is expected of private persons in the conduct of their business, involving a like danger to others.'"

We see, therefore, in this case the city assumed the duty of removing the garbage for private persons, and even in the absence of a statute they are impliedly liable for their negligent acts just the same as the private owner would have been.

Another case of importance is *Grand Forks v. Paulaness*, 19 N. D. 293, 40 L.R.A. (N.S.) 1158, 123 N. W. 878. This was a case in which the city was held liable in the United States district court for the district of North Dakota. The waterworks of said city were owned by it. They became out of repair. They were repaired by a licensed plumber in the employ of the city of Grand Forks, under the direction of the superintendent of the waterworks. In making such repairs an obstruction was placed upon the street by reason of which Paulaness was injured, and the city was held liable for its negligence, and plaintiff recovered a verdict against it. While in this case the recovery was had by reason of the negligence of the city in keeping its streets in an unsafe condition, nevertheless, if water had escaped through the negligence of the city in the management of its waterworks, and overflowed and destroyed property, there is no doubt in our mind but

what it can be held liable for such damage.

Where a municipality undertakes to maintain a waterworks system and to supply its citizens with water for pay, it is liable to individuals whose property is injured by the negligence of its employees placed in charge of the plant, failing to maintain it in a safe condition. *Piper v. Madison*, 140 Wis. 311, 25 L.R.A. (N.S.) 239, 133 Am. St. Rep. 1078, 122 N. W. 730. And where the municipal corporation uses its waterworks system for protection against fire, it is not relieved from liability to private property through the negligence of its employees in maintaining the plant in an unsafe condition, except for such acts as are performed in the actual work incident to extinguishing fires. In such case the city is performing an act for a private party for which it gets pay. However, in the case in question, in the removal of the garbage the act of the city is also the performance of an act for a private party, and the city reimburses itself through taxation. The fact that the city receives no pay, and that such work is paid for through the channel of taxation, does not detract from the fact that the disposal of the garbage is a duty incumbent upon the private owner of the premises, and, where the municipality undertakes to perform such a duty in place of the owner of the premises, such work is to be considered rather in the nature of a private act on the part of the city than a public duty, for the reason that the benefits derived from such performance accrue to the owners of private property and the inhabitants of the city. Where the city is organized and receives its charter from the state, either under a special grant or under the general law, it is, as a general rule, its ministerial duty under either of such grants to keep its streets in a safe condition, and to keep the city as a whole in a clean, healthful, and sanitary condition. We believe this is a part of the ministerial duty which the city obligates itself to perform, and if in the execution of such duty it acts negligently, like other corporations, it is liable for such negligence.

In *Denver v. Davis*, 37 Colo. 370, 6 L.R.A. (N.S.) 1013, 119 Am. St. Rep. 293, 86 Pac. 1027, 11 Ann. Cas. 187, 20 Am. Neg. Rep. 498, we find the following in the syllabus: "The maintenance of a dump for the reception of waste materials gathered from the streets, alleys, and private premises of a city is for its private and corporate convenience, so that the city will be liable in case it is so negligently managed that fire spreads from it and destroys property in the vicinity, although the supervision of the dump is in the health department."

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The principle in question in the *Denver Case* is, we believe, applicable to the case at bar. After a sewage system has once been completed and placed in operation, the maintenance, conduct, and operation thereof becomes merely a ministerial duty. If the municipality should be negligent in the performance of such ministerial duty, and should leave the manholes uncovered so that a person should fall therein and be injured, or if the pipe should break and private property should be injured thereby—should become flooded and not usable—it can hardly be said that the city would not be liable for its negligence on the ground that it was engaged in the execution of a governmental power. Garbage in a large sense is sewage. It is the coarser material that cannot be safely put through the sewer for fear of blocking the sewer pipe, and hence must be hauled rather than put through the sewer pipe. But, properly speaking, it may be classed under the head of sewage, and if the municipality is negligent in its removal, having undertaken to remove the same, and having undertaken to perform the duties which really belong to the owner of the premises from which such garbage is taken, it must use ordinary care in performing its duty, and if it fails to do so, and is negligent, it is liable for damages by reason of such negligence.

The question whether or not Johnson was an independent contractor was not exclusively a question of law for the court. It was a mixed question of law and fact, and thus became exclusively a question for the jury. The plaintiff was not a party to the written contract, and contended that the contract did not express the true relations of the parties thereto. 14 R. C. L. 78. For this reason Johnson's relations to the city of Fargo—whether he was an independent contractor or a mere servant—was a mixed question of law and fact. The demurrer should have been overruled, and such question submitted to the jury.

We are clear that the city of Fargo in removing or causing to be removed the garbage from private premises or from its streets and alleys, and keeping them in a clean condition, was acting in a purely ministerial and not a governmental capacity, for the benefit of itself and its citizens principally, and that in employing Johnson to remove such garbage the relation was established between the city and Johnson of master and servant. We are clear the demurrer should be overruled.

Petition for rehearing denied November 27, 1917.

FLORIDA SUPREME COURT.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, Plff. in Err.,

v.

CITIZENS & PEOPLE'S NATIONAL
BANK OF PENSACOLA.

(— Fla. —, 77 So. 104.)

Pleading — conversion — demand.

1. In an action of trover against a drawee bank for the conversion of a check upon the bank, where the declaration shows a conversion of the check by the bank, it is unnecessary to allege a demand by the plaintiff for a return of the check and a refusal by the defendant.

For other cases, see Pleading, II. 1, in Dig. 1-52 N. S.

Trover — bank check — unauthorized payment.

2. The payee of a bank check may maintain an action of trover against a bank upon whom the check is drawn, which pays the check to an unauthorized person, who falsely represents himself to be the agent of the payee to indorse the check and receive the proceeds of the same.

For other cases, see Banks, IV. a, 3, b, (3), in Dig. 1-52 N. S.

(November 28, 1917.)

ERROR to the Circuit Court for Escambia County to review an order sustaining a demurrer to the declaration in a suit for the conversion of a check. Reversed.

The facts are stated in the opinion.

Messrs. Blount & Blount & Carter, for plaintiff in error:

The payment of the check by the defendant upon the forged or unauthorized indorsement of plaintiff's agent was a wrongful act, and created a cause of action in favor of the plaintiff against the defendant either in case or trover for its value.

Chism v. First Nat. Bank, 96 Tenn. 641, 32 L.R.A. 778, 54 Am. St. Rep. 863, 36 S. W. 387; Tolman v. American Nat. Bank, 22 R. I. 402, 52 L.R.A. 877, 84 Am. St. Rep. 850, 48 Atl. 480; Survey v. Wells, F. & Co. 5 Cal. 125; Cranch v. White, 6 Car. & P. 767, 1 Bing. N. C. 414, 131 Eng. Reprint. 1176, 4 L. J. C. P. N. S. 113; Wood v. McKean, 64 Iowa, 16, 19 N. W. 817; Kleinwort v. Comptoir Nationale d'Escompte [1894] 2 Q. B. 157, 63 L. J. Q. B. N. S. 674, 10 Reports, 259; Siegel v. Kovinsky, 93 Misc. 541, 157 N. Y. Supp. 340; 39 Cyc. 2070;

Headnotes by ELLIS, J.

Note. — As to liability of drawee to true owner of a check which it has paid on a forged indorsement, see annotation following this case, post, 613, and references therein to annotation on collateral points. L.R.A.1918C.

21 Enc. Pl. & Pr. 902; Thomas v. First Nat. Bank, 101 Miss. 500, 39 L.R.A.(N.S.) 353, 58 So. 478; Brown v. People's Nat. Bank, 170 Mich. 416, 40 L.R.A.(N.S.) 657, 136 N. W. 506; Bobbett v. Pinkett, L. R. 1 Exch. Div. 368, 45 L. J. Exch. N. S. 555, 34 L. T. N. S. 851, 24 Week. Rep. 711; First Nat. Bank v. Pease, 168 Ill. 40, 48 N. E. 160; Robinson v. Bank of Winslow, 42 Ind. App. 350, 85 N. E. 793; Hamilton Nat. Bank v. Nye, 37 Ind. App. 464, 117 Am. St. Rep. 333, 77 N. E. 295; Chicago, B. & Q. R. Co. v. Burns, 61 Neb. 793, 86 N. W. 483; Henderson Trust Co. v. Ragan, 21 Ky. L. Rep. 601, 52 S. W. 848; Vanbibber & Co. v. Bank of Louisiana, 14 La. Ann. 486, 74 Am. Dec. 442.

A bank is presumed to know whether an indorsement is or is not genuine.

Jackson v. National Bank, 92 Tenn. 154, 18 L.R.A. 663, 36 Am. St. Rep. 81, 20 S. W. 802; Russell v. First Nat. Bank, 2 Ala. App. 342, 56 So. 868.

And is bound at its peril to determine that the indorsement is authorized.

McFadden v. Follrath, 114 Minn. 85, 37 L.R.A.(N.S.) 201, 130 N. W. 542; Ermentrout v. Girard F. & M. Ins. Co. 63 Minn. 305, 30 L.R.A. 346, 56 Am. St. Rep. 481, 65 N. W. 635.

Messrs. Watson & Pasco, for defendant in error:

There was no assignment of the funds of Virgin & Carter by the check, and the bank by its act is not liable as an acceptor.

First Nat. Bank v. Whitman, 94 U. S. 343, 24 L. ed. 229; Howard H. Clark & Co. v. Warren Sav. Bank, 31 Pa. Super. Ct. 647; J. M. Houston Grocer Co. v. Farmers' Bank, 71 Mo. App. 132; Lonier v. State Sav. Bank, 149 Mich. 483, 112 N. W. 1119; Rauch v. Bankers' Nat. Bank, 143 Ill. App. 625; 5 R. C. L. 489, 530, 531, 545; Brady, Bank Checks, ¶ 4, 136, 230; Baltimore & O. R. Co. v. First Nat. Bank, 102 Va. 753, 47 S. E. 837; Elyria Sav. & Bkg. Co. v. Walker Bin Co. 92 Ohio St. 406, L.R.A.1916D, 433, 111 N. E. 147, Ann. Cas. 1917D, 1055; Hanna v. McCrory, 19 N. M. 183, 141 Pac. 996; Ballen v. Bank of Kremlin, 37 Okla. 112, 44 L.R.A.(N.S.) 621, 130 Pac. 539; Van Buskirk v. State Bank, 35 Colo. 142, 117 Am. St. Rep. 182, 83 Pac. 778; 5 R. C. L. 518.

The bank did not take from plaintiff's agent by negotiation.

National Bank v. Farmers & M. Nat. Bank, 87 Neb. 841, 128 N. W. 522; State Bank v. First Nat. Bank, 87 Neb. 351, 29 L.R.A.(N.S.) 100, 127 N. W. 244; Farmers & M. Bank v. Bank of Rutherford, 115 Tenn. 64, 112 Am. St. Rep. 817, 88 S. W. 939; Byles, Bills, 11th ed. p. 334; Morse, Banks & Bkg. § 391, p. 686; Osborn v. Gheen, 5

Mackey, 189, affirmed in 136 U. S. 646, 34 L. ed. 552, 10 Sup. Ct. Rep. 1072.

The bank is not liable in trover for the amount of the check or any amount.

First Nat. Bank v. Whitman, 94 U. S. 343, 24 L. ed. 229; King v. McConnell, 57 Fla. 77, 49 So. 539; Frome v. Dennis, 45 N. J. L. 515; 2 Cooley, Torts, p. 877; Burditt v. Hunt, 25 Me. 419, 43 Am. Dec. 289; Nanson v. Jacob, 93 Mo. 331, 3 Am. St. Rep. 531, 6 S. W. 246; Gurley v. Armstead, 148 Mass. 267, 2 L.R.A. 80, 12 Am. St. Rep. 555, 19 N. E. 389; Davis v. Hurt, 114 Ala. 146, 21 So. 469; Hill v. Hayes, 38 Conn. 532; 5 Cyc. 211; Baltimore & O. R. Co. v. First Nat. Bank, 102 Va. 753, 47 S. E. 837; Lonier v. State Sav. Bank, 149 Mich. 483, 112 N. W. 1119; Elyria Sav. & Bkg. Co. v. Walker Bin Co. 92 Ohio St. 406, L.R.A.1916D, 433, 111 N. E. 147, Ann. Cas. 1917D, 1055; Hanna v. McCrory, 19 N. M. 183, 141 Pac. 996; Sims v. American Nat. Bank, 98 Ark. 1, 135 S. W. 359; National Bank v. Millard, 10 Wall. 152, 19 L. ed. 897; Brennan v. Merchants & Mfrs.' Nat. Bank, 62 Mich. 343, 28 N. W. 881.

Ellis, J., delivered the opinion of the court:

The plaintiff in error sued the defendant in error in the circuit court for Escambia county.

The declaration contained two counts. The first count alleged in substance that a freight agent of the plaintiff at Pensacola, named W. W. Weekly, received from the agent of the Atlantic Compress Company a check on the defendant's bank for the sum of \$905, payable to the order of the plaintiff, which check had been drawn by Virgin & Carter to pay a debt due to the plaintiff by them; that Weekly, now deceased, indorsed the check by writing the initials of the plaintiff and his own name as agent upon the check and presented the same to the defendant bank for payment; that the bank paid the amount of the check to Weekly, and charged the same to the account of Virgin & Carter, and returned the check to them; that Weekly was not authorized by the plaintiff to indorse or collect the check, and did not pay over to plaintiff the money so collected, nor has the plaintiff received the same from any other source.

The second count was for money had and received.

The bank demurred to the declaration upon the following grounds:

"(1) That the said declaration states no cause of action against this defendant.

"(2) That the said declaration sets up no sufficient facts to show any liability upon the part of the defendant.

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"(3) That the said declaration does not allege that the said W. W. Weekly had no authority to collect the said money.

"(4) That the said first count of the declaration does not allege that the said W. W. Weekly had no authority to indorse and/or collect the said checks.

"(5) That the said declaration does not allege that the said W. W. Weekly had no authority to receive money owing to the plaintiff.

"(6) That the said count of the declaration alleges nothing more than that the said Weekly received the money and embezzled the same, without denying the authority of Weekly to receive.

"(7) There is nothing alleged in the declaration sufficient to show that the transaction in the said first count of the declaration referred to created any privity between the plaintiff and this defendant, or created any liability on the part of this defendant to the plaintiff, not does it show any such contractual relation between the plaintiff and the defendant as to authorize the plaintiff to maintain an action against the defendant for or on account of the several matters and things in the said first count of the declaration set up.

"(8) That it does not appear from the allegations of the said first count of the declaration but that the said Weekly expended the alleged money for the benefit of the plaintiff.

"(9) That the fact, if it be a fact, that the said Weekly did not pay over to the plaintiff the said money in the said first count of the declaration mentioned, does not create any liability on the part of the defendant to the plaintiff."

The demurrer was sustained: and, the plaintiff withdrawing the second count and electing to stand on the first count, a judgment for the defendant was entered, and the plaintiff took a writ of error. The errors assigned are that the court erred in sustaining the demurrer and in entering judgment for the defendant.

The first count of the declaration may be considered as one in trover for the conversion of a check. The check was the property of the plaintiff; it was in the plaintiff's possession, for Weekly's possession was the plaintiff's possession; it was taken by the defendant, upon whom it was drawn, and the proceeds paid to a person who had no authority from the plaintiff to receive it; the account of the drawer was charged with the amount paid, and the check was returned to the drawer. It was unnecessary to allege a demand by the plaintiff and a refusal by the defendant to return the check, because the allegations of the declaration show a conversion. 1 Archbold, Nisi Prius,

549-553; *Robinson v. Hartridge*, 13 Fla. 501; *Anderson v. Agnew*, 38 Fla. 30, 20 So. 766.

The transaction as set forth in the declaration would support a count for money had and received. The check was the bank's authority for paying to the plaintiff from the account of Virgin & Carter the amount of money named in the check. The drawer of the check had the necessary funds on deposit, and the bank was solvent. Therefore, when the bank took from the funds on hand, or from the funds of Virgin & Carter on deposit, the amount stated in the check, it had in its possession for that instant of time money which it should have paid to the plaintiff; but the bank took the responsibility of saying that a payment to Weekly was a payment to the plaintiff. To hold that the drawer of the check is charged with the responsibility of seeing that the bank pays the check to an authorized agent of the payee after the drawer has delivered the check to the payee is to unsettle all transactions in which checks are used to pay debts, and introduce confusion worse confounded into the mercantile and business world.

Virgin & Carter, according to the allegations of the declaration, paid their debt to the plaintiff. They gave a check to the plaintiff on a solvent bank in which they had ample funds. That the bank was willing to honor the check when presented is shown by the fact that it did pay when presented. Under these circumstances the debt of Virgin & Carter was paid. If, shortly after the bank paid the check, it had failed, would the loss fall upon Virgin & Carter?

The declaration, considered from a common-law standpoint, is somewhat incomplete or informal, and, although it does not contain the words of the statutory form, it contains the substance without prolixity. The defendant took up the check and returned it to the drawer without authority from the owner to do so. This was an interference with plaintiff's property and constitutes a conversion, because, when the bank undertook to return the check to the maker, it exercised ownership over it. The returned check was used as a voucher or receipt or acquittance of the defendant's obligation to the drawer. This unauthorized act of ownership deprived the plaintiff of the use and possession of the check.

Lord Ellenborough, Ch. J., said: It might be a hardship upon the defendant, but that by law "a person is guilty of a conversion who intermeddles with my property and disposes of it; and it is no answer that he acted under authority of another who had himself no authority to dispose of it." L.R.A.1918C.

Stephens v. Elwall, 4 Maule & S. 259, 105 Eng. Reprint, 830.

Trover lies for all personal chattels, bank notes, bills of exchange, and other negotiable instruments. 1 Archbold, Nisi Prius, p. 551.

The question presented by the declaration seems to us to be similar in all respects to that presented in *Bristol Knife Co. v. First Nat. Bank*, 41 Conn. 421, 19 Am. Rep. 517, and would even answer the objections raised by the dissenting opinion in that case. The facts were as follows: The Bristol Knife Company was a corporation; one of its customers, named Myers sent to the company a check drawn by Hopper on the Security Bank in payment of a debt. The Bristol Knife Company indorsed the check to the First National Bank, and sent it by a messenger, the brother of the president of the Knife Company, to the First National Bank at Hartford for deposit. The messenger destroyed the deposit slip, presented the check at the bank, and stated that he wanted currency for it, as the "company wanted to pay off its hands." The currency was paid to the messenger, who absconded. The court held the bank liable in assumpsit. Two judges dissented, upon the grounds that the plaintiffs were the primary cause of the fraud, because the messenger was their special agent for the purpose of delivering the check to the defendant as a deposit.

The court, speaking through Mr. Justice Loomis, said: "The principles that control this case are not to be found in any distinction between special and restrictive indorsements of negotiable paper, nor in any view of the rights of bona fide holders or purchasers of such paper. The record shows that the defendants put no faith in any title which the holder of the check had or assumed to have; hence their position is not like that of a bona fide purchaser of negotiable paper from a holder clothed with the apparent legal title. The holder in this case not only made no pretense of title, but openly professed to act only in behalf of the plaintiffs. The defendants well knew that the check was the property of the plaintiffs, that the transaction was wholly with them, and that they must account to them for the avails. It is found that the defendants have collected the full amount of the check; but have they ever accounted to the plaintiffs for the same? It is conceded that they paid the amount of the check to the messenger who brought it to the bank, and the question is whether such payment, in legal effect, is a payment to the plaintiffs? The whole case resolves itself into a mere question of agency."

In the case at bar it cannot be assumed

that Weekly had authority to take the check to the bank for deposit to the credit of the plaintiff. Certainly he had no authority to indorse the check for the plaintiff and receive the proceeds, for that is admitted by the demurrer. Therefore the bank, and no one else, assumed the responsibility of dealing with Weekly as the plaintiff's agent. The drawers of the check were not at fault, because they made it payable to the plaintiff's order; the plaintiff was not at fault, for it had given Weekly no such commission as he undertook. His authority as the plaintiff's agent ceased when, as freight agent, he received the check from the makers, as we construe the declaration. Under the circumstances of this case, as shown by the declaration, the liability of Virgin & Carter upon the account which they owed to the plaintiff, and to pay which they sent the check, would seem to be discharged. There would seem to be no sufficient reason for holding Virgin & Carter responsible for the dishonesty of the plaintiff's agent, whom it had designated to receive the check. As between the plaintiff and the makers of the check, the loss, if any, should fall upon the party more directly responsible for, and having control of, the agent whose dishonesty occasioned it. See *McFadden v. Follrath*, 114 Minn. 85, 37 L.R.A. (N.S.) 201, 130 N. W. 542; *Burstein v. Sullivan*, 134 App. Div. 623, 110 N. Y. Supp. 317. The case is somewhat analogous to those in which a check payable to one person is presented for payment by another person of the same name. As between the payee and the bank paying the check, the loss falls upon the latter. *Thomas v. First Nat. Bank*, 101 Miss. 500, 39 L.R.A. (N.S.) 355, 58 So. 478; *Indiana Nat. Bank v. Holtsclaw*, 98 Ind. 85; 7 C. J. 693, note, 1.

In the Indiana case the court held that the unauthorized indorsement of the check conferred no title, and in contemplation of law the check remained untransferred, and in this condition was subject to plaintiff's acceptance, for whom it was intended, but was sent to the wrong address. So the un-

authorized indorsement of the check in this case conferred no title, neither did its delivery; but the defendant nevertheless has undertaken to dispose of it as its own by charging it to the drawers' account and returning it to them.

The rule is well established that a banker on whom a check is drawn must ascertain at his peril the identity of the person named in it as payee; but it does not apply in this case. There was no question as to the identity of the payee, nor was payment made upon a forged instrument. The bank simply assumed the sole responsibility of treating Weekly as the agent of the plaintiff, with authority to indorse its name upon checks and collect the proceeds. It was guilty of negligence for which no one other than itself was responsible. It committed a wrong for which it is answerable in damages,—a wrong to which it cannot be said that either the drawers or payee were parties.

The section in the Negotiable Instruments Law providing that a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and that the bank is not liable to the holder unless and until it accepts or certifies the check (Gen. Stat. § 3098), does not apply. The plaintiff is not suing the bank for breach of a contract in not paying the check. It is suing the bank because the latter has undertaken to exercise ownership over a check which belonged to the plaintiff without its authority,—because the bank had in its possession funds, the proceeds of the check, which it should have paid to the plaintiff, but negligently failed to do so.

We think there is nothing in the point that the damages in this case would be merely nominal; and, if nominal damages only were claimed, the case would not be within the jurisdiction of the court.

The order sustaining the demurrer to the declaration was error, for which the judgment is reversed.

Browne, Ch. J., and Whitfield, Taylor, and West, JJ., concur.

Annotation—Liability of drawee to true owner of a check which it has paid on a forged indorsement.

In general.

On payment of check to unauthorized person by drawee as barring action against drawer by payee on claim for which check was given, see 37 L.R.A. (N.S.) 201.

Various questions between the drawer and drawee, arising out of the payment by the latter of a check upon a forged or unauthorized indorsement, are treated L.R.A.1918C.

in notes cited in L.R.A. Indexes under the title "Banks."

When the payee or holder of a check sues the drawee bank *upon the check*, he generally finds great difficulty in getting away from the principle that there is no privity of contract between the parties. The rule that he cannot recover *upon the check*, since the extensive adoption of the Negotiable Instrument Act, has

to *Ballard v. Home Nat. Bank, L.R.A.* become practically universal. See note 1916C, 161, covering this question. In order that there may be a recovery, where the drawee has paid the check on an unauthorized indorsement, there must be something arising out of the facts or the form of action that will enable the payee to avoid the force of this general rule. When his action is against an intermediary bank,—a bank that has cashed the check on a forged indorsement and collected it,—he does not meet this difficulty for the reason that he must sue for the check or for the proceeds rather than *upon the check*. See cases cited in note to *United States Portland Cement Co. v. United States Nat. Bank, L.R.A.1917A*, 148.

When the drawee bank has cashed a check on a forged indorsement and charged the amount against the drawer's account, some courts have permitted a recovery by the injured holder on the theory that such action by the bank constitutes an acceptance, which, of course, creates privity of contract and takes the case out of the rule already stated; while others deny that such acts amount to an acceptance, and refuse to permit a recovery. See cases cited in *L.R.A.1916C*, pages 181, 182.

The theory of acceptance.

LOUISVILLE & N. R. Co. v. CITIZENS & PEOPLE'S NAT. BANK, ante, 610, was not argued or decided upon the theory of acceptance. Counsel for the plaintiff freely admitted that paying the check on an unauthorized indorsement did not constitute an acceptance of the check, in view of the Negotiable Instrument Act, which provides that an acceptance must be in writing. Practically all of the cases in which the decision turned upon this theory have been cited in the *L.R.A.* note last above cited. Hence only a few such cases are here cited for the purpose of comparison.

The court, in *LOUISVILLE & N. R. Co. v. CITIZENS & PEOPLE'S NAT. BANK*, apparently makes a distinction between a check paid upon a forged indorsement and one paid upon an unauthorized indorsement. Of course, in the latter case the bank knows that it is not paying the money to the payee in person, and in that respect it may be more blamable; but it is difficult to see how that fact alone either helps or hinders the holder to maintain an action without privity of contract. Some of the cases cited in the notes already referred to, notably *First Nat. Bank v. Whitman (1877) 94 U. S. L.R.A.1918C*.

343, 24 L. ed. 229, involved unauthorized indorsements, but they were tried and decided upon the theory that payment of the check and charging it against the drawer did or did not constitute an acceptance.

Both *J. M. Houston Grocer Co. v. Farmers' Bank (1897) 71 Mo. App. 132*, and *Jackson v. National Bank (1893) 92 Tenn. 154*, 18 *L.R.A.* 663, 36 *Am. St. Rep.* 81, 20 *S. W.* 802, are cases of this kind, the one holding that payment with settlement of drawer's account is not sufficient to constitute an acceptance where the indorsement was not authorized, and the other holding that it is sufficient. And see other cases cited in the earlier note.

In Illinois, under the rule which once prevailed there, that the payee of a check can maintain an action against the drawee bank for the amount thereof, provided that the drawer has, at the time of presentation, sufficient funds on deposit to pay the check (see cases cited in *L.R.A.1916C*, p. 169), the payment of a check upon an unauthorized indorsement did not relieve the bank of liability to the true holder thereof. *Commercial Nat. Bank v. Lincoln Fuel Co. (1896) 67 Ill. App. 166*; *T. M. Sinclair & Co. v. Goodell (1901) 93 Ill. App. 592*. But the plaintiff was obliged to prove that the bank had sufficient of the drawer's funds to pay the checks at the time they were presented by the true holder, and the fact that the bank paid the checks to a stranger is not sufficient proof that it had, even at that time, funds belonging to the drawer. *Rauch v. Banker' Nat. Bank (1908) 143 Ill. App. 625*. It appears by the opinion in this case that the Negotiable Instrument Act was adopted in Illinois before the decision, but did not influence the decision for the reason that all the transactions took place before its enactment.

Money had and received.

It has been held that an action for money had and received cannot be maintained by the true payee of a check against the drawee bank that has paid the check upon an unauthorized indorsement and charged the same to the drawer's account. *Freeman v. Savannah Bank & T. Co. (1891) 88 Ga. 252*, 14 *S. E.* 577 (the court in this case merely followed the *Whitman Case (U. S.) supra*, so that it perhaps turned upon the acceptance theory, without regard to the form of the action); *Lonier v. State*

Sav. Bank (1907) 149 Mich. 483, 112 N. W. 1119.

Action for conversion.

The drawee bank that cashes a check upon an unauthorized indorsement is liable in an action for conversion to the true payee who has received no benefit from the proceeds. *Burstein v. People's Trust Co.* (1911) 143 App. Div. 165, 127 N. Y. Supp. 1092; *Schnabel v. Hanover Nat. Bank* (1912) 78 Misc. 35, 137 N. Y. Supp. 727; *LOUISVILLE & N. R. Co. v. CITIZENS & PEOPLE'S NAT. BANK*, ante, 610. And see cases cited under the following heading.

In *New York Brick & Paving Co. v. Bronx Borough Bank* (1903) 42 Misc. 31, 85 N. Y. Supp. 557, affirmed in (1905) 105 App. Div. 623, 94 N. Y. Supp. 1157, which is affirmed in (1906) 186 N. Y. 559, 79 N. E. 1112, an action by the payee of the check against the drawee bank for conversion was dismissed where the defendant had paid on an unauthorized indorsement, but it appeared that the payee had received full benefit of the proceeds. It was held that under such circumstances the mere irregularity would not make the bank liable, since no one was injured thereby.

Form of action not considered.

In several cases, the courts, without indicating the theory or discussing the form of action, have held that the drawee bank is liable to the true payee where it pays the check on an unauthorized or forged indorsement. Whether these cases were decided upon the theory of conversion or not, safe practice would appear to require some form of action that will permit a decision on that theory. Also see cases cited in note to

A. Blum, Jr.'s Sons v. Whipple, 13 L.R.A.(N.S.) 211, in this connection.

An action can be maintained by the true payee of a check against the drawee bank that has paid it upon an unauthorized indorsement. *Robinson v. Bank of Winslow* (1908) 42 Ind. App. 350, 85 N. E. 793; *Vanbibber v. Bank of Louisiana* (1859) 14 La. Ann. 486, 74 Am. Dec. 442; *William Deering & Co. v. Kelso* (1898) 74 Minn. 41, 73 Am. St. Rep. 324, 76 N. W. 792; *Dispatch Printing Co. v. National Bank* (1910) 109 Minn. 440, 50 L.R.A.(N.S.) 74, 124 N. W. 236 (the point assumed); *McFadden v. Follrath* (1911) 114 Minn. 85, 37 L.R.A.(N.S.) 201, 130 N. W. 542. See also note to *United States Portland Cement Co. v. United States Nat. Bank*, L.R.A. 1917A, 145, citing some cases where the action was against an intermediary bank.

Bristol Knife Co. v. First Nat. Bank (1874) 41 Conn. 421, 19 Am. Rep. 517, discussed by the court in *LOUISVILLE & N. R. Co. v. CITIZENS & PEOPLE'S NAT. BANK*, ante, 610, may be distinguished from cases that come more directly within the scope of this annotation by the fact that there was no unauthorized indorsement of the check. The check was properly indorsed by one having the authority to indorse it, placed in an envelop with a deposit slip, and sent by messenger to the bank for deposit. The messenger presented only the check and called for the cash. The only question was whether his possession of the check, properly indorsed, was sufficient evidence of his authority to receive the cash, which the bank knew belonged to the payee.

J. W. M.

KENTUCKY COURT OF APPEALS.

EMMA LUSCHER et al., Appts.,
v.

SECURITY TRUST COMPANY et al.

(— Ky. —, 199 S. W. 613.)

Limitation of actions — claim against heir — right of estate.

An heir cannot, in the settlement of a decedent's estate, be charged with a claim

against him for money advanced by the ancestor as surety to pay a note of the heir, if the claim is barred by the Statute of Limitations.

For other cases, see *Executors and Administrators*, IV. c. 3, in *Dig. 1-52 N. S.*

(January 10, 1918.)

A PPEAL by plaintiffs from an order of the Circuit Court for Fayette County sustaining a demurrer to and dismissing a

Note. — As to duty of debtor to account for statute-barred debt before participating in estate of creditor, see annotation following this case, post, 619.

As to the right to deduct an indebtedness owing to remote ancestor by predeceased immediate ancestors, see note to *Adams v. Yancey*, 47 L.R.A.(N.S.) 1026. L.R.A.1918C.

As to whether the indebtedness of an heir to the estate may be treated as a counterclaim or set-off against his distributive share in proceeds of realty, see note to *Marvin v. Bowlby*, 4 L.R.A.(N.S.) 189.

petition filed to settle the estate of plaintiff's decedent, and to set off an indebtedness of one of the defendant heirs against his distributive share in the estate. Affirmed.

The facts are stated in the opinion.

Mr. J. S. Luscher, for appellant:

An indebtedness barred by the Statute of Limitations, which is due the estate by a distributee, may be offset by the administrator by the application of the interest of the distributee to the liquidation of the indebtedness.

Bougere Succession, 28 La. Ann. 743; *Re Bogart*, 28 Hun, 466; *Rogers v. Murdock*, 45 Hun, 30.

The personal representative has an equitable lien upon the assets of the decedent.

Rogers v. Murdock, *supra*; *Smith v. Kearney*, 2 Barb. Ch. 533; *Brown v. Mattingly*, 91 Ky. 275, 15 S. W. 353; *Waterman. Set-Off*, p. 234.

The English rule is that an indebtedness due the estate by the distributee, although the collection thereof is barred by the Statute of Limitations, may be used to offset the distributee's interest in the estate.

2 *Williams*, Exrs. p. 619; *Courtenay v. Williams*, 3 Hare, 539, 67 Eng. Reprint, 494, 13 L. J. Ch. N. S. 461, 8 Jur. 844; *Rose v. Gould*, 15 Beav. 189, 51 Eng. Reprint, 509, 21 L. J. Ch. N. S. 360; *Coates v. Coates*, 33 Beav. 249, 55 Eng. Reprint, 363, 33 L. J. Ch. N. S. 448, 10 Jur. N. S. 532, 9 L. T. N. S. 795, 12 Week. Rep. 634; *Campbell v. Graham*, 1 Russ. & M. 453, 39 Eng. Reprint, 175, 9 L. J. Ch. 234.

In *Williams v. Gilchrist*, 3 Bibb. 49, and in *Gilchrist v. Williams*, 3 A. K. Marsh. 235, it was held that a set-off, if barred, would not be asserted in defense to a cause of action, but the court seems to have departed from that ruling in the cases of *Nall v. Farmers' Bank*, 5 Ky. L. Rep. 122, abstract; *Rudd v. Anderson*, 12 Ky. L. Rep. 489, 14 S. W. 340; *Edwards v. McKinsey*, 14 Ky. L. Rep. 925, abstract; *Grover v. Tingle*, 21 Ky. L. Rep. 885, 53 S. W. 281; *Aultmah & T. Co. v. Mead*, 121 Ky. 241, 123 Am. St. Rep. 193, 89 S. W. 137.

Mr. J. Pelham Johnston, for appellee *George C. Stahel*:

An administrator cannot set off an indebtedness owing by a distributee to the intestate, which was barred by the Statute of Limitations in the lifetime of the intestate, against the distributee's share of the estate.

Allen v. Edwards, 136 Mass. 138; *Holt v. Libby*, 80 Me. 329, 14 Atl. 201; *Reed v. Marshall*, 90 Pa. 345; *Milne's Appeal*, 99 Pa. 483; *Light's Estate*, 136 Pa. 211, 20 Atl. 536, 537; *Richardson v. Keel*, 7 Lea, 74; *Boden v. Mier*, 71 Neb. 701, 98 N. W. 701; *Kimball v. Scribner*, 174 App. Div. 845, 161 N. Y. Supp. 511; *Williams v. Gilchrist*, 3 L.R.A.1918C.

Bibb, 49; *Gilchrist v. Williams*, 3 A. K. Marsh. 235.

The English doctrine, being based on a rule of English chancery, does not apply where the distributee may maintain an action at law to recover his distributive share, as in Kentucky.

Courtenay v. Williams, 3 Hare, 539, 67 Eng. Reprint, 494, 13 L. J. Ch. N. S. 461, 8 Jur. 844.

A distributee's claim to his share of an estate is a legal, not an equitable, right, and the relation between him and the administrator being that of creditor and debtor, the Statute of Limitations can be pleaded as a bar to the effort of the administrator to retain in his hands the distributee's share. In satisfaction of an indebtedness of the distributee to the intestate.

Allen v. Edwards, 136 Mass. 138; *Holt v. Libby*, 80 Me. 329, 14 Atl. 201; *Reed v. Marshall*, 90 Pa. 345; *Milne's Appeal*, 99 Pa. 483; *Light's Estate*, 136 Pa. 211, 20 Atl. 536, 537; *Richardson v. Keel*, 7 Lea, 74; *Boden v. Mier*, 71 Neb. 701, 98 N. W. 701; *Rogers v. Murdock*, 45 Hun, 30; *Smith v. Kearney*, 2 Barb. Ch. 533; *Kimball v. Scribner*, 174 App. Div. 845, 161 N. Y. Supp. 511.

Messrs. Hunt & Bush for other appellees.

Carroll, J., delivered the opinion of the court:

There is one question of law presented by this record, and it is this: In the settlement of the estate of a decedent, can one of the heirs be charged with a debt due by him to the decedent that is barred by limitation? It comes up on this state of facts: *Charlotte Stahel*, in April, 1893, was compelled to and did pay a note for \$1,000 on which she was the surety of her son, *George C. Stahel*. In 1916 *Mrs. Stahel* died intestate, and after her death one of her children brought a suit to settle her estate. In this suit it was charged, and stands admitted, that *Mrs. Stahel* paid, under the circumstances stated, the \$1,000 note, and it was sought to set off this sum, with interest from the date of its payment, against the distributive share of *George C. Stahel* in the estate of his mother. *George C. Stahel* for defense relied alone on the Statute of Limitation in such case made and provided, and the lower court held that the plea of the statute presented a good defense, and from that judgment this appeal is prosecuted by *Emma Luscher*, a daughter of *Mrs. Stahel*, who was plaintiff in the suit below.

It is admitted by counsel for *Emma Luscher*, the appellant, that as *Mrs. Stahel* paid this \$1,000 note in the ordinary course

of her liability as a surety, an action by her, if she were living, to recover the amount so paid from George C. Stahel, would be barred if it had been brought when this suit was begun. But it is said that in a suit to settle the estate of a person who dies intestate, or in the settlement of an estate without a suit, the Statute of Limitation does not run against a debt or demand due by one of the heirs or distributees to the intestate, and that there may be deducted at any time from the share of the estate to which the heir would be entitled to the amount of the debt or demand due by him to the intestate at the time of her death. So far as our investigation, which has been much aided by that of counsel in this case, goes, this question is a new one in this state, and, curiously enough, there are not many decisions of other courts directly in point.

If the sum paid by Mrs. Stahel for her son could be treated as an advancement, there could be no question that the son should be charged with it in the distribution of his mother's estate, because § 1407 of the Kentucky Statutes provides, in part, that, "any real or personal property or money, given or devised by a parent or grandparent to a descendant, shall be charged to the descendant or those claiming through him in the division and distribution of the undivided estate of the parent or grandparent: and such party shall receive nothing further therefrom until the other descendants are made proportionately equal with him, according to his descendable and distributable share of the whole estate, real and personal, devised and undivided."

There is, however, no contention that this indebtedness should be treated as an advancement within the meaning of the statute. On the contrary, it is affirmatively admitted that when Mrs. Stahel became liable as surety on the note of her son, and afterwards was obliged to and did pay the note, the ordinary relation of creditor and debtor was thereby established between her and her son, and that she simply had a claim against him for the amount paid as his surety, the collection of which she might have enforced in the same manner that she could have enforced the collection of any other indebtedness. There being then no attempt to treat the matter as an advancement, and no evidence in the record on this subject, as the case went off on demurrer, the question recurs: Should the amount paid by the mother as surety, with interest thereon from date of payment, be deducted from the distributable share of George Stahel in the estate of his mother, although it was admittedly barred by the

Statute of Limitation applicable to such demands, at the time of her death? Of course, if this indebtedness had not been barred by the statute there would be no difficulty in the way of setting it off against his distributable share.

Section 2514 of the Kentucky Statutes, fixing the period in which certain actions must be brought at fifteen years from the date of their accrual, and § 2515, fixing five years as the time when certain actions must be brought after their accrual, are substantially the same in so far as the nature of the bar interposed by the statute is concerned, although a different period of time is fixed and the sections apply to different states of cases. *Joyce v. Joyce*, 1 Bush, 474. It is therefore not material which one should be applied here; and as the cause of action in Mrs. Stahel to recover the amount paid as surety accrued when she paid the debt, which was more than fifteen years before her death, we may, for the purposes of the case, look to § 2514, which provides, in part, that, "civil actions, other than those for the recovery of real property, shall be commenced within the following periods after the cause of action has accrued, and not after: . . . Upon a bond or obligation for the payment of money or property, or for the performance of any undertaking, shall be commenced within fifteen years after the cause of action first accrued."

But the argument is made that this statute merely precludes the maintenance of an action for affirmative relief if it is not brought within the prescribed time, but does not operate to defeat the assertion of a claim by the estate of an intestate against a distributee for the purpose of defeating or reducing the right of the distributee to participate in the estate, because, as said by counsel for the estate, this character of relief is negative in its nature and not embraced by the statute, which does not put an obstacle in the way of the estate's retaining at any time out of the share of a distributee a debt due by him to the estate.

We do not, however, find ourselves able to agree with the counsel in the soundness of the distinction attempted to be made. If the estate of Mrs. Stahel had sought to collect by action from George Stahel the amount paid by his mother as surety, there could be no question about his right to plead and rely on the statute in bar of the action, and as he could defeat the collection of the demand by interposing the Statute of Limitation, there seems to be no good reason why he should not also be permitted to plead and rely on the statute when the attempt is made to collect the demand by deducting it from his share of the estate.

So far as the rights of the estate and the rights of George Stahel are concerned, the collection of the demand by an independent action, or the collection of it by deducting the amount from his portion of the estate, would have precisely the same effect, as in either event the estate would get the money. It is, therefore, plain that if the distinction sought to be made applicable is controlling, the statute must be ignored, because it makes no distinction between the right to collect a demand due an estate by an independent action and the right to collect it by deducting the amount from the share of the estate going to the debtor.

It is said, however, that in *Aultman & T. Co. v. Meade*, 121 Ky. 241, 123 Am. St. Rep. 193, 89 S. W. 137; *Weakley v. Meriwether*, 156 Ky. 304, 160 S. W. 1054, and in other cases therein cited, this court has held that the Statute of Limitation can be successfully pleaded only to an action asserting affirmative relief, and is not available as a mere defensive plea. But the cases in which this rule was announced presented states of fact in which it was sought to defeat by plea of limitation the right of the defendant to assert by way of counterclaim transactions connected with and growing out of the matter that was the basis of the suit, and the rule that in such cases the Statute of Limitation will not operate to bar the defense is well illustrated in the *Meade Case*. There the *Aultman & Taylor Company* had sold *Meade* a sawmill, and in a suit by the company to collect its debt, *Meade* set up as a defense the value of the sawmill that he alleged the company had taken possession of and converted to its own use. The company interposed a plea of limitation to this defense, but the court held that the statute was not available, saying: "If such mortgagee, by virtue of his mortgage contract, and not as a tort-feasor, takes the mortgaged property to be applied upon the mortgage debt, is it not his agreement, as part of the mortgage contract, to so apply it? And if he fails to do so, is not that a matter purely of defense in a suit to recover the balance of the mortgage debt, as much as would be a plea of payment? We think it is. Having reached this conclusion, the disposal of the plea of limitation becomes simple."

But here there is no connection whatever between the claim of *George Stahel* to his distributive part of the estate and the demand asserted by the estate against him on account of the payment of the surety debt. These two matters are separate and distinct, not arising out of the same contract or transaction. In other words, the indebtedness sought to be deducted by the estate was in the nature of a set-off, and it has

been held in *Williams v. Gilchrist*, 3 Bibb, 49, and *Hawthorn v. Roberts*, *Hardin* (Ky.) 70, that, "a debt, to be pleadable as a set-off, must be a mutually subsisting debt at the time of bringing the suit. But a debt barred by the Statute of Limitations is not a subsisting debt, and so cannot be pleaded as a set-off or given in evidence."

We are also referred to *Brown v. Mattingly*, 91 Ky. 275, 15 S. W. 353, as sustaining the right of the estate to deduct this indebtedness, but this case, while it recognizes the right of an administrator to plead as a set-off a distributee's indebtedness to the estate against the distributee's interest therein, does not hold or even intimate that the right to plead the indebtedness as a set-off would be available if the debt due by the distributee were barred by limitation. Of course where the claim of the estate against the distributee is not barred by limitation, and is a valid and subsisting debt against the distributee, there can be no doubt about the right of the estate to rely on the claim as a set-off against the distributee's interest. It should, however, be said that the contention of counsel for the estate that the statute does not bar the right to deduct from the share of a distributee or legatee a debt due by him to the estate is supported by *Williams on Executors*, vol. 2, p. 619, where it is said: "An executor may retain so much of the legacy as is sufficient to satisfy a debt due from the legatee to the testator, although the remedy for such debt was, at the time of the death of the testator, barred by the Statute of Limitation."

But this text finds its principal support in English cases, although, as said by *Woerner on Am. Law of Administration*, 2d ed. vol. 2, § 564, the same doctrine is held by some American courts, and he refers to the cases of *Wilson v. Kelly*, 16 S. C. 216; *Holmes v. McPheeters*, 149 Ind. 587, 49 N. E. 452; and *Tinkham v. Smith*, 56 Vt. 187. It should, however, be observed that in some of these states the subject is regulated by statute, and in others the courts treated the indebtedness of the heir or legatee as an advancement. But opposed to the English rule referred to by *Williams on Executors* is *Allen v. Edwards*, 136 Mass. 138, where the court held that a debt due from a legatee to the testator, which was, at the time of the testator's death, barred by the Statute of Limitation, could not be deducted from the legacy, unless the language of the will clearly showed that the testator intended that such deduction should be made.

In *Holt v. Libby*, 80 Me. 329, 14 Atl. 201, the question was clearly presented to the court, and it was held that the executor could not deduct from a legacy a debt due

by a legatee to the estate which was barred by limitation, the court saying: "The estate is just as much of a debtor to the indebted legatee as the legatee is to the estate. Each has a legal right and remedy, and a statute-barred debt is not more recoverable by an estate than by any other creditor. To our minds, this is the better doctrine."

In the case of *Light's Estate*, 136 Pa. 211, 20 Atl. 536, 537, the same rule was announced, the court saying: "If the statute can be pleaded with effect when the decedent's estate is a debtor, we can see no good reason why it may not be pleaded also with like effect when the estate is a creditor; if the running of the statute should be stopped by the death in one case, why not in the other? There is no necessity arising out of the administration of the law, or the practice in equity, which calls for any such distinction; the legatees were as much entitled to the protection of the statute as any other creditor. Admitting the right of an executor, or of the heirs, in the distribution of a decedent's estate, to set off the debts of the legatees against their legacies, the debts, to constitute a valid set-off should be valid, subsisting debts, not barred by the statute."

In *Richardson v. Keel*, 9 Lea, 74, the court said: "We do not perceive the principle upon which it can be held that while suit upon the claim is barred by the statute,

so that there can be no judgment or recovery upon it, yet the administrator may appropriate the effects of the defendant, which he holds in trust for him, to the payment of the barred debt."

To the same effect are *Boden v. Mier*, 71 Neb. 191, 98 N. W. 701; *Kimball v. Scribner*, 174 App. Div. 845, 161 N. Y. Supp. 611.

Having no statute in this state making any exception referable to claims asserted by an estate against a distributee, we are disposed to the view that the general Statute of Limitation is as applicable in this class of cases as it is in others. It may be true, as urged by counsel for the estate, that to allow *George Stahel* to get his full distributive share of the estate, while denying the estate the right to deduct his indebtedness, would be unjust to the other heirs and distributees; but if so the injustice was not worked by the law, but by the failure of *Mrs. Stahel* to collect or attempt to collect her debt before it was barred by the statute, or to put it, as we may assume she might easily have done, in such form as that its life would have been extended. But at least there is no more injustice in allowing the statute to defeat a meritorious claim like this than there is in allowing it to defeat the collection of other just demands, as is often done.

The judgment is affirmed.

Annotation—Duty of debtor to account for statute-barred debt before participating in estate of creditor.

It is a generally accepted rule, both in England and the United States, which in some jurisdictions is embodied in statutory form, but which exists in the absence of statute, that where the legatee of a general legacy or share of residue, or the distributee of an intestate's estate, is a debtor to the estate, he is not entitled to receive his legacy without bringing his debt into account. The right of the executor or administrator to retain so much of the legacy or distributive share as will satisfy the debt is based upon two theories,—one, which may be termed the legal theory, being that the legatee or distributee has assets of the estate in his hands which are applicable to the satisfaction of his

claim; the other, which may be termed the equity theory, being that he should not be permitted to receive his legacy or distributive share while retaining in his hands a part of the fund out of which his own and other legacies or distributive shares are to be paid.

There is, however, a difference of opinion as to whether this rule is applicable in the case of debts which have become barred by the Statute of Limitations.

In England, and in many of the United States, it is held that the amount of the statute-barred debt owing to the estate by a legatee may be applied by the executor in satisfaction of the legacy.¹

And the same rule has been held to ap-

¹*Courtenay v. Williams* (1844) 3 Hare, 539, 67 Eng. Reprint, 494, 13 L. J. Ch. N. S. 461, affirmed in (1845) 15 L. J. Ch. N. S. 204, 8 Jur. 844; *Coates v. Coates* (1864) 10 Jur. N. S. 532, 33 Beav. 249, 55 Eng. Reprint, 363, 33 L. J. Ch. N. S. 448, 9 L. T. N. S. 795, 12 Week. Rep. 634; (*Gee v. Liddell* (1866) 35 Beav. 629, 55 Eng. Re-
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print, 1041; *Noble v. Tait* (1903) 140 Ala. 469, 37 So. 278; *Rawlins v. Rawlins* (1885) 75 Ga. 632 [dictum]; *Re Esmond* [1910] 154 Ill. App. 357 [but compare *Hesley v. Shaw* (1905) 120 Ill. App. 92, set forth *infra*]; *Re Lietman* (1899) 149 Mo. 112, 73 Am. St. Rep. 374, 50 S. W. 307 [dictum]; *Re Bogart* (1882) 28 Hun (N. Y.) 466;

ply in the distribution of an intestate's estate.² In reply to the contention that a different rule should apply in the case of a distributee who owes to the estate a debt which has become barred, in that, while a legatee takes by the bounty of the testator, the next of kin takes by operation of law, it has been said: "The duty of an administrator is to administer the estate of the intestate. In this instance part of the estate consists of this debt, which is due to the estate, though the remedy for recovering part of it may have become barred by statute. Until the debtor discharges his duty to the estate by paying the debt which he owes to it, he can have no right or title

to any part of it under the statute. A legacy, no doubt, is a gift arising from the bounty of the testator, but a legacy can only be paid in the course of administration; that is to say, after all the claims of creditors of the estate and all the liabilities of debtors to the estate have been satisfied."³

The theory of these cases is that the Statute of Limitations bars only the right of action, and not the debt itself, and therefore that where property of the debtor comes into the hands of the creditor the statute does not preclude his appropriating such property to the payment of the debt.⁴

In the leading English case on this

Rogers v. Murdock (1887) 45 Hun. 30, 9 N. Y. S. R. 660; *Re Foster* (1895) 15 Misc. 176, 37 N. Y. Supp. 36; *Leask v. Hoagland* (1909) 64 Misc. 156, 118 N. Y. Supp. 1035 (reversed on another ground in (1910) 136 App. Div. 658, 121 N. Y. Supp. 197); [but see *Kimball v. Scribner* (1916) 174 App. Div. 845, 161 N. Y. Supp. 511, *infra*]; *Re Covin* (1883) 20 S. C. 471.

² *Re Cordwell* (1875) L. R. 20 Eq. (Eng.) 644, 44 L. J. Ch. N. S. 746; *Re Wheeler* [1904] 2 Ch. (Eng.) 66, 73 L. J. Ch. N. S. 576, 52 Week. Rep. 586; 91 L. T. N. S. 227; *Holmes v. McPheeters* (1898) 149 Ind. 587, 49 N. E. 452; *Garrett v. Pierson* (1870) 29 Iowa, 304 [dictum]; *Holden v. Spier* (1902) 65 Kan. 412, 70 Pac. 348; *Rogers v. Murdock* (1887) 45 Hun. 30, 9 N. Y. S. R. 660; *Re Smith* (1895) 14 Misc. 169, 35 N. Y. Supp. 701 [dictum]; *Re Timerson* (1903) 39 Misc. 675, 80 N. Y. Supp. 639; *Sartor v. Beaty* (1886) 25 S. C. 293; *Ex parte Wilson* (1909) 84 S. C. 444, 66 S. E. 675; *Tinkham v. Smith* (1883) 56 Vt. 187.

In Louisiana, it is held that the heir cannot plead against collation that the debt which he owes is prescribed. *Bougère's Succession* (1876) 28 La. Ann. 743.

And an heir cannot be relieved from collating by prescription after the succession has been opened. *Skipworth's Succession* (1860) 15 La. Ann. 209.

³ *Re Cordwell* (1875) L. R. 20 Eq. (Eng.) 644.

⁴ In *Rogers v. Murdock* (1887) 45 Hun. 30, 9 N. Y. S. R. 660, it is said that the doctrine that where there is a legal and also an equitable remedy in respect to the same subject-matter, the latter is under the control of the same statute bar with the former, is inapplicable to a case where the executor or administrator claims the right to retain the whole or a part of a legacy or distributive share in discharge or satisfaction of a statute-barred debt due from a legatee or distributee to the estate, as such doctrine relates to an action, or a proceeding in the nature of an action, brought to enforce an equitable remedy, in which the statute bar is set up as a defense. The court said: "If, in the present case, the executor were suing to re-

cover the claims above mentioned, the rule would apply. But that is not the case. The only object of the proceeding instituted by the executor is to settle his accounts and distribute the assets of the estate. As the claims against the appellant have not been paid in fact, and no presumption of payment arises from the lapse of time, they are assets in the hands of the executor, for which he must account. And as no affirmative action has been instituted, or is necessary on his part, to make his lien and right of detention available, the Statute of Limitations does not stand in his way."

In *Tinkham v. Smith* (1883) 56 Vt. 187, it is said: "As such assertion, by way of plea in bar, or satisfaction of the decree of distribution, is not in form an action to enforce the payment of such indebtedness, a replication of the Statute of Limitations is not applicable thereto. The Statute of Limitations applies only to actions (Rev. Stat. chap. 55), and not to pleas in bar, by payment or satisfaction; and probably not to pleas, as such, unless in the nature of an action, like declarations in set-off. Although many of the cases cited by the defendant's counsel are suits in equity, they all sustain his contention, that an administrator has the right to apply the indebtedness from an heir to the estate, in part or whole satisfaction of the share of such heir in the estate; and that the Statute of Limitations does not bar nor apply to such application, as it bars and applies to actions only."

In *Holden v. Spier* (1902) 65 Kan. 412, 70 Pac. 348, the court said: "Is the statute applicable when the question is whether the indebtedness of an heir to an estate shall be retained out of his distributive share? We think the bar of the statute cannot be interposed in such cases. The theory of the law, and it is an equitable one, is that the indebtedness of an heir of the estate should be regarded as assets of the estate already in his hands, and that his legacy or share is to that extent satisfied. It would be grossly inequitable to allow an heir to obtain his full share of an estate while he was withholding a por-

question⁵ Vice Chancellor Wigram reasoned as follows: "The Statute of Limitations that governs the present case is the 21 Jac. 1, chap. 16, which takes away the remedy against the debtor, unless the action be brought within six years after the cause of action arose; but it leaves the right untouched, differing in this respect from a more recent Statute of Limitations, by which the right as well as the remedy is barred. In accordance with this construction of the act it has been repeatedly decided, and is settled law, that if a creditor, by means of a lien or other lawful means, can pay himself without resorting to an action against the person of the debtor, he may lawfully do so. In *Spears v. Hartly* (1800) 3 Esp. (Eng.) 81, 6 Revised Rep. 814, which was a case of trover, the defendant, a wharfinger, claimed a lien upon merchandise in his hands for the balance of a general account, which, it was held, he was entitled to; and the only question then was whether, as the balance which the defendant claimed was due to him nine or ten years before the action was brought, the debt was not discharged by the operation of the Statute of Limitations, and the lien, therefore, gone. Lord Eldon said it was true that, if the debt was discharged by the statute, there could be no lien by reason of it; but the debt was not discharged, it was the remedy only. He says, 'I am of opinion that, though the Statute of Limitations has run against a demand, if the creditor obtains possession of goods in which he has a lien for a general balance, he may hold them for that demand by virtue of the lien. In this case the defendant had a subsisting demand when the goods

came to his possession, and I am of opinion he may enforce it by the lien which the law has given him for general balance.' *Higgins v. Scott* (1831) 2 Barn. & Ad. 413, 109 Eng. Reprint, 1196, 9 L. J. K. B. 262, is an authority also in point. If a debtor pays money to a creditor, without directing the appropriation, the creditor, having acquired a right to apply it, may apply it in payment of a debt barred by the Statute of Limitations. *Mills v. Fowkes* (1839) 5 Bing. N. C. 455, 132 Eng. Reprint, 1174, 7 Scott, 444, 2 Arnold, 62, 8 L. J. C. P. N. S. 276, 3 Jur. 406, is also an authority upon the subject, and I may refer also to *Coppin v. Coppin* (1725) 2 P. Wms. 291, 24 Eng. Reprint, 735, and *Williamson v. Naylor* (1838) 3 Younge & C. Exch. (Eng.) 208. I shall assume, for the purpose of the argument in this case, as being favorable to the plaintiff, that the right which the law gives to the creditor having a lien on the goods or other property of the debtor does not enable a debtor effectually to plead, by way of set-off, a debt barred by the Statute of Limitations; that is, I shall assume that the plaintiff might reply the Statute of Limitations in answer to such a plea, as in *Chapple v. Durston* (1830) 1 Crompt. & J. 1, 148 Eng. Reprint, 1311, and *Field v. Besant* (1833) 5 Barn. & Ad. 357, 110 Eng. Reprint, 822, 2 Nev. & M. 207. The question, then, is whether the present case is to be governed by the principle of the former or of the latter cases. If the executor had made himself personally liable to the payment of the legacy, or if the object of the suit had been to charge the executor personally, the principle of the latter cases might possibly

tion of the same that was already in his hands. It has been said that 'it is against conscience that he should receive anything out of the fund without deducting therefrom the amount of that fund which is already in his hands, as a debtor to the estate.' This is not a mere question of set-off, but of equitable lien and right of retainer. *Smith v. Kearney* (1848) 2 Barb. Ch. (N. Y.) 548. Our Statute of Limitations is one of repose, and does not raise a presumption of payment, as in some of the states. The lapse of time does not extinguish an obligation nor satisfy a debt, but the statute simply bars the remedy and prevents the use of the obligation or debt as a cause of action or affirmative defense."

In *Re Covin* (1883) 20 S. C. 471, it is said: "The most of the positions taken by appellant's counsel . . . are no doubt correct; to wit, that J. L. Covin is not liable to account to a legatee, nor to creditors of the estate, nor could the execu-

tors sue him in the probate court on his note. But neither of these principles are involved here. There is no attempt to enforce payment of his note by either legatee, creditor, or the executors. The question, on the contrary, is whether the executors shall be required to pay over to him certain interests which, under the will of his father, he seems to be entitled to. He is a devisee and legatee under this will, and the estate cannot be settled without determining his interests, as well as that of all the other parties, and in defining and adjudging his interests all the facts connected therewith must be considered. The executors are seeking no judgment on the note against him, but they are seeking a decree as to the conditions upon which they shall pay over to him such interest as he may have in their hands."

⁵ *Courtenay v. Williams* (1844) 3 Hare, 539, 67 Eng. Reprint, 494, affirmed in (1845) 15 L. J. Ch. N. S. 204, 8 Jur. 844.

have governed this case. But this is not a suit for that purpose; it is a suit to recover a legacy out of assets, that is, claiming a portion of the assets in the hands of the executor; and the claim is not made in any other way. The case is the same as if the assets were in the hands of the accountant general. Now, to say that the right remains, and that the remedy only is barred, is, in a case like this, the same thing as saying that the legatee has already in his hands, to the amount of his debt, those assets of the testator which he seeks by his suit. Several ways of putting the case may be suggested in support of the argument on the part of the executors. They may say to the legatee, 'We admit your right to the legacy; you have assets of the testator in your hands; pay your legacy pro tanto out of those assets,' as in *Jeffs v. Wood* (1723) 2 P. Wms. 128, 24 Eng. Reprint, 668, and *Campbell v. Graham* (1830) 1 Russ. & M. 453, 39 Eng. Reprint, 175, 9 L. J. Ch. 234. Again, the executor might say, 'You ask for a portion of the assets of the testator; but you are yourself a debtor to the testator's estate, and his assets are diminished pro tanto by your default; it is against conscience that you should take anything out of the estate until you have made good what you owe to it;' and the equity of a trustee to impound the interest of a *cestui qu  trust* in the trust fund, under such circumstances, is clear. *Priddy v. Rose* (1817) 3 Meriv. 86, 36 Eng. Reprint, 33, 17 Revised Rep. 24; *Smith v. Smith* (1835) 1 Younge & C. Exch. (Eng.) 338; *Ex parte Turbin* (1832) *Montague, Bankr. Cas.* (Eng.) 443, 1 *Deacon & C. Bankr. Cas.* 120, 1 L. J. Bankr. N. S. 46. To such a case the rule that he who would have equity must do equity would apply by way of a rebutter to the plaintiff's demand. A third argument may, perhaps, be suggested, though I do not place any reliance upon it. If the testator had been living, and the statute had been pleaded to an action by himself, he might have enforced his claims to the amount of the legacy by canceling the legacy in his will. Now, if the will was made on the supposition that the debt existed, it was, in contemplation of law, made on the supposition that the debt would be paid; and if the circumstances under which, and with reference to which, the will was made, became altered by the act of the legatee, is it not possible that a court of justice, in this case as well as in many others, might hold the altered circumstances to operate as a revocation? I L.R.A.1918C.

do not, however, as I have said, rely upon the last point; I think the first and second points are decisive of the case."

And in an Indiana case,⁶ the court, in speaking of the right of an administrator to retain sufficient of a distributive share to discharge a statute-barred debt owed to the estate by the distributee, said: "This right is not one of set-off, but is founded on the principal that the administrator or executor has an equitable lien on the share of the distributee or legatee, until the latter has discharged the obligation which he owes to the estate. The heir or legatee, as the authorities affirm, is not, in accordance with justice or good conscience, entitled to be awarded and receive his share as long as he is a debtor to the estate, and thereby has in his own hands a part of the fund upon which the payment of his own share and the shares of others depend. To allow a distributee to receive his share of the fund in the hands of the administrator for distribution, while the former is in default in the payment and discharge of his own obligations to the estate, would serve to diminish the fund, and result, perhaps, to the prejudice of others. By permitting the distributee to receive his share, while he retains a part of the fund in his own hands, out of which his share ought to be paid, might and frequently would result in awarding to him a portion of the fund greater than that received by other equally entitled distributees. These principles, in reason, do and must apply when the recovery of the debt which the distributee owes to the estate is barred by the Statute of Limitation. The Statute of Limitation is one of repose, and is only a bar to the remedy, and not to the debt itself, simply leaving it unpaid without any legal remedy on the part of the creditor to enforce its payment by suit, in the event the debtor relies on the statute as a defense. Measured, however, by a moral standard, and one in accord with good conscience, the debtor is still under an obligation to pay his debt, although a recovery thereon under the law may be barred by the lapse of time."

The rule applies where the indebtedness has become barred subsequently to the testator's death, as well as where it became barred in his lifetime,⁷ but where the courts deny the right to deduct from a legacy or distributive share a debt which has become barred in the lifetime

⁶ *Holmes v. McPheeters* (1898) 149 Ind. 587, 49 N. E. 452.

⁷ *Re Bogart* (1882) 28 Hun (N. Y.) 466.

of the decedent, they also deny the right in case of a debt upon which the Statute of Limitations had not fully run at the time of decedent's death, but which subsequently became barred.⁸

The debt must have been one for which, but for the Statute of Limitations, the legatee or distributee could have been sued; and so, where a distributee is not legally bound, by reason of being a married woman with no separate estate, the executor has no right of retainer.⁹

So, a right of retainer cannot be claimed in respect of a debt of over twenty years' standing, where the lapse of twenty years raises a presumption of payment.¹⁰

The executor may not claim to retain a legacy on the ground that the testator had signed as security the legatee's promissory note, where the note became barred by the Statute of Limitations as against both the promisors before the death of the testator; and the situation is not changed by the fact that the note is held by the executor, since he has no right to waive in his own favor the bar of the Statute of Limitations, and to bind the estate of his testator by a new promise to himself to pay the debt which, at the date of his testator's death, could not have been legally enforced.¹¹

The doctrine that, where a legatee of a general legacy or share of residue is a

debtor to the estate, he is not entitled to receive his legacy without bringing the debt into account, does not require the sole residuary legatee of the debtor to bring a statute-barred debt into account before participating in the estate of the creditor.¹²

The contrary doctrine.

In several of the United States it is held that where a debt is barred by the Statute of Limitations, it cannot be brought into account, either as against a legatee,¹³ or a distributee.¹⁴ These cases reject the English doctrine on one or the other of two grounds,—one of which is that the local Statute of Limitations operates not simply to bar the remedy, but to extinguish the debt, and that the legatee or distributee is as much entitled to the benefit of the statute as any other creditor;¹⁵ the other being that as in local jurisdiction the legatee or devisee is not obliged to resort to a court of equity to enforce his claim, but may bring an action at law, it is not within the power of the courts to compel him to do equity.¹⁶ The grounds on which they were decided are stated in the subjoined footnote.¹⁷

Where will directs deduction of debts.

Irrespective of the attitude of the courts in any particular jurisdiction on the question whether a legacy may be retained in satisfaction of a statute-barred

⁸ *Light's Estate* (1890) 136 Pa. 211, 20 Atl. 536, 537, overruling *Thompson's Appeal* (1862) 42 Pa. 345, which had theretofore been followed in *Re Murray* (1870) 2 Pearson (Pa.) 473, and *Re Lang* (1885) 16 Pittsb. L. J. N. S. (Pa.) 9.

⁹ *Re Wheeler* [1904] 1 Ch. (Eng.) 66, 73 L. J. Ch. N. S. 576, 52 Week. Rep. 586, 91 L. T. N. S. 227.

¹⁰ *Sartor v. Beaty* (1886) 25 S. C. 293.

¹¹ *Wadleigh v. Jordan* (1883) 74 Me. 483.

¹² *Re Bruce* [1908] 2 Ch. (Eng.) 682, 4 B. R. C. 713, 78 L. J. Ch. N. S. 56, 99 L. T. N. S. 704.

¹³ *Holt v. Libby* (1888) 80 Me. 329, 14 Atl. 201; *Allen v. Edwards* (1883) 136 Mass. 138; *Kimball v. Scribner* (1916) 174 App. Div. 845, 161 N. Y. Supp. 511; *Reed v. Marshall* (1879) 90 Pa. 345; *Light's Estate* (1890) 136 Pa. 211, 20 Atl. 536, 537; *Sherer's Estate* (1900) 17 Lanc. L. Rev. (Pa.) 3821.

¹⁴ *Boden v. Mier* (1904) 71 Neb. 191, 98 N. W. 701; *Harrod v. Carder* (1888) 3 Ohio C. C. 479, 2 Ohio C. D. 274; *Drysdale's Appeal* (1850) 14 Pa. 531; *Milne's Appeal* (1882) 99 Pa. 483; *Re Murray* (1870) 2 Pearson (Pa.) 473; *Richardson v. Keel* (1882) 9 Lea (Tenn.) 74.

¹⁵ See *Light's Estate* (1890) 136 Pa. 211, 20 Atl. 536, 537.
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¹⁶ See *Allen v. Edwards* (1883) 136 Mass. 138.

¹⁷ In *Holt v. Libby* (1888) 80 Me. 329, 14 Atl. 201, the court, after referring to the doctrine of the English courts that a legacy may be retained in satisfaction of the legatee's debt to the estate though such debt has become barred, and remarking that a legacy was recoverable in England, at the time when such doctrine was established, only in chancery, said: "This doctrine cannot be applicable in this state, and in most of the states, where a legacy is made by statute, if not by ancient practice, a legal claim. With us it is a distinct and independent legal claim. The estate is just as much of a debtor to the indebted legatee as the legatee is to the estate."

Each has a legal right and remedy. And a statute-barred debt is no more recoverable by an estate than by any other creditor. To our minds, this is the better doctrine. Observation leads us to believe that a testator is more likely to intend to remit than to collect such debts, when nothing is declared of them by him in his will, especially debts against his children and relatives. In many instances such claims are covered by the dust of time and forgotten, though found by executors after the death of the testators. In many other instances

debt owed to the testator, it is uniformly held that where a testator directs that any debts due or owing to him from legatees shall be brought into the division of the estate, or deducted from the share of the one so indebted, the debt must be deducted though barred by the Statute of Limitations.¹⁸

In such a case the legatee is a mere

the advances are intended as benefactions and gifts, conditioned upon some unforeseen circumstances arising to make it expedient to regard them as debts."

In *Richardson v. Keel* (1872) 9 Lea (Tenn.) 74, it is said: "One species of property can no more be taken than another to pay a debt which the law does not recognize as valid security. The defendant's distributive share in his father's estate is as much his property as any other he may own."

In *Helsey v. Shaw* (1905) 120 Ill. App. 92, it was held that an administrator could not obtain an order in the court of probate authorizing the setting off of notes barred by the Statute of Limitations against the distributive share of the maker, the court saying: "We are of opinion, however, that whether the strict rules of law, or equitable principles, are applied in the determination of the question, the notes are, in either case, barred by the Statute of Limitations. It is well settled that when courts of law and equity have concurrent jurisdiction, a claim barred at law will be barred in equity, and that even when the jurisdiction in equity is exclusive, the limitation applies if the remedy sought is analogous to a remedy at law. *Hancock v. Harper* (1877) 86 Ill. 445. The purpose of the petition was, and the effect of granting the same would be, to enforce the payment of the notes in question. The proceeding was, therefore, clearly analogous to an action at law for the same purpose. There is no claim that any new promise to pay the notes existed, nor that any mutual claims existed between the deceased and the makers of the notes. The trial court properly held that the Statute of Limitations, which is a statute of repose, based upon the presumption that the debt has been paid, barred not only the remedy of appellant, as the representative of his intestate, but the right which it was intended to vindicate, as well." But compare *Re Esmond* (1910) 154 Ill. App. 357, in which a different view seems to have been taken; also *Rogers v. Murdock* (1887) 45 Hun. 30, 9 N. Y. S. R. 660, above set forth, in which it is said that the doctrine that where there is a legal and also an equitable remedy in respect to the same subject-matter, the latter is subject to the same statute bar as the former, does not apply to a situation of this kind.

In *Kimball v. Scribner* (1916) 174 App. Div. 845, 161 N. Y. Supp. 511, it was held that an executor cannot set up as a defense, in an action brought by a legatee L.R.A.1918C.

volunteer, and must take the bounty of the testator upon the terms upon which it is bestowed.¹⁹

Though the contention has been made in cases of this type that where the testator directs such indebtedness as, at the time of his decease, may be due from a legatee to be deducted from his share, it must be assumed that only the indebted-

to recover his legacy, the existence of unpaid promissory notes forming part of the assets of the estate, but which are barred by the Statute of Limitations. The court said: "I do not find any authority in this state where this question has been decided in an action at law to recover the amount of a legacy. There are numerous authorities, originating mostly in the surrogates' courts, arising upon accounting proceedings for a judicial settlement of an estate, where it has been held, following the English chancery rule, that an executor has the right to retain, as against a legatee, sufficient moneys to discharge an obligation of the legatee to the decedent, even though such obligation was subject to the bar of the Statute of Limitations. *Rogers v. Murdock* (1887) 45 Hun (N. Y.) 30, 9 N. Y. S. R. 660; *Re Foster* (1895) 15 Misc. 175, 37 N. Y. Supp. 36; *Re Timerson* (1903) 39 Misc. 675, 80 N. Y. Supp. 639; *Leask v. Hoagland* (1909) 64 Misc. 156, 118 N. Y. 1035, reversed in (1910) 136 App. Div. 658, 121 N. Y. Supp. 197; *Re Leslie* (1878) 3 Redf. (N. Y.) 280. These cases all proceed upon the theory that the Statute of Limitations is one of repose only, and does not discharge the debt (*Hulbert v. Clark* (1891) 128 N. Y. 295, 14 L.R.A. 59, 28 N. E. 638); that the debt is a part of the assets of the estate and that the debtor cannot, in good conscience, demand the payment of his legacy from the estate without contributing to the assets thereof the amount of his indebtedness. There are, however, authorities in other jurisdictions which hold that in an action to recover a legacy it is not a good defense that the legatee was indebted to the decedent on an obligation as to which the bar of the Statute of Limitations has run." And, after reviewing *Allen v. Edwards* (Mass.) supra, and referring to other similar decisions, the court continued: "I think that the reasoning in *Allen v. Edwards*, is distinctly applicable to the case at bar. It would seem that there can be no longer any sound distinction in legal principle whether this question arises in a surrogate's court in a proceeding to distribute an estate, or in an action at law to recover a legacy. Certainly, in this action at law, the principle has been applied according to the weight of authority and with regard to the substantial weight of reason."

¹⁸ *Rose v. Gould* (1852) 15 Beav. 189, 51 Eng. Reprint, 509, 21 L. J. Ch. N. S. 360; *Gray v. Hayhurst* (1910) 157 Ill. App. 488; *Holt v. Libby* (Me.) supra; *Baker v. Safe Deposit & T. Co.* (1901) 93 Md. 363, 48 Atl.

ness that is demandable and collectable by process of law can be deducted, the courts have declined to recognize its validity.¹⁹

920, 49 Atl. 623; *Cummings v. Bramhall* (1876) 120 Mass. 552; *Allen v. Edwards* (1883) 136 Mass. 138; *Gillingham's Estate* (1908) 220 Pa. 353, 69 Atl. 809; *Bird's Estate* (1851) 2 Pars. Sel. Eq. Cas. (Pa.) 168.
¹⁹ *Gillingham's Estate* (1908) 220 Pa. 353, 69 Atl. 809. E. S. O.

OKLAHOMA SUPREME COURT.

NORMAN MILLER, Plff. in Err.,

MRS. BLANCHE HORTON.

(— Okla. —, 170 Pac. 509.)

Bills and notes — pledge — title.

1. The pledging of commercial paper as collateral security for the payment of a debt does not vest the pledgee with complete title; he has only a special interest therein to secure the debt; the general ownership remains in the pledgeor.

For other cases, see *Pledge and Collateral Security, II. a, in Dig. 1-52 N. S.*

Same — right to sell.

2. The pledge of commercial paper as collateral security for payment of debts does not, in the absence of special power for that purpose, authorize the pledgee to sell the securities so pledged, upon default of payment of the debt, either at private or public sale. He must hold and collect the same as it becomes due and apply the proceeds to the payment of the debt secured.

For other cases, see *Pledge and Collateral Security, II. a, in Dig. 1-52 N. S.*

(June 6, 1917.)

ERROR to the District Court for Bryan County to review a judgment in favor of plaintiff in an action brought to recover a balance alleged to be due on a promissory note. Affirmed.

The facts are stated in the Commissioner's opinion.

Mr. J. M. Crook, for plaintiff in error:

Defendant having become the holder of the note after maturity in his own right, the same was duly and legally discharged, and a peremptory verdict in his favor should have been given by the lower court instead of for plaintiff.

3 R. C. L. § 497, p. 1269; *Long v. Bank of Cynthiaana*, 1 Litt. (Ky.) 290, 13 Am. Dec. 234; *Harmer v. Steele*, 4 Exch. 1, 154 Eng. Reprint, 1100, 19 L. J. Exch. N. S. 34, 4 Eng. Rul. Cas. 515; *Freakley v. Fox*, 9

Headnotes by PRYOR, C.

Note.—As to right of pledgee of commercial paper to sell the same, see annotation following this case, post, 628; and references therein to annotation on collateral points.
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Barn. & C. 130, 109 Eng. Reprint, 49, 4 Mann. & R. 18, 7 L. J. K. B. 148.

It was error to hold that there had been no fraud shown or proven in the case, because plaintiff's husband, at the time of making the trade transferring the property, made false and fraudulent representations to the defendant which were material.

Watkins v. West Wythesville Land & Improv. Co. 92 Va. 1, 22 S. E. 554; *Nairn v. Ewalt*, 51 Kan. 355, 32 Pac. 1110; *Blydenburgh v. Welsh*, Baldw. 331, Fed. Cas. No. 1,583; *Slaughter v. Gerson*, 13 Wall. 379, 20 L. ed. 627; *Wise v. Fuller*, 29 N. J. Eq. 257.

Messrs. McPherren & Cochran and Charles A. Phillips, for defendant in error:

The delivery of the note as collateral security was simply a pledge of the note.

Averill Machinery Co. v. Bain, 50 Mont. 512, 148 Pac. 334.

A pledge of personal property does not vest the ownership of the property in the pledgee, but only a special ownership.

Ibid.; *Joliet Iron & Steel Co. v. Scioto Fire Brick Co.* 82 Ill. 548, 25 Am. Rep. 341; *Garlick v. James*, 12 Johns. 146, 7 Am. Dec. 294; *Halliday v. Bank of Stewart County*, 112 Ga. 461, 37 S. E. 721.

A pledgee cannot sell any evidence of debt pledged to him, except the obligations of governments, states, or corporations, but may collect the same when due.

Joliet Iron & Steel Co. v. Scioto Fire Brick Co. 82 Ill. 548, 25 Am. Rep. 341; *Wheeler v. Newbould*, 16 N. Y. 392; *Richardson v. Ashby*, 132 Mo. 238, 33 S. W. 806.

The attempted sale by the bank did not divest the title of Horton to this note.

Halliday v. Bank of Stewart County, 112 Ga. 461, 37 S. E. 721; *Powell v. Ong*, 92 Ill. App. 95; *Union Trust Co. v. Rigdon*, 93 Ill. 458; *Garlick v. James*, 12 Johns. 146, 7 Am. Dec. 294.

There was no testimony introduced by defendant to sustain his allegation of fraud.

20 Cyc. 13; *Hutchinson v. Gorman*, 71 Ark. 305, 73 S. W. 793; *Elwell v. Russell*, 71 Conn. 462, 42 Atl. 862; *Cooley v. King*, 113 Ga. 1163, 30 S. E. 486; *McFarland v. Carlsbad Sanatorium Co.* 68 Or. 530, 137 Pac. 209, Ann. Cas. 1915C, 555; *Raser v. Moomaw*, 78 Wash. 653, 51 L.R.A. (N.S.) 707, 139 Pac. 622; *Hutchason v. Spinks*, 3

Cal. App. 291, 85 Pac. 132; *American Nat. Bank v. Hammond*, 25 Colo. 367, 55 Pac. 1090; *King v. Howeth*, 42 Okla. 178, 140 Pac. 1182; *Connell v. El Paso Gold Min. & Mill. Co.* 33 Colo. 30, 78 Pac. 677.

Pryor, C., filed the following opinion:

On the 8th day of October, 1914, the defendant in error, Blanche Horton, commenced an action in the district court of Bryan county against Norman Miller, plaintiff in error, to recover the sum of \$190, alleged to be the balance due on a promissory note made by the plaintiff in error to the defendant in error. The parties will be referred to as they appeared in the court below.

The petition of the plaintiff in the court below alleged, in substance: That on the 20th day of September, 1912, the plaintiff and her husband, L. D. Horton, sold to the defendant, Norman Miller, lot 7 in block 134 in the city of Durant, Oklahoma, for the sum of \$1,600, and in addition thereto the defendant was to assume a real estate mortgage on the lot at the time. The defendant paid the plaintiff and L. D. Horton \$600 in cash and for the deferred payment made and delivered to the plaintiff and L. D. Horton his two promissory notes in the sum of \$500 each; one due on the 20th day of September, 1913, and the other due on the 20th day of September, 1914. That the plaintiff retained a vendor's lien on the said lot as security for the payment of the said notes. That the first note was paid by the defendant when the same became due. That during the year 1913 the plaintiff and her husband delivered to the First National Bank of Idabel, Oklahoma, the last note as collateral security for the payment of a certain note in the sum of \$435, given to said bank by Warren Phillips and L. D. Horton, and assigned the vendor's lien on said lot to said bank. That the sum of \$50 had been paid on said note of Warren Phillips and L. D. Horton which the said First National Bank held. That on the 20th day of September, 1914, there was due and unpaid as principal and interest on the said note given to the plaintiff and L. D. Horton the sum of \$380, and while the said bank held said note as collateral security, the defendant went to the First National Bank of Idabel, and paid the note of the said Warren Phillips and L. D. Horton, the sum due thereon at that time being \$434.37, and secured from the said First National Bank the said note of Warren Phillips and L. D. Horton, and the note pledged with the said bank as collateral security, the same being the \$500 note sued on, and the release of the vendor's lien which the plaintiff and L. D. Horton had delivered to the bank at the L.R.A.1918C.

time of negotiating the \$435 loan. But at the time of taking up the said note and security by the defendant there was still due on the said \$500 note the sum of \$160.19 after giving the defendant credit for the \$434.37 which he paid to the said First National Bank. That L. D. Horton, prior to this suit, assigned his interest in said note to plaintiff. The plaintiff asks in her petition judgment for the said \$160.19, for the cancellation of the release of the vendor's lien delivered to the First National Bank by said plaintiff, and for a foreclosure of the vendor's lien.

The answer of the defendant alleges in substance that by reason of his transaction with the First National Bank of Idabel in taking up the said note of one Phillips and L. D. Horton in the sum of \$434.37, and the bank delivering the said \$500 note of the defendant to the plaintiff, and the release of the vendor's lien, that the defendant became the absolute owner of the note sued on in this action. He sets up a further defense, and asks damages in the sum of \$104 against the plaintiff by reason of certain alleged fraud which he alleges to have been committed by the plaintiff against him in the original transaction, wherein he alleges the plaintiff represented to him that the lot had a mortgage against it in the sum of \$750, bearing a low rate of interest, 6 per cent, which made said purchase a desirable proposition. It further alleges that it did not run the length of time represented by the defendant, and that he was compelled to pay said mortgage off in the year of 1912, and had to borrow the money for that purpose at a higher rate of interest.

When this cause came on for hearing there was a jury duly impaneled, but, after hearing the evidence and argument of counsel, the court directed a verdict for plaintiff and rendered judgment thereon, to which the defendant excepted, and prosecutes his appeal to this court for review.

The defendant urges two assignments of error, which may be briefly stated: First, that the court erred in overruling a motion of the defendant to quash depositions of the plaintiff; second, that the court erred in directing the jury to return a verdict for the plaintiff, which said verdict was contrary to the law and evidence.

The motion of the defendant to quash the depositions of H. C. Morris and Warren Phillips is as follows: "Comes now the defendant and moves the court to quash the depositions of Warren Phillips and H. C. Morris, taken on October 1, 1915, for the reason that they were not taken upon such notice and under procedure as was in such cases provided by law."

The specific complaint made on the hear-

ing of said motion against the deposition was that the notice of taking said depositions did not give the defendant sufficient time to make preparation and attend the taking of the same. The records show that the notice was served on the defendant on the 25th day of September, 1915, by leaving a copy thereof at the residence of the defendant in the city of Durant, with the wife of defendant, and by mailing a copy thereof to J. M. Crook, the attorney of record, of the defendant. The records show that the said attorney received this notice on the 25th day of September, 1915, at Oklahoma City. The date fixed in said notice for the taking of said depositions was the 1st day of October, 1915, and the place, the town of Idabel, Oklahoma.

The statute prescribing the notice for the taking of depositions and the manner of service thereof is as follows: "5079. Prior to the taking of any deposition, unless taken under a special commission, a written notice, specifying the action or proceeding, the name of the court or tribunal in which it is to be used, and the time and place of taking the same, shall be served upon the adverse party, his agent or attorney of record, or left at his usual place of business or residence. The notice shall be served so as to allow the adverse party sufficient time, by the usual route of travel, to attend, and one day for preparation, exclusive of Sunday and the day of service; and the examination may, if so stated in the notice, be adjourned from day to day."

The evidence further shows that the attorneys for the plaintiff offered to agree with the attorney for the defendant that the depositions might be taken any time between the 1st and the 4th day of October, or any time that would not delay the trial of said cause, which was set for the 6th day of October, 1915. There seems to be no legal objection whatever to this notice; in fact, it appears that the notice is more liberal than the statute. Therefore the court committed no reversible error in refusing to quash the same upon motion of the defendant.

In regard to the second error urged by the plaintiff, that the court erred in directing the verdict, and that the verdict and judgment were contrary to the law and evidence, the defendant urges in his brief two propositions: the alleged fraud of the plaintiff in the purchase of said lot, and that he had discharged said note by the transaction he had with the bank. Upon careful examination of the evidence in the record it appears plainly that there is no evidence to support whatever allegations of fraud the answer contains. The evidence of the defendant in this regard simply shows that

the representative of the plaintiff stated to the defendant that there was a mortgage on said lot bearing a low rate of interest, which made the purchase a desirable proposition. As to there being a mortgage on the place bearing a low rate of interest, this was true, and as to whether or not it was a desirable proposition is a mere matter of opinion, which does not constitute fraud. Further, the representative of the plaintiff, when negotiating with the defendant to sell him the lots, delivered to him a statement of the mortgage which showed the principal amount, interest paid, and the interest due and the interest to fall due, and the date when the mortgage would become due. This statement is entirely consistent with the representations complained of by defendant, and alone completely refutes the allegations of the answer as to fraudulent representations as to said mortgage. The defendant himself introduced this statement as his own evidence. It therefore conclusively appears from the record that no fraud whatever was established by the evidence of the defendant. The counterclaim of the defendant failed.

The next contention made by the defendant is that, when the defendant took up the note for \$434.37 of Warren Phillips and L. D. Horton and the \$500 note sued on in this action and the vendor's lien, the defendant became the absolute owner of said \$500 note, and that there was no further liability of the defendant to plaintiff on said note; that said transaction was a complete discharge of said note. This question depends on whether or not, when any evidence of indebtedness, such as a promissory note, is pledged as collateral to secure the payment of the debt, the title passes from the owner of such evidence of indebtedness to the pledgee. The question seems to have been well settled that the mere pledging of a promissory note or other evidence of indebtedness as collateral security for the payment of a debt does not divest the pledgeor of title and vest title in the pledgee. *Averill Machinery Co. v. Bain*, 50 Mont. 512, 148 Pac. 334; *Garlick v. James*, 12 Johns. 146, 7 Am. Dec. 294; *Union Trust Co. v. Rigdon*, 93 Ill. 458; *Halliday v. Bank of Stewart County*, 112 Ga. 461, 37 S. E. 721. In the case of *Union Trust Co. v. Rigdon*, supra, the supreme court of Illinois held: "On a pledge or pawn of personalty, the legal property does not pass as in the case of a mortgage with a condition of defeasance, but the general ownership remains with the pledgeor, and only a special property passes to the pledgee."

In the case of *Averill Machinery Co. v. Bain*, supra, the court held: "The legal title to property pledged remains in the

pledgeor. *Legatt v. Palmer*, 39 Mont. 302, 102 Pac. 327. The pledgee has a special property interest in the thing pledged; that is, he has a lien upon it which depends for its validity upon possession. *Rairden v. Hedrick*, 46 Mont. 510, 129 Pac. 498. When the principal debt is paid, the pledge is discharged (31 Cyc. 851), and the pledgeor is entitled to a return of the pledge."

As the pledgee does not hold the title to the thing pledged, it follows as a matter of course, unless he has a contract giving him authority to sell the same, he cannot do so.

When a person or corporation is holding a promissory note, commercial paper, or other evidence of debt as collateral security for the payment of a debt to him, he has only the authority to collect the same and apply it on the debt due him, and he cannot sell said collaterals and pass title thereto to the pretended purchaser. *Joliet Iron & Steel Co. v. Scioto Fire Brick Co.* 82 Ill. 548, 25 Am. Rep. 341; *Wheeler v. Newbould*, 16 N. Y. 392; *Powell v. Ong*, 92 Ill. App. 95; *Union Trust Co. v. Rigdon*, 93 Ill. 458. In the case of *Union Trust Co. v. Rigdon*, supra, the supreme court of Illinois held: "There is a distinction between a pledge of ordinary chattels and a pledge of commercial paper. A pledge of the latter as collateral security for the payment of a debt does not, in the absence of a special power for that purpose, authorize the pledgee to sell the securities so pledged, upon default of payment, either at public or private sale. He is bound to hold and collect the same as they become due, and apply the net proceeds to the payment of the debt so secured."

In the case of *Joliet Iron & Steel Co. v. Scioto Fire Brick Co.* supra, the court said: "The pledge of commercial paper as collateral security for the payment of a debt does not, in the absence of a special power for that purpose, authorize the party to whom such paper is so pledged to sell the securities so pledged, upon default of pay-

ment, either at public or private sale. He is bound to hold and collect the same as it becomes due, and apply the net proceeds to the payment of the debt so secured. A person holding property or securities in pledge occupies the relation of trustee for the owner, and as such, in the absence of special power to do otherwise, is bound to proceed as a prudent owner would with his own. From the very nature of the case, property can only be applied as security through the process of sale. Not so with bonds, mortgages, or promissory notes."

Further, the statute (Revised Laws 1910, § 4519) forbids the sale of evidence of debts by the pledgee; said section being as follows: "A pledgee cannot sell any evidence of debts pledged to him, except the obligations of governments, states, or corporations; but he may collect the same when due."

The evidence of defendant shows that he had knowledge of the nature of the bank's interest in said note. As title to said note did not pass to the First National Bank when the plaintiff deposited the same with it as collateral security, and as the bank, under the law, had no authority to sell the same, title did not pass to the defendant when he took the same up and procured the possession thereof. He was liable to the plaintiff for the amount due thereon at the time of the commencement of the suit, and as the counterclaim of the defendant in the way of damages failed as above shown, all of the defenses of the defendant have failed. The court committed no prejudicial or reversible error in directing a verdict for the plaintiff.

Therefore the judgment of the court below should be affirmed.

Per Curiam:

Adopted in whole.

Petition for rehearing denied February 12, 1918.

Annotation—Right of pledgee of commercial paper to sell the same.

This note is supplemental to part of the note to *Moses v. Grainger*, 53 L.R.A. 857, 858. It will be observed that neither note is concerned with the right to transfer the collateral as an incident to a transfer of the principal obligation.

For pledgee's conversion of pledged property by invalid sale, see the note in 43 L.R.A. 737.

The ruling in *MILLER v. HORTON*, ante, 625, that, in the absence of special contract, the holder of commercial paper as collateral cannot separate it from the L.R.A. 1918C.

debt by sale, is sustained by the authorities, as appears from the earlier note in 53 L.R.A. 858.

It will be observed that in *MILLER v. HORTON*, the action was by the pledgeor against the maker of the pledged note. In *Powell v. Ong* (1900) 92 Ill. App. 95, the facts were similar to those in the *MILLER CASE*, except that in the *Powell Case* the action was by the pledgeor against the pledgee. In the *Powell Case* the plaintiff gave the defendant his promissory note, and as collateral secur-

ity a larger note of C, due at the same time, and after the notes came due the defendant turned them over to C on receipt of the amount due on the plaintiff's note. It was held that the defendant was liable to the plaintiff for the value of C's note, less the amount of A's note. The court said: "The law is well settled in this state that 'a pledgee who holds commercial paper as collateral security for the payment of his debt has no authority, in the absence of a special power for that purpose, to sell securities upon default of payment, at public or private sale. He is bound to hold and collect the same as they become due, and apply the net proceeds to the payment of the debt so secured.'" The court quoted Story on Bailments, § 321, as follows: "The person holding commercial paper as collateral security for a debt due him has no right, unless, perhaps, in a very extreme case, to compromise with the parties to the security for a less sum than the sum due on the security, and if he does he will be compelled to account to the pledgeor for the full value;" and after referring to the case of the Union Trust Co. v. Rigdon (1879) 93 Ill. 458, discussed in the earlier note, said further: "In Colebrook on Collateral Securities, § 96, the rule is stated as follows: 'The pledgee of negotiable securities as collateral security is not permitted, in the absence of special agreement, in his dealings with the securities, to accept anything less in discharge or satisfaction of them from the parties bound than the face value of such paper. Any trade or compromise or rebate made by the pledgee with the maker or other parties to such collaterals, whereby the same are surrendered for less than the face value thereof, is a breach of the duty of the pledgee and is not sustained. Any arrangement whereby the securities are transferred for less than is due thereon to a party already bound for the full amount is a compromise, notwithstanding a power of sale has been given by the contract of pledge.' It is therefore apparent from the above authorities that appellant, by disposing of the collateral note to the maker thereof, rendered himself liable to appellee for any damages sustained by the latter, and it was immaterial whether there was any actual fraud or collusion on the part of appellant in the transaction. The measure of damages was prima facie the amount due on the collateral note, less the debt it was given to secure; and the burden of proving the amount to be less was upon the appellant."

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It may be doubted whether it was necessary, in order to sustain the decision in *MILLER v. HORTON*, to invoke the principle that the holder of commercial paper as collateral cannot sell the same (in the absence of a special power).

In *State v. Castleton* (1913) 255 Mo. 201, 164 S. W. 492, the court agrees with the rule announced in *Richardson v. Ashby* (1895) 132 Mo. 238, 33 S. W. 806, referred to in the earlier note, to the effect that the holder of commercial paper "as collateral for the payment of a debt cannot, in the absence of a special power for that purpose, sell the security so pledged upon default of payment of the debt, at public or private sale, with or without notice, as in the case of ordinary property, on timely notice, nor by order of court dispose of same." If he sells the same, he will be liable for a conversion.

In *Le Banque D'Hochelaga v. Larue* (1910) 3 Alberta L. R. 42, where a bank sued the defendant on his promissory note, and he counterclaimed on notes of a third party, amounting to the same sum, which he had pledged as collateral to the note sued on, and which the bank had turned over to the third party, it was held that the bank's claim was equaled by the counterclaim.

In *Jenckes v. Rice* (1903) 119 Iowa, 451, 93 N. W. 384, where a contract of indemnity deposited as collateral security with a bank was sold, the court said: "We are of the opinion that the sale of the collateral security by the bank did not vest the absolute title therein in the plaintiff. It is undoubtedly the rule that the pledgee of personal property in the shape of goods or merchandise or tangible chattels of any kind may sell the same, after default, upon proper notice to the pledgeor; but this rule has been quite generally held not to apply to choses in action or commercial paper, other than stocks and bonds, unless the contract so provides; and the reason for this exception is that such securities, not being usually marketable at their fair value, would generally be sold at a sacrifice, and an injustice would thus be done the debtor; and it cannot be presumed that it was the intention of the parties thus to deal with the securities."

In *Peacock v. Phillips* (1910) 247 Ill. 467, 32 L.R.A. (N.S.) 42, 93 N. E. 415, it was held that one who, with knowledge of the facts, purchases a note and mortgage held by a bank as collateral for a note of less amount, executed by one of the makers of the mortgage, at a sale by the bank in accordance

with the contract, upon default in payment of its note at maturity, can enforce the collateral note and mortgage securing it only to the extent of the amount due on the obligation for which it stood as collateral. See also note to this case in 32 L.R.A.(N.S.) 42.

The following quotations are of interest in connection with the subject:

"It is elementary that, when a collateral note has been indorsed and delivered, the pledgee is the legal owner of it to the extent of the debt, and the pledgeors are owners of the remainder, and that the pledgee is entitled to collect the note, and must use diligence to do so." Baldwin v. Jordan (1914) — Tex. Civ. App. —, 171 S. W. 1016.

"Where a note has been transferred as collateral security for a debt less than the amount of said note, the payee is still the equitable owner of said note to the amount of the excess over the debt for which the note had been transferred as collateral." Thomson v. Findlater Hardware Co. (1913) — Tex. Civ. App. —, 156 S. W. 301.

"It is too well settled to require citation of authority that the holder of a note, given as collateral security for a debt due him, can sue the maker and recover upon such collateral security, and that a judgment against the principal

debtor and against the maker of the note assigned as collateral security can be recovered in the same action, even though such collateral security exceeded in amount the debt it was assigned to secure, the excess, after the payment of the principal indebtedness, inuring to the benefit of him who assigned the note as collateral." Forty-Acre Spring Live Stock Co. v. West Texas Bank & T. Co. (1908) — Tex. Civ. App. —, 111 S. W. 417.

But a pledgeor, after acquiescing in the delivery by the pledgee to the maker of notes pledged as collateral, may not tender the amount of his debt to the pledgee and demand the collateral. First Nat. Bank v. Seaward (1916) 78 Or. 567, 152 Pac. 883.

While the statute of California forbids a pledgee from selling any evidence of debt pledged to him, and limits his right to collect the same when due, and he has no right to sell a note transferred to him as collateral, and an unauthorized sale would be a conversion as to the pledgeor, this statute is for the benefit of the pledgeor, and the maker of the note, when he is not prejudiced by its sale, cannot be heard to complain. Woolf v. Clarke (1911) 17 Cal. App. 696, 121 Pac. 407.

B. B. B.

WASHINGTON SUPREME COURT. (Department No. 1.)

JULIUS BLUM, Respt.,
v.

W. H. ROWE, Impleaded, etc., Appt.,

(— Wash. —, 168 Pac. 781.)

Receivers — right of simple contract creditor.

A simple contract creditor without lien on any specific property of his debtor is not entitled to the appointment of a receiver for an individual debtor's property on the ground that the debtor is insolvent and will dissipate and squander his property.

For other cases, see *Receivers*, I. b, in Dig. 1-52 N. S.

(November 12, 1917.)

APPEAL by defendant Rowe from an order of the Superior Court for King County appointing a receiver as to him in-

Note. — As to right of a simple contract creditor to the appointment of a receiver of the property of his individual or firm debtor, see annotation following this case, post, 632, and references therein to annotation on collateral points.
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dividually in an action brought to recover an amount alleged to be due from defendants for work and labor performed and money expended at their request and for their benefit. Reversed.

The facts are stated in the opinion.

Mr. E. P. Whitting, for appellant:

The affidavit alleges no sufficient ground upon which to rest the appointment of a receiver as against any of the defendants.

Henderson v. Reynolds, 168 Ind. 522, 11 L.R.A.(N.S.) 960, 81 N. E. 494, 11 Ann. Cas. 977; Thompson v. Adams, 60 W. Va. 463, 55 S. E. 668; Uhl v. Dillon, 10 Md. 500, 69 Am. Dec. 172; Walker v. Zorn, 50 Ga. 371; Spokane v. Amsterdamsch Trustees Kantoor, 18 Wash. 81, 50 Pac. 1088; Norfor v. Busby, 19 Wash. 450, 36 Pac. 715; Balfour-Guthrie Invest. Co. v. Geiger, 20 Wash. 579, 56 Pac. 370; 34 Cyc. 37.

Messrs. Jay C. Allen and Philip Tindall, for respondent:

Plaintiff's case calls for the exercise by the court of the discretion conferred upon it by the statute relative to the appointment of receivers, which authorizes the appointment of a receiver "when, in the dis-

cretion of the court, it may be necessary to secure ample justice to the parties."

Spute v. Spute, 74 Wash. 665, 134 Pac. 175; *Davis v. Edwards*, 41 Wash. 483, 84 Pac. 22; *Euphrat v. Morrison*, 39 Wash. 311, 81 Pac. 695.

Webster, J., delivered the opinion of the court:

Plaintiff brought this action to recover the sum of \$310, alleged to be due him from the defendants and each of them for work and labor performed and money expended at their special instance and request and for their benefit. In addition, it is alleged that the defendants are insolvent, and unless a receiver is appointed to take charge of their property, certain mining claims which they hold under a lease will be lost by failure of the defendants to keep the leases in force, and other assets belonging to them will be dissipated and squandered. The prayer is for a money judgment for the amount mentioned, and that a receiver pendente lite be appointed to take charge of and manage the property and assets of the defendants, subject to the direction of the court. The application for a receiver was denied as to the defendant corporations, but granted as to the individual defendant, W. H. Rowe, and a receiver was ordered to take charge of the mining claims and certain personal property used in connection with them until the further order of the court. The defendant Rowe appeals.

The question for determination is, can a simple contract creditor whose claim has not been reduced to judgment, and who is not asserting a lien against any specific property, maintain an action for the appointment of a receiver to take charge of and manage the property of an individual debtor, upon an allegation of insolvency and that the debtor is about to lose or squander his property? In the recent case of *Grays Harbor Commercial Co. v. Fifer*, 97 Wash. 380, 166 Pac. 770, this court held that, "in an application for the appointment of a receiver, the plaintiff must show (1) Either that he has a clear right to the property itself, that he has some lien upon it, or that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim; and (2) that the possession of the property by defendant was obtained by fraud, or that the property itself, or the income arising from it, is in danger of loss from neglect, waste, misconduct, or insolvency. . . . Until a creditor has obtained a judgment at law for his demand against the debtor, and the return of an execution unsatisfied, an action in equity will not lie to reach assets and apply them to the payment of a moneyed

demand arising upon a contract, express or implied. Allegations of insolvency do not change this rule."

In that case, as in this, the defendant, for whose property the receiver was appointed, was an individual, and not a corporation, and consequently the rule announced in *Oleson v. Bank of Tacoma*, 15 Wash. 148, 45 Pac. 734; *New York Nat. Exch. Bank v. Metropolitan Sav. Bank*, 28 Wash. 553, 68 Pac. 905; and *Davis v. Edwards*, 41 Wash. 480, 84 Pac. 22, has no application. In those cases it was held that subdivision 5 of § 741, Rem. & Bal. Code, in express terms and in language capable of but one interpretation, provides that a creditor has only to establish the fact that he is such, and that the corporation of which he is a creditor is insolvent, to make it the duty of the proper court to appoint a receiver to take possession of the property of the corporation and close up its affairs. With respect to corporations the statute provides: "A receiver may be appointed by the court in the following cases: . . . (5) when a corporation has been dissolved or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights."

It seems plain under this language, and the court so held, that the right to the appointment of a receiver in such cases is made to depend solely upon the character of the defendant and the status of its affairs, and not upon the nature of the plaintiff's claim. We have no similar statute relating to appointment of receivers for individual, as distinguished from corporate, debtors, and must therefore look to the general law upon the subject.

In *High on Receivers*, 4th ed. § 406, the rule as to the right to maintain an action for the purpose of putting a receiver upon the property of a debtor is in conformity with our holding in the *Fifer Case*, supra, and is in this language: "Having already shown that the aid of a receiver is extended only in behalf of creditors who have fully exhausted their remedy at law, it follows necessarily that the jurisdiction will not be exercised in favor of mere general creditors, whose rights rest only in contract, and are not yet reduced to judgment, and who have acquired no lien upon the property of the debtor. Courts of equity will not permit any interference with the right of a debtor to control his own property, at the suit of creditors who have acquired no lien thereon, and whatever embarrassment the creditor may experience by reason of the slow procedure of the courts of law must be remedied by legislative, and not by judicial, authority. And while there are a few instances where the courts

have maintained a contrary doctrine, the great weight of authority supports the rule that, in the absence of statutory provisions to the contrary, a general contract creditor, before judgment, is not entitled either to an injunction or a receiver against his debtor, upon whose property he has acquired no lien. Any interference with the debtor's property, or with his right of disposing of it before judgment, is beyond the judicial power, and courts of equity will not extend their extraordinary jurisdiction beyond the limits fixed by the authorities."

"The reason of the rule seems to be that,

until the creditor has established his title, he has no right to interfere, and it would lead to an unnecessary, and perhaps a fruitless and oppressive, interruption of the exercise of the debtor's rights. Unless he has a certain claim upon the debtor, he has no concern with his frauds." Chancellor Kent in *Wiggins v. Armstrong*, 2 Johns. Ch. 144.

We conclude that the action of the court in appointing the receiver was erroneous, and the order is reversed.

Ellis, Ch. J., and Main, Morris, and Chadwick, JJ., concur.

Annotation—Right of simple contract creditor to the appointment of a receiver of the property of his individual or firm debtor.

Scope.

The principles underlying many of the decisions cited in the present note are fully discussed in the note to *Ziska v. Ziska*, 23 L.R.A.(N.S.) 1, on the question of conditions precedent to equitable remedies of creditors.

In *BLUM v. ROWE*, ante, 630, the court makes a distinction, as regards the right of a creditor to a receiver of the property of the debtor, between cases where the debtor is an individual and where it is a corporation. In other cases, for example, *Coquard v. National Linseed Oil Co.* (1898) 171 Ill. 480, 49 N. E. 563, it is stated that courts of chancery have no general power to appoint receivers of corporations, and can appoint them only where expressly authorized by statute. And in *High on Receivers*, § 289, it is said that, "when the jurisdiction of courts of equity has been extended by legislation to the appointment of receivers over incorporated companies, the power thus conferred is treated by the courts as a delegated authority, the exercise of which requires the most careful consideration. The effect of appointing a receiver being to take the property of the corporation out of the control of its own officers, to whom it has been intrusted by its stockholders, the courts proceed with extreme caution in the exercise of so summary a power. And in construing such statutes, they are inclined to give them a strict construction, and require the prescribed method of obtaining jurisdiction of the person and of the subject-matter to be strictly followed."

It has seemed best, therefore, to confine the note to the question of the right of a simple contract creditor of an individual or a partnership to the appointment of a receiver for the property of the debtor, and to exclude, in general,

cases where the debtor was a corporation, even though some cases of the latter class are apparently decided on grounds not peculiar to that class of cases. This is true, for instance, of such cases as *Nesbit v. North Georgia Electric Co.* (1907) 156 Fed. 979; *Dodge v. Pyrolusite Manganese Co.* (1882) 69 Ga. 665 (the court stating the rule broadly that creditors without lien or title or some interest in the debtor's property who have not reduced their claims to judgment, have, as a general rule, no right to invoke interference by an injunction and the appointment of a receiver; the debtor being, however, in this instance, a corporation); *Virginia-Carolina Chemical Co. v. Provident Sav. Life Assur. Soc.* (1906) 126 Ga. 50, 54 S. E. 929 (the general rule being laid down that ordinarily a creditor by note, without judgment or lien, is not entitled to an interlocutory injunction and the appointment of a receiver for the debtor's property; the debtor in this instance also being apparently a corporation); *Adee v. Bigler* (1880) 81 N. Y. 349; *Wiedemann Brewing Co. v. Herman* (1913) 20 Ohio C. C. N. S. 187.

Consultation of the notes to *Exchange Bank v. Bailey*, 39 L.R.A.(N.S.) 1032, and *Feess v. Mechanics' State Bank*, L.R.A.1915A, 606, on the question of the inherent jurisdiction of equity independently of statute, at the instance of stockholders to appoint a receiver or wind up a corporation because of mismanagement or fraud of its officers, will be found helpful on the general question as to the power of equity to appoint a receiver for a corporation.

As to the question whether a judgment creditor must exhaust his remedies at law as a condition of the right to a receiver,

see note to *Minkler v. United States Sheep Co.* 33 L.R.A. 546.

Rule in general.

BLUM v. ROWE, ante, 630, is in accord with the general rule laid down in many cases, that a simple contract creditor of an individual or a partnership, with no lien on the debtor's property, is not ordinarily, in the absence of statute, entitled to the appointment of a receiver therefor, although the grounds for such appointment might otherwise be sufficient, such as insolvency, waste, or threatened removal or concealment of the property. The following cases apply, or at least recognize this rule:

Fed.—*Cates v. Allen* (1892) 149 U. S. 451, 37 L. ed. 804, 13 Sup. Ct. Rep. 977; *Viquesney v. Allen* (1904) 65 C. C. A. 259, 131 Fed. 21; *Maxwell v. McDaniels* (1910) 106 C. C. A. 453, 184 Fed. 311.

Cal.—*Ibbetson v. Pearson* (1907) 7 Cal. App. 261, 94 Pac. 252 (holding a lessor who had no lien on the crop, but rented for cash payable in instalments, not entitled to a receiver, on failure to pay rent, to care for growing crops of the tenant, who was alleged to be insolvent).

Ga.—*Walker v. Zorn* (1873) 50 Ga. 370; *Johnson v. Farnum* (1876) 56 Ga. 144; *Collins v. Myers* (1882) 68 Ga. 530.

Ill.—*Bigelow v. Andress* (1863) 31 Ill. 322 (applying the broad doctrine that the complainant must first establish his claim at law before a court of equity will lend its aid, the reason being that such a court does not assume jurisdiction to settle and establish purely legal rights).

Ind.—*May v. Greenhill* (1881) 80 Ind. 124; *Steele v. Aspy* (1891) 128 Ind. 367, 27 N. E. 739; *State v. Union Nat. Bank* (1896) 145 Ind. 537, 57 Am. St. Rep. 209, 44 N. E. 585 (holding that the appointment of a receiver of an individual debtor at the instance of one holding a chattel mortgage on part of the debtor's property, but having no judgment or other general lien against the debtor, could be only for the property covered by the lien of the mortgage).

Iowa.—*Clark v. Raymond* (1892) 84 Iowa, 251, 50 N. W. 1068 (holding that a creditor without lien or judgment, who attached, as the property of the debtor, land alleged to have been fraudulently conveyed by him, and garnished the grantees and lessees of the land, could not by petition in the nature of a creditors' bill, on the ground of the insolvency of the debtor and garnishees, obtain the appointment of a receiver to take possession of the land and lease it L.R.A.1918C.

pending the litigation. A later appeal in this case is reported in (1892) 86 Iowa, 661, 53 N. W. 354, where, after recovery of judgment in the action at law, it was held that a receiver should not be appointed, the insolvency of the fraudulent grantees not being established).

Md.—*Uhl v. Dillon* (1857) 10 Md. 500, 69 Am. Dec. 172; *Blondheim v. Moore* (1857) 11 Md. 365; *Hubbard v. Hubbard* (1859) 14 Md. 356; *Rich v. Levy* (1860) 16 Md. 74; *Morton v. Graffin* (1888) 68 Md. 545, 13 Atl. 341, 15 Atl. 298.

Mo.—*Batchelder v. Althimer* (1881) 10 Mo. App. 181 (recognizing the general rule that a simple contract creditor has no right to an injunction and the appointment of a receiver, but holding that the rule did not apply to creditors of an insolvent limited partnership; see this case under "Limited partnerships," infra).

N. J.—*Young v. Frier* (1853) 9 N. J. Eq. 465 (holding that creditors at large of a firm could not maintain a suit against the members of the firm, and judgment and execution creditors thereof, to declare void the judgments as fraudulent, and enjoin a sale under the executions, and to obtain appointment of a receiver).

N. Y.—*O'Mahoney v. Belmont* (1875) 62 N. Y. 133; *Greenwood v. Brodhead* (1850) 8 Barb. 593; *Mitchell v. Bettman* (1857) 25 Barb. 408 (recognizing common-law rule); *Bayaud v. Fellows* (1858) 28 Barb. 451; *Hardt v. Levy* (1893) 72 Hun, 225, 25 N. Y. Supp. 248; *Veit v. Collins* (1902) 39 Misc. 39, 78 N. Y. Supp. 763.

N. D.—*Golden Valley Land & Cattle Co. v. Johnstone* (1910) 21 N. D. 101, 128 N. W. 691, Ann. Cas. 1913B, 631.

Ohio.—*Hulse v. Wright* (1832) Wright, 61 (holding that an injunction and a receiver of an individual debtor would not be granted at the instance of a general creditor who had sold him goods on time not yet expired, on the ground that the debtor was in failing circumstances, and was conducting his business in a ruinous manner, and was threatening an assignment of his property to pay or secure certain confidential creditors); *Bell v. Miller* (1891) 11 Ohio Dec. Reprint, 163.

Philippine.—*Molina y Salvador v. De La Riva* (1907) 7 Philippine, 302; *Strong v. Van Buskirk-Crook Co.* (1908) 10 Philippine, 190.

S. C.—*Pelzer v. Hughes* (1887) 27 S. C. 409, 3 S. E. 781; *Whilden v. Chap-*

man (1908) 80 S. C. 84, 61 S. E. 249 (intimations in accord with above rule).

Tex.—Carter Bros. v. Hightower (1890) 79 Tex. 135, 15 S. W. 223; Waples-Platter Co. v. Mitchell (1895) 12 Tex. Civ. App. 90, 35 S. W. 200; Cahn v. Johnson (1896) 12 Tex. Civ. App. 304, 33 S. W. 1000; Boone v. First Nat. Bank (1897) 17 Tex. Civ. App. 365, 43 S. W. 594; Holloway v. Shuttles (1899) 21 Tex. Civ. App. 188, 51 S. W. 293.

Wash.—Grays Harbor Commercial Co. v. Fifer (1917) 97 Wash. 380, 166 Pac. 770 (see quotation from this case in *BLUM v. ROWE*, ante, 630).

W. Va.—Thompson v. Adams (1906) 60 W. Va. 463, 55 S. E. 668 (holding that a simple contract creditor is not entitled to appointment of a receiver to take charge of debtor's property on the ground of waste or misappropriation thereof).

The courts, in assigning reasons for the above rule, have for the most part followed the general principles considered in the note to *Ziska v. Ziska*, 23 L.R.A.(N.S.) 1, on the question of conditions precedent to equitable remedies of creditors. Consideration of that note will be helpful in this connection. The following quotation concisely indicates the reasons frequently given for the rule: "As a general rule, in the absence of special circumstances showing the necessity for placing the property in the custody of the court, a court of equity will not appoint a receiver when the party seeking relief has an adequate and complete remedy at law. . . . The power to appoint a receiver is never exercised if any other safe and expedient remedy can be used. . . . A receiver will not be appointed if garnishment, execution, and attachment will enable the creditor to reach the property sought." *Grays Harbor Commercial Co. v. Fifer* (1917) 97 Wash. 380, 166 Pac. 770.

The rule applies to debts not due as well as to those past due. *Johnson v. Farnum* (1876) 56 Ga. 144.

And it was said in *Batchelder v. Altheimer* (1881) 10 Mo. App. 181, that whether the debt was due or not was immaterial as regards the well-established general rule that a simple contract creditor is not entitled to an injunction and the appointment of a receiver.

The application of the rule under various circumstances in a number of the cases cited above is here shown.

A plaintiff in ejectment was held, in *Walker v. Zorn* (1873) 50 Ga. 370, not entitled to the appointment of a receiver to take charge of certain crops on L.R.A.1918C.

the premises, to secure the recovery of mesne profits, pending the trial, on the ground of the insolvency of the defendant, since he had no lien on the crop and stood in no better position than any other creditor.

So in *Golden Valley Land & Cattle Co. v. Johnstone* (1910) 21 N. D. 101, 128 N. W. 691, Ann. Cas. 1913B, 631, it was held that a vendor under an executory contract for the sale of land, who had no lien on the crop raised by the vendee in possession, was not entitled to a receiver to take possession of the crop so raised after its severance, for the purpose of subjecting it to his claim for the value of the use and occupation of the premises after forfeiture by the vendee of his contract of purchase, although the vendee was insolvent.

And it was held erroneous in *Uhl v. Dillon* (1857) 10 Md. 500, 69 Am. Dec. 172, to grant an injunction and appoint a receiver on a bill alleging that the defendant had purchased a large amount of stock from the complainants, payments for which were due and unpaid; that he was engaged in disposing of the stock, had already sold his real estate and received the money therefor, and was collecting the debts due him and secreting the same, with intent to defraud the complainant and other creditors; that the complainants were informed and believed that, as soon as he was able to complete the sales and collect said debts, he intended to abscond for the purpose of injuring, delaying, and defrauding creditors; and praying for the appointment of a receiver and an injunction to restrain the defendant from selling or disposing of his property or collecting the debts due him. The court said: "Whatever may be the supposed defects of the existing laws of the state in leaving to the debtor the absolute power of disposing of his property, and leaving the creditor to the slow and very inadequate legal remedies now provided, if such defects exist it is solely in the power of the legislature to correct them. It is not within the province of the chancery courts to stretch their power beyond the limits of the authorities of the law, for the purpose of remedying such defects. Such a course would be productive of great mischief, and make the rights of the citizen depend upon the vague and uncertain discretion of the judges, instead of the safe and well-defined rules of law."

To a similar effect is *Hubbard v. Hubbard* (1859) 14 Md. 356, holding that the granting of an injunction to restrain an

individual debtor from collecting or assigning any debt due him, and from disposing of his property, and the appointing of a receiver, were not warranted on allegations that the defendant was indebted to the complainant in a certain sum, payment of which was refused; that the complainant was informed and believed that the defendant was collecting the debts due him with a view to removal for the purpose of defrauding creditors; and that he feared and believed that it was the purpose of the defendant to perpetrate a fraud on him by placing the property beyond his reach before he could obtain a judgment.

A similar conclusion was reached also in *Rich v. Levy* (1860) 16 Md. 74, in which it was held that the granting of an injunction and the appointing of a receiver were not warranted on a bill filed by a simple contract creditor alleging that the debtor was insolvent, was selling her goods and applying the proceeds to her own use and the use of others without consideration, and thus, and in other ways, was wasting her resources; that she was sending large quantities of her goods beyond the reach of creditors; and that the complainant had begun suit against her, but would be unable to obtain judgment and execution before she had wholly wasted her assets.

In *Steele v. Aspy* (1891) 128 Ind. 367, 27 N. E. 739, it was held that allegations in a complaint by an unpaid seller of a stock of goods, that the purchaser was insolvent and was selling the goods and applying the proceeds to his own use in violation of the contract of sale, were insufficient to justify the appointment of a receiver for the property of the debtor, where the title to the property sold had passed; the court saying that to authorize the interposition of the court by the appointment of a receiver, it was essential that the complainant should show either that he had a clear legal right to the property, or that he had some lien upon or right in it, or that it constituted a special fund out of which he was entitled to satisfaction of his demand.

A creditor is not entitled to have money due to his debtor collected and disposed of by a receiver merely because judgment creditors of the debtor might claim the money if brought into court by a garnishment proceeding; for such creditors would have an equal right to intervene in the equity case and claim the money in the hands of the receiver, L.R.A.1918C.

if one should be appointed. *Bush v. Mattox* (1900) 110 Ga. 472, 35 S. E. 640.

And the fact that one of the partners of an insolvent firm sold his interest in the partnership to a third party to hinder, delay, and defraud creditors, and that the purchaser was aware of the fraud, and formed a partnership with the remaining partner, was held, in *Waples-Platter Co. v. Mitchell* (1895), 12 Tex. Civ. App. 90, 35 S. W. 200, not to entitle a general creditor who had no lien on the partnership assets to the appointment of a receiver therefor.

In *Whilden v. Chapman* (1908) 80 S. O. 84, 61 S. E. 249, the court said: "We think the appellants are right in the position that a creditor of a copartnership, in order to maintain an action for the appointment of a receiver of partnership assets, must show he has no adequate remedy at law; that is, that he cannot enforce payment of his debt by judgment and execution. It is therefore necessary for him to allege and prove not only the insolvency of the partnership as such, but the insolvency of the copartners as individuals. Indeed, it may well be doubted whether creditors who have no liens, and have not obtained a return of nulla bona on their executions, are entitled to the appointment of a receiver of partnership assets, even on proof of insolvency of the partnership and the individuals composing it, except where the assignment act applies."

The complaint of the creditors in this case does not allege the insolvency of the members of the firm, and for that reason, if no other, the injunction and the appointment of a receiver could not be sustained on the complaint alone."

Such cases as *Rhodes v. Cousins* (1828) 6 Rand. (Va.) 188, 18 Am. Dec. 715, lay down a rule apparently broad enough to prevent a simple contract creditor from obtaining the appointment of a receiver, although the prayer was for an injunction or other equitable relief, and it is not clear that a receivership was sought. In this case the court said: "It is well-settled law that none but a judgment creditor can have the assistance of equity to control, prevent, or interfere with, in any way, the disposition which a debtor may choose to make of his property. He may destroy it, give it away, convey it fraudulently, or sell it and waste the money, and no creditor at law can stop him by injunction. A creditor must have proceeded as far as he can at law. If he means to affect the land, he must have a judgment, and take his elegit. If the personality,

there must be judgment and execution issued; and he must show in his bill that he has done this, or it may be demurred to." And to the general effect that a creditor who has no lien and has not reduced his claim to judgment has ordinarily no standing in equity to interfere with the property, see *Crippen v. Hudson* (1855) 13 N. Y. 161; *Reubens v. Joel* (1856) 13 N. Y. 488, disapproving *Mott v. Dunn* (1854) 10 How. Pr. (N. Y.) 225, contra; *Holdrege v. Gwynne* (1866) 18 N. J. Eq. 26; and *Wiggins v. Armstrong* (1816) 2 Johns. Ch. (N. Y.) 144. In the latter case the court, in holding that a simple contract creditor was not entitled to an injunction to control disposition of the debtor's property on the ground of fraud, stated that "the reason of the rule seems to be that, until the creditor has established his title, he has no right to interfere, and it would lead to an unnecessary and, perhaps, a fruitless and oppressive interruption of the exercise of the debtor's rights. Unless he has a certain claim upon the debtor, he has no concern with his frauds."

Exceptions.

Although, as shown above, the general rule is opposed to the appointment of a receiver of the debtor's property at the instance of a simple contract creditor, there are a few cases in which, under exceptional circumstances, the rule has not been applied. It will be observed that the court in the majority of these cases apparently considered that the property under the particular circumstances was a trust, or quasi trust, fund for creditors, or that, on account of fraud, it never in equity passed from the complainant, who had sold it to the debtor.

Thus, in *Cohen v. Meyers* (1871) 42 Ga. 46, it was held not erroneous to appoint a receiver for a stock of goods purchased from complainants and alleged to have been fraudulently transferred by the debtor to a third party, who was selling them as his own, where the insolvency of the debtor was admitted and it was alleged that the transfer was made for the purpose, on the part of both the debtor and the third party, of defrauding the complainants and other creditors. The court recognized the general rule that a general creditor cannot ask the preventive aid of a court of equity before he obtains a judgment; but stated that there were facts alleged which if true gave the creditors in this instance a peculiar equity; that it was charged that the debtor purchased the goods with intent to defraud the complainants, that

he never intended to pay for them, and that the third party knew thereof and acted accordingly with the avowed purpose of making money out of the transaction; and that if the debtor was in complicity with the third party before the goods were purchased, or if the latter knew when he obtained the goods that the debtor had this intent, the case would be entirely out of the rule referred to; that in that case the goods, in equity, never belonged to the debtor, and a court of equity had jurisdiction. To a somewhat similar effect are *Wachtel v. Wilde* (1877) 58 Ga. 50, and *Cohen v. Morris* (1883) 70 Ga. 313.

And *Cohen v. Meyers* (Ga.) supra, was followed in *Wolfe v. Claffin* (1888) 81 Ga. 64, 6 S. E. 599, in which the court said: "As a general rule, a party must pursue his legal remedies to their available extent before he can apply to a court of equity for relief; but this rule is subject to some exceptions. Where a party shows that his rights are imperiled and he is in danger of losing them; that he had sold goods to the defendant upon the faith of the latter's representations, which were false and fraudulent, and afterward rescinded the contract and claimed the goods as his own; and that the defendant had given certain mortgages on the goods to persons residing in another state,—we think this makes out such a case as falls within the ruling in the case of *Cohen v. Meyers* (Ga.) supra. In that case this court held that a creditor, although not a judgment creditor, might under certain circumstances resort to equity." And it was held in the *Wolfe* Case that it was not erroneous to appoint a receiver under the circumstances indicated, especially where, in view of the fact that the complainants were required to give bond for all damages that might be sustained in consequence of the proceedings, it did not appear that the defendants would be prejudiced by the appointment of a receiver.

And where a creditor who held notes of the debtor firm containing waiver of homestead and exemption rights had no remedy at law because of proceedings of the firm in bankruptcy, in which personal property, partly of a perishable nature, was set aside to one of the partners, it was held that the creditor's remedy was in equity for a judgment in rem against the exempted property, and that the court was authorized to appoint a receiver therefor pending recovery of the judgment, under a statute providing that a court of equity may appoint a receiver to take possession of and hold, subject

to the direction of the court, any assets charged with the payment of debts, where there is manifest danger of loss or destruction or material injury to those interested. *Bell v. Dawson Grocery Co.* (1904) 120 Ga. 628, 48 S. E. 150.

It was held in *Sanford v. United States Fidelity & G. Co.* (1902) 116 Ga. 689, 43 S. E. 61, that a cause for equitable relief was shown by a petition filed by the surety of a tax collector, alleging that the principal had committed a breach of his bond by a failure to pay over to the state and county large sums of money which he had collected; that he was insolvent and was disposing of his personal property so as to avoid the liens created by the statute thereon; and praying for an injunction against the principal to prevent his disposing of his property and for the appointment of a receiver therefor.

—death of debtor.

In this connection, see V. g. of note to *Ziska v. Ziska*, 23 L.R.A.(N.S.) p. 92.

The fact that the creditor's claim was not a lien on the debtor's property, and had not been reduced to judgment, has been held in several cases not to prevent his obtaining the appointment of a receiver after the debtor's death.

Thus, in a proceeding in the nature of a creditors' bill instituted by an executor for the settlement of the estate, praying that the creditors of the estate should be called in and enjoined from suing him at law as executor, it was held, in *Harmon v. Wagener* (1890) 33 S. C. 487, 12 S. E. 98, that a receiver of the personal property of the testatrix might be appointed at the instance of a creditor, on the ground of the insolvency of the executor and his misapplication and waste of the assets, without recovery by the creditor of a judgment and a return on execution of nulla bona. The court said: "It was urged that the judge had no jurisdiction to grant equitable relief, including the appointment of a receiver, for the reason that the creditors had not first exhausted their legal remedies, which could only be shown by proof of an execution obtained on the law side of the court, with a return upon it of nulla bona, which was not shown. There is such a doctrine as applicable to cases *inter vivos*, but, as we understand it, the rule of evidence has no application to a 'creditors' bill,' to marshal the assets of the estate of a deceased debtor. It is quite clear that a creditor may file what is known as a 'creditors' bill' against the executor of his dead

debtor, to make him account for the estate in his hands, without having first obtained a judgment upon the law side of the court, and procured upon it a return of nulla bona."

And in *Byrne v. First Nat. Bank* (1899) 20 Tex. Civ. App. 194, 49 S. W. 706, it was contended that a receiver should not have been appointed to take possession of the assets of a partnership on the ground that the surviving partner was colluding with a third party to defraud the creditors and was wasting the property, since the plaintiffs were merely simple contract creditors without lien on the property. But the court said: "It is, as contended by appellants, generally true that receivers are appointed only at the suit of the judgment creditors or creditors who have an express lien on the property of their debtor; but this, as will be seen from cases cited further on, is not universally so. While courts of equity rarely take from the possession and control of the owner his property at the suit of a creditor who neither has an express lien upon the property nor whose debt is not evidenced by a judgment against the debtor, it is believed that where the debt is due from a partnership, and the partnership has been dissolved by the death of one of the partners, and the partnership property is in the possession and control of the surviving partner or partners, courts of equity treat the property as a trust fund in which the creditors have an equitable or quasi lien, and for misconduct of the surviving partner, who is a trustee, the creditors may have the property placed in the hands of a receiver and the business of the dissolved partnership wound up under the supervision of the court. In this case the defendant . . . was charged with colluding with . . . [a third party] to defraud the creditors of himself and his deceased partner. He was also charged with wasting the assets of the firm. These allegations, it would seem, if true, are ample to authorize the appointment of a receiver."

—limited partnerships; distinction as to general partnerships.

It is held in New York that general creditors of an insolvent limited partnership may sue in equity, on behalf of themselves and all other creditors of the firm, for the appointment of a receiver and the ratable distribution of the assets of the partnership, the decisions being based apparently on the ground that under the statute the assets are, after insolvency, a trust fund for the benefit of

all the creditors. *Innes v. Lansing* (1839) 7 Paige (N. Y.) 583; *Hardt v. Levy* (1893) 72 Hun, 225, 25 N. Y. Supp. 248; *Gray v. Levy* (1894) 75 Hun, 96, 26 N. Y. Supp. 861; *Whitcomb v. Fowle* (1879) 7 Abb. N. C. (N. Y.) 295; *La Claise v. Lord* (1855) 10 How. Pr. (N. Y.) 461; *Levy v. Ely* (1858) 15 How. Pr. (N. Y.) 395; *Jackson v. Sheldon* (1859) 9 Abb. Pr. (N. Y.) 127; *White-wright v. Stimpson* (1848) 2 Barb. (N. Y.) 379.

So a simple contract creditor of an insolvent limited partnership was held, in *Batchelder v. Altheimer* (1881) 10 Mo. App. 181, entitled to maintain a suit for the appointment of a receiver of the firm to collect, protect, and distribute the assets as a trust fund for all the creditors, on the ground that the partners were secreting its effects and giving preferences, under a statute providing that, if the partnership became insolvent, no special partner should be paid as a creditor of the firm or receive the benefit of any lien in his favor as such, until the other creditors of the firm were satisfied, and that no sale or change of the effects of the firm or any member thereof, made for the purpose of giving a preference or priority to a creditor, should be valid against creditors, if made when the firm was insolvent or in contemplation of insolvency. The court relied largely upon the reasoning in the New York cases to the effect that, under the somewhat similar statute of the latter state, the assets of a limited partnership constitute a trust fund from the time of insolvency of the firm, or at least from the time the aid of a court of chancery is invoked.

The doctrine of the above New York cases was applied in *Dillon v. Horn* (1850) 5 How. Pr. (N. Y.) 35, to the case of a general partnership where the indebtedness was conceded, the court taking the view that the doctrine of a trust fund of the assets for the benefit of creditors, after insolvency of the firm, applied both to limited and general partnerships.

And in *Mott v. Dunn* (1854) 10 How. Pr. (N. Y.) 225, it was held that a simple contract creditor of an insolvent partnership might maintain a suit to set aside an assignment of the assets on the ground of fraud, and to obtain a receiver, where the insolvency of the partnership and of the individual partners and the debt were admitted. But this case seems to be overruled by *Reubens v. Joel* (1856) 13 N. Y. 488.

And in *Hardt v. Levy* (1893) 72 Hun, L.R.A.1918C.

225, 25 N. Y. Supp. 248, it was held that a suit in equity by general creditors against the members of a general partnership, on behalf of all the creditors, for the appointment of a receiver and the ratable distribution of the assets, could not be maintained, although it might be if the firm was a limited partnership and insolvent. And to the same effect is *Gray v. Levy* (1894) 75 Hun, 96, 26 N. Y. Supp. 861.

And it was held in *La Claise v. Lord* (1855) 10 How. Pr. (N. Y.) 461, that the doctrine that a general creditor of a limited partnership which was insolvent might obtain a receiver therefor did not apply where the receiver was not sought for the benefit of all the creditors, but solely for the benefit of the complainant, and the indebtedness was not admitted and could be determined only after protracted litigation.

—insolvency of assignee.

Where the assignee to whom debtors in failing circumstances had made an assignment to pay debts and secure him as their indorser was insolvent, it was held that a receiver should be appointed on a bill filed by creditors on their own behalf and on behalf of all others in the same situation. *Haggarty v. Pittman* (1828) 1 Paige (N. Y.) 298, 19 Am. Dec. 434. The court said: "This court will never for a moment sanction the idea that debtors in failing circumstances shall be permitted to put their creditors in the power of an insolvent assignee by a voluntary assignment of their property to him, although it is expressed to be for the payment of their debts, or for his indemnity against prior responsibilities. They may lawfully prefer one creditor to another, and indemnify their sureties in preference to either; but they have no equitable right to jeopardize the honest claims of any by assigning their property to trustees who are irresponsible. And the proper course for this court, in such cases, is to appoint a receiver on the application of the parties for whose benefit the fund is assigned."

Statutes.

A statute authorizing the appointment of a receiver when, in the discretion of the court, it might be necessary to secure ample justice to the parties, was held, in *Grays Harbor Commercial Co. v. Fifer* (1917) 97 Wash. 380, 166 Pac. 770, not to authorize the appointment of a receiver of a firm at the instance of a simple contract creditor, since it did not appear that the creditor did not have an adequate remedy at law.

And a statute authorizing the appointment of a receiver in an action "by a creditor to subject any property or fund to his claim," when it is shown that the property is in danger of being lost, removed, or materially injured, was held, in *Carter Bros. v. Hightower* (1890) 79 Tex. 135, 15 S. W. 223, to refer to creditors having a lien on the debtor's property, and not to entitle a creditor in an action merely on an account to obtain a receiver of the debtor's property. It was said: "We think this statute, notwithstanding the broad terms in which it is couched, is not to be construed as applying to every case in which a creditor seeks to secure the satisfaction of a debt, and in which there is danger that the funds or property belonging to the debtor will be lost or destroyed. Such a construction would allow the appointment of a receiver in an ordinary action at law for the recovery of a debt. We cannot think that the legislature intended such a radical departure from the old established principles of the common law and from the long-settled practice of the courts in our state. Was it intended that whenever a debtor failed to meet his obligation he should be liable to have his property and credits put into the hands of a receiver merely because there might exist danger of its being lost, removed, or physically impaired? We think not. The act must be construed as applying only to the funds and property upon which the creditor has a lien for the satisfaction of his debt. The words, 'by a creditor to subject any property or fund to his claim,' are to be limited to some particular fund or property belonging to a debtor upon which the creditor has a specific lien. It is true that in a general sense a creditor who brings an action at law to recover a debt seeks to subject all the defendant's property to the payment of his claim. But he cannot obtain relief as against any particular article or class of property, unless a lien be declared upon it by the levy of an attachment or the service of a writ of garnishment."

But in some states the general rule against the appointment of a receiver of the debtor's property at the instance of a simple contract creditor has been changed by statute.

Thus, under a statute providing that a creditor with a lien may file a bill in chancery to subject to the payment of his debts any property which his debtor has fraudulently transferred or attempted to transfer, it was held, in *Weis v. L.R.A.* 1918C.

Goetter (1882) 72 Ala. 259, that a simple contract creditor could maintain a suit to set aside, on the ground of fraud, a sale of the entire stock of goods of his individual debtor, and obtain a receiver to take charge of the property. The court said that the general rule was that, to entitle a complainant to a receiver, he must show some title or claim, lien upon, or interest in the specific thing which was the subject of the litigation, and that a mere creditor at large had no right to this extraordinary remedy; but that the statute gave to a creditor without a lien the same right to pursue property fraudulently transferred as a creditor with a judgment previously had, and when a bill was filed under the statute and process served on the defendant, a lien was acquired on the property conveyed.

And under a statute providing that it should not be necessary, in a proceeding in equity to vacate "any conveyance or contract or other act" as fraudulent as against creditors, for any creditor to recover judgment on his demand in order to obtain the relief sought, it was held, in *Sanderson v. Stockdale* (1857) 11 Md. 563, that simple contract creditors of a firm were entitled to an injunction to prevent disposition and wasting of the firm assets, and, if necessary for their security, to the appointment of a receiver for the firm, on a bill alleging the insolvency of the partnership, the dissolution or pretended dissolution thereof, the transfer of the partnership effects to defeat the claims of creditors, and the misapplication of the firm assets to the private purposes of the partners.

The Georgia statute provided that, in case any corporation not municipal, or any trader or firm of traders, should fail to pay, at maturity, any one or more matured debts, payment of which had been properly demanded of such debtor, and by him refused, and should be insolvent, it should be in the power of a court of equity, under a creditors' petition, to proceed to collect the assets and appropriate the same to the creditors. This statute it appears is construed as permitting any creditor, although he has not reduced his claim to judgment, to obtain a receiver if the statutory conditions are fulfilled. See, for example, as construing the statute, *Fechheimer v. Baum* (1889) 2 L.R.A. 153, 37 Fed. 167; *Collins v. Myers* (1882) 68 Ga. 530 (holding that a creditor must show that a debtor is a trader and is insolvent, and that an allegation of insolvency rest-

ing alone on the debtor's failure to pay at maturity is insufficient); *Blanchard v. Vansyckle* (1883) 70 Ga. 278 (holding that a general creditor of a firm was not entitled to a receiver after the firm had sold its entire interest and ceased to do business); *Barnwell v. Wofford* (1881) 67 Ga. 50 (holding that a receiver would not be appointed at the instance of simple contract creditors, if the assets were not more than sufficient to pay the lien creditors, since to do so would be merely to interfere with the liens at the instance of those who could realize nothing in any event; and to the same effect, see *Collins v. Myers* (Ga.) supra); *Willcox v. Dunlap* (1889) 83 Ga. 417, 9 S. E. 1046 (considering the question as to what circumstances operate to deprive one of the character of trader).

And under the Virginia Code an injunction may be granted and a receiver appointed of the property of an insolvent firm which is wasting the assets, in a suit in the nature of a creditors' bill by simple contract creditors, where the debt is admitted. *Fink v. Patterson* (1884) 21 Fed. 602.

The South Carolina statute providing that "whenever any debtor shall assign his . . . property for the benefit of . . . creditors, it shall . . . be lawful for any creditor, . . . either by simple contract, specialty, or in any other manner, to institute proceedings against the said debtor or the assignee, . . . either to attack and set aside the said deed of assignment, or to enforce the provisions thereof, or for any other purpose whatever, without first obtaining and entering up judgment against the said debtor" (*Regenstein v. Pearlstein* (1888) 30 S. C. 192, 8 S. E. 850), has been construed as permitting a simple contract creditor to maintain a suit to set aside an assignment of his debtor and procure the appointment of

a receiver. *Pelzer v. Hughes* (1887) 27 S. C. 409, 3 S. E. 781; *Meinhard Bros. v. Strickland* (1888) 29 S. C. 491, 7 S. E. 838; *Austin v. Morris* (1885) 23 S. C. 393.

And the privilege conferred by this statute is not affected by the ground on which the assignment is assailed. *Regenstein v. Pearlstein* (S. C.) supra.

Consent of debtor.

It has been held that consent by an individual debtor to the appointment of a receiver of his property at the instance of a simple contract creditor does not confer jurisdiction on the court to appoint the receiver on the ground of insolvency, the court making a distinction in this respect between cases where the debtor was an individual and where it was a corporation. *Maxwell v. McDaniels* (1910) 106 C. C. A. 453, 184 Fed. 311.

And where a partner of an insolvent firm sold his interest in the partnership to a third party, who was aware of the fact that the sale was made to hinder, delay, and defraud creditors, and who formed a partnership with the remaining partner, it was held that the consent of the latter to the appointment of a receiver would not authorize such appointment at the instance of a simple partnership creditor who had no specific lien on its assets. The court stated that the allegation of consent by the remaining partner to the proceeding did not change its nature, as the creditor's right through him ceased by reason of the partner's agreeing to the sale and entering into a copartnership with the purchaser; and the principle was applied that equity would not afford relief where the legal remedy was adequate and complete. *Waples-Platter Co. v. Mitchell* (1895) 12 Tex. Civ. App. 90, 35 S. W. 200.

R. E. H.

ALABAMA SUPREME COURT.

WOODWARD IRON COMPANY, Appt.,
v.
H. A. HUBBARD.

(— Ala. —, 77 So. 400.)

Master and servant — employers' liability — tramway — part of railway.

Rails laid 12 or 15 feet apart for a distance of 300 or 400 feet in front of coke ovens for the purpose of carrying a structure designed for manipulating the coke in the ovens are not a railway or any part of it. L.R.A. 1918C.

the track of a railway, within the meaning of those terms as used in the Employers' Liability Act.

For other cases, see *Master and Servant*, II. c. 4, b, in Dig. 1-52 N. S.

(Gardner, Somerville, and Thomas, JJ., dissent.)

(December 20, 1917.)

Note. — As to the applicability to private railroads of statutes abrogating or modifying the fellow-servant rule as to railroads, see annotation to *Ed H. Cunningham & Co. v. Neal*, 15 L.R.A. (N.S.) 479, and supple-

APPEAL by defendant from a judgment of the City Court of Bessemer in favor of plaintiff, in an action brought under the Employers' Liability Act to recover damages for injuries sustained by him while in defendant's employ. Reversed.

The facts are sufficiently stated in the dissenting opinion.

Count "A," mentioned in the dissenting opinion, is as follows:

"Plaintiff claims of the defendant the sum of \$25,000 as damages, for that, heretofore, to wit: on the 6th day of February, 1916, defendant was operating a by-product plant at or near Woodward in Jefferson county, Alabama, and used in connection therewith in the operation of said plant a certain machine or appliance known as and called a coke-pusher machine, which was operated by an electric motor and ran along on a track composed of 100-pound rails in front of the coke ovens, to which coke-pusher machine was attached as a part thereof an appliance known as a leveling bar. And plaintiff avers that on the day and date aforesaid, he was in the service or employment of the defendant at said by-product plant as a machinist and as such was engaged in the performance and discharge of his duties in and about making certain repairs on said leveling bar or adjusting same, and while plaintiff was standing upon a platform or scaffold upon said coke-pusher machine provided by the defendant for the use of the plaintiff in making said repairs, said coke pusher was suddenly started, and plaintiff avers that he was caused to stumble and fall from off said platform or scaffold to the concrete floor below, a distance of, to wit: 30 feet, and as a proximate consequence thereof the bones of his right ankle and right foot were crushed and broken and his left ankle and back were badly sprained, and he was permanently injured in his right ankle and he was caused to suffer great mental and physical pain and anguish and to lose much valuable time in consequence of his said injuries.

"Plaintiff avers that his said injuries were proximately caused by reason of the negligence of a person in the service or employment of the defendant by the name of H. Costner, who had the charge or con-

trol of an electric motor upon a railway or the part of the track of a railway in this: that the said Costner suddenly started said electric coke-pusher machine without any signal or warning to the plaintiff, causing him to stumble and fall as aforesaid."

Messrs. Cabaniss & Bowie, for appellant:

The railway in this case was not such a railway as is meant and intended by the 5th subdivision of § 3910 of the Code.

Woodward Iron Co. v. Lewis, 171 Ala. 245, 54 So. 566; Appel v. Selma Street & Suburban R. Co. 177 Ala. 457, 59 So. 164; Dresser, Employers' Liability, § 80; Perry v. Old Colony R. Co. 164 Mass. 296, 41 N. E. 289.

Messrs. Charles A. Calhoun and John T. Glover, for appellee:

The railway upon which this electric motor coke-pusher machine was run was a railroad or railway within the purview of the 5th subdivision of § 3910 of the Code, and was clearly within the beneficial and remedial intent of the legislature.

Jarvis v. Hitch, — Ind. App. —, 65 N. E. 608; 5 Labatt, Mast. & S. 2d ed. §§ 5142, 5259; Woodward Iron Co. v. Lewis, 171 Ala. 233, 54 So. 566; Birmingham R., Light & P. Co. v. Mosely, 164 Ala. 111, 51 So. 424; Boggs v. Alabama Consol. Coal & I. Co. 167 Ala. 251, 140 Am. St. Rep. 28, 52 So. 878; Woodward Iron Co. v. Sheehan, 166 Ala. 431, 52 So. 24; Hunter v. Ingram-Day Lumber Co. 110 Miss. 744, 70 So. 901; McKnight v. Iowa & M. R. Constr. Co. 43 Iowa, 406; Stebbins v. Crooked Creek R. & Coal Co. 116 Iowa, 513, 90 N. W. 335; Hairston v. United States Leather Co. 143 N. C. 512, 55 S. E. 847, 10 Ann. Cas. 698; Texas & P. R. Co. v. Webb, 31 Tex. Civ. App. 498, 72 S. W. 1044; Missouri, K. & T. R. Co. v. Smith, 45 Tex. Civ. App. 128, 99 S. W. 743; Kline v. Minnesota Iron Co. 93 Minn. 63, 100 N. W. 681; Glimes v. Oliver Iron Min. Co. 108 Minn. 278, 122 N. W. 161; Big Five Tunnel, Ore-Reduction & Transp. Co. v. Johnson, 44 Colo. 236, 99 Pac. 63; Cook v. Modern Brotherhood, 114 Minn. 299, 131 N. W. 334; Cox v. Great Western R. Co. L. R. 9 Q. B. Div. 106, 30 Week. Rep. 816, 47 J. P. 116; Doughty v. Firbank, L. R. 10 Q. B. Div.

mental annotation to Schoen v. Chicago, St. P. M. & O. R. Co. 45 L.R.A.(N.S.) 841.

As to whether street or interurban roads are within the meaning of statutes of this character, see note to Norfolk & P. Traction Co. v. Ellington, 17 L.R.A.(N.S.) 117.

As to what are "railroad hazards" within the meaning of statutes abolishing or restricting fellow-servant doctrine, see notes to Johnson v. Great Northern R. Co. 18 L.R.A.(N.S.) 478, and Hanson v. Northern P. R. Co. 22-L.R.A.(N.S.) 969. L.R.A.1918C.

Generally, as to employees or employments within the purview of statutes abrogating or modifying the fellow-servant rule, see note to Missouri P. R. Co. v. Smith, 47 L.R.A.(N.S.) 113.

As to the constitutionality of statutes modifying or abrogating the fellow-servant rule, see notes to Bradford Constr. Co. v. Heflin, 12 L.R.A.(N.S.) 1040, and Louisville & N. R. Co. v. Melton, 47 L.R.A.(N.S.) 84.

358, 52 L. J. Q. B. N. S. 480, 48 L. T. N. S. 530, 48 J. P. 55; *Coughlan v. Cambridge*, 166 Mass. 268, 44 N. E. 218.

Per Curiam:

A full statement of the facts necessary to an understanding of the question here treated is found in the dissenting opinion of Justice Gardner, and such statement of facts is here adopted by reference thereto, without being here repeated.

The majority are of the opinion that the track upon which the "coke-pusher machine" in question was operated is not a "railway," nor "any part of the track of a railway," within the meaning of subdivision 5 of the Employers' Liability Act (Code 1907, § 3910 [5]). The question was discussed at some length, and many decisions and textbooks were reviewed and cited, in the case of *Woodward Iron Co. v. Lewis*, 171 Ala. 233, 54 So. 566. It was there held that a tram track, used for the purpose of transporting ore which was being mined, was a "railway" within the meaning of this subdivision. We did not decide in that case, nor did we mean to say as dicta, that every track or tramway used by a master in his business, upon or over which any machine is moved by means of a steam locomotive or electric motor, would be a railway, within the meaning of the statute in question. In fact, several cases were cited approvingly in which it was intimated, if not decided, that all tracks or ways on which machinery is operated by the master, even by means of steam engines and electric motors, are not "railways," or "any part of the track of a railway," within the meaning of the statute. See *Woodward Iron Co. v. Curl*, 153 Ala. 205, 44 So. 974, Id. 153 Ala. 215, 44 So. 969; *Sloss-Sheffield Steel and I. Co. v. Mobley*, 139 Ala. 425, 36 So. 181; *Freeman v. Sloss-Sheffield Steel & I. Co.* 137 Ala. 481, 34 So. 612. It is true that these cases did not expressly decide that the tracks there in question, or a track like the one in question, is not a railway or a part thereof, within the meaning of the subdivision in question; but they do show that this class of tracks was not by the court or by the parties considered to be such in those cases. Mr. Dresser, in his work on *Employers' Liability* (vol. 1, § 80, p. 349), says, in defining the phrase "upon a railway:" "The courts have confined all the words of this section, as well as those under discussion, to the kind of railroad the legislature must have had in mind."

Each term used in this subdivision, such as "signal," "point," "engine," "car," and "electric motor," must be considered in connection with the context, and not as an isolated term. As is said by the text-writer, L.R.A.1918C.

ers on the subject of the English Employers' Act, "upon a railway" is the keynote to the subsection, because it applies to and qualifies each of the terms. This court has taken the same view of our act, which is merely a copy of the English statute. The track or way used by the master in his business, to come within the meaning of this subdivision, must be used or intended for the purpose of transporting or moving products, freight, or passengers, in connection with his business. It was never intended to include all tracks, ways, or rails, upon which any of his machinery is moved merely in its operation or transportation, as in the instant case. The track in question was not intended to transport any products, freight, or passengers, to or from the master's plant or place of business, but merely and exclusively for moving the "coke-pushing machine" from one coke oven to another. If it had been used for transporting coal to the coke ovens or for transporting the coke from the ovens by means of trams propelled by steam engines or by electric motors, then the case of *Woodward Iron Co. v. Lewis*, supra, would be an authority for holding the track in question to be "a railway," within the meaning of the 5th subdivision of the Employers' Act. The track in this case was used and intended to be used as a part of the carriageway of one particular machine from one coke oven to another.

A tram track, on which logs are hauled to a sawmill and the lumber is hauled therefrom, by means of cars propelled or moved thereon by steam locomotive engines or electric motors, might be a railway within the meaning of the statute; but the mere track or rails upon which the carriage moves the logs while they are being sawed are not a "railway," nor "a part of the track of a railway," within the meaning of the statute in question. Surely the track or way on which a steam shovel is moved while being operated is not a railway within the meaning of the statute; and if it is not, then neither is the track here in question. It results that the judgment must be reversed, and the cause remanded.

Anderson, Ch. J., and McClellan, Mayfield, and Sayre, JJ., concur.

Gardner, J., dissenting:

This cause was assigned to the writer, and the following opinion was prepared, but upon consultation of the whole court a majority did not concur, and their views are expressed in a separate opinion. I therefore adopt the following as expressive of my dissenting views:

Appellee (plaintiff in the court below)

brought this suit against the appellee for the recovery of damages for injuries sustained while in the employ of defendant as a machinist and repair man at its by-product plant. The case was submitted to the jury on three counts, designated A, D, and E; but the question here involved only concerns count A, which will appear in the report of the case. Under said count recovery was sought under subdivision 5 of the Employers' Liability Act, which we, for convenience, here quote: "When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has charge or control of any signal, points, locomotive, engine, electric motor, switch, car, or train upon a railway, or of any part of the track of a railway."

Counsel for appellee insists that the affirmative charge was due the defendant under count A of the complaint, for the reason that the railway or track of the railway disclosed by the evidence in this case was not such a railway as is meant and intended by subdivision 5 of the Employers' Liability Act. This is the sole question presented by this appeal, and requires a brief review of the evidence.

Plaintiff was a machinist and a repair man. One Costner operated what is called the "coke-pushing machine," which was moved by electricity on rails like a large railroad track. Costner gave the signal for the repair man, and plaintiff in response went upon the pusher machine to repair the defective part, and while standing upon a platform on the machine, consisting of a board (as testified by the plaintiff) 6 inches wide, Costner, who operated the machine from the cab, gave the machine a sudden start (according to the evidence of the plaintiff) and without warning, thereby causing plaintiff to lose his balance and fall to the concrete pavement some 20 feet below, resulting in the injuries here complained of. The evidence in regard to the question of negligence on the part of Costner was in dispute, and submitted to the jury for determination.

The coke-pusher machine is structural iron work between 25 and 30 feet high, about 12 or 15 feet in width, and about 35 feet in length, was on wheels about the size of ordinary railroad car wheels, except that each wheel had two flanges instead of one. This machine was operated by electric motive power on rails, like a large railroad track; they were steel rails and built like railroad rails. The length of the track is estimated to be about 300 to 400 feet, and the track runs along in front of the ovens, and between the rails is a concrete pavement. The pusher machine moved up

and down this track, pushing the coke and leveling the ovens. The machine was operated in front of the ovens, being run from one of them to another on this railroad track. It had what is called a "rammer" and also a leveling bar, the latter being used for leveling the coke in the ovens, and the rammer for pushing it out on the other side. The machine was also used for taking the doors off the ovens, and then moving the coke from the ovens. The leveling bar ran over rollers on the machine and would be run through the oven and pulled back over these rollers. There was an electric motor on the machine, used, of course, for the purpose of operating the same, and this motor was situated close to the front of the machine. Plaintiff received his injuries at the time Costner was in the cab of the machine operating the same by means of this electric motive power. This machine could be operated at a speed, variously estimated by the witnesses, from 2½ to 5 miles per hour. The record contains photographs of the machine, five in number, affording much information as to its size, the track upon which it was operated, as well as its manner of use.

That the pusher machine here involved comes within the provision of said subdivision 5 of the Employers' Liability Act is not questioned, but it is insisted that the track upon which the same is operated is not a railway within the meaning of said subdivision. As recognized by this court in *Woodward Iron Co. v. Lewis*, 171 Ala. 233, 54 So. 566, it is impracticable to lay down any abstract rule as to what is and what is not a railway. A definition of a "railroad" or "railway" in *Rapalje and Lawrence, Law Dictionary*, vol. 2, is as follows: "A road specially laid out and graded, having parallel rails of iron or steel for the wheels of carriages or cars, drawn by steam or other motive power, to run upon."

One of the definitions of "railway" found in *Webster's New International Dictionary* is, "A line of rails or track providing a runway for wheels." There are, however, numerous definitions varying with the different connections with which the term is used in statutes, contracts, or conveyances, which are found noted in 33 Cyc. 33-36, inclusive; also 1406. That the track upon which was operated the pusher machine here referred to was a railway, or a part of the track of a railway, within some of the definitions of that term, we think is very clear. We are concerned however, with its meaning under a proper construction of subdivision 5 only.

The Employers' Liability Act of this state, copied from the English statute, was passed for the benefit of the servant,

and is remedial, and should be construed so as to advance the remedy. *Boggs v. Alabama Consol. Coal & I. Co.* 167 Ala. 251, 140 Am. St. Rep. 28, 52 So. 878. Speaking of the statute, and as to whether or not the same should be given a strict or liberal construction, the appellate court of Indiana used the following language, which we think here appropriate: "With respect to the English act of 1880, the rule of construction has been stated by Brett, M. R., in *Gibbs v. Great Western R. Co. L. R. 12 Q. B. Div. 208*, 211: 'This act of Parliament having been passed for the benefit of workmen, I think it to be the duty of the court not to construe it strictly as against the workmen, but in furtherance of the benefit which it was intended by Parliament should be given to them, and therefore as largely as reason enables one to construe it in their favor, and for the furtherance of the act.' The purpose of the legislature in enacting the law was to remove what was regarded as an evil. The purpose was to protect employees from the negligent movement of engines along the tracks of railways. Prior to its passage the injured parties were without legal remedy, because those in charge of the engines were fellow servants. The legislature will be presumed to have had in mind not details in the construction of the engine, but a machine of the same general character, effecting practically the same results, used in the same way, and subjecting the employees to the same dangers." *Jarvis v. Hitch*, — Ind. App. —, 65 N. E. 608.

See also 5 *Labatt, Mast. & S.* § 1666. And the following English authorities are also of interest in connection with the question here involved: *Cox v. Great Western R. Co. L. R. 9 Q. B. Div. 106*, 30 Week. Rep. 816, 47 J. P. 116; *Doughty v. Firbank*, L. R. 10 Q. B. Div. 358; 52 L. J. Q. B. N. S. 480, 48 L. T. N. S. 530, 48 J. P. 55; *Gibbs v. Great Western R. Co. L. R. 12 Q. B. Div. 208*, 53 L. J. Q. B. N. S. 543, 50 L. T. N. S. 7, 32 Week. Rep. 329, 48 J. P. 230; *Walsh v. Whiteley*, L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38.

This state, in its later decisions construing said subdivision, has shown decided inclination to the liberal construction of the statute, as evidenced by the following cases: *Woodward Iron Co. v. Lewis*; and *Boggs v. Woodward Iron Co. v. Sheehan*, 166 Ala. 429, 52 So. 24; *Western U. Teleg. Co. v. Howington*, — Ala. —, 73 So. 550. In the latter case it was held that the 5th subdivision protected employees when the master, as a mere licensee, was in the use of the track of a railroad upon business in no way con-

nected with that of the owner or operator of the said railroad. Several of our cases are there reviewed. In *Woodward Iron Co. v. Lewis*, supra, it was held that a tramway used in an ore mine was a railroad within the meaning of said subdivision. In our opinion, the reasoning in that case is decisive of this. The tramway in that case was laid in the slope of the mine, upon which tramcars were run for the purpose of transporting ore from the bottom of the slope to the top, or to the tipple where the cars were dumped. The cars were operated by means of an electric motor. In determining the question as to whether or not the tramway was a "railway," within the meaning of this subdivision, the court said: "The object and purpose of the Employers' Act, and that of this particular subdivision, must be looked to and heeded. The act was for the benefit of the servant. . . . It must also be borne in mind that this act, unlike statutes requiring trains to stop at crossings, and to ring the bell or blow the whistle on approaching crossings, stations, etc., is not dealing with the rights of or duties to the public, but only with the private rights and duties of the master, and of his servants. Neither the plant nor the railway need be a public one, to be within the statute. A private railway is as much within the statute as a public one. It extends to side tracks and switches, as well as to the main line. Under our statute it is now immaterial whether the motive force is steam or electricity. It is immaterial whether the engine is a dummy, or is a mogul, passenger, or a freight engine, or a switch engine, if it is 'upon a railway.' . . . The gauge of the railway is immaterial; it may be narrow, standard, or broad—each is within the statute if the way is a railway. Nor does the length of the way, if it is a railway, have anything to do with the bearing of the statute. . . . Looking at the subject-matter and the parties with which the act deals—that is, with the master and the servant, inter se—and the fact that the enactment is remedial, we are inclined to hold that a no more restricted meaning should be placed upon this statute than is consistent with the natural and popular sense of the word. And considering other questions, to do which we have authority, such as: That the track or way need not be public; that, though private, it is within the statute; that it need not be permanent, but may, if merely temporary, be sufficient; that the questions of width and length have no bearing; and that the motive power for the propulsion of the cars, provided they are on a railway, has no determinative effect—we

hold that the tramway in question is a railway within the meaning of the statute, and that the court did not err in refusing the general affirmative charge to the defendant as to the third count." *Woodward Iron Co. v. Lewis*, supra.

In the instant case, the track upon which the pusher machine was operated was composed of heavy rails laid parallel, with concrete pavement between them. The pusher machine was operated up and down this track on wheels similar to those of railroad car wheels, with the single exception that they had flanges on each side, instead of a flange only on one side. The fact that the rails were as much as 20 or 25 feet apart, or that the track was not more than 400 feet in length, can, under the decision of the *Lewis Case*, supra, have no material effect upon the question here to be determined. The question of width and length is without bearing, and it is, of course, no objection that it was a private track; nor can it be objected that the pusher machine did not haul freight or pull cars. In *Woodward Iron Co. v. Sheehan*, 166 Ala. 429, 52 So. 24, count 1 of the complaint (held by this court to be sufficient) showed that a mass of iron or slag was being moved by means of a cable or rope and a locomotive engine. Here coke in the ovens was leveled by means of this pusher machine, and was also extracted from the ovens by the same machine pushing the coke out by means of what is called the rammer; the machine, however, first removing the doors from the ovens.

As previously stated, the Employers' Liability Act was passed for the benefit of workmen, and this particular subdivision was for the protection of employees from the negligent moving of engines along the

tracks of railroads; and, as said by the Indiana court in *Jarvis v. Hitch*, supra: "The legislature will be presumed to have had in mind, not details in the construction of the engine, but a machine of the same general character, effecting practically the same results, used in the same way, and subjecting the employees to the same dangers."

So, in the instant case, the same character of danger being present to which the employee is subjected, and for whose benefit the statute is enacted, the legislature will not be presumed to have had in mind the mere details as to construction of the track, its breadth or length, or as to whether or not it shall be of permanent or temporary use. Here the employee is subjected to the same danger from the negligent operation of this machine upon this track, less in degree perhaps, somewhat, than upon a commercial railroad, but still of the same general character. The holding of the majority, in my opinion, practically repudiates the reasoning and logic of the *Lewis Case*, and passes without notice the *Sheehan Case*, supra.

I am of the opinion that the construction insisted upon by counsel for appellant, and here adopted by the court, is out of harmony with the rule of construction established for this statute by the authorities from this state above cited, and therefore conclude that the track here in question was a railway within the meaning of subdivision 5, and that the court below committed no error in refusing the affirmative charge as to count A. I think the judgment should be affirmed, and respectfully dissent.

Somerville and Thomas, JJ., concur in the foregoing opinion.

IOWA SUPREME COURT.

JACKSON

v.

FERGUSON, Appt.

(— Iowa, —, 165 N. W. 326.)

Libel — charging making dates.

It is not slanderous per se to state that a married woman had been making dates with men unless the statement intended to charge immorality, or was so understood. For other cases, see *Libel and Slander*, II. b, in *Dig.* 1-52 N. S.

(December 11, 1917.)

Note. — As to slander and libel in charging woman with unchastity, see notes to *Battles v. Tyson*, 24 L.R.A. (N.S.) 577, and *Sturdivant v. Duke*, 48 L.R.A. (N.S.) 615. L.R.A. 1918C.

A PPEAL by defendant from a judgment of the District Court for Woodbury County in favor of plaintiff in an action brought to recover damages for an alleged slander. Reversed.

Statement by Weaver, J.:

Action at law to recover damages for alleged slander. Verdict and judgment for plaintiff for \$150, and defendant appeals.

Messrs. Jepson & Stecker and Henderson & Fribourg for appellant.

Messrs. J. A. Prichard and Schmidt & Pike for appellee.

Weaver, J., delivered the opinion of the court:

The plaintiff and her husband and the defendant Ferguson and wife are comparative-

ly young people, having their homes in the same neighborhood. On one occasion the two husbands had been from home overnight, and on their return or soon thereafter information came to them that on the night of their absence their wives stayed together at the home of one of them, and that two young men visited them, staying with them until nearly morning. This caused some ill feeling, and defendant made the story the subject of certain statements respecting plaintiff which she alleges to be slanderous. The petition alleges that defendant said of and concerning plaintiff and his (defendant's) wife: "They have been making dates with men for immoral purposes." "They have been making dates with men all winter, and have been found out."

The defendant denied the alleged slander and pleaded certain matters in mitigation.

The proof tended to show that defendant did say that they (plaintiff and defendant's wife) "had made dates with some other men," that he and Jackson had found out by the boys "that they had made dates and been there," and that "they have been making dates with other men and doing things while we were gone that were simply awful;" "they have been making dates with other men and stayed up nights or one night with them." There is no evidence that he said that the "dates" to which he referred were made for immoral purposes. No special damages were alleged and no evidence of special damage offered.

At the close of the testimony on the part of plaintiff defendant moved for a directed verdict in his favor on the ground, among other things, that the words shown to have been spoken by the defendant were not slanderous per se, and no special damages had been alleged or proved. The motion was denied. At the close of all the evidence the defendant asked the court to instruct the jury, among other things, "that the words shown to have been spoken are not slanderous per se, and the burden is on plaintiff to show they were spoken maliciously, and that to recover she must allege and prove special damages."

The instruction was refused.

In our judgment the court's ruling in these respects was erroneous. There is nothing in the expression, "making dates with men," which necessarily or as a matter of law can be said to mean that plaintiff is a lewd woman or that the dates said to have been made with men were for lewd purposes. It is true that the petition alleges that the words were used by defendant with that slanderous meaning, and were so understood by those who heard him, and had there been any evidence to support these allega-

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tions, then it would doubtless have been proper for the trial court to have instructed the jury that, if they found the words were used in that defamatory sense, and that the hearers so understood their meaning, then the statement would be slanderous per se, and malice and injury would be presumed. But there is no such evidence in the record. It is not an unheard-of thing in these days for a married woman to make one of a theater party or card party or joy-riding party or other social gatherings in which her husband has no part, and whatever may be said of her wisdom or prudence in so doing, it would be a most unjustifiable thing to say that the acceptance of an appointment or date for such diversion is an act of immorality, or to say that a statement based on such acts to the effect that a woman has made dates with men (no covert defamatory sense being intended) is, as a matter of law, slander per se. "Making a date" is perhaps an inelegant expression, but giving the words no more than their ordinary and natural effect, they mean nothing more than the making of an appointment, or the fixing of a time or date for some specified purpose. If, without more, they be made use of to indicate an appointment for some unlawful or immoral purpose, it is a perversion of their natural meaning, and will not be so construed in the absence of proof that such was the intention of him who so used it, or that it was so understood by those who heard it. *McLaughlin v. Bascom*, 38 Iowa, 660; *Barton v. Holmes*, 16 Iowa, 254; *Wimer v. Allbaugh*, 78 Iowa, 79, 16 Am. St. Rep. 422, 42 N. W. 587. The instructions given to the jury are inconsistent with this view of the law and constitute reversible error.

Our conclusions above stated are sufficient to require a new trial and other points suggested in argument become immaterial.

For the reasons stated, the judgment appealed from is reversed, and the cause will be remanded for a new trial.

Gaynor, Ch. J., and Preston and Stevens, JJ., concurring.

KENTUCKY COURT OF APPEALS.

FARMERS' BANK & TRUST COMPANY,
Admr., etc., of William Winston, Deceased, Appt.,

v.

CITY OF HENDERSON.

(— Ky. —, 200 S. W. 330.)

Evidence — injury on highway — intoxication of plaintiff.

1. Evidence that one injured by the over-

turning of an automobile through an alleged defect in a highway was intoxicated at the time may be considered by the jury in an action to hold the municipality liable for the injury, as bearing upon the question of his exercise of care.

For other cases, see Evidence, XI. h, in Dig. 1-52 N. S.

Highway — defect — assumption of risk — joy ride.

2. Persons voluntarily driving or riding in an automobile upon a public highway at a dangerous rate of speed, merely to enjoy the exhilarating and pleasurable sensation, assume the risk of injury from inability of the driver to avoid defects in the street.

For other cases, see Highways, IV. c, in Dig. 1-52 N. S.

Automobile — riding with drunken driver — negligence.

3. One who, for the purpose of taking a pleasure drive, enters an automobile driven by one known to be intoxicated, is guilty of negligence which will prevent his holding the municipality liable for injury due to a defect in the street which the driver could not avoid because of his condition.

For other cases, see Highways, IV. c, in Dig. 1-52 N. S.

Same — broken steering gear — operation of car.

4. It is negligence to put on power to drive an automobile out of a ditch at the side of a highway after the steering gear is broken.

For other cases, see Highways, IV. c, in Dig. 1-52 N. S.

(February 8, 1918.)

APPEAL by plaintiff from a judgment of the Circuit Court for Henderson County in favor of defendant in an action brought to recover damages for the death of plaintiff's intestate, alleged to have been caused through a defect in the highway. Affirmed. The facts are stated in the opinion.

Messrs. Woodward & Dixon for appellant.

Messrs. B. S. Morris and Vance & Heilbrunner, for appellee:

When the evidence tends to show that the occupants of an automobile, including the chauffeur, are drunk and on a joy ride and run an automobile into a ditch, and one of the occupants seeks to recover damages from the city for maintenance of the ditch, and the city pleads contributory negligence, it is

proper for the court to instruct the jury on contributory negligence.

29 Cyc. 534; Louisville & N. R. Co. v. Cummins, 111 Ky. 333, 63 S. W. 594; Louisville v. Bott, 151 Ky. 578, 152 S. W. 532.

A city may determine when and in what manner its streets can be improved, and is not liable merely for failing to improve a street or suffering it to remain in the condition it found it when annexed.

Harney v. Lexington, 130 Ky. 251, 113 S. W. 115.

A city is not bound to anticipate and provide against so extraordinary a danger as a runaway horse or a runaway automobile.

Harrodsburg v. Abram, 138 Ky. 157, 29 L.R.A.(N.S.) 199, 127 S. W. 758.

In a suit to recover damages for improper maintenance of a ditch by a city, evidence of former accidents caused in the same way is not competent, unless it is shown that the city had knowledge of former accidents in time to have repaired the ditch so as to prevent similar accidents.

Green v. Richmond, 7 Ky. Ops. 434.

Sampson, J., delivered the opinion of the court:

Can one who is injured through a defect in a street while riding as a guest in an automobile recover of the city, where the negligence of the driver contributed to the injury, if the guest, before entering the car, knew the driver was unskilled, incompetent, or intoxicated to such an extent as to be unable to exercise that degree of care required of a person engaged in operating automobiles under like circumstances? That is the principal question presented by the facts in this case.

About midnight of June 18, 1916, William Winston and a companion named Nunnely, two colored men, obtained from a garage in Henderson, Kentucky, a Ford automobile for the purpose of taking a pleasure drive in company with two colored women. While driving out South Green street in that city, the car ran into a ditch at the side of the street, overturning and inflicting injuries upon Winston from which he shortly thereafter died.

It is alleged in the petition that it was the duty of the city to keep and maintain

Note.—The subject of imputed or contributory negligence of a passenger riding in an automobile driven by another, precluding recovery against a third person for injury, is treated in the note to *Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co.* L.R.A.1915B, 953, and see references therein to notes on related questions. Later cases in this series on the subject indicated are: *Lynn v. Goodwin*, L.R.A.1915E, 588; *An-*

thony v. Kiefner, L.R.A.1915F, 876; *Knoxville R. & Light Co. v. Vangilder*, L.R.A. 1916A, 1111; *St. Louis & S. F. R. Co. v. Bell*, L.R.A.1917A, 543; *Jacobs v. Jacobs*, L.R.A.1917F, 253; and *Hardie v. Barrett*, L.R.A.1917F, 444.

As to intoxication of person operating automobile, see annotation following *Powell v. Berry*, L.R.A.1917A, 313.

its streets in a reasonably safe condition for the travel of the public, and that it had failed to perform this duty, allowing South Green street, at the point of the accident, to fall into bad repair in that a small wash or drain, about 4 or 5 feet long and several inches deep, had been allowed to remain in the edge of the street, near a large ditch carrying a stream, for several weeks next before the accident, and that the city and its officers knew of this defective condition of the street in time to have repaired it before the injury. The allegations of the petition upon this subject were traversed by the answer, and it was affirmatively alleged by the city that Winston and his companions were drunk on the occasion of the accident, "and while the deceased, Winston, and the other occupants of said car were in a drunken condition as aforesaid, the said automobile or car was so negligently and carelessly driven that it ran into a ditch on the east side of said Green street, at the point where said accident occurred, and the said car or automobile was overturned, and the said deceased, William Winston, and the other occupants of said car or automobile, were thrown from out of same and into said ditch, resulting in the injuries complained of in the petition. . . . And Winston was not exercising ordinary care for his own safety, but at said time was acting in utter disregard thereof." It is further charged in the answer that the sole and only cause of decedent's injury and death "was the carelessness and negligence and want of care on the part of said decedent, William Winston, for his own safety as above set forth;" and "William Winston was himself guilty of negligence which contributed to cause and bring about all of the injuries of which plaintiff complains." Evidence was introduced to show a defect in the street, and that this defective condition had continued for many weeks before the accident; and further, that at least some of the officials of the city, including one councilman, knew of the defect. The city denied knowledge of the defect in the street, or that it was defective, and called witnesses to prove that Winston and his companions were engaged in taking what is commonly called a joy ride, and were driving at a dangerously high rate of speed, holloing and laughing; that the driver Nunnally knew of the ditch and its location and condition; that in approaching it, going downhill, he speeded up the car, and instead of keeping to the right, as the law of the road requires, negligently drove to the left onto the bank of the ditch; that both Winston and Nunnally were drunk or drinking and unable to properly guide and control an automobile, L.R.A.1918C.

and that as a consequence of the drunkenness and inability the accident happened.

A trial before a jury resulted in a verdict in favor of the defendant city. Upon this appeal the administrator of William Winston complains: First, that the verdict is not supported by sufficient evidence; second, the court erred in instructing upon contributory negligence, and in other instructions to the jury; third, the court erred in admitting incompetent evidence and in rejecting competent evidence offered by the administrator. In appellant's brief it is asserted to be reversible error for the court to admit evidence showing Winston's intoxicated condition. It is urged that whether drunk or sober Winston, being a passenger on the rear seat of the automobile, would have received the same injuries, he having no control over the car or its driver. The city contends that Winston was guilty of contributory negligence, while appellant insists there was a total failure of evidence to establish negligence on the part of Winston which contributed to his injury.

While the status of the parties is not affected by the drunkenness of one of them in a case of this character, unless by reason of such intoxication the one injured failed to exercise such care for his own safety as might be ordinarily expected of a sober person of ordinary prudence under similar circumstances, and but for such failure on his part the injury would not have happened, yet the jury may consider the fact of intoxication as a circumstance along with other evidence. One is not relieved of the duty of exercising ordinary care for his own safety by voluntary intoxication. And while appellant insists it was prejudicial error to admit evidence showing the insobriety of decedent, we are constrained to the view that the jury was entitled to all the facts, especially those showing or tending to show contributory negligence on his part.

In a case where a plaintiff was run down by a buggy occupied and driven by two intoxicated persons on a public highway, this court in allowing evidence of the intoxicated condition of the driver held: "The admission of evidence tending to show that the appellants were more or less intoxicated at the time the injury was inflicted is not, therefore, open to question. If it were, however, it was unquestionably competent. The issue was whether the appellants were guilty of neglect. Intoxication ordinarily deprives one of the same power to exercise caution as when sober." *Alexander v. Humber*, 86 Ky. 569, 6 S. W. 453.

In *Berry on Automobiles*, 2d ed. p. 188, it is said: "It has been held that the act of intoxication on the part of the operator of an automobile which causes injury to an-

other is not, in and of itself, such negligence as will authorize recovery. It may be pleaded and proved by way of inducement, for the purpose of illustrating the negligent conduct alleged against the defendant; but if one, although intoxicated, drives his machine in a proper manner and observes the law in every respect, he cannot be held liable for an injury inflicted by his machine merely because he was intoxicated at the time."

When two or more persons voluntarily drive or ride an automobile upon a public highway at a dangerously high rate of speed, merely for the purpose of enjoying the exhilarating and pleasurable sensations incident to the swirl and dash of rapid transit, they may properly be said to be engaged in joy riding. Such joy riders not only assume the risks of danger attendant upon the sudden and violent movements of the car, but also such as arise from the inability of the driver, when traveling at a high rate of speed, to make short quick stops to avoid collisions or defects in the street, or direct the car at bends or curves in the road so as to keep in the traveled way.

It is said that there is no evidence showing contributory negligence on the part of Winston, since he was not in charge of the car and had no control over it. We cannot assent to this proposition, because the evidence shows that Winston and Nunnelly were associated together for some hours on the evening before the accident, and had been in and about restaurants and saloons together, and had just walked, talking the while, from a restaurant to the garage before entering the car. Winston was fully acquainted with Nunnelly's intoxicated condition, if he was intoxicated; he knew all the facts or had the opportunity of knowing them before he entered the car, and is therefore charged with that knowledge. If, as the evidence conduces to show, Nunnelly the driver was intoxicated, and with this knowledge Winston voluntarily entered the car to take a pleasure drive, he was guilty of negligence which directly contributed to his injury. One who voluntarily permits himself to be driven about the streets in a motor car operated by a drunken chauffeur does not exercise ordinary care for his own safety, and he assumes the danger incident to such drive when he voluntarily places himself in a car which is managed and controlled by an intoxicated driver. This is not because of the imputed negligence rule, but because of the personal negligence of the passenger. This doctrine has been recognized in many instances.

In the case of *Titus v. New Scotland*, 90 Hun, 468, 35 N. Y. Supp. 971, it was held: The negligence of a driver under the influence of liquor, driving a private wagon at L.R.A.1918C.

night along a defective highway, is imputed to his companion riding with him and too intoxicated to keep his seat in the wagon, in case of the latter's death by the overturning of the wagon upon him at an unrailed bridge over a creek crossing the highway, and prevents his administrator from recovering for his death from the municipality on account of the defective highway.

See also *Donnelly v. Brooklyn City R. Co.* 100 N. Y. 16, 15 N. E. 733; *Payne v. Chicago, R. I. & P. R. Co.* 39 Iowa, 823.

Undoubtedly it is sound doctrine to hold: "A passenger, the guest in an automobile operated by another, is bound to exercise reasonable care for his own safety, and that a failure to do so constitutes contributory negligence and bars recovery against a third person for injury resulting, in part, from the operator's negligence."

And, with greater reason, one about to enter a car should exercise reasonable care to see that the driver in charge is an experienced, reasonably safe, and sober person, and if he fails to do this and injury results to him from a defect in the street to which the negligence, want of skill or care on the part of the driver contributed, such negligence is chargeable to him:

The evidence further shows that after the car struck the wash or drain in the street of which complaint is made, Nunnelly the driver, in attempting to guide the car out of the gully, broke the radius rod, thereby crippling the steering gear and losing control of the car; nevertheless, he put on extra power in order to drive the car out of the gully, and in doing so ran it along the edge of the main ditch for several feet before the car overturned, causing the injury. There is no contradiction of this evidence. Obviously, it was negligence on the part of the driver, assumed under the facts in this case by decedent, to undertake to drive the car out of the gully by putting increased power to it after the steering gear was broken and he was unable to guide it. A prudent person would have stopped the car instead of attempting to speed it up.

It has been held by this court that drunkenness of the injured party does not excuse the negligence of a city in leaving an open pit in a street into which a pedestrian falls while using the street at night, but if the intoxicated condition of the injured man was such that he was rendered unable to and therefore did not exercise that degree of care usually employed by reasonably prudent persons under like circumstances, then voluntary drunkenness amounts to contributory negligence. *Covington v. Lee*, 28 Ky. L. Rep. 492, 2 L.R.A. (N.S.) 481, 28 S. W. 493. With more reason may it be held that, while the negligence of the driver of an automobile

is not imputable to a passenger riding in the rear seat of a car, who had no control over the car, but who is not relieved of the duty of exercising ordinary care for his own safety, he is guilty of contributory negligence and cannot recover, if injured by the car being overturned when driven over an embankment through the negligence or recklessness of a drunken or incompetent driver; the passenger previously informed of such drunkenness or incompetency is charged with negligence in intrusting himself to such driver and exposing himself to the dangers of such a drive.

It may be stated generally that drunkenness of the injured party does not change the status of the litigants in a suit for damages on account of negligence, but if it be shown that the injured party was so incapacitated by voluntarily drinking intoxicants that he lost use of his limbs, or was reckless, or careless, and this want of care, no matter how occasioned, contributed to bring about the injury, and but for which the injury would not have happened, the drunkenness at once becomes an important consideration, and may be shown in evidence to the jury.

Even while prosecuting a journey, if the driver becomes intoxicated so as to lose control of the vehicle, or is reckless, and this is known to the passenger, ordinary care requires the passenger to call upon the driver to stop and allow him to alight, or turn the management of the vehicle over to another capable of properly directing it, and if the passenger fails to exercise such care and is injured as a result of the negligence or recklessness of the driver and a third person, he may not have recourse of such third person, this being denied him because of his own negligence rather than upon the ground that the negligence of the driver is imputed to him. All recognize the rule that a passenger in any conveyance, public or private, related or unrelated to his driver, must, in order to recover for injuries sustained through the negligence of a third party, be himself wholly free from contributory fault. The supreme court of California held that if the driver is a careless or reckless one, and the injured person knew it, proof of these facts is competent and relevant upon the showing of the passenger's own contributory negligence in going on a ride with such a driver. *Bresee v. Los Angeles Traction Co.* 149 Cal. 131, 5 L.R.A. (N.S.) 1059, 85 Pac. 152.

It is held by the courts of Texas that if a passenger in a hired automobile urge the chauffeur to run the machine at an excessive rate, or if the passenger acquiesce in the demands of his companions for a higher rate of speed, and is injured as a result of L.R.A.1918C.

a defective street and the negligence of the driver, the passenger's negligence so contributed to his injury as to defeat a recovery.

The Indiana courts have held that where the vehicle is in charge of an intoxicated driver, the passenger is not sufficiently free from negligence on his part to warrant a recovery where the injury results from reckless driving. *Brannen v. Kokomo, G. & J. Gravel Road Co.* 115 Ind. 115, 7 Am. St. Rep. 411, 17 N. E. 202. The same court in *Vincennes v. Thuis*, 28 Ind. App. 523, 63 N. E. 315, held that it was as much the duty of the guest to use reasonable care and judgment to learn of and avoid danger as it is the duty of the driver, and that when an injury results to a traveler on the highway negligently obstructed by a municipality, under such circumstances that the municipal corporation would have been liable for the injury had the traveler himself been free from negligence, the city will not be held liable where the guest was riding in a buggy driven at a high and reckless speed by one more or less intoxicated, on a dark night, and with knowledge of obstacles in the street, his contributory negligence being plain. Nor can a passenger assume that the driver is exercising ordinary care when the acts and conduct of the driver in the presence of the passenger are such as to impress a reasonably prudent person that the driver is reckless or is intoxicated to such an extent as to be unable to properly manage and control the vehicle. Undoubtedly if the guest is cognizant of danger resulting in injury, and fails to call the driver's attention to it, but permits him to drive recklessly into it without protest on his part, no recovery can be had. *Cunningham v. Thief River Falls*, 84 Minn. 21, 86 N. W. 763. 10 Am. Neg. Rep. 106.

The Missouri courts held that an occupant of a vehicle may not intrust his safety absolutely to a driver, regardless of the imminence of danger, or the visible lack of ordinary caution on the driver's part to avoid harm. If a passenger is aware of the danger, and that the driver is remiss in guarding against it, and takes no care of himself to avoid injury, he cannot recover for the injury sustained. This is not because the driver's negligence is imputable to the passenger, but because the person's own negligence contributes to his damage. *Fechley v. Springfield Traction Co.* 119 Mo. App. 358, 96 S. W. 421.

In New York it was held that one invited to ride in a vehicle, and who is thrown out by running on a pile of rubbish on the highway, negligently left there, cannot recover for his injuries of him who placed it there, if it is shown that the driver was intoxicated.

ed and was driving rapidly and recklessly, and the injured man fails to remonstrate, or do anything to discover and avoid danger. *Meenagh v. Buckmaster*, 26 App. Div. 451, 50 N. Y. Supp. 85.

Pennsylvania has adopted the rule that a traveler by night in a wagon driven by a drunken driver, known to him to be intoxicated, cannot recover for injuries suffered by the overturning of the vehicle at the side of the road in consequence of driving over a high bank which was without a fence, since the acts constitute negligence as a matter of law. *Hershey v. Mill Creek Twp.* 6 Sadler (Pa.) 459, 9 Atl. 452. In *Foley v. East Flamborough Twp.* 26 Ont. App. Rep. 43, it is held that a person riding in a private conveyance and injured or killed by the upsetting of the vehicle over an obstruction in the highway run upon by a horse is chargeable with negligence if he intrusts himself to a drunken driver, or to a driver incompetent from intoxication to control the team, and cannot recover damages from the party responsible for the condition of the highway. For other cases holding to the same effect, see note II. in 8 L.R.A. (N.S.) 601.

Undoubtedly, evidence tending to show the intoxicated condition of Winston was competent upon the trial to prove that Winston was not exercising that degree of care which a reasonably prudent person, under the circumstances, would usually exercise for his own safety. And while we do not hold that the negligence of Nunnelly the driver is imputable to Winston, nevertheless Winston was guilty of negligence in intrusting himself to such driver; he, at the time, being in possession of all the facts and knowing of the intoxicated condition of Nunnelly. This of itself was negligence which so contributed to the injury and death of Winston that but for which Winston would not have been injured. The trial court properly submitted the question of contributory negligence to the jury.

The other instructions are rather long and involved. We are not prepared to say that they do not properly submit to the jury the questions to be decided. We are of opinion the jury was justified by the evidence in returning a verdict for defendant.

There appearing no prejudicial error, the judgment is affirmed.

KENTUCKY COURT OF APPEALS.

E. A. WELCH, Appt.,
v.

COMMONWEALTH OF KENTUCKY.

(— Ky. —, 200 S. W. 371.)

Gaming — slot machine — effect of indicating coming play.

That a gum-vending machine which always delivers gum by deposit of the coin, and sometimes delivers checks good in trade in addition thereto, always indicates before the coin is placed in the slot what will be delivered by the next play, does not take it out of the operation of a statute forbidding the use of gambling machines.

For other cases, see Gaming, in Dig. 1-52 N. S.

(February 5, 1918.)

APPEAL by defendant from a judgment of the Circuit Court for Fayette County convicting him of keeping a gambling machine, and from an order denying motion for new trial. Affirmed.

The facts are stated in the opinion.

Note. — For operation of slot machine as gambling, see the notes to *Territory v. Jones*, 20 L.R.A. (N.S.) 239; *Mueller v. William F. Stoecker Cigar Co.* 34 L.R.A. (N.S.) 573; and *Ferguson v. State*, 42 L.R.A. (N.S.) 720. L.R.A. 1918C.

Mr. Edwin N. Casey, for appellant:

Before a game can be called a gambling game or a game of chance there must be some element of chance in the game.

2 Whart. Crim. Law, § 1405.

The machine in question was not a gambling device.

Rex v. Stubbs, 9 Alberta L. R. 26, 25 D. L. R. 424.

Messrs. Charles H. Morris, Attorney General, and Henry F. Turner, Assistant Attorney General, for the Commonwealth:

The slot machine in question is a gambling device, the use of which is prohibited by § 1960 of the Kentucky Statutes.

Allen v. Com. 178 Ky. 250, 198 S. W. 896; *State v. McTeer*, 129 Tenn. 535, 167 S. W. 121; *People ex rel. Verchereau v. Jenkins*, 153 App. Div. 512, 138 N. Y. Supp. 449; *Moberly v. Deskin*, 169 Mo. App. 672, 155 S. W. 842; *Ferguson v. State*, 178 Ind. 568, 42 L.R.A. (N.S.) 720, 99 N. E. 806, Ann. Cas. 1915C, 172.

Settle, Ch. J., delivered the opinion of the court:

The grand jury of Fayette county returned against the appellant E. A. Welch the following indictment (formal parts omitted): "The grand jury of Fayette county . . . accuses E. A. Welch of the offense of permitting gambling on premises of which he has control; . . . that said E.

A. Welch on the 28th day of April, 1917, in the county aforesaid and within twelve months next before the finding of this indictment, he then and there being the occupant of and in control of a certain house and premises located at No. 227 North Limestone street in the city of Lexington, Kentucky, did knowingly, wilfully, and unlawfully suffer and permit a machine and contrivance, such as is ordinarily used for gambling for money and property of value, to wit, a slot machine used in betting, whereby money and other things of value may be bet, won, and lost, to be set up, conducted, kept, and operated and exhibited in said house and premises, and on said slot machine so set up, conducted, kept, operated and exhibited as aforesaid, money and property of value was then and there bet, won, and lost, against the peace and dignity of the commonwealth of Kentucky. . . ."

When the case was called for trial the defendant waived the right of trial by jury, and by agreement made with the commonwealth submitted it to the court upon the law and the following agreed statement of facts: "It is agreed that the machine in question is about 2 feet wide and about 3½ feet in height, and is known as a gum-vending machine; that the machine is operated by dropping a nickel in the slot which is in front of the machine and pulling down a lever. The machine is loaded with packages of chewing gum and metal checks, each of which is good for five cents in trade at the defendant's café. There is a dial about 3 inches in diameter on the front of the machine which works automatically and plainly indicates to the player before each play what he will receive for his nickel. After he plays the indicator points to another number showing what the next play will get. That is, when the hand points to 'gum' the player drops a nickel in the slot and knows he will receive only chewing gum. If the dial points to 'two' the player knows when he drops in his nickel that he will receive a package of chewing gum and two chips [checks]; if it points to 'four,' a package of chewing gum and four chips; if to 'twelve,' a package of chewing gum and twelve chips; if to 'sixteen,' a package of chewing gum and sixteen chips; if to 'twenty,' a package of chewing gum and twenty chips. With each play the machine gives a package of chewing gum of a standard brand. The machine always gives the results as above mentioned, and the player always knows before he plays just what he will receive for his nickel. The dropping of a nickel in the slot causes the machine to drop to the player the gum or gum and chips indicated on the dial and automatically sets the machinery so that the dial

indicates what will be the result of the next play. The chips or checks are good for 5 cents each in trade at the defendant's place of business. At various times, in the café run by the defendant, divers persons were permitted, within twelve months prior to the finding of the indictment, to play the said machine by dropping nickels therein, and to receive from the machine in addition to the gum the number of checks entitled by each play on the dial of the machine; and divers persons were permitted to and did play said machine in the said manner and did receive checks in addition to the gum, and exchanged the said checks for merchandise in the defendant's place of business."

The trial court held that the appellant was guilty of the offense charged in the indictment, and by the judgment entered so declared and fixed his punishment at a fine of \$200. He filed a motion and grounds for a new trial, which the court overruled. And from that judgment he prosecutes this appeal.

The grounds urged by appellant for the new trial and now relied upon for the reversal asked of the judgment were and are that the judgment is contrary to law and unsupported by the evidence. So the question presented by the appeal for our decision is, Is a slot machine, such as the appellant admittedly operated in his café, a gambling machine or device the use of which is prohibited by §§ 1960-1967, Kentucky Statutes, under which the indictment was found? It is appellant's contention that it is not, because, when the operator plays the machine he gets a package of gum, and by looking at the indicator knows in advance of dropping in another nickel whether or not he will get any checks, and, if so, how many. This fact, it is further claimed, deprives the playing of the machine of any element of chance. It is also argued by appellant's counsel that whether this slot machine is a gambling device must be determined by the single play, and that in determining the question the court cannot extend the consideration to the possibility of any future play. In other words, that a machine to be a gambling device must be so constructed, manipulated, and used in each play and at each time that each play in itself will be an act of gambling. This contention ignores the fact that there might be in the mind of the player a hope or expectation that on some future play he would receive more than the indicator shows he will receive on the one he is making. There is nothing in the case of *Allen v. Com.* 178 Ky. 250, 198 S. W. 896, cited by appellant's counsel, that sustains their theory of this case. The difference between the machine in the *Allen* Case and the one we here have is that in the *Allen* Case,

while the deposit of a nickel would always procure a package of chewing gum, the chance of the chewing gum being accompanied by checks was a mere hazard; the player might or might not get the checks in addition to the chewing gum. This introduced an element of chance in the playing of the machine which the opinion declares would appeal to the player's propensity for gambling, whereas in the case of the present machine, while the same element of chance obtains, instead of its resulting from the dropping of one nickel in the slot, it comes from the dropping therein of two nickels or a dime; that is, in beginning to play the machine the player would know that his first nickel could only get him a package of chewing gum, yet by paying his second nickel or 10 cents he might receive two packages of chewing gum and as much as \$1 worth of checks; and it is this which constitutes the element of chance. The question whether the identical machine here involved is a gambling device seems to have been well settled in other jurisdictions. Thus in *State v. McTeer*, 129 Tenn. 535, 167 S. W. 121, the court said: "The question raised is whether the slot machine described is a gambling device. We are of the opinion it is."

The contention was made in that case, as here, that it was not a gambling device, because the indicator always showed what the player was to get before he deposited his nickel, and for that reason that there could have been no element of uncertainty or chance in playing the machine. In rejecting this contention the court declared that while upon depositing the first nickel the player might know exactly what he was to receive from the machine in return, yet the indicator at the end of that play might show that the next nickel deposited, instead of drawing only a package of chewing gum, might draw in addition to a package of chewing gum \$1 worth of checks. In this connection it is in the opinion said: "The lure is the opportunity of winning from 10 to 100 cents by the deposit and expenditure of 5 cents. There must be at least one play before any of the numbers mentioned is shown on the indicator, and there may be many, and it is not known which number will appear, nor at what time, nor after how many plays. . . . However, there is always a chance that any single player, by the expenditure of 10 cents, through making two plays of 5 cents each, may obtain, not only a package of gum worth 5 cents, but checks worth from 10 cents to 100 cents, and so in proportion for many plays, and a corresponding loss to the owner of the machine on such individual deals. The player is induced to continue by the fact that he is getting 5 cents' worth of gum for each play L.R.A.1918C.

with always the chance just ahead that the next presentation of the indicator will give him the opportunity of making a profit of from 100 to many times that per cent. We think this shows the machine is a gambling device."

In *People ex rel. Verchereau v. Jenkins*, 153 App. Div. 512, 138 N. Y. Supp. 449, the same conclusion was reached, the slot machine being the same that we have in the instant case. In the opinion the court said: "Thus, in addition to the gum and trade checks indicated as the certain receipts upon the dropping of the nickel is given an option to obtain a package of gum and an uncertain number of trade checks upon the dropping of the second nickel. That this uncertain option has in it such an element of chance as constitutes gambling can hardly be questioned; in fact, this element of chance only gives to the machine its value, and that" this, to us, "is within the direct prohibition of the penal law . . . seems clear."

The case of *Moberly v. Deskin*, 160 Mo. App. 672, 155 S. W. 842, brings out even more clearly the element of chance that necessarily results from the use of a machine like the one in question. In that case the court said: "The only important difference between the device in that case and the one under consideration is that the latter indicated in advance the result of the next play. But that is found on analysis to be a distinction without a substantial difference. It was possible for a player to put a nickel in the slot and obtain from the machine a package of gum worth 2 or 3 cents and checks good for merchandise of the value of \$1. One cannot imagine that a player would stop when the indicator pointed at trade checks, i. e., at a certainty of gain. Consequently, the inventor of the device knew that when each new player began, the indicator . . . would point to gum only, i. e., to no reward for the next play; but he also knew that in the vast majority of instances the dealings between the player and the machine would consist of more than a single play, and we hold as unsound the view of defendant that each play constituted a separate and distinct transaction in the sense of ending the relation of the player to the machine, which was designed and intended to include a number of plays. The contrivance was intended to allure the player into continuing to play in the hope that the next time the finger would point to trade checks and thus bring him something for nothing. Clearly the machine was a gambling device."

In *Re Cullinan* (Sup.) 114 App. Div. 654, 99 N. Y. Supp. 1007, the court said of a machine like this: "The inventor of the

present machine has attempted to obviate the criticism to which other slot machines have been subjected by cunningly returning to the operator of "the machine a check or ticket which secures to him in cigars or liquor the amount of his stake. Like most endeavors to adhere to the letter of the law while violating its spirit, he cannot succeed. The present device attractively administers to the gambling humor the same as other slot machines of substantially similar design. Unless it did this it would not entice the customer. If in every instance it actually returned 5 cents in coin to the player, no one would pretend that the device would attract anyone. So, if on every cast a ticket was run out calling for 5 cents in trade, no person would take the trouble to drop a nickel in the slot. It is the hazard, the chance of winning more than the sum ventured, which draws people to the machine, and that element was the conspicuous one retained in its mechanism, and it is that which brings it within the condemnation of the statute forbidding gambling in a place where liquor is sold."

Appellant's counsel admit they have not been able to find any authority in support

of their contention emanating from any court of last resort in the United States. They, however, cite the case of *Rex v. Stubbs*, 9 Alberta L. R. 26, 25 D. L. R. 424, decided June 15, 1915, by the supreme court of Alberta, Canada. The excerpt from the opinion of which, quoted in their brief, does seem to support their contention, but the opinion is so out of harmony with the authorities in this country and also with our own views of this case that we are unwilling to adopt its reasoning or conclusions.

We are unable to see that the machine operated by appellant in his café is any less a gambling contrivance than that condemned as such in *Allen v. Com* 178 Ky. 250, 198 S. W. 896. It undoubtedly appeals to the player's propensity to gamble. The thing growing out of its use that attracts the player is the chance that, ultimately, he will receive something for nothing. It therefore contains the vice at which the statute is directed, and though the inventor of the machine has endeavored to adhere to the letter of the law, the fact remains that he has violated its spirit.

We find no error in the judgment of the circuit court, and it is therefore affirmed.

KENTUCKY COURT OF APPEALS.

EDWIN A. KECK, Admr., etc., of Gustave Nelson Keck, Deceased, Appt.,
v.

LOUISVILLE GAS & ELECTRIC COMPANY et al.

(179 Ky. 314, 200 S. W. 452.)

Master and servant — dangerous instrument — motor cycle.

1. A master is not liable for injury done by his servant with a motor cycle furnished for his use, on the mere theory that it is a dangerous instrument.

For other cases, see *Master and Servant*, III. a, 2, in Dig. 1-52 N. S.

Same — scope of employment — riding home.

2. A trouble man of an electric company who is furnished by his employer with a motor cycle for use in his work is not acting within the scope of his employment, so as to render the master liable for the negligent operation of the machine, while riding to his home after the expiration of his working hours, although the master

permits him to use the machine for that purpose.

For other cases, see *Master and Servant*, III. a, 2, in Dig. 1-52 N. S.

(February 15, 1918.)

A PPEAL by plaintiff from a judgment of the Common Pleas Branch, Fourth Division, of the Circuit Court for Jefferson County, in favor of defendants, in an action brought to recover damages for the death of plaintiff's decedent, alleged to have been caused by the negligent operation of a motor cycle. Affirmed.

The facts are stated in the opinion.

Messrs. Hubbard & Hubbard, for appellant:

The defendant company having knowingly permitted the defendant Roach to use its motor cycle for the purpose of conveying him from his work to his residence, and from his residence to his work, must respond in damages for the death of a person, caused by the negligent operation of the machine by him while using it as a means of transit from his work to his residence.

Note. — As to responsibility of owner of motor cycle for its negligent operation by another, see annotation following this case, post, 656; and references therein for annotation on related questions.
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Louisville & N. R. Co. v. Walker, 162 Ky. 209, 172 S. W. 517; Burger v. Taxicab Motor Co. 66 Wash. 676, 120 Pac. 519; Fletcher v. Baltimore & P. R. Co. 168 U. S. 135, 42 L.

ed. 411, 18 Sup. Ct. Rep. 35; *East St. Louis Connecting R. Co. v. Reames*, 173 Ill. 582, 51 N. E. 68, 4 Am. Neg. Rep. 471; *Reynolds v. Denholm*, 213 Mass. 576, 100 N. E. 1006; *Ionnone v. New York, N. H. & H. R. Co.* 21 R. I. 452, 46 L.R.A. 730, 79 Am. St. Rep. 812, 44 Atl. 592, 7 Am. Neg. Rep. 163; *Vick v. New York C. & H. R. R. Co.* 95 N. Y. 267, 47 Am. Rep. 36; *Ryan v. Cumberland Valley R. Co.* 23 Pa. 384; 1 Bailey, *Personal Injuries*, 65; *Reilly v. Hannibal & St. J. R. Co.* 94 Mo. 600, 7 S. W. 407.

A motor cycle is a dangerous instrumentality, and the master is bound to exercise a proper degree of care to guard and control and protect dangerous instrumentalities owned or operated by him, and to respond in damages for an injury incurred by reason of the improper use of such instrumentality by a servant, though not then engaged in the performance of his duties.

Tyler v. Stephan, 168 Ky. 770; 174 S. W. 790; *Re Wickstrum*, 92 Neb. 523, 42 L.R.A. (N.S.) 1068, 138 N. W. 733.

When the defendant company, for a period of four or five years or more, knew that its motor cycle men were riding its machines to go from their work to their homes, and from their homes to their work, and made no objection to same, it thereby consented to same, and placed its stamp of authority and approval upon their acts.

Maack v. Southern R. Co. 148 Ky. 122, 146 S. W. 28.

Messrs. *Matt O'Doherty and J. W. Fowler, Jr.*, for appellees.

Clay, C., filed the following opinion:

On January 26, 1916, Gustave Nelson Keck, an infant seven years of age, was struck and killed by a motor cycle belonging to the Louisville Gas & Electric Company, and ridden by Walter Roach, one of its employees. This suit was brought by the administrator of the decedent to recover damages for his death. The Louisville Gas & Electric Company defended on the ground that, at the time of the accident, its codefendant Walter Roach was operating the motor cycle solely for his own purposes, and not in the service or the performance of any duty owing to it. At the conclusion of the evidence, the trial court directed a verdict in favor of the Louisville Gas & Electric Company, and thereupon the action was dismissed as to Roach. Plaintiff appeals.

The facts are as follows: Since the month of May, 1912, Roach had been in appellee's employ as "an incandescent trouble man." The company employed both night and day men for this service. It was their duty to answer calls that might come from its patrons about trouble with the wires or lights in their residences. The company's

headquarters were at Seventh and Ormsby avenue. Roach was a day man. His hours of service were from 7 o'clock A. M. to 8 o'clock P. M. In order that they might properly attend to their duties, the incandescent trouble men were furnished by the company with motor cycles. The company had a garage at Seventh and Ormsby avenue where its motor cycles and autos were kept when not in use. On the evening of the accident Roach quit work at 8 o'clock P. M. A few minutes later he left the company's shop at Seventh and Ormsby avenue and started on his way home, riding one of the company's motor cycles. He lived on Eighteenth street near Hill street about a mile from Seventh and Ormsby avenue. When Roach reached a point on Eighteenth street, some distance south of Dumesnil street, decedent and other children were playing a game called "I spy." The decedent was "it," and by the rules of the game he was required to stand at the "base," which was on the west side of Eighteenth street, with his eyes covered until his playmates found their hiding places. Just before Roach came along on the motor cycle, the decedent had crossed to the east side of Eighteenth street. While standing there, one of the boys holloed "free" on the west side and started for the base. Thereupon decedent started to the west side and came in contact with the motor cycle. He was thrown some distance, and received injuries from which he died.

There was no competent evidence tending to show that the incandescent trouble men were authorized by the company to ride the machines home in order that they might answer calls while off duty. There was evidence, however, that Roach and the other trouble men occasionally rode the machines home with the knowledge and acquiescence of the company's employees superior in authority to them. It will thus be seen that the question for decision is whether the company is liable for the negligence of an employee while using one of its motor cycles, with its knowledge and acquiescence, solely for his own convenience, while he was at liberty from the service and was not in the performance of any duty which he owed to the company.

We perceive no reason for applying the rule regulating the care and protection of dangerous instrumentalities. Under that rule, railroad companies cannot intrust their engines, cars, or other dangerous instrumentalities to their employees, even for the purpose of going to and from their homes, without being responsible for injuries caused by the negligent use of such instrumentalities. *Louisville & N. R. Co. v. Walker*, 162 Ky. 209, 172 S. W. 517; *Fletcher v. Baltimore*

& P. R. Co. 168 U. S. 135, 42 L. ed. 411, 18 Sup. Ct. Rep. 35; East St. Louis Connecting R. Co. v. Reames, 173 Ill. 582, 51 N. E. 68, 4 Am. Neg. Rep. 471. We are not prepared to say that a motor cycle is a "dangerous instrumentality" within the meaning of that rule. In our opinion it is in the same category with automobiles, in that it is not inherently dangerous, but becomes dangerous only when negligently operated. Hence, we conclude that the company cannot be held liable on the sole ground that Roach used the machine with its knowledge and acquiescence. *Tyler v. Stephan*, 163 Ky. 770, 174 S. W. 790.

There being no liability on the ground that the company intrusted Roach with a dangerous instrumentality, it follows that the company's liability depends on whether the relation of master and servant existed at the time of the accident. The liability of the master for the negligence of the servant proceeds from the maxim, "Qui facit per alium facit per se." In other words, where the servant is acting for the master and in his stead, the effect is the same as if the act had been performed by the master in person. The test in every case is: Was the servant acting for his master, or for himself? If he acts in the furtherance of his master's business, he acts for the master. If he acts in the furtherance of his own business or pleasure, he acts for himself. Applying these principles to the case under consideration, we find that Roach's working hours ended at 8 o'clock P. M., and the accident happened after that time. He was then at liberty from the service. In riding the motor cycle home, he used it solely for his own convenience, and not for the purpose of performing any duty which he owed to the company. Under these circumstances, he was acting for himself and not for the com-

pany, and the company cannot be held liable for his negligence. Nor does the fact that he was then using the company's machine with its knowledge and acquiescence affect the question. Under the best-considered authorities, the liability of the master does not turn on the fact that the servant was then using the master's property, but on whether he was using it in the furtherance of the master's business. *Tyler v. Stephan*, supra; *Sullivan v. Louisville & N. R. Co.* 115 Ky. 447, 103 Am. St. Rep. 390, 74 S. W. 171; *Hartley v. Miller*, 165 Mich. 115, 33 L.R.A.(N.S.) 81, 130 N. W. 336, 1 N. C. C. A. 126; *Reilly v. Connable*, 214 N. Y. 586, L.R.A.1916A, 954, 108 N. E. 853, Ann. Cas. 1916A, 656; *Douglass v. Hewson*, 142 App. Div. 166, 127 N. Y. Supp. 220; *Slater v. Advance Thresher Co.* 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133. The case of *Reynolds v. Denholm*, 213 Mass. 576, 100 N. E. 1006, does not conflict with the above rule. There the chauffeur lived in the defendant's house. He had no particular hours of service, but was subject to orders at all times. He took his meals at one place and his laundry at another, each place being about half a mile distant. Both his meals and laundry were paid for by defendant as a part of his wages. He often used the auto for the purpose of going to his meals and getting his laundry. On the evening of the accident, he had ridden to his supper in the automobile, and after supper was on his way to get his laundry, when the accident occurred. After getting his laundry, it was his duty to return to the house to await orders. These facts were held sufficient to make it a question for the jury whether the chauffeur was acting in the scope of his employment at the time of the accident.

Judgment affirmed.

Annotation—Responsibility of owner of motor cycle for its negligent operation by another.

As to regulations affecting motor cycles, see note to *Re Wickstrum*, 42 L.R.A.(N.S.) 1068.

For motor cycle as a motor vehicle within statutes regulating the latter and other similar vehicles, see note to *People v. Smith*, 21 L.R.A.(N.S.) 41.

It will be noticed that it was sought to hold the defendant company liable in *KECK v. LOUISVILLE GAS & E. Co.* ante, 654, for an injury inflicted while its motor cycle was being used by one of its employees, on the theory that it was a dangerous instrumentality, and also on the theory that the employee was using it within the scope of his em-
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ployment; but that a recovery was denied on the first theory, the court holding that there was no reason for applying the rule regulating the care and protection of dangerous instrumentalities, and also on the second theory, where it appeared that the employee was using the machine to go to his home after working hours, although such use was with the defendant's permission. The decision in this case is in accord with cases involving the liability of an owner of an automobile for injuries inflicted by his machine while it is being used by another for his own purposes.

Generally, as to liability of owner for

injuries by automobile while being used by a servant or a third person for his own business or pleasure, see annotation to *Reilly v. Connable*, L.R.A.1916A, 957, and earlier annotations there referred to.

And as to liability of owner, upon the ground of dangerous agency or of negligence in intrusting car to incompetent or negligent person, for injuries inflicted while the latter is operating the car for his own purpose, see notes to *Neubrand v. Kraft*, L.R.A.1915D, 691; *Walker v. Klopp*, L.R.A.1916E, 1295; and *Gardiner v. Solomon*, L.R.A.1917F, 384.

Generally, as to liability of master for injury done by servant to third person in use of dangerous agency, see note to *Galveston, H. & S. A. R. Co. v. Currie*, 10 L.R.A.(N.S.) 367.

And as liability where automobile is being used by a member of owner's family, see annotation to *McNeal v. McKain*, 41 L.R.A.(N.S.) 775; *Birch v. Abercrombie*, 50 L.R.A.(N.S.) 59; *Griffin v. Russell*, L.R.A.1916F, 223; and *Van Blaricom v. Dodgson*, L.R.A.1917F, 363; and later case, *Blair v. Broadwater*, L.R.A.1918A, 1011.

There are, as yet, few cases in which a recovery has been sought against the owner of a motor cycle for an injury resulting from the operation of his machine by another.

The decision in *KECK v. LOUISVILLE GAS & E. CO.* is in accord with that reached in *Babbitt v. Seattle School Dist.* (1918) — *Wash.* —, 170 Pac. 1020. A prima facie case was established in that case by proof of an injury to the plaintiff by a motor cycle, and the defendant's ownership thereof, and its use at the time by an employee, but, it having been subsequently shown by undisputed evidence that at the time of the injury the employee had ceased his day's work and was using the motor cycle for his own convenience, without permission from the defendant and against one of its rules, it was held that the defendant was not liable for the injury. The court said: "The owner of a motor vehicle who was not present at the infliction of the injury cannot be held liable except it be shown that the person in charge was not only agent of the owner, but was at the time engaged in the business of his master. While authority to use a motor vehicle in exceptional ways might be implied by circumstances which would warrant the inference that the employer knew of such uses, the commitment of such a vehicle to the custody and control of an employee for the L.R.A.1918C.

special purpose of delivering merchandise would not alone authorize the conclusion that the employee was at liberty to use the motor vehicle for other purposes. . . . It is well settled by all authorities that the act complained of must have been done while the servant was engaged in doing some act under authority from his master; not that while engaged in the act he is employed in the master's business, but the act must have been in the furtherance of the master's business, and such as may be fairly said to have been so expressly or impliedly authorized by the master. . . . By the uncontradicted evidence Brown had ceased his day's work, and was not in the employ or under the control of appellant until he resumed work the next day at 8 o'clock. He was not, then, in the service of appellant at the time of the accident. . . . The presumption, growing out of a prima facie case established by proof of the injury and the ownership of the motor cycle and the use thereof by an employee of the owner of the motor cycle, subsisted only so long as there was no substantial evidence to the contrary. When that was offered the presumption disappeared, unless met by further proof. Here the presumption arising from the fact of ownership was entirely destroyed by the other evidence."

In *Maskell v. Alexander* (1916) 91 Wash. 363, 157 Pac. 872, the only other case which has apparently considered the question under annotation, a recovery was sought against the owner of a motor cycle for an injury inflicted while its rider was practising on a race track for races. There was evidence tending to show not only the defendant's ownership, but also that he exercised control and supervision over the motor cycle and its rider; that he joined with owners of other motor cycles entered for the races in arranging for rules and judges; that he entered several motor cycles in the races and expended a considerable amount in preparing the machines and fixing for the races, and expected to get benefit from the races by way of advertising. It was held in this case that the evidence was sufficient to make it a question for the jury whether the rider was a mere gratuitous bailee of the motor cycle, or was an agent or servant of the defendant, and that it was sufficient to support the jury's finding that the rider was acting as the defendant's employee.

And an instruction that if the defendant permitted the rider to use the motor

cycle at the preliminary practice races and that that arrangement was in contemplation of some benefit to be derived, or which reasonably might be expected would be derived, from the use of the machine in the races to the defendant's business, then he would be liable for the rider's acts, was held, when taken in connection with other instructions, not erroneous on the ground that it led the jury to believe that if any benefit, without qualifications, was contemplated or could reasonably be expected, the de-

fendant would be liable for the rider's acts.

A further instruction that the owner of a motor cycle has a legal right to loan his machine, and if he does so, and the borrower uses it in and about his own business, and the owner has no management or control over it, or the borrower while the latter is using it, the owner cannot be held liable to one injured while the borrower is so using it, was approved.

J. T. W.

KENTUCKY COURT OF APPEALS.

MERCHANTS TRANSFER COMPANY,
Appt.,
v.

HULDAH H. KISER.

(170 Ky. 324, 200 S. W. 454.)

Carrier — loss through defect in goods — care.

A transfer company is liable for loss of the goods of a customer by fire originating in the explosion of a firearm packed in the goods if, by the exercise of ordinary care after discovering the fire, it might have extinguished it and saved the goods.

For other cases, see Carriers, III. o, in Dig. 1-52 N. S.

(February 15, 1918.)

APPEAL by defendant from a judgment of the Circuit Court for Fayette County in favor of plaintiff, and from an order denying a new trial, in an action brought to recover the value of property lost by fire while in defendant's possession for transportation. Affirmed.

The facts are stated in the opinion.

Mr. B. D. Berry for appellant.

Messrs. Allen & Duncan, for appellee:

Defendant, as a common carrier, was an insurer of the safe delivery of the goods, unless the loss by fire was caused by the inherent quality of the goods, and even if the fire was caused by the discharge of a loaded pistol packed in the goods, yet, if the negligence of the defendant contributed to the

loss in whole or in part, it is liable for the loss.

10 C. J. 121; Chesapeake & O. R. Co. v. Williams, 156 Ky. 114, 49 L.R.A. (N.S.) 347, 160 S. W. 769; Cincinnati, N. O. & T. P. R. Co. v. Rankin, 153 Ky. 730, 45 L.R.A. (N.S.) 529, 156 S. W. 400.

The burden of proof is on the carrier to show that the loss was due to an excepted cause.

10 C. J. 215; Slater v. South Carolina R. Co. 29 S. C. 96, 6 S. E. 936.

It was a question of fact for the jury to determine as to how the fire was started.

Southern R. Co. v. Smith, 125 Ky. 656, 102 S. W. 232.

Hurt, J., delivered the opinion of the court:

The appellee Huldah Kiser brought this action in the Fayette circuit court against the Merchants Transfer Company, which is a corporation doing business as a common carrier. By her petition, she averred that on the 20th day of April, 1916, she delivered to the appellant a lot of household goods, furniture, and articles of household use, under a contract with it that it would transport them from Lexington, Kentucky, and deliver them to her at Danville, Kentucky, and which it agreed and undertook to do for a compensation agreed upon between them, but violated its contract and failed to deliver the goods, or any part thereof, to her at Danville, Kentucky; that the goods were of the value of \$1,250, and prayed a judgment against it in that sum. The appellant

Note.—The duty of a carrier to take precautions to prevent loss threatened without any antecedent fault on its part is discussed in the note to *Pine Bros. v. Chicago, B. & Q. R. Co.* 39 L.R.A. (N.S.) 640; and see notes of collateral interest therein cited. See also the case of *Kime v. Southern R. Co.* 43 L.R.A. (N.S.) 617, with note on "Liability of carrier for suffocation of live stock," and the case of *George B. Higgins & Co. v. Chicago, B. & Q. R. Co.* L.R.A. 1917C, 507. L.R.A. 1918C.

The effect of the shipper's negligence in loading car, or as to condition of car, upon the carrier's common-law liability, is treated in the notes to *Duncan v. Great Northern R. Co.* 19 L.R.A. (N.S.) 952, and *Illinois C. R. Co. v. Rogers*, L.R.A. 1915C, 1220.

The liability of a carrier in respect of property which it accepts improperly packed or crated is treated in the notes to *Atlantic Coast Line R. Co. v. Rice*, 29 L.R.A. (N.S.) 1214, and *Northwestern Marble & Tile Co. v. Williams*, L.R.A. 1915D, 1077.

by its answer admitted the delivery of the articles to it for transportation to Danville, Kentucky, but averred that the appellee had "fraudulently, negligently, and wrongfully," and without its knowledge, placed among the goods, which she had represented to it to be household goods and furniture, a loaded revolver which, on the road between Lexington and Danville, was discharged without fault upon the part of the appellant, and which set fire to the goods, and they were consumed by the fire, including a portion of its wagon. It made its answer a counterclaim against the appellee, and prayed that the petition be dismissed, and that it recover of her the value of its wagon. The averments of the answer and counterclaim were denied by a reply, and in addition the appellee alleged that, although it might be true that the goods were set on fire by the discharge of the revolver, as alleged, the servants of appellant in charge of the wagon and goods could have, by ordinary care, discovered the fire in time to have saved her goods from burning, as well as have saved its wagon, but that they had negligently failed to do so. The affirmative averments of the reply were denied by a rejoinder. Upon the issues thus presented by the pleadings, the case went to trial before a jury, and the result of it was a verdict in favor of appellee against appellant for a sum of \$815, and a judgment was rendered in favor of her against it for that sum.

The appellant's motion for a new trial having been overruled, it has appealed from the judgment to this court, and assigns as error: (1) The refusal of the court to give two instructions asked for by it; and (2) the giving of two other instructions by the court, over its objection, wherein it contends that the court misinstructed the jury as to the law which pertains to the facts as presented by the evidence in the case. The court instructed the jury substantially as follows: That it should find a verdict for the plaintiff, unless it believed from the evidence that the fire which destroyed the goods was caused by the explosion of a cartridge in the pistol, which was packed with the goods, in which event it should find for the defendant, unless it further believed from the evidence that, by the exercise of ordinary care on the part of the servants in charge of the wagon, the fire could have been discovered by them in time to have saved the goods from destruction, and in that event it should find for the plaintiff, although it might believe from the evidence that the fire was caused by the discharge of the revolver. Another instruction defined the measure of damages to which the appellee was entitled, in the event the jury should find a verdict for her. A fourth in-

struction directed the jury that if it believed from the evidence that the appellee was negligent in placing the revolver among the goods, or it was packed therein in a negligent manner, and that the fire which destroyed the goods was caused by the explosion of a cartridge in the revolver, to find for the appellant upon its counterclaim, unless it should further believe from the evidence that the servants in charge of the wagon at the time it was destroyed could, by the exercise of ordinary care, have prevented its destruction. The measure of damages which it should find on account of the destruction of the wagon, in the event the jury found a verdict for the appellant on its counterclaim, was properly defined by the instructions. The words "ordinary care" and "negligence," as used in the instructions, were also defined.

The objection made to the instructions is that the court permitted the jury to find a verdict against the appellant, although the fire was caused by the explosion of a cartridge in the pistol, if the servants of appellant in charge of the wagon could, by the exercise of ordinary care, have discovered the fire in time to have saved the goods, and could then by the exercise of ordinary care have done so. The rejected instruction offered by the appellant presented its view of the case by directing the jury to find for the plaintiff, unless it believed from the evidence that the fire which destroyed the goods was caused by the explosion of a cartridge in the pistol, and if it believed that it was so caused to find for the defendant, thus absolving the appellant from any liability on account of the negligence of its servants in discovering the fire, or thereafter taking steps to save the goods from burning. The other instruction offered by appellant, which was rejected, was similar to the one given by the court upon the subject of its counterclaim, except that the one offered by appellant did not provide that a recovery could not be had for the loss of the wagon, if the servants of the appellant could have, by the exercise of ordinary care, saved the wagon from destruction, and negligently failed to do so.

It is conceded that the duty which was incumbent upon the appellant in the transportation and delivery of the goods was that of a common carrier. In other words, its obligation was that of an insurer of the safe transportation to and delivery of the goods at Danville. The carrier is liable for all loss of or injury to goods which he is engaged in transporting, unless the loss or injury is caused by the act of God, or of the public enemy, or of the public authority, or by the inherent nature or quality of the

goods, or the act or fault of the shipper. Where the carrier relies upon the act of God, the public enemy, or the public authority, or the inherent nature or quality of the goods, or the fault of the shipper, as the reason for the loss or injury suffered by the goods, and as a defense to a recovery of him for the loss or injury, he must take the burden of so showing from the fact that he is in possession of the goods and in a position to be able to account for loss of them or injury to them. He cannot, however, be excused unless the loss or injury was the entire cause, for if his negligence contributed to the cause of the loss, and except for his negligence the loss would not have occurred, the carrier is not excused. 10 C. J. 21, 215; 6 Cyc. 376; Cincinnati, N. O. & T. P. R. Co. v. Rankin, 153 Ky. 730, 45 L.R.A.(N.S.) 529, 156 S. W. 400; Chesapeake & O. R. Co. v. Williams, 156 Ky. 114, 40 L.R.A.(N.S.) 347, 160 S. W. 769; Stiles v. Louisville & N. R. Co. 129 Ky. 175, 18 L.R.A.(N.S.) 1112, 130 Am. St. Rep. 465, 110 S. W. 820; Hall v. Renfro, 3 Met. 51; Cincinnati, N. O. & T. P. R. Co. v. Sanders, 118 Ky. 115, 80 S. W. 488; Southern R. Co. v. Smith, 125 Ky. 666, 102 S. W. 232. Hence, if the facts of the case as presented by the evidence were such as to justify the giving of the instructions, and to make issues in the evidence of such as were submitted to the jury, it is apparent that the court properly instructed the jury as to the law.

The rule is, however, invoked that, although the issue was made in the pleadings as to the alleged negligence of the servants of the appellant who were in charge of the wagon in failing to exercise ordinary care in discovering that the goods were on fire and in saving them after the discovery, it is insisted that there was no evidence tending to prove any negligence upon the part of the servants, and hence the court should not have submitted the issue to the jury. Doubtless this contention should be upheld, if all the facts proven by the evidence, and the inference deducible therefrom, would show that the servants of appellant in charge of the wagon had not failed to exercise ordinary care for the safety and preservation of the goods; but, if the facts were such that reasonable men might well differ as to whether there was a failure to exercise ordinary care, it then became a question for the jury, and was properly submitted to it for its determination.

There were two servants of appellant with the wagon, to which was attached two horses. If the theory of the appellant is correct as to the origin of the fire, it had burned for $\frac{1}{2}$ of a mile, a large part of which was traveled in a slow walk, with L.R.A.1918C.

both servants riding upon the front of the wagon and within 3 or 4 feet of the fire, before they discovered it, and then only when a witness who lived beside the road, and who had seen smoke arising from the wagon before it arrived at her house, by vehement cries attracted their attention and told them of it. Neither servant made any effort to save the goods, but both proceeded to unhitch the team; but the owner of the house insisted that they remove the wagon from such close proximity to his house, when they hitched the team, drove 300 feet further, and then again unhitched the team and carried the horses away 50 or 60 feet, and then returned to the wagon. Neither up to this time had made any effort to save any of the contents, and not a single article was saved, but all were consumed. The facts and circumstances were all in evidence, as detailed by the servants of the appellant and other witnesses, and they are not such as to prove, without any contradiction or differences of opinion among reasonable men, that ordinary care was used by the servants in taking care of the goods, to discover the fact that they were on fire, or to save either them or the wagon after they became aware of the fire. There is a failure to satisfy that, if such efforts had been made to save the goods as might and could have been made, they would not have been saved. A jury is peculiarly a competent tribunal to determine such an issue, and it is not our province to say whether, in our opinion, they arrived at the proper verdict. The evidence was such as to require its submission to the jury, and is sufficient to sustain the verdict. The court, therefore, properly rejected the instructions asked by appellant, and properly gave the ones which it gave in lieu of them.

The judgment is therefore affirmed.

MINNESOTA SUPREME COURT.

JAMES B. SWING, Trustee, etc., of the Union Mutual Fire Insurance Company of Cincinnati, Resp't.,

v.

CLOQUET LUMBER COMPANY, Appt.

(121 Minn. 221, 141 N. W. 117.)

Evidence — admission — contents of document.

1. The contents of a policy of insurance and of a premium note may be proved

Headnotes by HALLAM, J.

Note. — As to proof of contents of writing by admissions, see annotation following this case, post, 664.

against a party by his admissions in writing, without production of the original documents themselves, or accounting for their nonproduction.

For other cases, see *Evidence*, IX. in *Dig.* 1-52 N. S.

Judgment — assessing policyholders.

2. A decree that an "assessment shall be made" against all policyholders, which determines the unpaid liabilities according to their accrual by quarterly periods, and fixes the percentage of assessment against every policy in force during the respective periods, is an assessment, and not an order for an assessment.

For other cases, see *Insurance*, III. h, in *Dig.* 1-52 N. S.

Insurance — notice of assessment — validity.

3. Defendant was liable to assessment on only one policy. The notice stated separately and correctly the amount for which he was liable on this policy, except that it did not give him credit for payments made. It erroneously stated that he was liable to assessment on other policies, and demanded payment for an aggregate sum which was largely excessive. There was nothing to indicate that defendant was prejudiced or misled, and the notice was not for this reason void.

For other cases, see *Insurance*, III. h, in *Dig.* 1-52 N. S.

Same — notice — variance from decree.

4. A notice which requires payment in a shorter time than the decree provides is not for that reason void, where a copy of the decree accompanies the notice.

For other cases, see *Insurance*, III. h, in *Dig.* 1-52 N. S.

Same — by registered mail — sufficiency.

5. The notice of assessment was given by registered mail. This complied with the provision of the decree requiring "due notice." It also complied with the by-laws of the company. There was no proof of any statute of Ohio bearing on this question. The manner of giving notice was sufficient.

For other cases, see *Insurance*, III. h, in *Dig.* 1-52 N. S.

Same — deposit note — credits.

6. The by-laws of the company provide that no member shall be liable, except to the extent of his deposit note. Defendant's note was \$687.50. It had paid \$302.50 before the assessment by the court. The court made an assessment of 86.0003 per cent of the face of the note. If no credit is given for payments made defendant's assessment will far exceed its liability. Held, defendant is entitled to credit on the assessment for the amount paid.

For other cases, see *Insurance*, III. h, in *Dig.* 1-52 N. S.

(April 25, 1913.)

APPEAL by defendant from a judgment of the District Court for St. Louis County in plaintiff's favor in an action L.R.A.1918C.

brought to recover an amount alleged to be due for an assessment upon certain insurance policies claimed to have been issued by the insurance company to defendant. Modified and affirmed.

The facts are stated in the opinion.

Mr. William B. Phelps, for appellant:

There was no evidence of an assessment having been made.

Swing v. H. C. Akeley Lumber Co. 62 Minn. 169, 64 N. W. 97; Swing v. Humbird, 94 Minn. 1, 101 N. W. 938.

The notice given was not such as the defendant was entitled to receive.

Benedict v. Grand Lodge, A. O. U. W. 48 Minn. 471, 51 N. W. 371; National Mut. Ben. Asso. v. Miller, 85 Ky. 92, 2 S. W. 909; Northwestern Traveling Men's Asso. v. Schauss, 148 Ill. 904, 310, 35 N. E. 747; 2 Bacon, Ben. Soc. §§ 381, 382; Miner v. Michigan Mut. Ben. Asso. 63 Mich. 338, 29 N. W. 862; Swing v. Barnard-Cope Mfg. Co. 115 Minn. 47, 131 N. W. 855; Swing v. Wurdt, 76 Minn. 198, 79 N. W. 94.

Messrs. P. A. Reece, and E. J. Kenny, for respondent:

Where the name of an individual appears on the stock book of a corporation as a stockholder, the presumption is that he is the owner of the stock, and in an action against him as a stockholder the burden of rebutting that presumption is cast upon defendant.

Turnbull v. Payson, 95 U. S. 418, 24 L. ed. 437; Finn v. Brown, 142 U. S. 56, 72, 35 L. ed. 936, 941, 12 Sup. Ct. Rep. 136; Longdale Iron Co. v. Pomeroy Iron Co. 34 Fed. 450; Bank of Commerce's Appeal, 73 Pa. 58; Glenn v. McAllister, 46 Fed. 887; Vanderwerken v. Glenn, 85 Va. 9, 6 S. E. 806.

The making of the decree of assessment by the court, and the computing of the amount due from each member and giving notice thereof by the trustee, completed the making of the assessment.

Langworthy v. Garding, 74 Minn. 325, 77 N. W. 207; Swing v. Rose, 75 Ohio St. 355, 79 N. E. 757; Swing v. Karges Furniture Co. 123 Mo. App. 367, 100 S. W. 662; Swing v. H. C. Akeley Lumber Co. 62 Minn. 169, 64 N. W. 97.

The notice given to defendant was sufficient.

Thibert v. Supreme Lodge K. H. 78 Minn. 448, 47 L.R.A. 136, 79 Am. St. Rep. 412; Benedict v. Grand Lodge, A. O. U. W. 48 Minn. 471, 51 N. W. 371; Mutual Reserve Fund Life Asso. v. Hamlin, 139 U. S. 301, 35 L. ed. 169, 11 Sup. Ct. Rep. 614; Thropp v. Susquehanna Mut. F. Ins. Co. 125 Pa. 427, 11 Am. St. Rep. 909, 17 Atl. 473.

Hallam, J., delivered the opinion of the court:

The Union Mutual Fire Insurance Company was a mutual insurance corporation incorporated under the laws of Ohio in June, 1888. It had a short career. In two years it was insolvent, and on December 18, 1890, judgment was entered in the supreme court of Ohio that it be ousted and excluded from being a corporation, and plaintiff James B. Swing was appointed trustee to wind up its affairs. The trusteeship has had a much longer career. It is now in its twenty-third year.

The by-laws of this corporation provided that any person wishing to become a member of said company should deposit with the secretary an application, together with a premium note of such amount as might be required by the board of directors, and should pay 20 per cent of said note in cash previous to the issuance of a policy; that such deposit note should continue in force during the life of the policy for which it was issued, and should be subject to assessment for losses and expenses. It was further provided that "no member shall be liable for losses or expenses, or for any indebtedness of the company, in any amount, except to the extent of the premium notes given by him." It is further alleged, and the court found, that on the 1st day of July, 1889, defendant applied to said insurance company for insurance on its mill property, and executed and delivered its premium note in the sum of \$687.50, and soon thereafter made the first payment of \$137.50; that said company on said day issued to defendant its policy of insurance No. 2652 in the sum of \$5,000. The court further found that on November 14, 1889, defendant paid an assessment of \$27.50, and on November 3, 1890, an assessment of \$137.50.

On June 11, 1901, the supreme court of Ohio made a decree "that the following assessments shall be made against all persons who hold policies of insurance in said company." The decree then determined the amount of unpaid liabilities according to their accrual by quarterly periods, and fixed the per cent of assessment against every policy in force during these respective periods. It provided that all persons who without being sued for them paid their assessments in accordance with the decree should have rebated to them one third thereof, and the trustee was given full power and was ordered to sue for and collect the full assessments, without rebate, when thirty days had elapsed after due notice thereof.

On March 25, 1902, the trustee sent by registered mail to each policyholder a no-

tice of this assessment, which notice stated in detail the amount such policyholder was obliged to pay on every policy he had in force, and also the amount that every other policyholder was obliged to pay, and contained the words: "You are required by law to pay within thirty days from this date, viz., March 22, 1902."

The amount of this assessment for the period during which defendant's policy was in force was \$6.0003 per cent of the face of its premium note. The trial court held that defendant was liable for such percentage, amounting to \$591.25, and judgment was entered accordingly. Defendant appeals.

1. Defendant contends that there is no competent proof as to the contents of the premium note given by it or of the policy issued by plaintiff. It is true neither document was offered in evidence. It does appear that a premium note was given and that a policy was issued. It was necessary for plaintiff to further prove, by competent evidence, the amount of the note and the amount and duration of the policy.

Plaintiff offered for this purpose the policy register of the company. This contains entries showing the issuance of policy No. 2652, the date thereof, the original amount thereof, the amount of the premium note, the amount that it was reduced by fire, and the amount of insurance remaining in force. Plaintiff contends that the policy register is competent evidence of these facts. He invokes the rule applied to stock corporations that, where the name of an individual appears on the stock book of a corporation as a stockholder, that fact establishes prima facie his relation as a stockholder in an action against him to enforce a stockholder's liability. *Holland v. Duluth Iron Min. & Development Co.* 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. 50; *Turnbull v. Payson*, 95 U. S. 418, 24 L. ed. 437. It is unnecessary to determine whether this rule is to be so extended as to make a policy register of a company such as this evidence in an action of this sort to establish the relation of policyholder, the amount of the policy, and the existence and amount of the premium note. It does appear in this case, from competent evidence, that the two assessments above mentioned were paid on a policy bearing the number 2652. It appears that defendant sustained a loss by fire; that there was paid by the insurance company to defendant, by reason thereof and on account of this policy, the sum of \$33.26; that defendant receipted therefor, and in said receipt recited that this policy No. 2652 was reduced in the amount of this loss, leaving the sum of \$4,966.74 still in force. It further appears that on December 30, 1890, defend-

ant returned to the company this policy with a letter containing the following:

Herewith return as requested.

Prem. Expires
2652 Gen'l Form \$5,000 \$137.50 July 1, 1894

Kindly give us proper credit for return premium and forward note to us at once and oblige.

This testimony constitutes an admission in writing of the essential parts of the policy and of the premium note. Some controversy has existed in the past as to whether the contents of a written instrument may be proved against a party by his own admissions, and the question has not heretofore been decided in this state. Webster v. Ferguson, 94 Minn. 86, 91, 102 N. W. 213. The weight of authority is to the effect that such proof is competent. Slatterie v. Poolley, 6 Mees. & W. 664, 151 Eng. Reprint, 579, 1 Harr. & W. 18, 10 L. J. Exch. N. S. 8, 4 Jur. 1038, 11 Eng. Rul. Cas. 202; 2 Wigmore, Ev. §§ 1255 et seq. This rule is sound in principle, at least when the admissions are in writing as they are in this case. We hold that a written admission of the contents of a written document may be established against the party making the admission, without production of the document or accounting for its nonproduction. This evidence is in this case ample and conclusive without resort to the policy register at all.

2. Defendant further contends that no assessment was ever in fact made by the Ohio supreme court; that the decree above mentioned was only an order for an assessment to be made by the trustee, which assessment the trustee never made. We do not concur in this contention. The material language of the decree is above stated. This language manifests a clear intent that the decree itself shall constitute the assessment, and it contains all the necessary elements thereof. It is true the decree did not compute the amount to be paid by each policyholder. But it fixed the per cent which each must pay. The amount of the assessment could be ascertained in any case by mere mathematical calculation. This is the view that this court has heretofore taken of this same decree. It was before the court in Swing v. Barnard-Cope Mfg. Co. 115 Minn. 47, 131 N. W. 855. In that case the court said: "In effect that decree levied assessments on the policyholders to pay the debts of the company. . . . The decree made the liability of the policyholders absolute. It gave a cause of action to the receiver against each policyholder for the amount of his assessment."

Defendant contends that the notice of assessment was invalid.

3. The notice stated that defendant's assessment amounted to \$1,106.88. This was far in excess of the amount for which defendant was liable. This fact did not render the notice void. The notice incorporated the decree in full, and it indicated the precise amount assessed on account of the policy and premium note on which defendant was held liable by the trial court. The total amount claimed was excessive, partly because policies were included that were not subject to assessment, and partly because of the failure to give the credit hereinafter mentioned. Defendant could not have been misled or prejudiced by the claim of an excessive amount, and the notice was not invalidated thereby.

4. It is urged that the notice was incorrect in stating the time within which the assessment should be paid. The decree required payment of the assessment within thirty days after due notice thereof, and gave the option to discharge the assessment within such thirty days by paying two thirds of the amount. The notice read: "You are required by law to pay within thirty days from this date, viz., March 22, 1902." This notice was not mailed until March 25th. But the notice gave verbatim the contents of the decree. We are of the opinion that the defendant could not have been misled or prejudiced by the defect in the notice mentioned. The case is entirely different from those cases where the giving of a notice is made the basis of a forfeiture.

5. It is contended that the notice of this assessment was not properly served. As above stated, the notice was sent by registered mail to all persons assessed. Defendant received its notice. The decree merely provides for "due notice thereof." The notice given was "due notice." Alworth v. Gordon, 81 Minn. 445, 84 N. W. 454. The by-laws of the corporation provide that "notice of assessments . . . shall be given personally to the parties liable, or printed or written notice requesting payment shall be mailed to them at their last postoffice address known to the officers of the company. The notice in this case complied with the by-laws.

It is contended, however, that notice by mail was not a compliance with the statutes of Ohio. Sections 3650 and 3651 of the Revised Statutes of Ohio, as amended by Act April 14, 1888 (85 Ohio Laws, p. 273), are in evidence. Section 3650, as so amended, provides in respect to assessments: "The directors shall, as often as they deem necessary, settle and determine the sum to be paid by the several members thereof, and publish the same in such manner as they may choose, or as the by-laws prescribe. . . ." Section 3651, as so amended, provides that "if a member neglect or refuse

assessment amounted to \$1,106.88. This was far in excess of the amount for which defendant was liable. This fact did not render the notice void. The notice incorporated the decree in full, and it indicated the precise amount assessed on account of the policy and premium note on which defendant was held liable by the trial court. The total amount claimed was excessive, partly because policies were included that were not subject to assessment, and partly because of the failure to give the credit hereinafter mentioned. Defendant could not have been misled or prejudiced by the claim of an excessive amount, and the notice was not invalidated thereby.

for the space of thirty days after the publication of such notice and after demand for payment to pay the sum assessed upon him, . . . the directors may sue for and recover the whole amount of contingent liability." It was held in *Swing v. Wurst*, 76 Minn. 108, 79 N. W. 94, that these sections applied to an assessment made by a receiver, and that they contemplated a "publication" in some manner of the notice of assessment. It is contended that the mailing of the notice was not a publication." It is unnecessary to determine whether it was or not, for it appears from the evidence in this case that the amended §§ 3650 and 3651 have no application to this proceeding. Section 2 of the act of April 24, 1888, by which these sections were amended, is decisive of this. This section was not in evidence in *Swing v. Wurst*, *supra*. This section provides that "this act shall not affect companies now doing business on the premium note plan, unless they elect to dispense with said notes and embody the contingent liability in the policy as herein provided and said original sections [3650 and 3651] are hereby repealed: Provided, that said sections shall remain in force as to all mutual companies now doing business, which do not elect to reorganize under said sections as amended by this act." This company did not so reorganize. *Swing v. Humbird*, 94 Minn. 1, 101 N. W. 988; *Swing v. Red River Lumber Co.* 105 Minn. 336, 117 N. W. 442. The original and not the amended sections accordingly apply to this company and to this proceeding. But the original sections are not in evidence. We can assume nothing

as to their contents. There is, accordingly, no statute of Ohio in evidence which in any way prescribes the manner of giving the notice that was given in this proceeding.

6. The amount of the premium note involved in this case was \$687.50. Defendant had paid \$302.50 prior to this assessment. The trial court found that under the decree of assessment plaintiff should recover 86.0003 per cent of the face of its premium note, or the sum of \$591.25 without deduction for the amounts already paid. Defendant contends that it should receive credit for the amounts previously paid on this premium note. Defendant's contention is correct. If the judgment of the trial court stands, plaintiff will be obliged to pay, including what he has paid, the sum of \$893.75. But the by-laws of the company provide that "no member shall be liable for losses or expenses, or for any indebtedness of the company, in any amount, except to the extent of the premium notes given by him." The decree does not, in terms, give credit for payments previously made to the company on premium notes, but it is not to be presumed that the supreme court of Ohio intended to make an assessment against this defendant for more than \$200 in excess of the amount for which he was liable under the by-laws of the company. We accordingly hold that defendant is entitled to credit against the amount found by the trial court in the amount of payment previously made, and that its liability is \$288.75 and interest, and no more. Judgment of the trial court will be modified to that extent. As so modified, the judgment appealed from is affirmed.

Annotation—Proof of contents of writing by admissions.

- I. Introductory, 664.*
- II. View favoring admissions, 665.*
- III. View excluding admissions, 668.*
- IV. Miscellaneous, 671.*

I. Introductory.

This note excludes cases where ground has been laid for the introduction of secondary evidence. It is not intended, in general, to include cases of admissions merely of title, or merely that a writing has been executed, or admissions of partnership, or cases where the admission was a subsequent instrument executed by the parties, or cases relating to the competency or credibility of witnesses.

The courts are not agreed upon the interesting and important question whether there may be proof of contents of written instruments by admissions, where no ground has been laid for the admission of secondary evidence. L.R.A.1918C.

The courts that admit the evidence do so on the theory that the admission or declaration is admitted as primary evidence of itself, and not as secondary evidence of the instrument in question. In some cases a distinction is made, or sought to be made, between instruments "collateral to the issue" and those directly in issue, holding that evidence of admissions as to collateral instruments may be received as an exception to the rule of exclusion. This is hardly a satisfactory solution of the problem. It may at least be said that in cases where the party seeking to introduce his opponent's admission has possession of the instrument in question, there is no good reason why he should not be required to produce it.

Prof. Wigmore (2 Ev. § 1255) makes the following suggestion: "The proper solution of the dilemma would be this:

When an admission of the contents is testified to, let production be dispensed with; but if the fact of the admission is bona fide disputed by the opponent, and some testimony to that effect is put in by him, then let production be required or the document's absence be accounted for."

Before the decision in *Slatterie v. Pooley* (1840) 6 Mees. & W. 664, 151 Eng. Reprint, 579, 1 Harr. & W. 18, 10 L. J. Exch. N. S. 8, 4 Jur. 1038, 11 Eng. Rul. Cas. 202, the question in England seems to have been in doubt. In *Sussex v. Temple* (1698) 1 Ld. Raym. 310, 91 Eng. Reprint, 1102, it was held that an answer in chancery admitting a deed might be shown against the heir of such answerer. But in *Call v. Dunning* (1803) 4 East, 54, 102 Eng. Reprint, 750, it was held that an answer in chancery admitting a bond was not evidence of its execution. In *Bloxam v. Elsee* (1825) 1 Car. & P. (Eng.) 558, Abbott, Ch. J., said "that you cannot ask a witness what a plaintiff has said as to the contents of deeds executed by such plaintiff, without giving such plaintiff notice to produce the deeds, or accounting for their nonproduction." On the other hand, in *Sewell v. Stubbs* (1824) 1 Car. & P. (Eng.) 73, where the defendants asked a witness whether one of the plaintiffs had not told him that he held a note of a certain firm for a certain amount, to which it was objected that the witness could not be asked the contents of the note, Gifford, Ch. J., said: "They may certainly ask anything that either of the plaintiffs said." And in *Earle v. Pickin* (1833) 5 Car. & P. (Eng.) 542, a case not clearly reported, Park, J., said: "What a party says is evidence against himself, as an admission, whether it relates to the contents of a written paper or to anything else."

The best known case on the subject is *Slatterie v. Pooley* (Eng.) supra, where it was held that the defendant's own declarations were admissible in evidence to prove the identity of the debts sued for with those mentioned in a certain schedule, although such admissions involved the contents of a written instrument not produced. Parke, B., said: "The reason why such parol statements are admissible, without notice to produce, or accounting for the absence of the written instrument, is that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its un-

truth, arising from the very nature of the case, where better evidence is withheld; whereas what a party himself admits to be true may reasonably be presumed to be so. The weight and value of such testimony is quite another question. That will vary according to the circumstances, and it may be, in some cases, quite unsatisfactory to a jury. But it is enough for the present purpose to say that the evidence is admissible." Lord Abinger, C. B., who was not present at the argument, stated: "That he had always considered it as clear law that a party's own statements were in all cases admissible against himself, whether they corroborate the contents of a written instrument or not."

This case has been followed in England but dissented from in Ireland. In the United States there is much difference of opinion on the subject. It will be seen that *SWING v. CLOQUET LUMBER Co.* ante, 660, follows the rule of *Slatterie v. Pooley*.

II. View favoring admissions.

The doctrine that the contents of writings may be proved by admissions is held in numerous cases. *Slatterie v. Pooley* (1840) 6 Mees. & W. 664, 151 Eng. Reprint, 579, 1 Harr. & W. 18, 10 L. J. Exch. N. S. 8, 4 Jur. 1038, 11 Eng. Rul. Cas. 202; *Howard v. Smith* (1841) 3 Mann. & G. 254, 133 Eng. Reprint, 1138, 3 Scott, N. R. 574, 10 L. J. C. P. N. S. 245; *Reg. v. Welch* (1846) 2 Car. & K. (Eng.) 296, 1 Den. C. C. 199, 2 Cox, C. C. 85; *Boulter v. Peplow* (1850) 9 C. B. 493, 137 Eng. Reprint, 984, 19 L. J. C. P. N. S. 190, 14 Jur. 248; *Murray v. Gregory* (1850) 5 Exch. 468, 155 Eng. Reprint, 205, 19 L. J. Exch. N. S. 355, 14 Jur. 555, *infra*; *Reg. v. Basingstoke* (1871) 14 Q. B. 611, 117 Eng. Reprint, 237, *infra*; *Pritchard v. Bagshawe* (1871) 11 C. B. 459, 138 Eng. Reprint, 551, 2 Loundes, M. & P. 323, 20 L. J. C. P. N. S. 161, 15 Jur. 730; *Rogers v. Card* (1858) 7 U. C. C. P. 89; *Paige v. Loring* (1873) Holmes, 275, Fed. Cas. No. 10,672, *infra*; *Morey v. Hoyt* (1893) 62 Conn. 542, 19 L.R.A. 611, 26 Atl. 127, *infra*; *Denver & R. G. R. Co. v. Wilson* (1894) 4 Colo. App. 355, 36 Pac. 67, *infra* (obiter); *Coombs v. Union Trust Co.* (1897) 146 Ind. 688, 46 N. E. 16, *infra*; *Coca Cola Bottling Co. v. International Filter Co.* (1916) 62 Ind. App. 421, 113 N. E. 17 (as stating the rule); *Gay v. Lloyd* (1847) 1 G. Greene (Iowa) 78, 46 Am. Dec. 78, *infra*; *Blackington v. Rockland* (1877) 66 Me. 332, *infra*; *Purinton v. Purinton* (1906) 101

Me. 250, 115 Am. St. Rep. 309, 63 Atl. 925, 8 Ann. Cas. 205, *infra*; *Crichton v. Smith* (1870) 34 **Md.** 42, *infra*; *Maurice v. Worden* (1880) 54 **Md.** 233, 39 Am. Rep. 384, *infra*; *Smith v. Palmer* (1850) 6 **Cush. (Mass.)** 513, *infra*; *Loomis v. Wadhams* (1857) 8 **Gray (Mass.)** 557, *infra*; *Clarke v. Warwick Cycle Mfg. Co.* (1899) 174 **Mass.** 434, 54 N. E. 887, *infra*; *Hutchinson v. Plant* (1914) 218 **Mass.** 148, 105 N. E. 1017, *infra*; *SWING v. CLOQUET LUMBER CO.*; *Edgar v. Richardson* (1878) 33 **Ohio St.** 591, 31 Am. Rep. 571, *infra*; *Curtis v. Ingham* (1829) 2 **Vt.** 287, *infra*; *Taylor v. Peck* (1871) 21 **Gratt. (Va.)** 11, *infra*.

Thus, admissions have been received of reference of a claim to an arbitrator and his adverse award (*Murray v. Gregory* (1850) 5 **Exch.** 468, 155 **Eng. Reprint**, 205, 19 L. J. **Exch. N. S.** 355, 14 **Jur.** 555); that the defendant was treasurer (by his admission in a bond) (*Reg. v. Welch* (1846) 2 **Car. & K. (Eng.)** 296, 1 **Den. C. C.** 199, 2 **Cox, C. C.** 85); of the existence and contents of a deed (*Rogers v. Card* (1858) 7 **U. C. C. P.** 89); of what the defendant had stated as to the contents of a letter (*Paige v. Loring* (1873) **Holmes**, 275, **Fed. Cas. No.** 10,673; *Loomis v. Wadhams* (1857) 8 **Gray (Mass.)** 557; *Purinton v. Purinton* (1906) 101 **Me.** 250, 115 Am. St. Rep. 309, 63 Atl. 925, 8 Ann. Cas. 205); of what a party's agent had stated partly reading from a letter (*Brown v. Equitable Life Assur. Soc.* (1902) 14 **Haw.** 80); in answer to interrogatories as to attachment proceedings in another state (*Combs v. Union Trust Co.* (1897) 146 **Ind.** 688, 46 N. E. 16); of a city's receipt of a notice (*Blackington v. Rockland* (1877) 66 **Me.** 332); of using the words complained of as libelous (*Maurice v. Worden* (1880) 54 **Md.** 233, 39 Am. Rep. 384); of the employment of the plaintiff by the defendant corporation (*Clarke v. Warwick Cycle Mfg. Co.* (1899) 174 **Mass.** 434, 54 N. E. 887); of a woman that she had been divorced, admitted against one claiming under a deed from her (*Edgar v. Richardson* (1878) 33 **Ohio St.** 591, 31 Am. Rep. 571).

In *Gay v. Lloyd* (1857) 1 **G. Greene (Iowa)** 78, 46 Am. Dec. 78, on the plea of no such record, it was held that a transcript of a judgment of a justice of the peace, not authenticated so as to be evidence, was properly received in evidence, when the defendant was shown to have stated that such a judgment was rendered against him by such justice, **J.R.A.1918C.**

although he did not admit that it was the correct copy and said it was unjust.

In *Crichton v. Smith* (1870) 34 **Md.** 42, it was held that a paper put in evidence in a suit by the defendant as being a charter party was evidence against him in another suit as being such charter party. It seems that the parties were the same in both suits, but an objection was made that it did not appear that they were the same, to which the court replied that it was immaterial whether they were the same or not.

In *Hutchinson v. Plant* (1914) 218 **Mass.** 148, 105 N. E. 1017, the plaintiff's counsel, in examining the defendant as a witness, asked him if he had dictated to anyone what took place at a certain interview, and he said that he had done so to his attorney, and the plaintiff's counsel then continued to ask him, reading from a paper, whether he had said so-and-so, to which he practically assented. The court said the evidence was not put in by the plaintiff to show the contents of the statement dictated by the witness, but as proof of his declarations material to the issues on trial. The testimony was primary evidence of his oral admission, rather than secondary evidence of the contents of the paper written from what he said.

In *Taylor v. Peck* (1871) 21 **Gratt. (Va.)** 11, where the defendant, in order to prove that he held the premises as the tenant of the plaintiff, offered receipts for rent from the plaintiff, it was held to be error to exclude the receipts on the ground that he held under a written lease.

Judicial statements and explanations of the rule.

(See also the quotations from *Slatterie v. Pooley* (1840) 6 **Mees. & W.** 664, 151 **Eng. Reprint**, 579, 11 **Eng. Rul. Cas.** 202, *supra*, I.)

"The written admissions of a party to a suit are receivable in evidence against him to prove facts directly in issue, although such facts are established by a writing not produced, and its absence not accounted for." *Blackington v. Rockland* (1877) 66 **Me.** 332.

A party's declaration is primary proof of the agency of his agent, and he cannot make it secondary by stating that there was a power of attorney. *Curtis v. Ingham* (1829) 2 **Vt.** 287.

"It is clear that an admission, either verbal or in writing, by 'the defendant,' of the contents of a deed, would be sufficient proof as against him of those contents." *Alderson, B.*, in *King v. Cole*

(1848) 2 Exch. 628, 154 Eng. Reprint, 642, 17 L. J. Exch. N. S. 283.

"The admissions of a party, freely and voluntarily made, are always evidence which may be introduced by the opposite party." *Maurice v. Worden* (1880) 54 Md. 233, 39 Am. Rep. 384.

In *Reg. v. Basingstoke* (1871) 14 Q. B. 611, 117 Eng. Reprint, 237, where it was held that evidence was properly received to the effect that the overseer of a parish had acted in a way inconsistent with the nongranteeing of a certificate, and that that was equivalent to evidence of the granting of a certificate, upon the authority of *Slattey v. Pooley*, 6 Mees. & W. 664, 151 Eng. Reprint, 579, 1 Har. & W. 18, 10 L. J. Exch. N. S. 8, 4 Jur. 1038, 11 Eng. Rul. Cas. 202. *Patteson, J.*, said: "Such an admission is like an estoppel, and, as is well put in a note (2 Smith, Lead. Cas. 437) to *Duchess of Kingston's Case* (1776) 20 How. St. Tr. 355, in *Mr. Smith's Leading Cases*, it is used 'not to supply the absence of the ordinary instruments of evidence, but to supersede the necessity of any evidence by shewing that the fact is already admitted.'"

In a case where the court said it was not necessary to invoke the rule it was said: "Even where a written instrument is a necessary part of the case, and its contents are directly in issue, parol admissions by a party to the suit, relating to its contents, may be introduced not as secondary, but as primary evidence." *Denver & R. G. R. Co. v. Wilson* (1894) 4 Colo. App. 355, 36 Pac. 67. It would seem, however, that the matter is, at least to some extent, governed by statute in Colorado.

"Answers to interrogatories are admissions of the party under oath, and the rule that parol evidence is not admissible to prove the contents of documents and other writings, or other facts shown by the decree of a court or other public record, does not apply in all its strictness to the admissions of a party. Such admissions are received as primary evidence." *Combs v. Union Trust Co.* (1897) 146 Ind. 688, 46 N. E. 16.

Smith v. Palmer (1850) 6 Cush. (Mass.) 513, was an action on breach of a contract to discontinue another action, and the plaintiff, to show that the other action had not been discontinued, offered an execution upon the judgment therein and also the declarations and admissions of the defendant, to show that the action had not been discontinued and that judgment had been entered.

therein, and it was held that the admissions were proper to that end. The court said: "The admissions of a party are not open to the same objection which belongs to parol evidence from other sources. A party's own statements and admissions are, in all cases, admissible in evidence against him, though such statements and admissions may involve what must necessarily be contained in some writing, deed, or record. Thus, the statements of a party that certain land had been conveyed might be admitted, though the conveyance must be by deed recorded. The general principle as to the production of written evidence as the best evidence does not apply to the admissions of parties, as what a party admits against himself may reasonably be taken to be true.

In the present case, the principal fact was that the defendant had not performed his contract in regard to which there could be no doubt that his admission would be important evidence; and the execution reciting the judgment assigned by the defendant himself was produced, in connection with the admissions and statements of the defendant."

The evidence is primary not secondary. *Morey v. Hoyt* (1893) 62 Conn. 542, 19 L.R.A. 611, 26 Atl. 127; *Denver & R. G. R. Co. v. Wilson* (1894) 4 Colo. App. 355, 36 Pac. 67 (obiter); *Combs v. Union Trust Co.* (1897) 146 Ind. 688, 46 N. E. 16; *Purinton v. Purinton* (1906) 101 Me. 250; *Maurice v. Worden* (1880) 54 Md. 233, 39 Am. Rep. 384; *Hutchinson v. Plant* (1914) 218 Mass. 148, 105 N. E. 1017; *Curtis v. Ingham* (1829) 2 Vt. 287.

In *Morey v. Hoyt* (Conn.) *supra*, where it was held permissible to show as primary evidence what the defendant had admitted as to the contents of a letter written by him, without showing that the letter could not be produced, the court said: "The evidence was claimed as an admission of the contents of a writing by one whose admissions were relevant. It was claimed as primary and not secondary evidence. If it was primary evidence, the objection taken is not tenable. The rule that the oral admissions of a party against himself and those claiming under him, although relating to the contents of a writing, are primary evidence, seems to be well established, whatever we may think of its wisdom. So far as we are aware this court has never had occasion to consider this rule, but elsewhere the weight of authority is in its favor. It is established in England, as shown by

the authorities cited. Primary evidence means the document itself, produced for the inspection of the court, . . . or an admission of its contents proved to have been made by a party whose admissions are relevant.' Stephen's Dig. art. 64. . . . The wisdom of this rule is questioned by Judge Taylor in his work on Evidence, and . . . it would seem that the courts in Ireland dissent from it, as do also the New York courts. The weight of authority, however, as before stated, seems to be in its favor, and we see no reason why it should not be applied in a case like the one at bar."

Doubtful cases.

There are two cases in Michigan, where admissions were held to be evidence, which leave the general question in doubt.

In *New York C. Ins. Co. v. Watson* (1871) 23 Mich. 488, it was held that the deliberate statement that there was subsequent insurance in the proofs of a policy of insurance dispensed with any other proof of such subsequent insurance. It operated as an admission. The effect of this case may be doubtful in view of the decision in *Cumberland Mut. F. Ins. Co. v. Giltinan* (1886) 48 N. J. L. 495, 57 Am. Rep. 586, 7 Atl. 424, *infra*, holding such evidence admissible as an exception to the rule that admissions cannot be used to show the contents of a writing.

In holding that it was error to exclude a copy of a letter written by one of the parties who admitted on the stand that it was a correct copy, the court said that this evidence converted the contents of the paper into admissions by him and made them original evidence. It was of no consequence that the paper was a copy of a letter he had written. When he made its contents identical with his declaration, the paper became an original for the purpose of showing his declaration. *Kelly v. McKenna* (1869) 18 Mich. 381.

For other cases on copies admitted to be correct, see *infra*, IV.

III. View excluding admissions.

Other cases hold that the contents of writings may not be proved by admissions. *Lawless v. Queale* (1845) 8 Ir. L. Rep. 382, *infra*; *Security Trust Co. v. Robb* (1906) 73 C. C. A. 302, 142 Fed. 78; *Morgan v. Patrick* (1844) 7 Ala. 185, *infra*; *Ware v. Roberson* (1850) 18 Ala. 105, *infra*; *Fralick v. Presley* (1856) 29 Ala. 457, 65 Am. Dec. 413 (obiter); *Halliburton v. Fletcher* (1861) 22 Ark. 453, L.R.A.1918C.

infra; *Bellamy v. Hawkins* (1880) 17 Fla. 750, *infra*; *Flournoy v. Newton* (1850) 8 Ga. 306; *Bryan v. Smith* (1839) 3 Ill. 47 (defendants' admission that they were tenants in common with plaintiffs); *Jameon v. Conway* (1848) 10 Ill. 227, *infra* (obiter); *Prussing v. Jackson* (1901) 208 Ill. 85, 69 N. E. 771, *infra*; *Rees v. Lawless* (1823) 4 Litt. (Ky.) 218, *infra*; *Griffith v. Huston* (1832) 7 J. J. Marsh. (Ky.) 385, *infra*; *Clark v. Slidell* (1843) 5 Rob. (La.) 330, *infra*; *Hope Mut. L. Ins. Co. v. Chapman* (1856) 6 Gray (Mass.) 75, *infra*; *Williams v. Brickell* (1859) 37 Miss. 682, 75 Am. Dec. 88, *infra*; *Bank of North America v. Crandall* (1885) 87 Mo. 208, *infra*; (as indicating such an opinion); *Cumberland Mut. F. Ins. Co. v. Giltinan* (1886) 48 N. J. L. 495, 57 Am. Rep. 586, 7 Atl. 424, *infra* (admitting a certain admission as an exception to the rule); *Jenner v. Joliffe* (1910) 6 Johns. (N. Y.) 9, *infra*; *Hasbrouck v. Baker* (1813) 10 Johns. (N. Y.) 248, *infra*; *Welland Canal Co. v. Hathaway* (1833) 8 Wend. (N. Y.) 480, 24 Am. Dec. 51, *infra*; *Sherman v. People* (1878) 13 Hun (N. Y.) 575; *Threadgill v. White* (1850) 33 N. C. (11 Ired. L.) 591, *infra*; *Buchanan v. Moore* (1823) 10 Serg. & R. (Pa.) 275, *infra*; *Com. ex rel. McDowell v. Keeper of County Prison* (1882) 11 W. N. C. (Pa.) 341, *infra*; *Moore v. Dickinson* (1893) 39 S. O. 441, 17 S. E. 998, *infra* (not necessary to decision).

Thus, it was held not competent to show by admission that the defendant sold the plaintiff land in another state, nor that a judgment had been secured against him there, nor that it bound the land (*Morgan v. Patrick* (1844) 7 Ala. 185); nor to show admissions, in a petition, of the contents of a judgment of a justice of the peace (*Ware v. Roberson* (1850) 18 Ala. 105); nor to show guardianship by the admissions of the supposed guardian (*Halliburton v. Fletcher* (1861) 22 Ark. 453); nor to show by admissions the amount or effect of a judgment or decree (*Bellamy v. Hawkins* (1880) 17 Fla. 750); nor the execution and contents of a deed where the presumption is that the deed is in the possession of a party to the action (*Griffith v. Huston* (1832) 7 J. J. Marsh. (Ky.) 385); nor admissions of an attachment (*Jenner v. Joliffe* (1910) 6 Johns. (N. Y.) 9); nor that there was a mortgage on the defendant's house (*Sherman v. People* (1878) 13 Hun (N. Y.) 575; see also *Williams v. Durst* (1860) 25 Tex. 667, 78 Am. Dec. 548, *infra*, "Texas"); nor a sale by bill of

sale in a certain place, the execution terms and legal effect of the bill being directly in issue (*Threadgill v. White* (1850) 33 N. C. (11 Ired. L.) 591).

An admission in an answer in chancery of the execution of a deed will not permit a copy of it to be introduced in evidence, without proof of the loss of the original. *Rees v. Lawless* (1823) 4 Litt. (Ky.) 218.

"The contents of a written instrument cannot be proved by parol in the absence of proof accounting for the nonproduction of the writing." *Prussing v. Jackson* (1901) 208 Ill. 85, 69 N. E. 771, where it was sought to show the publication of a libel by the defendant by admissions that he had written something on which the libel was based, and his writing was not produced.

In *Williams v. Brickell* (1859) 37 Miss. 682, 75 Am. Dec. 83, the court stated that it was error to admit secondary evidence of a telegram without requiring the production of the original, or accounting for its absence, but that, as there was proof in the record that the defendant admitted the contents of the despatch, as well as that he had sent it, he could not have been prejudiced by its admission.

Where the action was against the defendant for failing to attend as a witness on a subpoena, and evidence was received of a declaration by the defendant that he had been served with a subpoena, it was held that this was error, as the plaintiff had admitted that he had the original subpoena in his possession, and did not produce it. *Hasbrouck v. Baker* (1813) 10 Johns. (N. Y.) 248.

In *Welland Canal Co. v. Hathaway* (1833) 8 Wend. (N. Y.) 480, 24 Am. Dec. 51, it was held that a contract between the plaintiff and the defendant, signed by the defendant, could not be taken as evidence that the plaintiff was a properly constituted foreign corporation; it was incompetent evidence for that purpose, and was not the best evidence; the charter should have been produced. The court stated that at best the contract was but an admission, and he did not think it amounted to that.

In *Buchanan v. Moore* (1823) 10 Serg. & R. (Pa.) 275, it was held to be error to permit a witness to testify that the defendant called on him "with a small paper containing a description of his lands advertised for sale, in which the sawmill tract was described as containing upwards of 300 acres," without notice having been given to the defendant to produce the paper. L.R.A.1918C.

In a case where the question was whether the petitioner was a married woman, the court declined to receive admissions by her to the effect that she had been divorced, on the ground that the record was the only competent evidence on that point. *Com. ex rel. McDowell v. Keeper of County Prison* (1882) 11 W. N. C. (Pa.) 341.

Compare *Edgar v. Richardson* (1878) 38 Ohio St. 591, 31 Am. Rep. 571, *supra*, II.

Where the agent of the defendant had made a certain admission, his information being derived from letters from the defendant, and the letters were not produced, it was held that evidence of the contents of the letters was incompetent (but it was also held that it did not appear that the declarations were within the scope of the agency). *Moore v. Dickinson* (1893) 39 S. C. 441, 17 S. E. 998.

It may be noted that in *Spence v. Spence* (1811) 2 Brev. (S. C.) 466, where the plaintiff proved a grant to his father-in-law Mark, and a conveyance by deed from Mark to himself, it was held that the defendant could not show that Mark had declared to the plaintiff, before he gave him the deed, that he had already sold the land to a third party and made a conveyance to him.

The Massachusetts rule of admissibility seems to have been departed from in *Hope Mut. L. Ins. Co. v. Chapman* (1856) 6 Gray (Mass.) 75, where the plaintiff sued on a promissory note, and the defendant claimed that the note was given as premium upon an insurance policy issued by the plaintiff, and that it could not recover, as it had not complied with the requirements of the state law. He endeavored to prove the contents of the policy of insurance in his possession by answers to interrogatories of plaintiff's officer showing the above facts. It was held that this could not be done until a foundation for secondary evidence had been laid.

Judicial statements.

In *Lawless v. Queale* (1845) 8 Ir. L. R. 382, in excluding an admission by the defendant, where the plaintiff had a written agreement as to the premises in question which he had not produced, *Pennyfather, Ch. J.*, said, referring to *Slatterie v. Pooley* (1840) 6 Mees. & W. 664, 151 Eng. Reprint, 579, 1 Harr. & W. 18, 10 L. J. Exch. N. S. 8, 4 Jur. 1038, 11 Eng. Rul. Cas. 202: "I cannot subscribe to what was said by Parke, B., in that case. . . . The doctrine there

laid down is a most dangerous proposition. By it a man might be deprived of an estate of £10,000 per annum, derived from his ancestors by regular family deeds and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear they heard the defendant say he had conveyed away his interest therein by deed, had mortgaged or otherwise encumbered it; and thus, by this facility so given, the most open door would be given to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty. It is said, it is evidence against the person himself who made the admission and that there is no danger of untruth in what a man admits against himself. Supposing the admission to be proved, is there no danger of mistake or misconception of the contents of a written instrument? It may be long and difficult; one part or clause may explain or qualify another; an unprofessional or ignorant man may be led to believe it may be so-and-so, whereas the real and true meaning may be the very reverse or something very different. But, produce the deed or writing, *littera scripta manet*. On which side is the security, and why depart from the rule that, if you want to give evidence of the contents of a writing, the writing itself must be produced? Is there no danger of untruth or misrepresentation, when used against the party making the admission? That is the ground put by Parke, B., and in which I cannot agree, when I know by experience how easy it is to fabricate admissions, and how impossible to come prepared to detect the falsehood. Why are writings prepared at all but to prevent mistakes and misrepresentations? And why, having taken that precaution, with such writing at hand and capable of being produced, is the same to be laid aside and inferior and less satisfactory evidence resorted to?"

In *Jameson v. Conway* (1848) 10 Ill. 227, the court said: "The true rule on this subject undoubtedly is that the declarations of a party are not competent evidence to prove a matter directly in issue, unless parol evidence would be admissible to establish it, or unless there is no higher or better evidence of the same fact in existence, which can be produced."

In a case where the only evidence of the existence of an attachment was the confession of the plaintiff, the court stated that the confessions of a party had never been considered competent ev-

idence of the execution of a specialty, and much less ought they to be admitted as proof of matters of record. *Jenner v. Joliffe* (1810) 6 Johns. (N. Y.) 9.

"Loose admissions or conversations of parties cannot supply the absence of documentary evidence, when it exists; the documents themselves should be produced, unless their loss is satisfactorily proved, or their absence clearly accounted for, and then their contents should be established." *Clark v. Slidell* (1843) 5 Rob. (La.) 330.

In *Cumberland Mut. F. Ins. Co. v. Giltinan* (1886) 48 N. J. L. 495, 57 Am. Rep. 586, 7 Atl. 424, it was held that an admission, in the proof of loss, of other insurance, was evidence of the existence of the policies stated, judgment, however, being still for the plaintiff because it did not appear that these policies had run for ten days, as the defendant was bound to maintain the issue that the unauthorized policies had run for ten days. The court considered, however, that this was an exception to the general rule and was authorized on account of the exceedingly formal character of the admission and the purpose for which it was made, and said: "The broad ground was taken that the admissions of the contents of a written document, its nonproduction being unexplained, are receivable as primary evidence of its contents. For this doctrine, the case of *Slatterie v. Pooley* (1840) 6 Mees. & W. 664, 151 Eng. Reprint, 579, 1 Harr. & W. 18, 10 L. J. Exch. N. S. 8, 4 Jur. 1038, 11 Eng. Rul. Cas. 202, and the series of decisions to which it gave rise, were relied upon as the leading authorities in its favor. This class of adjudications, it is clear, goes far in the direction of sustaining the rule as claimed. But these decisions are all of modern date, originating in the year 1840, and have not received anything like universal approval by the courts of this country; and it is certain that they are opposed to the immemorial administration of the law in this state. That a written instrument whose existence is put in issue by the pleadings need not be produced at the trial, its absence being unexcused, is a doctrine that, as part of our own law and as a general rule of evidence, has, it is safe to say, never heretofore been advanced in any of our courts. With us the ancient, and, it is deemed, the safe, principle has prevailed, that the document is the primary evidence and the admission of its contents secondary evidence,

and that the latter cannot be resorted to as long as the former is available."

In holding that it was error to refuse the plaintiff leave to introduce in evidence a record of a decree, and holding that the plaintiff was not bound to accept admissions of the defendant in lieu thereof, the court stated that the admission was not broad enough to embrace the facts that the record disclosed, and stated further: "And if it had been sufficiently comprehensive in this particular, it would not preclude the plaintiff of his strict legal right to have the record read; for it is the rule that the parol admission of a party made in pais is competent evidence only of those facts which may lawfully be established by parol evidence; it cannot be received . . . to supply the place of existing evidence by matter of record." 1 Greenl. Ev. § 203." *Bank of North America v. Crandall* (1885) 87 Mo. 208.

Texas.

In Texas the cases are probably to be taken as favoring a general rule of exclusion where the contents of the instrument in question are directly in issue.

In *Williams v. Durst* (1860) 25 Tex. 667, it was held that a declaration of the defendant's testator that he had told the witness that he had mortgaged a lot to the plaintiff's intestate was not competent proof of the execution and contents of the mortgage.

In *Dooley v. McEwing* (1852) 8 Tex. 306, it was held that the oral declaration or admission of a party having sold a slave, when that sale was evidenced by writing, was admissible as primary evidence of the fact, the sale of the slave not requiring a deed in writing. The court observed that where the terms of a written contract were in controversy, the writing must be produced, but that was not the case in this instance. The writing was collateral to the principal fact that it was a sale, and this it was competent to prove by the oral admission of the party as primary evidence of the fact.

Upon an issue as to whether there was other insurance, it was held to be error to exclude evidence of oral admissions by the plaintiff of such other insurance, and to exclude questions in regard to the same when he was on the witness stand, as it was not the contents but the fact of other insurance that was important, and that was only collaterally involved and might have been proven by parol. It was original evidence. *Philadelphia Underwriters L.R.A.1918C.*

Agency v. Brown (1912) — Tex. Civ. App. —, 151 S. W. 899.

Perhaps, in view of these cases, the decision in *Hoeffling v. Hambleton* (1892) 84 Tex. 517, 19 S. W. 689, is to be construed as considering the instrument to be collateral. There, in a suit for commissions on the sale of land, the defendant stated, on cross-examination, that he had sold the land to the person alleged by the plaintiff, and it was held that this was sufficient without producing the deed. The court said that it was a proper case for the application of the doctrine that admissions by a party of the contents of a written instrument may be received in evidence, without production of the writing, or accounting for its absence.

IV. Miscellaneous.

A copy of a lease signed by the defendant in his own handwriting and sent by him to the plaintiff was admitted in *Carroll v. Peake* (1828) 1 Pet. (U. S.) 18, 7 L. ed. 34.

So, in *Ansell v. Baker* (1850) 3 Car. & K. (Eng.) 145, it was held that a copy of a deed sent by the plaintiff to the defendant in a letter may be admitted in evidence against the plaintiff without the deed.

See also *Kelly v. McKenna* (1869) 18 Mich. 381, *supra*, II.

In the following cases copies admitted to be correct by the other party were held admissible as an exception to the rule of the incompetency of admissions.

Thus, where a defendant on the witness stand, on being asked whether he had written a certain letter, produced a copy of it, it was held that this copy was evidence, although no notice has been given to produce the original. *Barnett v. Wilson* (1901) 132 Ala. 375, 31 So. 521.

In *Haas v. Storner* (1897) 21 Misc. 661, 47 N. Y. Supp. 1100, where the defendant on the stand admitted that a certain paper was a letter-press copy of a paper signed by her, it was held that this bound the defendant as an admission against interest, and made the evidence primary in its nature.

Cases of accounts stated are excluded.

Where it was claimed by the plaintiff that an alteration had been made in a certain document, an admission on the part of the defendant as to the nature of the document,—that is, a copy declared to be accurate made public by the defendant's attorney,—was held to be properly received in evidence for whatever bearing it might have on the

issue as to the alteration. *Mullarky v. Manker* (1918) 102 Kan. 92, 170 Pac. 31.

In *Poole v. Gerrard* (1858) 9 Cal. 593, the court, in holding testimony to the effect that a party had shown the witness a contract was admissible without notice to produce, said: "The Code provides that 'there shall be no evidence of the contents of a writing other than the writing itself, except in' the cases mentioned. The second exception stated is, where 'the original is in possession of the party against whom the evidence is offered, and he fails to produce it,

after reasonable notice.' Where parol testimony is offered simply to prove the fact that writing was made in reference to the matter in controversy, without stating the contents of the same, it is admissible, if relevant under the circumstances of the particular case. But when it is sought to prove the stipulations contained in the writing, the parol evidence is not admissible without first taking the proper preliminary steps. The Code is very explicit that you shall not prove the contents of the writing other than by the writing itself, except in the cases mentioned." B. B. B.

TENNESSEE SUPREME COURT.

MAXWELL OPERATING COMPANY

v.

C. W. HARPER.

(138 Tenn. 640, 200 S. W. 515.)

Innkeeper — liability for loss from check room.

An innkeeper maintaining a check room for the convenience of his guests is liable for the loss of articles therefrom, notwithstanding he states on the checks that articles are at owner's risk, and maintains a baggage room and safe in which valuables are stored at the risk of the innkeeper.

For other cases, see *Innkeeper*, III. b, in Dig. 1-52 N. S.

(February 9, 1918.)

PETITION for a writ of certiorari to review a judgment of the Court of Civil Appeals affirming a judgment of the Circuit Court for Davidson County in favor of plaintiff, in an action brought to recover the value of an overcoat alleged to have been misdelivered or stolen from defendant's check room. Denied.

The facts are stated in the opinion.

Messrs. P. M. Estes and M. P. Estes, for defendant:

A hotel by a special contract can limit its liability for the loss of effects of a guest.

16 Am. & Eng. Enc. Law, 538, 540; 2 Kent, Com. 594; Schouler, Bailm. § 309; *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657; *Van Wyck v. Howard*, 12 How. Pr. 147; *Fuller v. Coats*, 18 Ohio St. 343; *McDaniels v. Robinson*, 26 Vt. 316, 62 Am. Dec. 574; *Marshall v. Nashville R. & Light Co.* 118 Tenn. 254. 9 L.R.A.(N.S.)

Note. — As to liability of innkeeper for loss of goods from check room, see annotation following this case, post, 674, and references therein for annotation on related questions.
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1246, 101 S. W. 419, 12 Ann. Cas. 675; *Memphis & C. R. Co. v. Jones*, 2 Head. 515.

Where a guest is notified that his baggage must be deposited in a particular place for safe-keeping, and he neglects to do so, the innkeeper is not liable.

Wilson v. Halpin, 1 Daly, 496; *Packard v. Northcraft*, 2 Met. (Ky.) 442; *Marshall v. Nashville R. & Light Co.* 118 Tenn. 254. 9 L.R.A.(N.S.) 1246, 101 S. W. 419, 12 Ann. Cas. 675.

The burden of proof was upon plaintiff to show that the overcoat was lost through gross or wilful negligence, and the mere inference to be drawn from the fact that the overcoat could not be found is not sufficient.

Memphis & C. R. Co. v. Jones, 2 Head. 517.

Messrs. J. D. B. De Bow and J. D. C. Atkins for plaintiff.

Williams, J., delivered the opinion of the court:

The petitioner operates the Maxwell House, one of the leading hotels of Nashville, and as a part of its equipment has a check room near the lobby, in which room the overcoats and small baggage of its guests are kept. Harper, at the time a guest of the house, deposited his overcoat in this room for safe-keeping and received from the attendant a check, in the form of those there customarily in use, as follows:

Accommodation Check.

Left at owner's risk. The management will not be responsible for loss or damage. No. 4554.

[Signed] Maxwell Operating Co.

Harper had been a patron of the hotel for two or three years and on numerous occasions; and on previous visits he had been directed by the clerk and employees of the house to the check room as the place in which to deposit such articles. His overcoat in question here was in some way mis-

delivered or stolen, and he brought this suit to recover its value. Both of the lower courts have given judgment in his favor.

The defenses of the hotel company are that it maintained a baggage room in the basement where storage was at its risk; also a place behind the clerk's desk where articles might be left, the company assuming responsibility; and further, that the check received by Harper operated as a contractual limitation upon its common-law liability.

It is conceded, as it must be, that from an early day the rule in this state has been that an innkeeper is excused from liability for the loss of a guest's baggage or goods only when the loss or injury results from the act of God, or is caused by the public enemy, or by the fault, direct or implied, of the guest himself. *Minning v. Wells*, 9 *Humph.* 746, 51 *Am. Dec.* 688, and cases in accord.

We hold, on the facts of this case, that the attempt to work an abrogation or release of this common-law liability by the handing out of the check was unreasonable.

The storage room in the basement was for heavy baggage, and it does not appear that the equipment behind the desk was other than a safe for the keeping of valuables. By custom and previous dealings with Harper himself, he was, by the hotel company, directed to the check room as a fit and the proper repository for his overcoat.

Obviously, the overcoat was not a thing to be kept as a valuable in a hotel safe. 22 *Cyc.* 1083, and cases cited.

A hotel which operates a check room in effect invites such use by its guests as Harper made of it; and the hotel company could not validly negative its common-law duty or liability by any such regulation or stipulation. The stipulation in the check was void for unreasonableness, unsupported as it was by a consideration.

The exact legal question involved is, perhaps, one of first impression; but the decisions from early times have fairly indicated its true solution by way of an analogy that has been resorted to not infrequently by the judges in argumentation. In cases which have concerned attempts of carriers, by notice or stipulation, to limit or abrogate their obligations in respect of goods intrusted, the closely parallel relation of a public innkeeper have been referred to, and the obligations imposed by the earlier decisions upon innkeepers have been laid upon common carriers. It is interesting to notice that, in the development of jurisprudence, the law governing innkeepers was first declared; and that later, when the courts had to deal with the more modern relation of a common carrier to his patron, the judges made

application of many of the rules already in force in respect to the duties and obligations of the ancient innkeeper.

In this case we have the converse proposition, where resort is to be had to analogous decisions on the carrier's obligation.

Touching the analogy: In *Lane v. Cotton*, 12 *Mod.* 481, 88 *Eng. Reprint*, 1463, Chief Justice Holt, in giving the reason for the obligation of quasi insurer being imposed alike upon carriers and innkeepers, said: "For what is the reason that a carrier or innkeeper is bound to keep such goods as he receives at his peril? It is grounded upon great equity and justice," etc.

In *Richmond v. Smith*, 8 *Barn. & C.* 9, 108 *Eng. Reprint*, 946, 2 *Mann. & R.* 235, 6 *L. J. K. B.* 279, Bayley, J., said, "It appears to me that an innkeeper's liability very closely resembles that of a carrier;" and Lord Kenyon in *Kirkman v. Shawcross*, 6 *T. R.* 14, 101 *Eng. Reprint*, 410, 3 *Revised Rep.* 103, made a like observation.

An instructive and apposite case is that of *Cole v. Goodwin*, 19 *Wend.* 251, 32 *Am. Dec.* 470, where there was brought in question the validity of a regulatory stipulation posted up by a common carrier (and known to the passenger before he took passage) to this effect: "All baggage at the risk of the owner." Mr. Justice Cowen, after making ample use of the analogy referred to, said of the carrier's effort: "There are no principles in the law better settled than that whatever has an obvious tendency to encourage guilty negligence, fraud, or crime is contrary to public policy. Such, in the very nature of things, is the consequence of allowing the common carrier to throw off or in any way restrict his legal liability.

. . . My conclusion is that he shall not be allowed in any form to higggle with his customer and extort one exception and another, not even by express promise or special acceptance any more than by notice. He shall not be privileged to make himself a common carrier for his own benefit, and a mandatary, or less, to his employer. He is a public servant with certain duties defined by law and he is bound to perform those duties. As Ashurst, J., said of the duties of innkeepers in *Kirkman v. Shawcross*, they are indelible. . . . Admitting that the plaintiff acceded in the clearest manner to the proposition in the notice that his baggage should be carried on the terms mentioned, I think the contract thus made was void on his part as contrary to the plainest principles of public policy."

See also *Smith v. North Carolina R. Co.* 64 *N. C.* 235.

Carrying forward the parallel: The validity of a stipulation undertaking to

limit or release a carrier's liability is to be determined by its reasonableness, and its conformity to the policy of the law in relation to the obligations of the carrier to the public. If it be unreasonable or oppressive it is deemed void. *Louisville & N. R. Co. v. Gilbert*, 88 Tenn. 430, 7 L.R.A. 162, 12 S. W. 1018, and cases cited. The same principle applies in cases dealing with baggage deposited with a carrier, where the analogy becomes even stronger. *Grout v. Yazoo & M. Valley R. Co.* 131 Tenn. 667, L.R.A.1915E, 281, 176 S. W. 1027. An unreasonable notice, regulation, or stipulation that baggage is held at the owner's risk will not release the carrier from liability. 10 C. J. 1207, and cases cited.

What was said in *Cole v. Goodwin*, *supra*, should not, at this day, be construed to deny to the bailee of either sort the power to make reasonable regulations governing the exercise of the rights of a guest or passenger. 14 R. C. L. 527. Cases cited and relied upon by petitioner go no further than to declare the existence of such power.

Thus, in *Fuller v. Coats*, 18 Ohio St. 343,

so cited, the rule requiring reasonableness is recognized. In speaking of an innkeeper it was there said: "It may, in instances, become absolutely necessary for him to provide special means, and to make necessary regulations and requirements to be observed by the guest, to secure the safety of his property. When such means and requirements are reasonable and proper for that purpose, and they are brought to the knowledge of the guest with the information that if not observed by him the innkeeper will not be responsible," etc.

In the pending case no place was undertaken to be pointed out by the hotel company as safer than the check room; the guest was not denied or even cautioned as to its use, but invited to store his overcoat there. The manifest purpose of the stipulation was to evade the responsibility imposed by the policy of the law on the hotel company.

A correct result was reached when the Court of Civil Appeals adjudged liability. Writ of certiorari denied.

Annotation—Liability of innkeeper for loss of goods from check room.

As to liability of carrier for loss of property in check room, see note to *Terry v. Southern R. Co.* 18 L.R.A. (N.S.) 295, and *Fraam v. Grand Rapids & I. R. Co.* 29 L.R.A. (N.S.) 834.

As to duty of innkeeper as to effects of one who has left without intention of returning as guest, see notes to *Oxford Hotel Co. v. Lind*, 28 L.R.A. (N.S.) 495, and *Carol v. Kenney*, L.R.A.1916F, 234.

The decision in *MAXWELL OPERATING CO. v. HARPER*, ante, 672, is in accord with the common-law liability of an innkeeper for loss of guest's baggage or goods. The *HARPER CASE* seems to be the first case wherein there was an attempt to avoid liability because of the stipulation in the check against innkeepers responsibility for loss, but the decision that such stipulation was void for unreasonableness is fully supported, as pointed out in the *HARPER CASE*, in analogous decisions on carrier's obligations. The other cases in the annotation, it will be seen, are easily distinguishable from the *HARPER CASE*, as well as from each other, on the facts, no two cases presenting a situation that could be considered analogous, and so cannot be considered in conflict.

The loss of a salesman's stock of jewelry valued at \$6,300, taken from the coat room of a hotel where a guest left it with a boy in charge, taking a check

therefor, is within the operation of a statute exempting an innkeeper from liability for the loss of money, jewelry, or other valuables of a guest not delivered to him or his agent or clerk for deposit. *Elcox v. Hill* (1878) 98 U. S. 218, 25 L. ed. 103.

Elcox v. Hill seems to be the only case aside from the *HARPER CASE* where the party making use of the check room was actually a guest at the time. The decision in the *Elcox Case*, it will be seen, turned on facts not present in the *HARPER CASE*, and so is easily distinguished from that case.

As to effect of statute limiting innkeeper's liability for goods not delivered into his custody, see notes to *Rockhill v. Congress Hotel Co.* 22 L.R.A. (N.S.) 576, and *Jones v. Savannah Hotel Co.* 51 L.R.A. (N.S.) 1168.

In *Kleckner v. Hotel Strand* (1914) 60 Pa. Super. Ct. 617, a traveler on a Saturday evening went to a hotel and, upon being informed that there were no accommodations at that time, stated that he would wait awhile and if accommodations could be secured later the clerk should let him know. To a statement that he would leave his grip the clerk said, "Very well, we will check it." Not hearing from the clerk at a late hour he secured accommodations elsewhere. On returning Monday morning for his grip,

it could not be found. In holding that it was a case of bailment for mutual benefit, and that the hotel was liable for ordinary care and so had the burden of proving that it was not guilty of negligence, the court said: "The facts may not place it under one of the technical classes of bailments for mutual benefit, but it constitutes one of those exceptional cases which may properly be termed a bailment for mutual benefit. Such bailments arise where there exists a possibility or chance of expected profit to accrue from the patronage of the intending guest. . . . The defendant, in conducting a hotel, invited the public to become guests thereof. When this plaintiff applied for accommodations he placed himself in a position of becoming a guest. Had nothing beyond the refusal of accommodations taken place no contractual relations could have arisen. When the plaintiff told the defendant that he would wait for word as to accommodations, and the defendant accepted the plaintiff's proposition by saying, 'Very well, we will check it (the grip),' the defendant tacitly placed the plaintiff on the waiting list for accommodation. An implied contract arose, the consideration for which was the 'chance of profit' from plaintiff's patronage. Under these circumstances we believe it was the duty of the defendant to exercise ordinary care over such luggage, left in a proper place and under proper conditions. It would impose a hardship on the public to say that when a guest goes to a crowded hotel or one in which there are a large number of people seeking accommodation, and, after making application for accommodations, is requested to wait, that the safety of his luggage in the hands of a hotel representative is at the risk of the guest. Though the technical relation of innkeeper and guest might not have arisen, by reason of the failure of the hotel authorities to accept the person as a guest, their conduct gives rise to a higher degree of care over property left with them than that exercised in the case of a gratuitous bailment for which the appellee contends. This relationship would not exist for an unreasonable length of time. It must be determined within a reasonable time. The plaintiff waited until Saturday night and returned early Monday morning. The court could not, as a matter of law, declare this an unreasonable length of time."

A hotel keeper who keeps a guest's baggage during his absence, giving a receipt or check therefor, will not, *al-*
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though he continues his liability as hotel keeper for such baggage, be liable for its value if it is lost or destroyed by inevitable accident. *McElwaine v. Balmoral Hotel Co.* (1891) *Montreal L. Rep.* 7 S. C. (Quebec) 139.

In *Glenn v. Jackson* (1891) 93 *Ala.* 342, 12 L.R.A. 382, 9 So. 259, where a departing guest checked his valise until his return, the decision as to nonliability of the innkeeper for its loss turned on the fact that the porter who checked the valise was without authority to do so.

(As to liability of innkeeper for effects left by departing guest who intends to return, see annotation to *Watkins v. Hotel Tutwiler Co.* L.R.A.1917F, 834.)

In *Bean v. Ford* (1909) 65 *Misc.* 481, 119 *N. Y. Supp.* 1074, the decision as to nonliability as innkeeper for baggage lost from check room turned on the fact that the baggage was checked by one making free use of the inn. It was held, however, that there is in such a case a liability as gratuitous bailee where the loss is due to the innkeeper's own negligence.

(As to liability of innkeeper for loss of baggage or effects of one making free use of the inn, see annotation to *Parker v. Dixon*, L.R.A.1916E, 534.)

One who attended a ball and supper given under the auspices of a fire company who sold the tickets therefor, at a hotel at which he was not a guest, was held in *Carter v. Hobbs* (1863) 12 *Mich.* 52, 83 *Am. Dec.* 762, not to have become a guest at such hotel so as to hold the innkeeper liable, as such, for the loss of an overcoat and hat given to the clerk in charge of the office, the capacity in which the articles were received, the court stated, being merely as ordinary bailee.
J. H. B.

WASHINGTON SUPREME COURT. (Department No. 1.)

STATE OF WASHINGTON EX REL. PUBLIC SERVICE COMMISSION, Resp't.,

v.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, App't.

(89 Wash. 599, P.U.R.1916D, 469, 154 Pac. 1110.)

Public service corporations — private contract — disclosure to Commission.

1. The Public Service Commission is not

Note. — As to power of Public Service Commission to regulate disposition of surplus products, see annotation following this case, post, 680.

entitled to a disclosure of private contracts made by an electric railway company for the utilization of its surplus power, for consideration in fixing rates for its public service.

For other cases, see Public Service Commissions, in Dig. 1-52 N. S.

Same — scope of statute.

2. Private contracts for the utilization of its surplus power by an electric railway company must, in order to come within the jurisdiction of the Public Service Commission, be expressly included in the statute extending the jurisdiction of such Commission over public service corporations.

For other cases, see Public Service Commissions, in Dig. 1-52 N. S.

(February 15, 1916.)

APPEAL by defendant from a judgment of the Superior Court for Spokane County granting a writ of mandamus to compel it to submit its private contracts to relator. Reversed.

The facts are stated in the opinion.

Messrs. Graves, Kizer, & Graves, for appellant:

The defendant's power business is not a public business, in view of the uses to which the power sold by it is put, and is therefore not subject to the jurisdiction of the Public Service Commission.

Rutland R. Light & P. Co. v. Clarendon Power Co. 86 Vt. 45, 44 L.R.A.(N.S.) 1204, 83 Atl. 332; State ex rel. Tacoma Industrial Co. v. White River Power Co. 39 Wash. 648, 2 L.R.A.(N.S.) 842, 82 Pac. 150, 4 Ann. Cas. 987; Tacoma v. Nisqually Power Co. 57 Wash. 420, 107 Pac. 199; State ex rel. Lyle Light, P. & Water Co. v. Superior Ct. 70 Wash. 486, 127 Pac. 104; State ex rel. Weyerhaeuser Timber Co. v. Superior Ct. 71 Wash. 84, 127 Pac. 591; Munn v. Illinois, 94 U. S. 113, 134, 24 L. ed. 77, 87; Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427; Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; State ex rel. Harris v. Superior Ct. 42 Wash. 660, 5 L.R.A.(N.S.) 672, 85 Pac. 666, 7 Ann. Cas. 748; Healy Lumber Co. v. Morris, 33 Wash. 490, 63 L.R.A. 820, 99 Am. St. Rep. 964, 74 Pac. 681; Re Aubrey, 36 Wash. 308, 104 Am. St. Rep. 952, 78 Pac. 900, 1 Ann. Cas. 927; State ex rel. Richey v. Smith, 42 Wash. 237, 5 L.R.A.(N.S.) 674, 114 Am. St. Rep. 114, 84 Pac. 851, 7 Ann. Cas. 577.

Messrs. W. V. Tanner, Attorney General, and Scott Z. Henderson, Assistant Attorney General, for respondent:

Irrespective of any question of eminent domain, the contracts of defendant are L.R.A.1918C.

"clothed with a public interest," and therefore subject to regulation, and the determination of the policy of regulation is for the legislature.

Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; State ex rel. Harlan v. Centralia-Chehalis Electric R. Power Co. 42 Wash. 632, 7 L.R.A.(N.S.) 198, 85 Pac. 344; State ex rel. Harris v. Superior Ct. 42 Wash. 660, 5 L.R.A.(N.S.) 672, 85 Pac. 666, 7 Ann. Cas. 748; State ex rel. Harris v. Olympia Light & P. Co. 46 Wash. 511, 90 Pac. 656; State ex rel. Tolt Power & Transp. Co. v. Superior Ct. 50 Wash. 13, 96 Pac. 519; State ex rel. Shropshire v. Superior Ct. 51 Wash. 386, 99 Pac. 3; State ex rel. Dominick v. Superior Ct. 52 Wash. 196, 21 L.R.A.(N.S.) 448, 100 Pac. 317; Tacoma v. Nisqually Power Co. 57 Wash. 420, 107 Pac. 199; Healy Lumber Co. v. Morris, 33 Wash. 490, 63 L.R.A. 820, 99 Am. St. Rep. 964, 74 Pac. 681; State ex rel. Galbraith v. Superior Ct. 59 Wash. 621, 140 Am. St. Rep. 893, 110 Pac. 429; State ex rel. Clark v. Superior Ct. 62 Wash. 612, 114 Pac. 444; State ex rel. Lyle Light, P. & Water Co. v. Superior Ct. 70 Wash. 486, 127 Pac. 104; State ex rel. Weyerhaeuser Timber Co. v. Superior Ct. 71 Wash. 84, 127 Pac. 591; State ex rel. Mountain Timber Co. v. Superior Ct. 77 Wash. 585, 137 Pac. 904; Walker v. Shasta Power Co. 149 Fed. 568, 19 L.R.A.(N.S.) 725, 87 C. C. A. 660, 160 Fed. 856; Wisconsin River Improv. Co. v. Pier, 137 Wis. 325, 21 L.R.A.(N.S.) 538, 118 N. W. 857; Kilbourn City v. Southern Wisconsin Power Co. 149 Wis. 168, 135 N. W. 499; Re Southern Wisconsin Power Co. 140 Wis. 245, 122 N. W. 801; Jones v. North Georgia Electric Co. 125 Ga. 618, 6 L.R.A.(N.S.) 122, 54 S. E. 85, 5 Ann. Cas. 526; Nolan v. Central Georgia Power Co. 134 Ga. 201, 67 S. E. 656; Minnesota Canal & Power Co. v. Koochiching Co. 97 Minn. 429, 5 L.R.A.(N.S.) 638, 107 N. W. 405, 7 Ann. Cas. 1182; State ex rel. W. J. Armstrong Co. v. Waseca, 122 Minn. 348, 46 L.R.A.(N.S.) 437, 142 N. W. 319; State ex rel. Mason v. Consumers Power Co. 119 Minn. 225, 41 L.R.A.(N.S.) 1181, 137 N. W. 1104, Ann. Cas. 1914B, 19; Minnesota Canal & Power Co. v. Pratt, 101 Minn. 197, 11 L.R.A.(N.S.) 105, 112 N. W. 395; Helena Power Transmission Co. v. Spratt, 35 Mont. 108, 8 L.R.A.(N.S.) 567, 88 Pac. 773, 10 Ann. Cas. 1055, 37 Mont. 60, 94 Pac. 631; Hollister v. State, 9 Idaho, 8, 71 Pac. 541; Washington Water Power Co. v. Waters, 19 Idaho, 595, 115 Pac. 682, 186 Fed. 572; Rockingham County Light & P. Co. v. Hobbs, 72 N. H.

331, 66 L.R.A. 581, 58 Atl. 46; *Boyd v. Winnsboro Granite Co.* 66 S. C. 433, 45 S. E. 10; *Wilson v. D. W. Alderman & Sons Co.* 69 S. C. 176, 48 S. E. 81; *Riley v. Charleston Union Station Co.* 71 S. C. 457, 110 Am. St. Rep. 579, 51 S. E. 485; *D. W. Alderman & Sons Co. v. Wilson Lumber Co.* 77 S. C. 185, 57 S. E. 756; *McMeekin v. Central Carolina Power Co.* 80 S. C. 512, 128 Am. St. Rep. 885, 61 S. E. 1020; *Williams v. Haile Gold Min. Co.* 85 S. C. 1, 66 S. E. 117, 1057; *Harrell v. Columbia Electric Street R. Light & P. Co.* 89 S. C. 97, 71 S. E. 359; *Gainesville v. Gainesville Gas & E. P. Co.* 65 Fla. 404, 46 L.R.A. (N.S.) 1119, 62 So. 919; *Rutland R. Light & P. Co. v. Clarendon Power Co.* 86 Vt. 45, 44 L.R.A. (N.S.) 1204, 83 Atl. 332; *Wissler v. Yarkin River Power Co.* 156 N. C. 465, 74 S. E. 460; *Lucas v. Ashland Light, Mill & P. Co.* 92 Neb. 550, 138 N. W. 761; *Hagerla v. Mississippi River Power Co.* 202 Fed. 776; *Pittsburg Hydro-Electric Co. v. Liston*, 70 W. Va. 83, 40 L.R.A. (N.S.) 602, 73 S. E. 86; *Great Falls Power Co. v. Webb*, 123 Tenn. 584, 133 S. W. 1105; *Tuttle v. Jefferson Power & Improv. Co.* 31 Okla. 710, 122 Pac. 1102; 1 *Wyman*, Pub. Serv. Corp. §§ 60, 114.

Mount, J., delivered the opinion of the court:

Respondent brings a mandamus proceeding to compel a disclosure of private contracts. The appellant is a traction company operating a street railway system in the city of Spokane, and some interurban lines running out of Spokane into the surrounding country. It maintains a power plant which generates about 12,000 horse power. Its present average need for its operations is about 9,000 horse power. Some years ago, at a time when its own power plant had not been completed, appellant entered into a contract to take each year 3,800 horse power from the Washington Water Power Company, a power company operating in the same territory. With the development of its own plant giving approximately 12,000 horse power and the contract holding it to take 3,800 horse power from the Washington Water Power Company, appellant has a yearly supply of approximately 16,000 horse power, or about 6,000 or 7,000 horse power more than its present average need, although at times it uses as much as 12,000 horse power. This surplus it has sold under private contract to others, and it has been put to various uses, its customers being a land company, one or two farmers, who use the power for irrigation purposes, two manufacturing plants, a grain elevator, an irrigation company, and three or four individual owners of local electric light plants in towns and villages in the vicinity of Spo-

kane. The object of this proceeding is to compel appellant to submit its private contracts to the Public Service Commission, it being the theory of the Commission that it has jurisdiction over that part of the appellant's business which heretofore has been regarded as private and in which the state had no interest; that it cannot make an adequate and intelligent survey of the rates charged by appellant in its service to the public without them; and, further, that to regulate the rates for traction purposes, it must have a disclosure of all contracts and all activities yielding a revenue to appellant, whether they be private, entered into with individuals, or affect a public service only.

We understand the law in this state to be that companies furnishing electrical energy may or may not be public service corporations, depending upon the objects for which they were organized and the business in which they are engaged, the logic of the cases being that we will judicially inquire whether the sale of power is a selling to the public generally or is only an incident to the business in which the company is engaged: as, for instance, a sale pending a time when its surplus will be needed to accomplish its assumption of duty to the public; for it has been held that a public service corporation can anticipate its future needs and develop energy reasonably in excess of present requirements. The character of such companies and their relation to the public has been frequently considered by this court. We find no departure from our first holding that a sale of electrical energy or power for private enterprises is not an engaging in a public business, and gives such companies no right to assert the sovereignty of the state. *Healy Lumber Co. v. Morris*, 33 Wash. 490, 63 L.R.A. 820, 99 Am. St. Rep. 964, 74 Pac. 681; *State ex rel. Tacoma Industrial Co. v. White River Power Co.* 39 Wash. 648, 2 L.R.A. (N.S.) 842, 82 Pac. 150, 4 Ann. Cas. 987; *State ex rel. Harris v. Superior Ct.* 42 Wash. 660, 5 L.R.A. (N.S.) 672, 85 Pac. 666, 7 Ann. Cas. 748; *State ex rel. Harris v. Olympia Light & P. Co.* 46 Wash. 511, 90 Pac. 656; *State ex rel. Tolt Power & Transp. Co. v. Superior Ct.* 50 Wash. 13, 96 Pac. 519; *State ex rel. Shropshire v. Superior Ct.* 51 Wash. 386, 99 Pac. 3; *State ex rel. Dominick v. Superior Ct.* 52 Wash. 196, 21 L.R.A. (N.S.) 448, 100 Pac. 317; *Tacoma v. Nisqually Power Co.* 57 Wash. 420, 107 Pac. 199; *State ex rel. Lyle Light P. & Water Co. v. Superior Ct.* 70 Wash. 486, 127 Pac. 104; *State ex rel. Weyerhaeuser Timber Co. v. Superior Ct.* 71 Wash. 84, 127 Pac. 591. In all of these cases the company was asserting the right of eminent domain in order to avail itself of the rights and privileges granted by statute to public service corpo-

rations. In the absence of controlling legislation the court refused to extend the right. In the Nisqually Power Company Case we even held the use of the word "private" in a legislative act to have been inadvertent and therefore surplusage. The court has not inclined to the thought that corporations not directly engaged in the sale of power to the public generally should be clothed in the garb of the state, in the absence of an unquestioned intent on the part of the legislature so to do.

The case at bar is presented from the other angle. The company is insisting that its contracts with private individuals for the sale of excess power are of no concern to the state because they pertain to private business in no way affecting the public, while the state is insisting that such contracts are essential to an intelligent exercise of its admitted function to inquire into and regulate appellant's traction rates. In other words, appellant rests upon the law as we have heretofore found it to be, and respondent insists that the court has indicated a purpose to relax the rule in the later cases (State ex rel. Clark v. Superior Ct. 62 Wash. 612, 114 Pac. 444; State ex rel. Lyle Light P. & Water Co. v. Superior Ct. 70 Wash. 486, 127 Pac. 104; State ex rel. Weyerhaeuser Timber Co. v. Superior Ct. 71 Wash. 84, 127 Pac. 591; State ex rel. Mountain Timber Co. v. Superior Ct. 77 Wash. 585, 137 Pac. 994), or, if not, the Act of 1911 (Laws 1911, p. 541, § 8; 3 Rem. & Bal. Code, § 8626-8) is ample to sustain the right of respondent to inquire into and control that part of the business of appellant which has heretofore been considered as private, and not a proper subject of state control.

To review the cases in detail would serve no purpose. We have discovered in them no purpose to depart from our former holdings. There may be some expressions in cases involving collateral questions which seemingly touch the question under discussion, and which may give impulse to the thought that we had it in mind to modify some of our decisions, but the fact remains that whenever the exact question has been submitted to the court, it has held to the doctrine of the earlier cases; that is, that the sale of power to be used by others for traction purposes, lighting, manufacturing, etc., is not a public use, and that the sale of surplus power, or the difference between the ordinary requirements and the peak load, by a corporation which does do a public service business, when such surplus is not in use, is only an incident to the public employment, of which the law will take no notice. Notwithstanding the criticisms of counsel, there is sound reason for our former holdings, to which L. R. A. 1918C.

we shall advert when discussing the next phase of the case.

The final and controlling question is whether the Act of 1911 has extended the jurisdiction of the Public Service Commission over power companies, regardless of the character of the business in which they are engaged. Counsel for respondent says: "We may rest our case on the proposition that, irrespective of any question of eminent domain, the contracts of appellant are 'clothed with a public interest,' and therefore subject to regulation, and that the determination of the policy of regulation is for the legislature."

Counsel for appellant admits: "The sole question in the case is whether the defendant's power business is a public business, in view of the uses to which the power sold by it is put, and is therefore subject to the jurisdiction of the Public Service Commission. If it is within the legislative power to make public a business conducted as defendant's power business is, undoubtedly the legislature has done so, and the case was rightfully decided. It is an electrical company, and owns an electric plant within the definitions of the statute. Laws 1911, p. 541, § 8; 3 Rem. & Bal. Code, § 8626-8. The act makes no distinction between an electrical company selling its product for public purposes and one selling for private purposes. All such companies selling 'electricity for light, heat, or power for hire' are declared to be public service companies, subject to regulation by the public, and under the jurisdiction of the Public Service Commission."

This leads us to a construction of the statute. The purpose of the state in creating the Public Service Commission was to regulate "public service properties and utilities." In the White River Power Co. Case, 39 Wash. 648, 2 L. R. A. (N. S.) 842, 82 Pac. 150, 4 Ann. Cas. 987, we held the question whether the legislature could clothe power companies with a public character open, saying: "We do not mean to say that the right of eminent domain can, in no case, be extended to a corporation organized for the purpose of generating and transmitting electricity for power and other purposes. But before this can be done, public necessity must require it, and the right of the public to the use and enjoyment of the property must be regulated, guaranteed, and safeguarded by proper legislation."

It is argued that the present act (Laws 1911, p. 538; 3 Rem. & Bal. Code, §§ 8626-1 et seq.) furnishes ample authority for holding that public necessity, as evidenced by the legislative declaration, now requires that such companies be held subject to regulation in their private affairs, and that the

right of the public to the enjoyment and use of such property is regulated, guaranteed, and safeguarded by appropriate legislation. But we think the act does not go so far. That it assumes jurisdiction over power companies and electrical companies may be conceded, but we find nothing that compels the conclusion that the legislature intended to inquire into or regulate such companies except in so far as their business affects the right of the whole public to their products upon fair or reasonable terms. Granting, for the sake of argument, the right of the legislature to exercise the police power to the extent of regulating and controlling the price to be charged for power sold to private individuals or to others, such right should not be declared by the courts, in the absence of express legislation. The regulation and control of business of a private nature is sustained by reference to the police power, and even then it is sustained only when the courts have been able to say that a business is, in character and extent of operation, such that it touches the whole people and affects their general welfare. It is upon this principle that *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487, and *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, L.R.A. 1915C, 1189, 34 Sup. Ct. Rep. 612, rest. Until the legislature brings a business within the police power by clear intent, courts will not do so. Courts have assumed to say whether an act of the legislature falls within the police power, but primarily the assertion of police power is for the legislature. They are not disposed to hold that a thing should be done by an individual or by the whole public because the public welfare demands it. They have acted only after the legislature has defined the object of the power. In other words, the courts have never said primarily that the police power should be applied in any given case. Their only inquiry has been whether a legislative act is reasonably within the legislative power, and the thing sought to be done is fairly within the terms of the act. And it is well that it is so, for the legislative body can extend the domain of the police power with sufficient rapidity. There is no reason why the courts should engage in a rivalry with it.

At the time the Act of 1911 was passed the law was well defined and certain in its terms. The sale of power to individuals or companies, to be in turn sold, was not a public use. The rule and the cases declaring it must have been well understood by the legislature. Yet the act nowhere attempts to cover any use theretofore deemed to be private. Its whole context seems to

compel the thought that it had in mind only such uses as the public might compel. There is nothing to indicate a legislative intent to declare that the sale of surplus or secondary power pending a future use by a company in the performance of its public functions is a thing that affects the general welfare, the health, peace, or happiness of the citizen, or that it is in any way necessary to sustain the right of the state to govern.

Neither has the business of selling surplus power been so notoriously beset by abuses that we can judicially notice it as having an outlaw character. The right to regulate under the present law must be measured by the public interest. It will hardly be contended that appellant's contracts with those to whom it sells its surplus is of any interest or concern to anyone other than the immediate parties. It is not alleged that it is neglecting its public duty because of them. No one has a right to compel appellant to sell its surplus. The act of sale is purely voluntary. Like the merchant, it can sell at one price to one man and at another price to another. The parties to the contracts are not complaining. If either is not content with the offering of the other, he does not have to contract. He can go his way. But it is not so with appellant when exercising its public function, that is, furnishing something—a necessity—that all are entitled to receive upon equal terms, under equal circumstances, and without exclusive conditions. *Beale & W. Railroad Rate Regulations*, § 1.

The only interest the state can have in such contracts is that they may not be made and persisted in to the detriment of the public. They are made subject to the paramount undertaking of the company, and must give way to the public interest if necessity requires. If at any time the state, acting through its accredited agency, puts a burden upon a public service corporation which requires the use of its surplus energy, it must devote such energy to the public use and abandon its private contracts, for they are no longer mere incidents to the undertaking in which the public has no interest, but are an encumbrance upon a public service. A private contractor could not compel specific performance of his contract as against an intervening public right. Thus reasoning, it follows that inquiry into these collateral matters is not essential to the performance of the public functions of the respondent. The Commission insists that it cannot find a basis for rate making without knowing the private, as well as the public, affairs of the appellant. Granting that the appellant is entitled to a fair return upon its investment and the

public to a fair rate of transportation, to hold that respondent could figure appellant's private contracts as a basis for rate making would, in turn, compel the holding that appellant would be entitled to take from the public enough to make good its losses in its private enterprises. The state has no interest either in appellant's gains or losses in its private enterprises. It has not yet assumed to stand as an inquisitor or conservator in private business. The act creating the Commission reflects no more than an intent to care for every right of the public in so far as they relate to the public functions of a public service corporation. It provided for equality of service, a physical valuation, "the total market value of the property of each public service company operating in this state, *used for the public convenience within the state*," and that the Commission shall "ascertain the probable earning capacity of each public service company under the *rates now* charged by such companies;" that is, rates for service falling within the scope and intent of the law; for "rates" must be held to mean a

charge to the public for a service open to all and upon the same terms, and not a consideration of a private contract in which the public has no interest.

This holding makes it unnecessary for us to inquire into the power of the legislature to assume a control over business of a private nature, or whether such an act being-passed raises a legislative or judicial question. It is enough that the Public Service Commission Law does not go to that extent in its letter, and cannot be held to have gone to that extent by construction without doing violence to the manifest purpose and spirit of the law.

Remanded, with instructions to deny the writ.

Morris, Ch. J., and Chadwick and Ellis, JJ., concur.

Fullerton, J., concurs in the result.

Petition for rehearing denied December 9, 1916.

Annotation—Power of Public Service Commission to regulate disposition of surplus products.

Disposition of surplus product by public service corporation.

Cases passing upon the disposition of by-products, such as coke, tar, and other residuals produced in the manufacture of artificial gas, are not included in the present note.

In *STATE EX REL. PUBLIC SERVICE COMMISSION v. SPOKANE & I. E. R. Co.* ante, 675, it is held that the Commission is not entitled to a disclosure of private contracts made by an electric railway for the utilization of its surplus power, for consideration in fixing railway rates. It appeared that the railway company generated part of its own electric energy and bought some from a power company. It would seem that if the railway company was obliged to maintain a comparatively large plant upon which its patrons were obliged to pay a return to take care of peak loads, with the result that there was surplus electric energy during off-peak periods, that, as to such surplus, it would be the duty of the railway company to dispose of it to the best advantage for the benefit of its patrons, and that the proceeds realized from the sale thereof should be taken into consideration in fixing railway rates. Of course, the disposition of electric energy procured from other sources, or produced through the operation of excess machinery

upon which the patrons are not obliged to pay a return, is a private matter and of no concern to the company's patrons.

Sale by private company of surplus product to the public.

In *Cawker v. Meyer* (1911) 147 Wis. 320, 37 L.R.A. (N.S.) 510, 133 N. W. 157, which was an action to restrain the Commission from enforcing the Public Utility Law against a building owner, it was held that a building owner does not come within the meaning of a statute constituting a public utility everyone who shall furnish heat, light, or power, either directly or indirectly, to or for the public, by furnishing heat, light, and power to his own tenant, and selling surplus to three neighbors. The court said: "It was not the furnishing of heat, light, or power to tenants, or, incidentally, to a few neighbors, that the legislature sought to regulate, but the furnishing of those commodities to the public; that is, to whoever might require the same. *Wisconsin River Improv. Co. v. Pier* (1908) 137 Wis. 325, 21 L.R.A. (N.S.) 538, 118 N. W. 857. The use to which the plant, equipment, or some portion thereof is put must be for the public, in order to constitute it a public utility. But whether or not the

use is for the public does not necessarily depend upon the number of consumers; for there may be only one, and yet the use be for the public,—as where a plant is built and operated for furnishing power to the public generally, but for a time finds one consumer who uses it all. If the product of the plant is intended for, and open to the use of, all the members of the public who may require it, to the extent of its capacity, the fact that only one or two thereof consume the entire product renders the plant none the less a public utility. On the other hand, a landlord may furnish it to a hundred tenants, or, incidentally, to a few neighbors, without coming either under the letter or the intent of the law."

But in *Boach v. M. O. Danciger & Co.* (1917; Mo.) P.U.R.1917C, 144, it was held that a manufacturing company, although generating electricity primarily for its own use and selling only its surplus energy, within a limited portion of a city, to customers over their own wires and poles, and although not having a franchise to operate as an electric utility, and not using the streets and public places of the city, was nevertheless an electric utility within the meaning of the Missouri statutes, defining an electric plant as including all property used in connection with the generation of electricity for light, heat, and power for sale, so as to subject it to the jurisdiction of the Public Service Commission upon the complaint of a consumer whose service had been discontinued.

In *Sandpoint Water & Light Co. v. Humbird Lumber Co.* (1918; Idaho) P.U.R.1918B, 535, it was held that a manufacturing company could not dispose of surplus water in territory served by an existing utility without securing a certificate of public convenience and necessity from the Public Utilities Commission. The Commission said: "The whole theory of regulated monopoly upon which the Public Utility Act of Idaho is built, and which was approved by the supreme court of the state in *Idaho Power & Light Co. v. Blomquist* (1914) 26 Idaho, 222, 141 Pac. 1083, Ann. Cas. 1916E, 282, would be broken down if, on a pretext of surplus power, perhaps only surplus equipment, a rival might invade a field occupied by a public utility which was furnishing adequate service at reasonable rates, and take from it one, two, or perhaps more of its best patrons, without in any way subjecting itself to the law under which the existing utility was operating; and the pub-

lic would ultimately have to bear the burden of useless duplication. The Commission believes that the public interest is paramount and must be the controlling factor in deciding this case."

In *Sandpoint Water & Light Co. v. Humbird Lumber Co.* (Idaho) *supra*, where it appeared that the water was obtained by the company through the operation of stand-by pumping equipment installed to provide adequate fire protection for its own property, the Commission distinguished *STATE EX REL. PUBLIC SERVICE COMMISSION v. SPOKANE & I. E. R. Co.* the reported case, by pointing out that the lumber company's water was procured through the operation of excess machinery. The Commission said: "The lumber company claims to have a surplus of water beyond its own needs, and relies on the decision of the supreme court of Washington in *STATE EX REL. PUBLIC SERVICE COMMISSION v. SPOKANE & I. E. R. Co.* to sustain its right to dispose of such surplus without thereby becoming a public utility; but an examination of the facts and conditions connected with the lumber company's water supply shows that it has only surplus machinery and equipment, and not a surplus of water. In the Washington case, *supra*, the surplus consisted of electrical energy actually and necessarily generated to enable the railroad to supply its own needs, and the company was permitted to sell this surplus temporarily until such times as it should require it for its own use, without being required to account for the proceeds to the Public Service Commission. In this case the lumber company, in order to provide itself with adequate fire protection, installed pumps of larger capacity than are needed for the ordinary demands of its mills and yards, but to supply the railway company requires special service independent of any service or need of the lumber company. The electric pumps are automatically started in response to the needs of the railway company, and there is no reciprocal service on the part of the railway company, the pipes leading to its tanks being provided with check valves, so that water once delivered into said tanks cannot return to the system of the lumber company."

For discussion of cases passing upon the effect of rendering incidental service to members of the public to make corporation, otherwise private, a public utility, see annotation to *Wingrove v. Public Service Commission*, L.R.A. 1918A, 213.

Miscellaneous.

Although not strictly within the scope of the present note, *Citizens Electric Illuminating Co. v. Lackawanna & W. Valley R. Co.* (1916) 255 Pa. 176, 99 Atl. 465, is of interest in this connection. In this case an electric railroad company was enjoined from furnishing electricity for power purposes through the operation of excess generating machinery at the suit of an electric company chartered to furnish such service in that territory upon the ground that the railroad company was exceeding its corporate powers in furnishing electric power service. The court said: "The right of a corporation to sell and dispose of surplus ma-

terial on hand, not required in the conduct of its chartered business, is not questioned. The attempted analogy between the cases cited by appellant's counsel and the present one fails right here. It is a mistake to speak of the electric current that appellant proposes to sell to the coal company as surplus current that the company has on hand and for which it has no use. That current has never been developed, and can be developed only as appellant employs its surplus machinery to that end. It is the machinery that constitutes the surplus, and not the electric current."

A. L. R.

KENTUCKY COURT OF APPEALS.

JAMES W. McMILLIN, Admr. etc., of
Eugene McMillin, Deceased, Appt.,
v.

BOURBON STOCKYARDS COMPANY.

(— Ky. —, 200 S. W. 328.)

Negligence — care to protect premises from boys.

A stockyard company which maintains about its cattle dip fences reasonably sufficient to keep out intruders, and which drives boys off the premises whenever they are seen there, is not liable for the death of a boy who falls into the dip after going along an alley and finding an open gate leading to the dip.

For other cases, see *Negligence*, I. c. 2, b, in *Dig. 1-52 N. S.*

(February 5, 1918.)

A PPEAL by plaintiff from a judgment of the Court of Common Pleas Branch, Third Division, of the Circuit Court for Jefferson County in favor of defendant, in an action brought to recover damages for the death of plaintiff's son, alleged to have been caused by defendant's failure sufficiently to protect its premises from intrusion by children. Affirmed.

The facts are stated in the opinion.

Mr. Charles Reisch, for appellant:

The owner of premises upon which there is something dangerous and at the same time attractive to children of tender years, who knows that the place is, or because of

its location is likely to be, frequented by them, owes a duty to exercise care to so safeguard it as to prevent their injury.

Bransom v. Labrot, 81 Ky. 638, 50 Am. Rep. 193; *Mayfield Water & Light Co. v. Webb*, 129 Ky. 395, 18 L.R.A.(N.S.) 179, 130 Am. St. Rep. 469, 111 S. W. 712; *Thompson v. Cumberland Teleph. & Teleg. Co.* 138 Ky. 109, 127 S. W. 531; *Kisler v. Kentucky Distilleries & Warehouse Co.* — Ky. —, 112 S. W. 913; *Hermes v. Hatfield Coal Co.* 134 Ky. 300, 23 L.R.A.(N.S.) 724, 120 S. W. 351; *Lyttle v. Harlan Town Coal Co.* 167 Ky. 345, 180 S. W. 519; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; *Indian Ref. Co. v. Mobley*, 134 Ky. 822, 24 L.R.A.(N.S.) 497, 121 S. W. 657; *Miller v. Chandler*, 168 Ky. 606, 182 S. W. 833; 19 Cyc. 5; *Osborn v. Atchison, T. & S. F. R. Co.* 86 Kan. 440, 121 Pac. 364; *Hogan v. Houston Belt & Terminal R. Co.* — Tex. Civ. App. —, 148 S. W. 1166; *Indianapolis v. Williams*, 58 Ind. App. 447, 108 N. E. 387; *Thompson v. Alexander City Cotton Mills*, 190 Ala. 184, 67 So. 407, Ann. Cas. 1917A, 721; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Alabama G. S. R. Co. v. Crocker*, 131 Ala. 585, 31 So. 561; *Cœur d'Alene Lumber Co. v. Thompson*, L.R.A.1915A, 731, 131 C. C. A. 316, 215 Fed. 8; *Shawnee v. Cheek*, 41 Okla. 227, 51 L.R.A.(N.S.) 672, 137 Pac. 724, Ann. Cas. 1915C, 290; *Thompson v. Neg. § 1020*; *Carter Coal Co. v. Smith*, 173 Ky. 843, 191 S. W. 631.

Mr. Samuel Trusty also for appellant.

Note. — The duty of a property owner to a trespassing child is discussed in the note to *Walsh v. Pittsburgh R. Co.* 32 L.R.A.(N.S.) 559.

The doctrine of attractive nuisance, or the "turntable doctrine," as it is sometimes called, is treated at length in the note to *Cahill v. Stone*, 19 L.R.A.(N.S.) 1094. Many L.R.A.1918C.

specific and concrete applications of the latter doctrine are considered in notes cited in the L.R.A. Indexes under the title, "Negligence," subtitles, "Children—Dangerous attractions; turntables." The L.R.A. Digests should also be consulted under the title "Negligence" for later cases on this point.

Messrs. Humphrey, Middleton, & Humphrey and Louis Seelbach, Jr., for appellee:

The case at bar is not one for the application of the attractive nuisance doctrine.

1 Thomp. Neg. §§ 946, 968, 1024; Lackat v. Lutz, 94 Ky. 287, 22 S. W. 218; Reeves v. French, 20 Ky. L. Rep. 220, 45 S. W. 771, 46 S. W. 217, 4 Am. Neg. Rep. 155; Wells v. Duncan Coal Co. 157 Ky. 190, 162 S. W. 821; Branham v. Buckley, 158 Ky. 848, 166 S. W. 618, Ann. Cas. 1915D, 861; Mayfield Water & Light Co. v. Webb, 129 Ky. 395, 18 L.R.A.(N.S.) 179, 130 Am. St. Rep. 469, 111 S. W. 712; Lyttle v. Harlan Town Coal Co. 167 Ky. 345, 180 S. W. 519; Schauf v. Paducah, 106 Ky. 228, 90 Am. St. Rep. 220, 50 S. W. 42, 6 Am. Neg. Rep. 73; Thompson v. Cumberland Teleph. & Teleg. Co. 138 Ky. 109, 127 S. W. 531; Hermes v. Hatfield Coal Co. 134 Ky. 300, 23 L.R.A.(N.S.) 724, 120 S. W. 351; Kisler v. Kentucky Distillers & Warehouse Co. — Ky. —, 112 S. W. 913; Coon v. Kentucky & I. Terminal R. Co. 163 Ky. 223, L.R.A.1915D, 160, 173 S. W. 325; 29 Cyc. 464; Cahill v. E. B. & A. L. Stone & Co. 19 L.R.A.(N.S.) 1094, note; Thompson v. Illinois C. R. Co. 47 L.R.A.(N.S.) 1101, note; Miller v. Chandler, 163 Ky. 301, 173 S. W. 779.

Under the attractive nuisance doctrine, liability of the owner or occupier of the land is based on negligence.

1 Thomp. Neg. § 1024; Bransom v. Labrot, 81 Ky. 638, 50 Am. Rep. 193; Lyttle v. Harlan Town Coal Co. 167 Ky. 345, 180 S. W. 519; Miller v. Chandler, 168 Ky. 606, 182 S. W. 833.

Carroll, J., delivered the opinion of the court:

In the southwest corner of the Bourbon Stockyards at Louisville the stockyard company maintained quarantine pens in which were put cattle suspected of being diseased. On one side of these quarantine pens there was what is known as a cattle dip, consisting of a concrete trough about 40 feet long, 3½ feet wide, and placed below the level of the ground. This trough was filled with a solution composed of water and other ingredients prescribed by the government, and cattle with tick and perhaps other diseases would be driven into this concrete trough and through the solution it contained, which, in places, was deep enough to submerge the cattle and cause them to swim. These quarantine pens were inclosed by a solid fence, and the cattle dip was also inclosed by a separate slat fence. On one side of the pens there was an alley between Market and Jefferson streets, which passed directly into the stockyards. In this alley there was a gate leading into what was L.R.A.1918C.

called a runway inside the quarantine pens, and another gate leading from this runway into the ground where the cattle dip was located. These gates, which were usually closed, were at times left open, so that boys who found their way into the alley, as they could do from the street on which it opened, could then go into the quarantine pens and into that part of the pens in which the cattle dip was located by going through the gates before mentioned, if they were open, or by climbing over them or the surrounding fences, if the gates were closed; and it is shown that a number of boys in the neighborhood were in the habit of playing from time to time in the stockyard premises, as well as in the quarantine pens, and about where the cattle dip was located.

In October, 1914, Eugene McMillin, a little boy about six years old, in company with Frank Shipman, another little boy about the same age, went through the alley, and, finding the gates open, they went into the quarantine pens and were playing about the cattle dip. After getting to the cattle dip one of them stood on one of the concrete walls that had been made on each side of the dip, while the other got on the opposite wall, and here they were playing by pitching a toy gun across the dip from one to the other. While so engaged the gun fell into the dip, and Eugene McMillin, in an effort to get it, also fell into the dip, and soon afterwards died from the effects of the poisonous water which he swallowed. Subsequently this suit was brought by his administrator to recover damages for his death upon the ground that the cattle dip was an attractive place for children, and not sufficiently protected, and after the conclusion of the evidence in his behalf, the trial court took the case from the jury, and the administrator appeals.

There is evidence by a number of boys from eight to fifteen years old that they played in the stockyards, the quarantine pens, and about the dip many times; that sometimes they would go on the premises by climbing over the gates or the fences, and at other times the gates would be open and they would go through that way. It also appears from the evidence that whenever the superintendent or any of the employees of the stockyard saw the boys, they would run them out, but at times they would play about the premises for some little while before being observed by the stockyard people.

As illustrating the efforts made to keep boys out and the ways in which they got in, we may refer briefly to the evidence. Arch Burch, superintendent of the stockyards company, introduced as a witness for the plaintiff, said that there was an alley on the north side of the pen leading from Wen-

zell street into the stockyard; that there was a big gate at the end of the alley in the stockyard and also a smaller gate through which people could go; that he had been in charge of the stockyards for a number of years, and had seen children playing in the grounds, but they were always run out when discovered; that in order to get to their dipping pens from the alley a person had to go through two gates. Thomas Lawson, an employee of the company, said that he had seen boys in the quarantine pens frequently, and always ran them out; that he had instructions to do so from Mr. Burch, the superintendent, and did the best he could to keep them out although it was right difficult to do it; that it was the practice to keep the gates closed and fastened. Jeff Darringer, another employee of the company, introduced by the plaintiff, said that whenever they saw boys in there they had orders to and did run them out. Birdie Hall, who lived in a house a couple of hundred feet from the quarantine pens, said she had seen boys playing in the grounds many times; that she saw these two little boys go into the quarantine pens on the day Eugene McMillin lost his life; that when they went in the gate leading from the alley into the pens was open, and they went through the gate.

On this evidence the argument is made that as the quarantine pens and stockyard premises were attractive places for children to play in, and the cattle dip a dangerous place, the stockyard company was under a duty to so inclose and protect the cattle dip as to prevent children from playing about it, and thereby putting their lives in peril.

We have written a number of cases on the subject of the duty of the owners of attractive and dangerous premises to protect them from trespassing children, and have extended what is known as the attractive nuisance doctrine possibly farther than, and certainly as far as, any other court whose opinions have come under our observation; but we do not think the principle announced in *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193; *Lyttle v. Harlan Town Coal Co.* 167 Ky. 345, 180 S. W. 519; and *Miller v. Chandler*, 168 Ky. 606, 182 S. W. 833, can be applied to the facts of this case. The cattle dip into which this little boy unfortunately fell was on the private premises of the company, inclosed not only by one but by two fences, reasonably sufficient to keep out intruders.

It is true that there was a gate leading from the alley into the runway, separated from the dip by a solid fence, and at each end of this runway there was a gate leading into the place where the dip was located; and there was some evidence that one or

perhaps both of these gates were open at the time these children went from the runway into the inclosure where the dip was located. But we think that when the owner of private premises, although there may be on these premises a dangerous place attractive to children, has his premises inclosed by a fence so constructed as to reasonably prevent children from climbing over it, he is not to be held liable for accidents that happen to trespassing children who find a roundabout way to get into the premises, and then happen to find a gate that is open and through which they go to the place of danger. As said by the lower court in a brief opinion, the evidence in this case "further shows that practically the only dangerous place that has been made known here is the cattle dip; and it further shows that the dip was surrounded on all sides with a fence and beyond that by other fences around the cattle sheds. Now it seems to me that when a man protects his property in that way, he has exercised in full the duty which the law imposed upon him in exercising ordinary care to protect them from intrusion, and if, notwithstanding his protection, people go in there and get injured, they assume the risk, and not he. To hold otherwise would be, it seems to me, to say that a man using property in a large city for manufacturing purposes, or using dangerous machinery of any kind, or having appliances from which danger might be incurred by people coming in contact with them, would be absolutely powerless to protect himself.

Everybody who has any acquaintance with the habits of children knows how difficult it is to keep them out of inclosures inside of which there are suitable playgrounds, or indeed any kind of ground on which children can run and romp, or where there are things that are attractive to children. And so the law, in its tender regard for the safety of children, and in an effort to protect them from being hurt by the dangerous places, appliances, and machinery of one kind and another that may be found in premises where children are in the habit of going, or where they might be attracted to go, puts on the owner of such premises a duty that he does not owe to adults. But this duty does not go to the extent of making the owner an insurer of the safety of trespassing children. It only requires him to take reasonable precautions for their safety, and among these precautions are the duty of warning and notice as well as the duty, in some instances, of protecting by barriers, and especially are these last precautionary measures required at places where children are permitted without objection to go and play. But the owner need not keep gates that are on his inclosed

premises continually locked, and need not build his fence so high that no person can climb over it; nor is he required to have servants continually on the lookout for trespassing children. He need only exercise reasonable care, considering all of the surrounding conditions and circumstances, to prevent trespassing children from being hurt by the dangerous things he may have about his premises, and this we think the stockyard company did.

In cases like this it is very often difficult to draw with precision or clearness the

line between the cases holding the owner of the premises liable and the cases holding him not liable, but we think this case must be put with the cases of *Thompson v. Cumberland Teleph. & Teleg. Co.* 138 Ky. 109, 127 S. W. 531; *Hermes v. Hatfield Coal Co.* 134 Ky. 300, 23 L.R.A.(N.S.) 724, 120 S. W. 351; and *Mayfield Water & Light Co. v. Webb*, 129 Ky. 395, 33 Ky. L. Rep. 909, 18 L.R.A.(N.S.) 179, 130 Am. St. Rep. 469, 111 S. W. 712, and the judgment of the lower court is affirmed.

OREGON SUPREME COURT.

(Department No. 2.)

COUNTY OF MULTNOMAH, FOR USE OF
L. H. McMAHAN, Appt.,

v.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY et al., Resp'ts.

(— Or. —, 170 Pac. 525.)

Bond — contractor — recovery for rent of engine.

Under a statutory bond by one contracting with a county for the improvement of a highway, conditioned to pay all persons supplying labor or materials for the prosecution of the work, recovery may be had for the rent of a road engine hired by a subcontractor for use on the job.

For other cases, see *Bonds, II. a*, in *Dig.* 1-52 N. S.

(January 22, 1918.)

APPEAL by plaintiff from a judgment of the Circuit Court for Multnomah County sustaining demurrers to and dismissing a suit upon a contract and bond, for the recovery of rent for the use of a road engine. Reversed.

Statement by Bean, J.:

This is an action by the county of Multnomah for the use and benefit of L. H. McMahan upon a contract and bond executed by the Pacific Bridge Company, a corporation, and its surety. The complaint alleges, in substance, the following facts:

On June 21, 1915, Multnomah county en-

tered into a contract with the defendant Pacific Bridge Company for the improvement of a portion of Columbia River highway, namely, section D, from the east end of Oneonta bridge to the easterly line of the county. The contract and bond are set out in the complaint as exhibits. By the material provisions of the contract the construction company specifically agreed "to furnish all material, tools, and equipment and all labor necessary to complete the above-described work, strictly in accordance with said plans, specifications, and schedule of rates," and before the contract became effective to furnish the county with a bond providing for the faithful performance of the agreement. The contractor agreed "to promptly, as due, make payments to all persons supplying" him with labor or material for the prosecution of the work provided for. Provision was made granting a right of action to persons furnishing material, labor, and supplies to the contract company who were not paid, as follows: "The contractor further agrees that any person who supplied labor or material for the prosecution of any work provided for under this contract is hereby authorized to institute an action against said contractor or his sureties on his own relation in the name of the county, and to prosecute the same to final judgment, for his own use and benefit. The contractor further agrees that all the provisions of the laws of the state of Oregon, applicable to the protection of subcontractors, materialmen, and laborers engaged in carrying out the terms of this contract, are hereby made

Note. — The nature of labor or materials which will support an action upon a contractor's bond is discussed in the notes to *Standard Boiler Works v. National Surety Co.* 43 L.R.A.(N.S.) 162, and *United States Rubber Co. v. Washington Engineering Co.* L.R.A.1915F, 951; and see later cases, *National Surety Co. v. United States*, L.R.A. 1917A, 336; *Southern Surety Co. v. Municipal Excavator Co.* L.R.A.1917B, 558; and *Wisconsin Brick Co. v. National Surety Co.* L.R.A.1917C, 912. L.R.A.1918C.

For analogous questions as to mechanics' liens, see L.R.A. Indexes, under the title, "Mechanics' Liens," subtitle, "For what work or materials;" and see especially notes in 36 L.R.A.(N.S.) 866; 51 L.R.A.(N.S.) 1040; and L.R.A.1915E, 986, on mechanics' lien for materials wholly or partially consumed in process of work, but not becoming a part of the structure.

a part of this contract, whether expressly incorporated herein or not."

The construction company filed a bond with the county in accordance with the contract and § 6266, L. O. L., with the defendant United States Fidelity & Guaranty Company as surety. After reciting the contract between Multnomah county and the Pacific Bridge Company, the bond provides: "Now, therefore, if the said principal herein . . . shall faithfully and truly observe and comply with the terms, conditions, and provisions of the said contract, in all respects, and shall well and truly and fully do and perform all and singular the covenants, conditions, guaranties, matters, and things by it agreed, covenanted, and undertaken to be performed under said contract, plans, and specifications, upon the terms proposed therein, . . . and shall indemnify and save harmless the county of Multnomah, . . . and shall promptly pay all laborers, mechanics, subcontractors, and materialmen, and all persons who shall supply such laborers, mechanics, or subcontractors with materials, supplies, or provisions for carrying on such work, all just debts, dues, and demands incurred in the performance of such work, . . . then this obligation to be void; otherwise to remain in full force and effect."

It will be seen that the contract and bond embraced all the conditions mentioned in the statute, and some specifications in excess of the statutory requirements.

After setting forth the organization of the county, the incorporation of the construction company and the United States Fidelity & Guaranty Company, and the contract and bond, plaintiff's complaint proceeds to allege as follows: The Pacific Bridge Company commenced the construction of the improvement, and during the course thereof entered into an agreement with the defendant T. A. Sweeney for the grading of the highway. In performing this work he used a caterpillar engine which he hired from L. H. McMahan, whom he promised and agreed to pay the sum of \$10 per day for the use thereof. Between June 21, 1915, and October 24th of that year Sweeney had the use of the caterpillar engine for work on the improvement for a period of sixty-four days, making an aggregate total of \$640 due therefor, no part of which has been paid except \$10 and \$210 expended in making renewals and repairs on the engine, leaving a balance of \$420 unpaid. Prior to the commencement of the action L. H. McMahan made application to the county of Multnomah by affidavit for a certified copy of the bond and contract of the defendant Pacific Bridge Company and was furnished the same. The defendants filed separate demurrers to the complaint upon the L.R.A.1918C.

ground that that pleading did not state facts sufficient to constitute a cause of action. The demurrer of defendant T. A. Sweeney was on the further ground that there is no basis for the contractual relation set forth in the complaint between himself and the plaintiff. The respective demurrers were sustained by the court, and plaintiff having refused to plead further, judgment was entered in favor of the several defendants. Plaintiff appeals.

Messrs. William P. Lord and Arthur I. Moulton for appellant.

Messrs. Clark, Skulason, & Clark, for respondent companies:

Stipulated rental for the use of a caterpillar engine is neither labor nor material as the words are commonly construed, or as they are used in the legislation upon which plaintiff relies.

Allen v. Elwert, 29 Or. 428, 44 Pac. 823, 48 Pac. 54; McKinnon v. Red River Lumber Co. 119 Minn. 479, 42 L.R.A. (N.S.) 872, 138 N. W. 78; Potter Mfg. Co. v. A. B. Meyer & Co. 171 Ind. 513, 131 Am. St. Rep. 267, 86 N. E. 837; Troy Public Works v. Yonkers, 207 N. Y. 81, 44 L.R.A. (N.S.) 311, 100 N. E. 700; McAuliffe v. Jorgenson, 107 Wis. 132, 82 N. W. 706; Wood, C. & Co. v. El Dorado Lumber Co. 153 Cal. 230, 16 L.R.A. (N.S.) 585, 126 Am. St. Rep. 80, 94 Pac. 877, 15 Ann. Cas. 382; Hall v. Cowen, 51 Wash. 295, 98 Pac. 670; Gilbert Hunt Co. v. Parry, 59 Wash. 647, 110 Pac. 541, Ann. Cas. 1912B, 225; Essency v. Essency, 10 Wash. 375, 38 Pac. 1130.

Plaintiff cannot treat the bond involved here as a common-law obligation, and maintain this suit upon such theory.

Portland v. New England Casualty Co. 78 Or. 195, 152 Pac. 253; People v. Metropolitan Surety Co. 211 N. Y. 107, 105 N. E. 99; Parker v. Jeffery, 26 Or. 187, 37 Pac. 712; Brower & T. Lumber Co. v. Miller, 28 Or. 565, 52 Am. St. Rep. 807, 43 Pac. 659.

Mr. Thomas Mannix for respondent Sweeney.

Bean, J., delivered the opinion of the court:

In 1903 (Laws 1903, p. 256; L. O. L. § 6266), the legislature enacted the following: "Hereafter any person or persons, firm, or corporation, entering into a formal contract with the state of Oregon, or any municipality, county, or school district within said state, for the construction of any buildings, or the prosecution and completion of any work, or for repairs upon any building or work, shall be required before commencing such work, to execute the usual penal bond with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly

make payments to all persons supplying him or them labor or materials for any prosecution of the work provided for in such contracts."

The act provides that any person or persons who so furnish labor or material may obtain a copy of the contract and bond, and that such person "shall have a right of action, and shall be authorized to bring suit in the name of the state of Oregon, or any county, municipality, or school district within such state for his or their use and benefit against said contractor and sureties." This act was amended in 1913, but not so as to change the provisions above referred to.

The position taken by the defendants is that the payment for the use of the caterpillar engine is not provided for in the contract and bond under the terms of the statute. In the expression of the statute it is quite likely that the lawmakers, to a certain extent, had in contemplation the various lien statutes providing for liens on buildings and other property, both real and personal, for labor and materials. However, the enactment under consideration has a different purport and broader meaning than the ordinary lien statutes; therefore the construction of the latter affords but little assistance in arriving at the intent of the former. The lien statutes have usually been strictly held to cover only what is incorporated into the building or property against which the lien is claimed. Take, for instance, our Mechanics' Lien Statute (L. O. L. § 7416), which provides in part that a "person performing labor upon or furnishing material, or transporting or hauling any material of any kind to be used in the construction, alteration, or repair, either in whole or in part, of any building," shall have a lien upon the same. Such lien statutes obviously cover only what goes into the building or structure and adds to the value of the same.

In *American Surety Co. v. Lawrenceville Cement Co.* (C. C.) 110 Fed. 721, Judge Putnam states: "However, this principle of discrimination is so strongly entrenched in the practical rules properly applicable to the construction of this statute that it needs no further exposition. It has, however, no necessary relation to repairs of an incidental and comparatively inexpensive character, made on the plant during the progress of the work, representing only the ordinary wear and tear or the equivalent thereof. Such repairs, under some circumstances, are within the purview of the statute, and are not always excluded by any rules of construction which we must apply to it."

Even this underlying equity which requires these lien statutes to be so limited in their application is not applied with abso-

lute strictness; for instance, where a bill of lumber is sold to one erecting a building, no distinction is made between the portions of such material which are actually incorporated into the parts of the buildings and those which are used in erecting temporary floors and stagings necessary to aid in the construction. When the Congress of the United States enacted the statute from which the one under consideration, providing for giving the bond in question, was copied, it used a much broader expression than is employed in the lien statutes. Our law uses the following language: "Shall promptly make payments to all persons supplying him or them labor or materials for any prosecution of the work, provided for in such contracts."

As declared by Judge Putnam in *American Surety Co. v. Lawrenceville Cement Co.* supra, "the statute in question concerns every approximate relation of the contractor to that which he has contracted to do."

In the present case the act and the bond are susceptible of a more liberal construction than the lien statutes. Under the law and the plain language of the bond all indebtedness incurred for labor and material used in the prosecution of the work contracted to be performed is thereby protected. The grading of the highway was an important part of the construction. If Mr. Sweeney had owned the engine as a part of his construction outfit, and had used the same in the prosecution of the work in the same way he did after hiring the machine, there could have been no question but that a fair compensation for the wear and deterioration of the instrumentality would have been protected by the bond under the law. The making of the contract with another for the use of the engine in moving the dirt and material in the prosecution of the work of making the grade does not change the substance of the transaction so that the reasonable expense therefor would not come within the provisions of the bond. On the other hand, such compensation, which takes the place of the necessary wear and incidental repairs of the machine (see *American Surety Co. v. Lawrenceville Cement Co.* supra), comes directly within the protection of the letter and spirit of the bond. The use of the caterpillar engine having been supplied to the contractor through the medium of the subcontractor Sweeney for the prosecution of the work provided for in the contract, and the Pacific Bridge Company having given a bond with surety to pay for the same, and having failed to do so, as alleged in the complaint, the demurrers to the complaint should have been overruled. See *United States v. Hill v. American Surety Co.* 200 U. S. 197,

50 L. ed. 437, 26 Sup. Ct. Rep. 168; School Dist. ex rel. Hammond Lumber Co. v. Alameda Constr. Co. — Or. —, 169 Pac. 507; School Dist. v. Hallock, — Or. —, 169 Pac. 130; Portland v. New England Casualty Co. 78 Or. 195, 152 Pac. 253; Columbia County v. Consolidated Contract Co. 83 Or. 251, 163 Pac. 438. In Grants Pass Bkg. & T. Co. v. Enterprise Min. Co. 58 Or. 174, 177, 34 L.R.A.(N.S.) 395, 113 Pac. 859, 1 W. & M. Cas. Ann. 412, a suit to enforce a miner's lien allowed by § 7444, L. O. L., to any person furnishing materials or supplies for the working or development of any mine, it was held in an elaborate opinion by Mr. Justice Moore that electricity furnished to a mine for illumination or power constituted "supplies" within the meaning of the law.

The line of demarcation must be drawn between labor and material furnished a contractor which are covered by such a bond and those without the pale of such an undertaking by taking into consideration the service and material in the particular case. In *National Surety Co. v. United States*, L.R.A.1917A, 336, 143 C. C. A. 99, 228 Fed. 581, the syllabus says: "Supplies furnished a contractor with the United States, which were specifically intended for current consumption directly on the work, such as drills and material for drills used in drilling machines, and made to be used up currently, and in fact used up in direct and immediate contact with rock removed as part of the contract, were covered by the contractor's bond; the removal of such rock being a part of the 'construction of the work.'"

By the explicit terms of the contract the use of the engine referred to and that of other similar appliances was made a part of the contract price. According to the averments of the complaint the emery of the instrument entered directly into the construction of the highway just as effectively as though it had been owned by the contractor or subcontractor, and evidently served, to a large extent at least, as a substitute for manual labor. There is no chance for a double allowance for the service claimed.

This case is somewhat analogous to and within the reasoning of the so-called Powder Cases and Coal Cases. See *Schaghticoke Powder Co. v. Greenwich & J. R. Co.* 183 N. Y. 306, 2 L.R.A.(N.S.) 288, 111 Am. St. Rep. 751, 76 N. E. 153, 751, 5 Ann. Cas. 443, which is a lien case, and *City Trust, S. D. & Surety Co. v. United States*, 77 C. C. A. 397, 147 Fed. 155. The statute should not be extended to include the use of material not intended to be protected by it or by the contract and bond, such as claims for the purchase of an engine, hoisting apparatus, or the like. In the case of *United States L.R.A.1918C*.

Fidelity & G. Co. v. Bartlett, 231 U. S. 237, 58 L. ed. 200, 34 Sup. Ct. Rep. 88, the contractors were to build a breakwater. They owned a quarry which, in order to perform their contracts, it was necessary to open to get out the stone, transport it, and dump it into the water. The question involved was the labor cost of quarrying and hauling the materials. The court held that the whole of this was labor performed on the contract.

According to the strict legal definition of the term "labor and material" the use of the engine would not be embraced therein. 2 Words & Phrases, 2d Series, p. 1321. There can be no question but that the service of the machine in the actual grading of the highway, as alleged in the complaint, is covered by the language of the contract and bond. We see no reason why the parties negotiating the transaction may not follow their own wills as long as their minds coincide perfectly, in stipulating as to matters which are often the subject of controversy, as shown by the opinions in the cases above cited, and plainly say by their written instrument what shall be included in the contract and bond, considered as labor and material and paid for by the contractor and his surety, and so avoid disputes between those interested in the construction of the public improvement.

Statutes like the one in question have usually been and should be given a liberal construction so as to carry out the legislative intent and effect the purpose contemplated by the law. *United States v. American Surety Co. (C. C.)* 110 Fed. 721; *American Surety Co. v. Lawrenceville Cement Co.* supra; *Portland v. New England Casualty Co.* 78 Or. 195, 152 Pac. 253; *Ulster Sav. Inst. v. Young*, 161 N. Y. 23, 55 N. E. 483; *Hurley-Mason Co. v. American Bonding Co.* 79 Wash. 564, 140 Pac. 575. A public corporation authorized by law to require bonds of contractors for public work to secure the payment of labor and materials is not restricted by the statute from taking other or additional measures and provisions in excess of those specified by the statute in order to protect those who aid in the public work. *Brandt, Suretyship*, 3d ed. § 31; 1 *Elliott, Roads & Streets*, 3d ed. § 646; 2 *Dill. Mun. Corp.* 5th ed. § 830; 19 R. C. L. p. 1078, § 364.

In the case at bar, if the work mentioned had been performed by the exercise of the muscles of laborers, there would have been no question but that the same was protected by the statute. With the hard surface road pavement coming into vogue, new methods of road construction, utilizing high-power machinery, equipment, and appliances, have superseded the old mode of construction

with pick and shovel. It seems to us that it was intended by the enactment, as expressed by the lawmakers, that the construction of an improvement, such as a paved highway, should be paid for; that in order to carry out the intent of the law it was the right and duty of the county officials to require a bond protecting the payment of obligations incurred for labor or material approximating the construction work. Plainly, the contract and bond in question made such provisions and nominated the item sued for. The language of the statute indicates that the lawmakers had in mind the modern conditions prevailing at the time of the enactment. By the recitation in their contract and bond the parties to the transaction have to a certain extent placed their own construction upon the law, assented thereto,

and made their binding agreement in conformity therewith. Within the meaning of the contract and bond, which are in accordance with the spirit of the statute, the service of the engine should be deemed "labor and material." We are guided by the averments of the complaint. If the claim for the service of the machine was not reasonable, or if the instrumentality was not used as alleged, that should be explained in an appropriate manner.

The judgment of the lower court sustaining the demurrers to the complaint is reversed, and the cause will be remanded for further proceedings not inconsistent herewith.

McBride, Ch. J., and Moore and McCamant, JJ., concur.

TENNESSEE SUPREME COURT.

EVA EASLEY

v.

EAST TENNESSEE NATIONAL BANK,
Appt.

(138 Tenn. 369, 198 S. W. 66.)

Bills and notes — certificate of deposit — holder in due course.

1. A demand certificate of deposit stipulating that there shall be no interest after twelve months is negotiated an unreasonable time after issue if not negotiated until more than a year after its date, within the meaning of a statute providing that when so negotiated the holder is not deemed a holder in due course.

For other cases, see *Bills and Notes*, V. b, 1, in *Dig. 1-52 N. S.*

Lost instrument — recovery without bond.

2. Recovery on a lost certificate of deposit which, under the statute, could not, because not negotiated within a year after issue, be in the hands of a holder for value, may be had two years after demand, without giving an indemnity bond, under a statute providing that after the lapse of two years from maturity, recovery may be had on a lost instrument without bond.

For other cases, see *Lost Instruments*, in *Dig. 1-52 N. S.*

Note. — For certificate of deposit as a negotiable instrument, see annotation following this case, post, 691.

The question as to whether or not an action may be maintained on a lost negotiable instrument without giving indemnity is indirectly touched upon in the note to *Campbell v. Myers*, 48 L.R.A. (N.S.) 648, on "Jurisdiction, as between equity and law courts, of suits or actions on lost negotiable instruments." L.R.A.1918C.

Costs — litigation necessitated by negligence — liability of innocent party.

3. A bank sued on a certificate of deposit lost by the negligence of the holder should not be charged with costs, although recovery is had against it.

For other cases, see *Costs and Fees*, 1. in *Dig. 1-52 N. S.*

(October 31, 1917.)

APPEAL by defendant from a decree of the Chancery Court for Knox County in favor of complainant in a suit brought to recover on a lost certificate of deposit issued by defendant to plaintiff's husband. Affirmed.

The facts are stated in the opinion.

Messrs. **Cornick, Frantz, McConnell, & Seymour** for appellant.

Messrs. **Cates & Price**, for appellee:

The certificate of deposit in question is a negotiable instrument.

Citizens Nat. Bank v. Brown, 45 Ohio St. 39, 4 Am. St. Rep. 526, 11 N. E. 799; *Cassidy v. First Nat. Bank*, 30 Minn. 86, 14 N. W. 363; *Kirkwood v. First Nat. Bank*, 40 Neb. 484, 24 L.R.A. 444, 42 Am. St. Rep. 683, 58 N. W. 1016; *Smilie v. Stevens*, 39 Vt. 315; *Kavanagh v. Bank of America*, 239 Ill. 404, 88 N. E. 171; *Dickey v. Adler*, 143 Mo. App. 326, 127 S. W. 593; *Forrest v. Safety Bkg. & T. Co.* 174 Fed. 345; *Ford v. Brown*, 114 Tenn. 467, 1 L.R.A. (N.S.) 188, 88 S. W. 1036.

Complainant should not be required to execute an indemnity bond to the bank in order to entitle her to payment, for the reason that said certificate of deposit is barred as to anyone other than complainant, and by express statute in Tennessee she is relieved from executing an indemnity bond, because her suit is to set up a lost instru-

ment and recover judgment thereon, said instrument being more than two years past due.

Lowry v. Medlin, 6 Humph. 449; 2 Dan. Neg. Inst. 6th ed. § 1481, pp. 1657, 1658; *Moore v. Fall*, 42 Me. 450, 66 Am. Dec. 297; *Torrey v. Foss*, 40 Me. 74; 2 Parsons, Bills & Notes, 296, 303.

Green, J., delivered the opinion of the court:

This suit was brought to set up a lost certificate of deposit issued by the defendant bank and to recover the amount of the same. From a decree in favor of the complainant below, defendant has appealed to this court.

On September 10, 1910, *A. Easley*, deceased, deposited in the East Tennessee National Bank \$4,950, for which he took a certificate in words and figures as follows:

Certificate of Deposit.

East Tennessee National Bank of
Knoxville, Tennessee.

No. 13841.

September 10, 1910. \$4,950.

A. Easley, Agt., has deposited in this bank \$4,950, payable to the order of self, on the return of this certificate properly indorsed.

Interest at 3 per cent if left three months.

No interest after twelve months.

No interest for fractional parts of a month.

Safe deposit boxes for rent.

S. V. Carter, Cashier.

Easley died August 25, 1913, and by will appointed his wife, the complainant, his executrix, and devised and bequeathed to her all his estate.

While this deposit was made in the name of *A. Easley, agent*, the proof shows that the funds were his own, and this is not seriously controverted by the bank.

Prior to the death of *Easley*, and something more than a year after the date of the deposit, this certificate was lost. Deceased was in the habit of collecting his interest semiannually, and after collecting the instalment of interest due September 10, 1911, the said certificate of deposit was mislaid and has not yet been found. It is obvious from the testimony of the complainant that the certificate of deposit was in the possession of her husband until after September 10, 1911, and that he had not transferred it to anyone prior to that time. Some time subsequent to the death of her husband, the complainant made demand on the bank for the payment to her of the sum so deposited by the deceased. The bank declined to make this payment until the complainant executed to it an indemnity bond to cover any loss it

might sustain by reason of said certificate of deposit having come into the hands of an innocent holder. Complainant was not able financially to make a bond in the amount required by the bank.

It is the contention of the bank that a certificate of deposit is a negotiable instrument; that it is not due until presented and demand made for its payment; and that, if the *Easley* certificate were now outstanding in the hands of an innocent holder, no demand having been made, the bank would be liable therefor.

On the other hand, the complainant insists that a certificate of deposit, like a demand note, is due from the date of its issuance, and that this certificate, even if now outstanding, is barred by the Statute of Limitations. Complainant further insists that said certificate of deposit was in the possession of her husband unindorsed for more than a year after it was issued, and that no person who later acquired it could be a holder in due course, since any negotiation occurred an unreasonable length of time after the issuance of the paper. We do not find it necessary to pass on the question of the application of the Statute of Limitations.

We think a certificate of deposit such as the one in suit is a negotiable instrument. The authorities generally so hold. 3 R. C. L. p. 573; 7 C. J. p. 648. This court has treated such instruments as negotiable, although without any discussion. *Ford v. Brown*, 114 Tenn. 467, 1 L.R.A.(N.S.) 188, 88 S. W. 1036.

The certificate of deposit is undoubtedly payable on demand. It is payable "on the return of this certificate properly indorsed;" that is to say, upon presentation.

"An instrument is payable on demand (1) where it is expressed to be payable on demand, or at sight, or on presentation." Acts 1899, chap. 94, § 7; *Thompson's Shannon's Code*, § 3516a6.

The Negotiable Instruments Statute further provides: "Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course." Acts 1899, chap. 94, § 53; *Thompson's Shannon's Code*, § 3516a52.

"In determining what is a 'reasonable time' or an 'unreasonable time,' regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case." Acts 1899, chap. 94, prefix; *Thompson's Shannon's Code*, § 3516a-191.

It will be observed that the certificate of deposit in suit provides on its face that it shall bear no interest after twelve months.

The purpose of making time deposits, evidenced by certificates, ordinarily is to procure interest on the money deposited. Usually such certificates of deposit are renewed at the end of twelve months from the date of issuance, or at such other period as may be stipulated for the cessation of interest. Accordingly, we think that a demand certificate of deposit such as the one before us, stipulating "no interest after twelve months," negotiated more than a year after its date, is negotiated an unreasonable length of time after its issue, and one who takes it is not a holder in due course.

The supreme court of North Dakota reviewed the cases on the question of reasonable time, and said: "It is well established that a note payable on demand is due within a reasonable time after its date, and there are practically no authorities which hold that such a reasonable time can be extended beyond a year." *McAdam v. Grand Forks Mercantile Co.* 24 N. D. 645, 47 L.R.A. (N.S.) 246, 140 N. W. 725.

For the purpose of indorsement, demand paper has been held to be overdue in two months (*Camp v. Scott*, 14 Vt. 387); ten weeks (*Loosee v. Dunkin*, 7 Johns. 70, 5 Am. Dec. 245); three months (*Herrick v. Woolverton*, 41 N. Y. 581, 1 Am. Rep. 461); four months (*La Due v. First Nat. Bank*, 31 Minn. 33, 16 N. W. 426); six months (*Thompson v. Hale*, 6 Pick. 259). And see other cases collected in note 93c, 8 C. J. 408.

Looking to the authorities, the nature of this instrument, the usage of business, and the facts of this particular case, we conclude that no one who may have come into possession of the instrument in suit can be a holder in due course. It certainly could not have been negotiated until more than a year after the date of its issuance.

The complainant is entitled to recover from the bank the amount of the said certificate of deposit without the execution of an indemnity bond. Our statutes, as contained in Thompson's Shannon's Code, are as follows:

"5694. Lost instruments, how supplied.—Any lost instrument may be supplied by affidavit of any person acquainted with the facts, stating the contents thereof, as near as may be, and that such instrument has

been unintentionally lost or mislaid, and is still the property of the person claiming under it, unpaid and unsatisfied.

"5697. Indemnity bond may be required.—The court of justice before whom the action is tried, may, in case recovery is had upon a lost instrument, require the party claiming under it to give bond with good security, in double the amount of the claim, payable to the opposite party, and conditioned to indemnify such party against any demand by action on such lost instrument; and execution shall be stayed until such bond is given.

"5698. Unless two years have elapsed since maturity of instrument.—The person recovering on such lost instrument may, however, after the lapse of two years from the maturity of such instrument, enforce his recovery without giving the bond prescribed in the last section, in which case, the person from whom the recovery is had may plead the judgment in bar of an action by the actual holder of such lost instrument."

Complainant made demand for the payment of the deposit evidenced by this certificate more than two years ago. If a demand was necessary to mature the certificate as between her and the bank, still she could not be required to present the certificate. It being lost and its whereabouts unknown, as a matter of course it was impossible for her to present it, and to hold that presentation of the lost instrument must be made would be to destroy the efficacy of the section of the Code last quoted as to such paper.

Section 5698, *supra*, provides that the "person from whom recovery is had may plead the judgment in bar of an action by the actual holder of such lost instrument." This fully protects the bank.

Under the circumstances of the case, we think the chancellor properly taxed the costs of this proceeding to the complainant. The defendant bank has acted in good faith throughout, and only desired to be protected. This litigation has been rendered necessary by the carelessness of the complainant or her husband, the deceased, and the bank should not be put to any expense on account thereof.

The decree of the Chancellor is affirmed, with all costs taxed to the complainant.

Annotation—Certificate of deposit as a negotiable instrument.

I. Introduction, 691.

II. Majority rule that certificate is a negotiable instrument, 694.

III. Minority rule that certificate is not a negotiable instrument, 703.

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I. Introduction.

The term "negotiable" has not always been used consistently and with a fixed meaning. It has been stated to include any written security which may be trans-

ferred by indorsement or delivery so as to vest in the indorsee the legal title, and enable him to maintain a suit thereon in his own name.¹ The term "negotiable," when used with reference to commercial paper, imports more than the quality of being transferable by indorsement. In addition thereto the indorsement imposes upon the indorser a liability that the indorsement or delivery of a negotiable instrument to one who takes it for value before maturity and without notice of any defenses thereto entitles the one so taking to recover thereon against the maker the amount of the instrument; in other words, assuming that the instrument is not void, such holder is relieved of defenses to the instrument which might have been made to it in the hands of the payee. A negotiable instrument *prima facie* imports a consideration; this may be overcome in an action between the original parties, but a bona fide holder takes the instrument free from the defense of lack of consideration.

The indorsement of a negotiable instrument raises an implied contract on the part of the indorser with and in favor of the indorsee and every subsequent holder to whom the instrument is transferred, (1) that the instrument itself, and the antecedent signatures thereon, are genuine; (2) that he (the indorser) has a good title to the instrument; (3) that he is competent to bind himself by the indorsement as indorser; (4) that the maker or acceptor is competent to bind himself to the payment, and will, upon due presentment of the instru-

ment, pay it at maturity, or when it is due; (5) that if, when duly presented, it is not paid by the maker or acceptor he (the indorser) will, upon due and reasonable notice given him of the dishonor, pay the same to the indorsee or other holder.²

It is in the ordinary sense, as above defined, that the term "negotiable instrument" is used in this discussion.

In determining whether a certificate of deposit is a negotiable instrument, theoretically, two questions are involved: (1) The abstract question of whether such an instrument is in its nature negotiable; and, assuming an affirmative answer to this question, there remains (2) the question whether the instrument involved in the particular case is in form negotiable. Some courts, having answered the first question in the affirmative, have not considered the second, and seemingly erroneous conclusions have been reached.³

Except in Pennsylvania, it is held in the abstract that a certificate of deposit is a negotiable instrument. In a great majority of these cases the certificate contained negotiable words. It is assumed that the certificate must be in form negotiable in practically all the cases so holding. It has been expressly stated that in order that an instrument be negotiable it must be expressed in negotiable words.⁴ It is clear that a certificate of deposit may be drawn in such a form that it is non-negotiable.^{4a} A certificate reciting the receipt of a sum of money which the bank agrees to repay to the depositor or her assigns

¹ Odell v. Gray (1851) 15 Mo. 342, 55 Am. Dec. 147, cited in International Bank v. German Bank (1879) 71 Mo. 183, 36 Am. Rep. 468.

² 3 R. C. L. § 363, p. 1148.

³ See Klauber v. Biggerstaff (1879) 47 Wis. 551, 32 Am. Rep. 773, 3 N. W. 357, *infra*, note 15.

⁴ Johnson v. Henderson (1877) 76 N. C. 227.

^{4a} A certificate which contained the words "not transferable" was assumed by all parties to be non-negotiable, in Dollar v. International Bkg. Corp. (1909) 10 Cal. App. 83, 101 Pac. 34, the only question being whether or not it was assignable.

A certificate of deposit reciting the deposit of a sum of money to be accounted for by the bank, which contains on its face an indorsement to the effect that it is "a deposit receipt, not transferable," is held non-negotiable in Bank of Montreal v. Clark (1903) 108 Ill. App. 163. Accordingly the bank was held subject to garnishment in a suit against the depositor.

A deposit note acknowledging the receipt L.R.A.1918C.

of money "to account for here on demand," containing the statement that the note is not transferable and must be produced on each occasion of any withdrawal, is held not to be a negotiable instrument in Griffin v. Griffin (1898) 79 L. T. N. S. (Eng.) 442.

The words "not transferable," printed in large letters across a deposit receipt, were held to prevent its being considered a negotiable instrument in Re Commercial Bank (1897) 11 Manitoba L. R. 494.

An instrument designated a certificate of deposit, which recited that certain money has been placed to the credit of the depositor, and that "this amount is left on deposit in this bank, with the understanding that it is not to be withdrawn for two years, counted from this date, in consideration of which we hereby agree to pay the [the depositor] straight interest at the rate of 7% (seven per cent) per annum."—is not a negotiable instrument which can be assigned by indorsement and delivery. Young v. American Bank (1904) 44 Misc. 305, 89 N. Y. Supp. 913.

Apparently the instruments involved in

on return of this certificate, which is assignable only on the books of the company," has been held non-negotiable.^{4b} In discussing the general question of negotiability, the court states that, "while the usual terms employed to confer negotiability on an instrument for the payment of money are to make it payable to order or bearer, still instruments payable to assigns have been held to be negotiable in cases where it was apparent from the whole nature of the instrument and the language employed that such was intended to be their character.

Therefore, had the first sentence of the certificate terminated with the words, 'on return of this certificate,' it might be claimed, not without force, that the certificate was intended to be negotiable. But the words quoted are fol-

lowed by the provision, 'which is assignable only on the books of the company.' We think the clear effect and intent of this provision was to render the instrument non-negotiable, and to protect the company in dealing with the holder of the certificate as such holder might appear on the books of the company, without liability to third parties to whom, unknown to the defendant, it might have been transferred."

It has been held that "the rule which applies to negotiable instruments should not be invoked with reference to a certificate of deposit, until the certificate has been indorsed and transferred by the original holder."⁵

It is held generally in some cases that a certificate of deposit is a promissory note.⁶ In some cases so stating the char-

Saderquist v. Ontario Bank (1887) 15 Ont. App. Rep. 609, and *Bank of Montreal v. Little* (1870) 17 Grant, Ch. (U. C.) 313, were non-negotiable in form.

^{4b} *Zander v. New York Secur. & T. Co* (1904) 178 N. Y. 208, 102 Am. St. Rep. 492, 70 N. E. 449.

It is stated in *Re Fearing* (1910) 138 App. Div. 881, 123 N. Y. Supp. 396, that a certificate of deposit transferable only by assignment is not, strictly speaking, a negotiable instrument. This case was affirmed without reference to this point by the court of appeals in (1911) 200 N. Y. 340, 93 N. E. 956.

⁵ *Bank of Commerce v. Harrison* (1901) 11 N. M. 50, 66 Pac. 460.

⁶ *Taylor v. Hutchinson* (1905) 145 Ala. 202, 40 So. 108.

Swift v. Whitney (1858) 20 Ill. 144, holding that a certificate of deposit reciting that the depositor "has deposited with us . . . to the credit of himself, to be paid in like funds to his order hereon," is a promissory note so as to be admissible as evidence under the common count in an action thereon. The court, in referring to the certificates, further states that "they might, undoubtedly, have been negotiable under our statutes, if not by the law merchant."

Hunt v. Divine (1865) 37 Ill. 137, holding a certificate of deposit reciting that the depositor "has deposited in this bank . . . subject to the order of himself, and payable in like funds on return of this certificate three months after date," is a promissory note, and like a promissory note no demand of payment need be made thereon as a condition precedent to suit, nor is a return of the certificate a condition precedent to a right of recovery.

Bertolet v. Stoner (1911) 164 Ill. App. 605, holding that a gift of the certificate of deposit is completed by delivery without indorsement.

Mereness v. First Nat. Bank (1900) 112 Iowa, 11, 51 L.R.A. 410, 84 Am. St. Rep. 318, 83 N. W. 711, holding that the Statute of L.R.A. 1918C.

Limitations began to run on a demand certificate of deposit from the date thereof. But this decision is overruled by the decision in *Elliott v. Capital City State Bank* (1905) 128 Iowa, 275, 1 L.R.A. (N.S.) 1130, 111 Am. St. Rep. 198, 103 N. W. 777, holding that a demand certificate of deposit issued by a bank is not a demand promissory note within the rule that the Statute of Limitations begins to run upon it as soon as issued. See note to the latter case in 1 L.R.A. (N.S.) 1130 upon whether a demand is necessary to mature a demand certificate of deposit.

Dietrich v. Rothenberger (1903) 25 Ky. L. Rep. 338, 75 S. W. 271.

Beardsley v. Webber (1895) 104 Mich. 88, 62 N. W. 173, holding that the institution of a suit is a sufficient demand for the payment of a certificate of deposit.

A certificate of deposit reciting the deposit of a stated sum of money "to the credit of himself [the depositor], payable on the return of this certificate, properly indorsed," is stated in *Talladega Ins. Co. v. Woodward* (1870) 44 Ala. 287, to be in effect a promissory note payable on demand.

A certificate of deposit was held in *Mills v. Barney* (1863) 22 Cal. 240, to stand on the same footing as a promissory note so far as concerned the right of the bank to recover from an indorser to whom the amount of the certificate had been paid, where it appeared that a previous indorsement was forged.

In *Brummagin v. Tallant* (1866) 29 Cal. 503, 89 Am. Dec. 61, a certificate of deposit payable to the order of the depositor on demand was held to be governed by the rules applicable to the case of a demand note, in that the Statute of Limitations began to run against the same at the date thereof without demand.

A certificate of deposit is treated as a promissory note in *Brown v. McElroy* (1875) 52 Ind. 404; but it is there held that, contrary to the rule that obtains in the case of an ordinary promissory note payable

acter of a certificate of deposit, the question was one of negotiability, and these cases are treated *infra*; but in the cases cited in note 6, it is not clear that the question was one of negotiability. A promissory note may be negotiable or non-negotiable, so that the characterization of an instrument as a promissory note does not answer the question as to its negotiability, unless it is a necessary implication from the facts and the decision that the court had in mind the question of negotiability. No attempt has been made in the present note to include an exhaustive list of cases characterizing certificates of deposit as promissory notes, in which it is not clear that negotiable promissory notes were meant by the expression. Under special circumstances an instrument in form a certificate of deposit may be a mere receipt.⁷

The maturity of certificates of deposit

on demand, there must be a demand of payment of the bank and a refusal before suit can be brought.

In *Gregg v. Union County Nat. Bank* (1882) 87 Ind. 238, a certificate of deposit payable to the order of the depositor on the return of the certificate was held to be dishonored paper by lapse of time, when it was not negotiated for six years after its date. In view of the fact that it was a dishonored paper when taken by the plaintiff, the court stated that it was not necessary to decide whether it was negotiable by the law merchant.

A certificate of deposit reciting that money has been deposited in the bank payable to the order of the depositor on the return of the certificate is stated, in *Krebs v. Blatz* (1909) 134 Ky. 505, 121 S. W. 436, to be in effect a promissory note. It is further stated in this case that, when the depositor placed his name on the back of the paper and transferred it for a valuable consideration, he became liable to his transferee "as assignor." Upon the subsequent failure of the bank, when the depositor knew that his transferee was looking to him as the assignor, he made a settlement with him in which the certificate of deposit was returned; a number of years after this settlement the suit at bar arose, and the court held that the assignor, having elected to make a settlement and accept a return of the certificate, could not change his election.

A certificate of deposit issued by an association formed under the general banking law, payable to the order of a particular person a stated time after date with interest, was held, in *Bank of Orleans v. Merrill* (1842) 2 Hill (N. Y.) 295, to be in effect a negotiable promissory note, and having been issued without the sanction of the comptroller could not form the basis of a right of action.
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has been discussed in a previous note in this series of reports.⁸

The present note is confined to instruments issued by banks which are ordinarily known as certificates of deposit.⁹

II. Majority rule that certificate is a negotiable instrument.

Ordinarily a certificate of deposit contains a statement to the effect that the depositor has deposited in the bank a stated sum of money, and that such sum is payable to his order on the return of the certificate properly indorsed. The certificate usually contains provisions as to interest. A typical form may be seen in the opinion in *Easley v. East Tennessee Nat. Bank*, ante, 689. It is held generally in some cases without any reference to its form, that a certificate of deposit is a negotiable promissory note¹⁰ or a negotiable instru-

A certificate which, so far as appears, was given by an individual, reciting that a stated sum of money had been received from a named person for which "I am responsible, with interest at the rate of 7 per cent per annum, upon production of this receipt, and after three months' notice," is held to be a promissory note. *La Forest v. Babineau* (1906) 37 Can. S. C. 521.

By virtue of an express statute, it was held in *Blood v. Northrup* (1862) 1 Kan. 28, that a certificate of deposit was subject, in the hands of an assignee, to the same defenses as could have been made against the same in the hands of the assignor.

⁷ In *Hotchkiss v. Mosher* (1872) 48 N. Y. 478, where one who had guaranteed the payment of certain notes at a bank paid the notes and allowed the same to remain with the bank for collection from the principal obligor, and received from the bank as evidence of the transaction a certificate of deposit stating that he had deposited a certain sum of money with the bank, it was held that the certificate was simply an acknowledgment of so much money deposited with the bank, and of the same force and effect as a receipt for money.

⁸ Note to *First Nat. Bank v. Security Nat. Bank*, 15 L.R.A. 386.

⁹ See *First Nat. Bank v. Clark* and the note appended thereto, as to ordinary deposit slips given by banks. 17 L.R.A. 580.

¹⁰ *McMillan v. Richards* (1858) 9 Cal. 365. 70 Am. Dec. 655, holding that attachment would not lie against the bank after the certificate had been issued.

Springfield M. & F. Ins. Co. v. Peck (1882) 102 Ill. 265, recognizing that under the Illinois rule such certificates are negotiable.

Hanna v. Manufacturers' Trust Co. (1905) 104 App. Div. 90, 93 N. Y. Supp. 304.

In *Elmore County Bank v. Avant* (1914) 189 Ala. 418, 66 So. 509, an action upon a promissory note by a bank which had pur-

ment.¹¹ But usually the form appears and is substantially as set forth above, and such a certificate of deposit is held to be a negotiable instrument.¹² In other

cases the note by giving a certificate of deposit, the court, in sustaining a recovery, states that such a certificate is a negotiable promissory note, and after it is negotiated the bank could not defend a suit by a subsequent holder; so that after the original holder had negotiated his certificate of deposit, the bank was in the same position as if it had paid the holder value for the note sued upon.

In *Zang v. Wyant* (1898) 25 Colo. 551, 71 Am. St. Rep. 145, 56 Pac. 565, an action by creditors of a bank against the stockholders to enforce the statutory liability, a showing that a certificate of deposit had been issued to the parties seeking the recovery is held insufficient to entitle them to a recovery, the court stating that such certificates are negotiable instruments and transferable by indorsement and delivery, and it was therefore incumbent upon those who sought to recover thereon to prove their present ownership and produce them upon the trial, or show by competent testimony that they had been lost or destroyed. Otherwise a recovery might be had by the original payee after he had transferred and parted with his title to the instrument to a bona fide holder, who would have the right to maintain an action thereon notwithstanding such recovery.

A certificate was assumed to be a negotiable instrument in *Coye v. Palmer* (1860) 16 Cal. 158.

¹¹*Kushner v. Abbott* (1912) 156 Iowa, 598, 137 N. W. 913; *City Bank v. Bryan* (1913) 72 W. Va. 29, 78 S. E. 400; *Benedum v. First Citizens Bank* (1913) 72 W. Va. 124, 78 S. E. 656.

A certificate of deposit issued by a bank for borrowed money was without discussion assumed to be a negotiable instrument in *Barnes v. Ontario Bank* (1859) 19 N. Y. 152.

Certificates of deposit are treated in *Kinney v. Hynds* (1897) 7 Wyo. 22, 49 Pac. 403, 52 Pac. 1081, as negotiable instruments although there is no discussion.

A cashier's check which is referred to by the court as a certificate of deposit is held negotiable in *Drinkall v. Movius State Bank* (1901) 11 N. D. 10, 57 L.R.A. 341, 95 Am. St. Rep. 693, 58 N. W. 724.

It is held generally in *National City Bank v. Titlow* (1916) 233 Fed. 838, that a certificate of deposit is a negotiable instrument; but in that case the plaintiff was held not entitled to the rights of a bona fide holder because of having had notice of an infirmity in the instrument.

¹²*Maxwell v. Agnew* (1884) 21 Fla. 154, holding that a certificate of deposit payable to the depositor or bearer is in effect a promissory note payable to bearer and negotiable by delivery, so that, when the bank has once paid it to a person to whom it had been delivered by the depositor, such payment protects the bank against any claim of the depositor. L.R.A.1918C.

Carey v. McDougald (1849) 7 Ga. 84, holding the indorser of a certificate of deposit reciting the deposit of a certain sum of money, "which sum said bank will pay to him [the depositor] or his order on this certificate, on the 1st day of January next," liable on his indorsement.

Lynch v. Goldsmith (1879) 64 Ga. 42, holding that a depositor to whom a certificate of deposit was issued certifying that he had deposited in the bank a stated sum of money "subject to his order," who indorsed the certificate upon a transfer thereof, was liable to the transferee upon his indorsement.

Auten v. Crahan (1899) 81 Ill. App. 502, holding that a certificate of deposit payable to the order of the depositor on the return of the certificate properly indorsed was a negotiable instrument, and therefore the bank was not subject to be garnished in a suit against the depositor.

Drake v. Markle (1863) 21 Ind. 493, 83 Am. Dec. 358, holding that a certificate of deposit reciting that the depositor has deposited a stated sum of money "payable to the order of himself, in currency, on return of this certificate," is a negotiable promissory note, so that parties whose names appear on the back thereof are prima facie indorsers.

First Nat. Bank v. Stapf (1905) 165 Ind. 162, 112 Am. St. Rep. 214, 74 N. E. 987, 6 Ann. Cas. 631, holding a depositor who had indorsed a certificate of deposit "payable to the order of self, in current funds, on the return of this certificate properly indorsed," liable on his indorsement to the indorsee.

Bingham v. Newton Bank (1918) — Ind. App. —, 118 N. E. 318.

Bean v. Briggs (1855) 1 Iowa, 488, 63 Am. Dec. 464, holding that the payees of a certificate of deposit which recited that they had deposited in the bank a stated number of dollars "to the order of themselves, payable two months after date, payable to their order on return of this certificate, at interest," who had indorsed the same upon a transfer thereof, were liable upon their indorsement.

Fells Point Sav. Inst. v. Weedon (1862) 18 Md. 320, 81 Am. Dec. 603, holding a certificate of deposit which, after reciting the deposit of a stated sum of money and the provision as to interest, provides that the sum "will be paid to him [the depositor] or to his order on demand, and on returning this certificate," is a negotiable instrument, so as to entitle the bank to the return of the certificate as a voucher of payment and as security against any future claim.

Cassidy v. First Nat. Bank (1882) 30 Minn. 86, 14 N. W. 363, approved in *Mitchell v. Easton* (1887) 37 Minn. 335, 33 N. W. 910.

Dickey v. Adler (1910) 143 Mo. App. 326, 127 S. W. 593, holding a certificate of de-

cases in which such a form appears, a certificate of deposit is stated to be in

effect a promissory note when a question of negotiability is involved, and it seems

posit payable to "the order of self" negotiable under the Negotiable Instruments Law. *Fultz v. Walters* (1874) 2 Mont. 165.

Kirkwood v. First Nat. Bank (1894) 40 Neb. 484, 24 L.R.A. 444, 42 Am. St. Rep. 683, 58 N. W. 1016, holding that a bona fide purchaser of a certificate of deposit for value before maturity is protected to the same extent as an innocent holder of other negotiable paper, approving of *First Nat. Bank v. Security Nat. Bank* (1892) 34 Neb. 71, 15 L.R.A. 386, 33 Am. St. Rep. 618, 51 N. W. 305, containing a statement to the same effect, but holding the transferee not entitled to the rights of a bona fide holder because he had taken the certificate after maturity.

Pardee v. Fish (1875) 60 N. Y. 265, 19 Am. Rep. 176, holding that one to whose order a certificate of deposit in the usual form was payable, with interest, on the return of the certificate, who had indorsed the same upon a transfer thereof, was liable upon his indorsement.

Munger v. Albany City Nat. Bank (1881) 85 N. Y. 580; *Read v. Marine Bank* (1893) 136 N. Y. 454, 32 Am. St. Rep. 758, 32 N. E. 1083; *Re Baldwin* (1902) 170 N. Y. 156, 58 L.R.A. 122, 63 N. E. 62; *Re Ellard* (1909) 62 Misc. 374, 114 N. Y. Supp. 827; *Re Marine* (1912) 78 Misc. 707, 140 N. Y. Supp. 231, affirmed without reference to this point in (1915) 169 App. Div. 65, 154 N. Y. Supp. 845.

Citizens' Nat. Bank v. Brown (1887) 45 Ohio St. 39, 4 Am. St. Rep. 526, 11 N. E. 799; *Cuyahoga Steam Furnace Co. v. Lewis* (1853) 4 Ohio Dec. Reprint. 15.

Folk v. Moore (1916) 103 S. C. 266, 88 S. E. 18, holding third parties who indorsed their names upon the back of a certificate of deposit before delivery liable as makers.

EASLEY V. EAST TENNESSEE NAT. BANK, ante, 689.

Bellows Falls Bank v. Rutland County Bank (1867) 40 Vt. 377, holding a certificate of deposit which recited the deposit in the bank of a stated number of dollars payable to the order of the depositor on the presentation of the certificate properly indorsed, to be a negotiable instrument upon which an indorsee might maintain an action.

Pomeroy Nat. Bank v. Huntington Nat. Bank (1913) 72 W. Va. 534, 79 S. E. 662, holding a certificate of deposit payable to the order of the depositor in current funds, on the return of the certificate properly indorsed, a negotiable instrument.

Curran v. Witter (1887) 68 Wis. 16, 60 Am. Rep. 827, 31 N. W. 706, holding negotiable a certificate of deposit payable to the order of the depositor on the return of the certificate properly indorsed.

Miller v. Austen (1851) 13 How. (U. S.) 218, 14 L. ed. 119, holding a certificate of deposit payable to the order of the depositor upon the return of the certificate a negotiable instrument.

Bank of Saginaw v. Title & T. Co. (1900) L.R.A.1918C.

105 Fed. 491, holding a certificate of deposit payable to the order of the depositor on the return of the certificate properly indorsed to be a negotiable instrument.

See reference to *Ford v. Brown* (1904) 114 Tenn. 467, 1 L.R.A. (N.S.) 188, 88 S. W. 1036, in *EASLEY V. EAST TENNESSEE NAT. BANK*.

In *Darden v. Banks* (1857) 21 Ga. 297, certificates of deposit payable to the order of the depositor are held to be but the promissory notes of the bank and negotiable, and, being payable in "current notes," to be within the prohibition of a statute against the issuance by a bank of any bank bills, notes, etc., payable in any other manner than with gold and silver coin.

A certificate of deposit reciting the deposit of a stated sum of money "payable to the order of" the depositors "on return of this certificate, thirty days from date," is assumed, in *Johnson v. Barney* (1855) 1 Iowa, 531, to be a negotiable instrument.

The person to whose order such a certificate had been made payable was held liable upon an indorsement of the same, in *Towle v. Starz* (1897) 67 Minn. 370, 36 L.R.A. 463, 69 N. W. 1098.

A certificate reciting that money had been deposited for the account of a certain person, and containing a promise to pay to said person "or to his order, on return of this receipt, with 7 per cent per annum interest," which, so far as appears, was given by an individual, was held to be a negotiable promissory note in *Frank v. Wessels* (1876) 64 N. Y. 155.

A certificate of deposit reciting that the depositor "has deposited in this bank \$4,000 in currency, payable in like funds, to the order hereon of himself," is held in *Howe v. Hartness* (1860) 11 Ohio St. 449, 78 Am. Dec. 312, to have all the characteristics of a negotiable promissory note, unless the fact that it is payable in currency affects the negotiability. As to whether a certificate payable in currency is negotiable, see *infra*.

A certificate of deposit payable to the order of the depositor in current funds, upon the return of the certificate properly indorsed, is assumed to be a negotiable instrument in *Tobin v. McKinney* (1901) 15 S. D. 257, 91 Am. St. Rep. 694, 88 N. W. 572, rehearing of (1900) 14 S. D. 52, 91 Am. St. Rep. 688, 84 N. W. 228, and it is held that the negotiability of the certificate is not destroyed by the provision, "payable to the order of herself, in current funds, on return of this certificate properly indorsed."

A certificate of deposit which recites the deposit of money, and states that the certificate "will be cashed only upon being returned to the bank by [the depositors] or their order," is a negotiable certificate. The court states that, while there is no promise to pay in so many words, the language of the last paragraph of the instrument is susceptible of no other construction than such a promise to pay either to the depos-

safe to assume that the court meant to hold it negotiable.¹⁸

itors or their order. *Young v. American Bank* (1904) 44 Misc. 308, 89 N. Y. Supp. 915.

The court in *Re Central Bank* (1889) 17 Ont. Rep. 574, holds negotiable a certificate of deposit which was payable to the order of the depositor with interest at 4 per cent per annum on receiving a fifteen-days notice, but contained a provision that no interest will be allowed unless the money remains with the bank a stated time. The certificate contained a provision, "This receipt to be given up to the bank when payment of either principal or interest is required." The court states that, admitting that such an instrument does not possess all the incidents of a promissory note, it is so far negotiable as to pass a good title to a bona fide purchaser.

The privy council expressed an opinion in *Richer v. Voyer* (1874) L. R. 5 P. C. (Eng.) 461, 30 L. T. N. S. 506, 22 Week. Rep. 849, that a certificate payable to the order of a named person upon the surrender of the certificate, which required the deposit to remain a stated time to bear interest, is a negotiable instrument; but expressly refrained from deciding this question.

¹⁸ In *Poorman v. Mills* (1868) 35 Cal. 118, 95 Am. Dec. 90, holding that a certificate of deposit stating that the depositor has deposited a certain sum payable to himself or order on demand, or on return of the certificate properly indorsed, passes by delivery when indorsed in blank, and that the holder may write over the indorsement, "Pay to the order of (the bearer)" and that that has the effect in the hands of a bona fide holder of an indorsement in full.

Laughlin v. Marshall (1857) 19 Ill. 390, holding the payee of a certificate of deposit which was made "payable to the order of himself, . . . on the return of this certificate," who had transferred the same by indorsement, liable on his indorsement to his indorsee.

Cate v. Patterson (1872) 25 Mich. 191, holding that a certificate of deposit is a promissory note within the meaning of a statute permitting an action thereon by attaching a copy thereof to a declaration upon the common counts. In this case the person to whose order the certificate was payable was held liable as an indorser to the person to whom he had transferred the certificate.

That a certificate of deposit payable to the order of the depositor in current funds, on the return of the certificate, is a negotiable instrument, seems not to have been denied in *Tripp v. Curtenius* (1877) 36 Mich. 494, 24 Am. Rep. 610, reversing a judgment in favor of transferees thereof, who had taken the certificate four months after its date, and who claimed to be bona fide holders and therefore relieved of the defense of payment to a prior holder. The court states that on such a certificate the time begins to run from the date thereof. "and no one L.R.A.1918C.

It has been held that, when such an instrument has been indorsed by the

can become a bona fide purchaser who does not take it within some reasonably short period."

In the subsequent case of *Birch v. Fisher* (1863) 51 Mich. 36, 16 N. W. 220, the lapse of thirty-one days is held not sufficient to raise the presumption that the paper has been dishonored, so as to prevent one who took the same after that lapse of time from the date thereof becoming a bona fide holder, and entitled to hold the same as against the party to whose order it was made payable, from whom it had been obtained by fraud.

Jensen v. Wilslef (1913) 36 Nev. 37, 132 Pac. 16, Ann. Cas. 1914D, 1220, holding the person to whose order such a certificate was made payable liable as an indorser upon his indorsement upon a transfer thereof.

A certificate of deposit is held in *Philpot v. Temple Bkg. Co.* (1907) 3 Ga. App. 742, 60 S. E. 480, to be a chose in action, the delivery of which as a gift constitutes an equitable assignment of the money for which it calls.

A certificate of deposit which stated that the depositor had deposited in the bank a stated number of dollars "to the credit of himself, payable in like funds on the return of this certificate duly indorsed, four months after date," was held to be an instrument within the meaning of a statute prohibiting a banking association from issuing or putting in circulation "any bills or notes" unless the same shall be made payable on demand, and therefore to be void. *Bank of Peru v. Farnsworth* (1857) 18 Ill. 563. In arriving at this conclusion the court states that this instrument "is simply a promissory note. No particular form of words is necessary to make a promissory note. . . . This paper contains all these essential elements of a promissory note without limit or qualification, and beside that simply expresses the consideration on which the promise is made." The action in this case was brought by an indorsee, and the court states that, "like a promissory note, it was put in circulation by the indorsement of the promisee, and this action is brought by the assignee. If it was not a promissory note in the commercial sense of the term, then by what authority was it negotiated?"

It is expressly stated in *Bank of Peru v. Farnsworth* (Ill.) supra, that the certificate of deposit may be put in circulation by indorsement of the promisee, and the transfer thereof is spoken of as a negotiation.

In *Hunt v. Divine* (1865) 37 Ill. 137, supra, the plaintiff is spoken of as an assignee of the certificate, although in describing the certificate it is stated to have been indorsed by the payee.

See *Swift v. Whitney* (1858) 20 Ill. 144.

In some cases dealing with certificates of deposit the negotiable character of the paper is conceded. In *Kilgore v. Bulkeley* (1841) 14 Conn. 362, an action against the indorsers of a certificate of deposit which

payee, he should be considered as the drawer of a check or bill for the amount named therein, so as to be entitled to have it protested for nonpayment and to receive notice thereof.¹⁴

The certificates involved in the foregoing cases, so far as appears, contained

stated that the depositors had deposited a stated sum of money which was payable "to their order and the return of this certificate," it was admitted that the indorsement by the defendants of the instrument in question imposed on them a liability to pay the plaintiff the sum therein mentioned, provided a legal demand was made when due and payment refused and legal notice of such payment given to the defendants, and it is stated that "the instrument in question is conceded, by the counsel for the defendants, to be a promissory note; but the result to which the court has come would be the same whether it is to be considered as a note or, in connection with the defendants' indorsement, an accepted draft or order, or, as it is otherwise termed, a certified check, provided it is a note of the bank in the one case, or a draft or check on the bank in the other."

¹⁴ *Piner v. Clary* (1856) 17 B. Mon. (Ky.) 645, holding that the indorser of such a certificate was discharged by laches on the part of the indorsee in failing to make protest and give notice thereof within a reasonable time. This case is approved in *Robertson v. Jones* (1884) 6 Ky. L. Rep. 71. Compare with *Patterson v. Poindexter* (1843) 6 Watts & S. (Pa.) 227, 40 Am. Dec. 554, *infra*, note 48.

¹⁵ *Welton v. Adams* (1854) 4 Cal. 37, 60 Am. Dec. 579. The certificate here recited a deposit of a stated amount of money "payable at our office . . . on return of this certificate with her indorsement herein." The certificate having been lost, the court held that the bank could not be compelled to pay the amount thereof except upon receipt of indemnity against the presentation of the original certificate. This case is approved in *McMillan v. Richards* (1858) 9 Cal. 365, 70 Am. Dec. 655.

In *Kavanagh v. Bank of America* (1909) 239 Ill. 404, 88 N. E. 171, a certificate of deposit reciting that "F. M. Creelman has deposited in this bank \$500, payable in current funds five months from date, with interest at the rate of 3 per cent per annum, on return of this certificate properly indorsed," was held a negotiable instrument, and free from defenses in the hands of a bona fide indorsee. The argument in this case was that the certificate was not a negotiable instrument assignable by indorsement, so as to convey the legal title to the indorsee, because it was not payable to a person named therein as required by the Negotiable Instrument Act. In answer to this argument the court states that the certificate acknowledges the receipt of the money from the depositor, and states that it is payable on return of the certificate

the usual words of negotiability. It has been held in case of a certificate of deposit containing none of the usual words of negotiability, such as "or order" or "or bearer," that the certificate was negotiable.¹⁶ In all but one¹⁶ of the certificates involved in these cases, the cer-

properly indorsed; that the legal effect is a promise to pay to the depositor who is named in the instrument, and the court concludes that the certificate is in effect a promissory note and negotiable under the statute. The *Kavanagh* Case is approved in *Pryor v. Bank of America* (1909) 240 Ill. 100, 88 N. E. 288.

A bank which had issued a certificate of deposit reciting the deposit of money, and containing the provision that it is "payable on the return of this certificate properly indorsed," was held liable to a bona fide holder thereof for the entire amount of the certificate, although it had made a payment thereon to the person to whom it was made payable. *National Bank v. Washington County Nat. Bank* (1875) 5 Hun (N. Y.) 605. The court treats the deposit of money as a bailment, but states that, when the bank has given a certificate of deposit and made the certificate payable on its return properly indorsed, it has added to its original undertaking as a depository "an agreement that they will pay the deposit to the holder of that certificate properly indorsed. They are therefore under a liability as depository, to be ready to redeliver the money whenever demanded; and further, to deliver it to any holder of that certificate properly indorsed. It followed, therefore, that they are liable to a bona fide holder of the certificate, notwithstanding a payment to the original depositor."

A certificate of deposit payable to the depositor in current funds, on the return of the certificate properly indorsed, was treated without discussion in *Old Nat. Bank v. Exchange Nat. Bank* (1908) 50 Wash. 418, 97 Pac. 462, as a negotiable instrument, so as to entitle an indorsee thereof to recover from the bank free from defenses which the bank had against the depositor. The certificate was also treated as a negotiable instrument in that an indorser thereof is subject to the liabilities of an indorser of a negotiable instrument. The bank of deposit was located in a state other than that in which the action was brought, and a statute of the state in which the bank of deposit was located, providing that a negotiable written contract for the payment of money may be transferred by indorsement in like manner with negotiable instruments, and that such indorsement transfers all the rights of the assignor under the instrument to the assignee, subject to all equities and defenses existing in favor of the maker at the time of the indorsement, was urged by the bank of deposit as authorizing it to offset its claim against the depositor. The court, however, did not pass upon the statute; neither did the statute,

tificate was payable on the return thereof "properly indorsed." It has been expressly held that the words "properly indorsed" in a certificate payable to the depositor "on return of this certificate properly indorsed" necessarily imply that the instrument is payable to the depositor or his order.¹⁷ It has been held, apart from the effect of the Negotiable Instrument Law, that, while the usual words of negotiability are "or order" or "or bearer," no fixed form of words is necessary to impart negotiability,¹⁸ so that the words "properly indorsed" may with propriety be interpreted to impart that quality to the instrument, if it is apparent that in using them it was intended to make the instrument negotiable. It is doubtful, however, whether some of the courts holding negotiable such instruments as were involved in the cases cited in this paragraph considered the effect of the absence of the ordinary words of negotiability. The Negotiable Instruments Law provides that an instrument, to be negotiable, must be payable to order or to bearer, or in some states to the order of a specified person or to bearer.¹⁹ Whether a strict compliance with this statute will be required, or whether other words clearly indicating an intent to make the instrument negotiable, will be held sufficient, remains to be seen.

Coming now to the more specific questions connected with the determination of whether a certificate of deposit is a negotiable instrument, it appears that

so far as appears, impose upon an indorser of a non-negotiable instrument the liabilities of an indorser of a negotiable instrument.

Klauber v. Biggerstaff (1879) 47 Wis. 551, 32 Am. Rep. 773, 3 N. W. 357, holding a certificate of deposit reciting a deposit of money by a stated person, "payable to himself in currency on the return of this certificate," to be a negotiable instrument.

Forrest v. Safety Bkg. & T. Co. (1909) 174 Fed. 345, holding that a certificate of deposit reciting that a named person has deposited a stated sum of money "to the credit of himself, payable in current funds on the return of this certificate properly indorsed," is a negotiable instrument.

In *Long v. Straus* (1886) 107 Ind. 94, 57 Am. Rep. 87, 6 N. E. 123, 7 N. E. 763, the court had for its consideration an acknowledgment of the receipt of money in the language, "Received of Joseph S. Long \$1,000, on deposit, in national currency." Upon the first opinion the court did not regard this as an ordinary certificate of deposit, but in the opinion on rehearing the court, after stating that certain implied obligations arose, continued that, if "the in-

such a certificate of deposit is ordinarily likened to a promissory note. The lack of a promise in express words does not prevent its being considered in effect a promissory note. The West Virginia court²⁰ states: "That the paper in question is neither a check nor bill of exchange is admitted, but, by the great weight of authority, it is held to be in legal effect a promissory note, notwithstanding the lack of a promise in express words." It has been stated by the Iowa court that the test to determine whether such a certificate is in effect a promissory note, "perhaps, consists in the inquiry whether the transaction is a deposit, or an immediate debt and engagement to pay."²¹ The court then referring to the certificate of deposit involved in the case at bar,²² states that it has all the requisites of a negotiable promissory note, and continues: "It is conceded to have words of negotiability, in being made payable 'to the order of themselves' and 'to their order.' . . . Then, again, it is a written instrument for the payment of a fixed amount in money absolutely, and subject to no contingency, at a certain time, and it is conclusively certain who is to pay and be paid. These requisites make a good promissory note, provided there is also what amounts, in legal effect, to a promise to pay. . . . For this purpose, no particular form of words is necessary, nor need there be a promise in express language; but it is sufficient if an undertaking to pay is implied on the face

strument we have under consideration had been written out in full, although payable on demand, it would be a promissory note, and it seems, under the principles we have stated, that it is a promissory note, and as such negotiable." The question involved in this case, however, did not require a decision as to the negotiability of the instrument, and the court expressly refrained from deciding this question.

¹⁸ See *Klauber v. Biggerstaff* (1879) 47 Wis. 551, 32 Am. Rep. 773, 3 N. W. 357.

¹⁷ *Forrest v. Safety Bkg. & T. Co.* (1909) 174 Fed. 345.

¹⁹ 3 R. C. L. p. 876, § 61; Dan. Neg. Inst. 6th ed. § 106.

²⁰ This provision is not considered by the court in *Kavanagh v. Bank of America* (1909) 239 Ill. 404, 88 N. E. 171, supra, a case decided under the Negotiable Instruments Act.

²¹ *Pomeroy Nat. Bank v. Huntington Nat. Bank* (1913) 72 W. Va. 534, 79 S. E. 662.

²² *Bean v. Briggs* (1855) 1 Iowa, 488, 63 Am. Dec. 464.

²³ *Ibid.*, see supra, note 12, for form of certificate.

of the note. . . . And so an order or promise to deliver a certain sum of money to A, or to be accountable or responsible to A for a certain sum of money, or that A shall receive it from the maker, is a good promissory note.

. . . The usual express words 'I promise to pay,' etc., it is true, are not contained in this instrument, but an undertaking to pay is clearly implied, as contradistinguished from a mere acknowledgment of a deposit in the nature of a bailment. That the sum is stipulated to draw interest almost necessarily excludes the conclusion that it was a bailment or simple deposit. Then, as to the promise aside from the whole tenor of the instrument, we have the word 'payable' used in two connections, relating to the time of payment, as also to whose order the money was to be paid." The supreme court of Michigan,²³ in dealing with a certificate of deposit which recited that there had been "deposited in this bank \$550, payable to the order of Rufus Cate, with interest if left three months, on the return of this certificate," states that "it contains all the elements necessary to constitute a promissory note, the statement of the deposit being, in legal effect, no more than a statement of the consideration; and the word 'payable,' in the context in which it stands, must be treated as an express promise to pay, as this is the only possible meaning which can be attributed to it. It was payable on demand, no other time being fixed, and the sum was certain, within the meaning of that term as generally used in the definition of a promissory note; the amount of principal was certain at all events and though, if left for three months, interest was to be added from its date, yet there was no time, whether before or after the expiration of the three months, when, if payment had been demanded, the amount due would not have been absolutely cer-

tain,—if before the three months, the stated principal only; if after that time, the interest to be added to that principal." The English privy council states obiter that "the word 'payable' in the certificate in question unquestionably imports a promise to pay the sum deposited."²⁴

While a certificate of deposit is usually treated as being an instrument in the nature of a promissory note, it has been held that a certificate of deposit payable to the order of depositor on the return of the certificate properly indorsed is not a demand promissory note, within the meaning of a statute making promissory notes on demand subject to all the equities between the original parties. Such a certificate is held not to be due until a demand is made and the certificate returned or tendered. Accordingly, one who has taken such a certificate by indorsement from the depositor a short time after its issue may show that he is a bona fide holder thereof and entitled to the rights of a bona fide holder of negotiable paper.²⁵ The Massachusetts court states that "such certificates are issued with the design that they shall be used as money, and taken with as much confidence as the bills of the bank, and to avoid the risk and inconvenience of keeping, carrying, and counting sums of money, and are so regarded in mercantile affairs. . . . Such certificates are not commonly known in the community as promissory notes."

Certain provisions usually found in certificates of deposit have been the subject of adjudication by the courts. In some cases it is admitted that a certificate of deposit as such is a negotiable instrument,²⁶ the argument being against the negotiability of the particular one involved in the case at bar.

The fact that such instruments are made payable on return of the certificate is not such a contingency as affects the negotiable character thereof.²⁷ The re-

²³ Cate v. Patterson (1872) 25 Mich. 191.
²⁴ Micher v. Voyer (1874) L. R. 5 P. C. (Eng.) 461, 30 L. T. N. S. 506, 22 Week. Rep. 849.

²⁵ Shute v. Pacific Nat. Bank (1884) 136 Mass. 487.

The maturity of certificates of deposit is discussed in the note to First Nat. Bank v. Security Nat. Bank, 15 L.R.A. 386.

²⁶ Hatch v. First Nat. Bank (1900) 94 Me. 348, 80 Am. St. Rep. 401, 47 Atl. 908; First Nat. Bank v. Greenville Nat. Bank (1892) 84 Tex. 40, 19 S. W. 334.

²⁷ Bingham v. Newton Bank (1918) — Ind. App. —, 118 N. E. 318; Cassidy v. First L.R.A. 1918C.

Nat. Bank (1882) 30 Minn. 86, 14 N. W. 363, approved in Mitchell v. Easton (1887) 37 Minn. 335, 33 N. W. 910.

Hatch v. First Nat. Bank (1900) 94 Me. 348, 80 Am. St. Rep. 401, 47 Atl. 908. The court here states that the language, "on return of this certificate properly indorsed," expresses no more than the law implied as the duty of the holder in the absence of any such stipulation.

Kirkwood v. First Nat. Bank (1894) 40 Neb. 484, 24 L.R.A. 444, 42 Am. St. Rep. 683, 58 N. W. 1016; Frank v. Wessels (1876) 64 N. Y. 165; Pomeroy Nat. Bank v. Huntington Nat. Bank (1913) 72 W. Va. 534, 79 S. E. 662. See Tobin v. McKinney

quirement that the certificate of deposit be payable on return of the certificate "properly indorsed" has been held not to render it non-negotiable.²⁸ One court taking this view argues that "a 'proper' indorsement is such an indorsement as the law merchant requires in order to authorize a payment to the holder. If presented by the original payee, no indorsement would be proper, or at least necessary; if presented by another, 'proper indorsement' to show his title would be requisite. We do not think that this provision operates as a condition destroying the negotiability of the instrument."²⁹

Even though a demand upon the bank is necessary before action can be brought upon the instrument, thus distinguishing it from a promissory note, the negotiable character of the instrument is not destroyed.³⁰

A provision that the certificate shall bear interest if it remains a stated period does not render the certificate uncertain as to amount, so as to destroy its negotiability.³⁰ The Maine court³¹ argues in the case of a certificate payable on demand, that "if payment be demanded at any time within six months [the time fixed for the payment of interest], the amount payable is certain; it is the face of the certificate. If payment be not demanded until after six months, the amount pay-

able is equally certain; it is the face of the certificate and interest to the time of payment. In this respect, the certificate is like a note payable at a time certain, with interest at a specified rate from the date of the note, or from maturity if it is not paid at maturity."

A provision that a notice shall be given a stated time before payment can be required does not prevent the instrument from being negotiable.³²

One of the requisites of a negotiable promissory note is that it be payable in money. Whether when a note is payable in current funds or in currency it is negotiable within this requirement is a question upon which there is not an agreement among the authorities.³³ The same question arises in case of certificates of deposit payable in "currency" or in "current funds," etc. It is apparent that a discussion limited to certificates of deposit cannot adequately cover this question; it is necessary to consider the cases dealing with instruments other than certificates of deposit. As to this question, therefore, this discussion does not purport to be exhaustive. The same difference of opinion that exists in cases of commercial paper generally is found to exist in cases of certificates of deposit; one line of authorities holds that such certificates payable in current funds or in currency are non-negotiable,³⁴ at least that they are prima

(1901) 15 S. D. 257, 91 Am. St. Rep. 694, 88 N. W. 572, *supra*.

An instrument in the form of a certificate of deposit, which apparently was issued by an individual for money deposited with him, is stated not to be payable on a contingency because of the fact that the instrument is made payable "on the return of this certificate." *Smilie v. Stevens* (1866) 39 Vt. 315.

²⁸ *Kirkwood v. First Nat. Bank* (1894) 40 Neb. 484, 24 L.R.A. 444, 42 Am. St. Rep. 683, 58 N. W. 1016.

²⁹ *Pardee v. Fish* (1875) 60 N. Y. 265, 19 Am. Rep. 176.

³⁰ *Hatch v. First Nat. Bank* (1900) 94 Me. 348, 80 Am. St. Rep. 401, 47 Atl. 908; *Cate v. Patterson* (1872) 25 Mich. 191. see text to note 23, *supra*; *Kirkwood v. First Nat. Bank* (Neb.) *supra*.

Richer v. Voyer (Eng.) *supra* (dictum), approved in *Re Central Bank* (1889) 17 Ont. Rep. 574.

³¹ *Hatch v. First Nat. Bank* (1900) 94 Me. 348, 80 Am. St. Rep. 401, 47 Atl. 908.

³² *Richer v. Voyer* (1874) L. R. 5 P. C. (Eng.) 461, 30 L. T. N. S. 506, 22 Week. Rep. 849 (dictum); *Re Central Bank* (Ont.) *supra*.

³³ See 1 Dan. Neg. Ins. § 56, p. 76.

³⁴ *Huse v. Hamblin* (1870) 29 Iowa, 501, 4 Am. Rep. 244, holding a certificate of L.R.A.1918C.

deposit payable "in currency" to be non-negotiable.

Johnson v. Henderson (1877) 76 N. C. 227 (payable "in current funds"); *Ford v. Mitchell* (1862) 15 Wis. 304 (payable "in currency"); *Platt v. Sauk County Bank* (1863) 17 Wis. 222 (payable "in current funds"); *Lindsey v. McClelland* (1864) 18 Wis. 481, 86 Am. Dec. 786 (payable "in current funds").

The foregoing Wisconsin cases are practically overruled in *Klauber v. Biggerstaff* (1879) 47 Wis. 551, 32 Am. Rep. 773, 3 N. W. 357, although the court there states that, in upholding the negotiable quality of the certificate of deposit in the case at bar, "it has not been found necessary expressly to overrule any of those cases," referring to the foregoing Wisconsin cases.

National State Bank v. Ringel (1875) 51 Ind. 393, holding that the depositor is not compelled to give a bond of indemnity in order to recover the amount of the certificate from the bank, where the certificate has been lost.

The court in *Krieg v. Palmer Nat. Bank* (1912) 51 Ind. App. 34, 95 N. E. 613, recognizes that there is considerable difference in the decisions as to whether a bill or note payable in current funds is negotiable, but adheres to the rule established in Indiana that such an instrument is not negotiable

facie non-negotiable, but that parol evidence is competent to show that the term "currency" or "current funds" describes that which by custom or law is money.³⁵

On the contrary, it has been held that a certificate payable in current funds or in currency is negotiable.³⁶ The latter seems to be the rule followed in the recent cases, and arises doubtless from the fact that currency is now practically synonymous with money. The Indiana court³⁷ argues that, "beginning with the issue of United States Treasury notes, declared to have the quality of legal tender, it has been the practice of drawers of bills of exchange and makers of promissory notes to indicate payment in gold or silver or such notes, and from that time the terms 'current funds' and 'currency' have been used to designate any of these, all being current and declared by statute to be legal tender. The better rule now seems to be that instruments of the kind in question, payable in 'current funds' or in 'currency,' are payable in money. . . . We therefore hold that this certificate of deposit is payable in money, and is negotiable as an inland bill of exchange." The Maine court³⁸ states, in its discussion of this question,

under the law merchant. Accordingly, a certificate of deposit payable "in current funds" was held non-negotiable under the law merchant, but negotiable by virtue of the Indiana statute. The Indiana statute is not set out, but in the headnote in the official report of the case is stated to make all promissory notes, bills of exchange, bonds, or other instruments in writing negotiable by indorsement thereon.

The above Indiana cases overruled by *Millikan v. Security Trust Co. (Ind.)* infra.

³⁵ It is stated in *Huse v. Hamblin* (1870) 29 Iowa, 501, 4 Am. Rep. 244, that "it is probable that competent evidence would have been admitted, if offered, to prove that the word 'currency' used in the instrument describes that which by custom or law is money, and thus the certificates would have been shown to be commercial paper, . . . but the record does not show that any such evidence was offered."

³⁶ *Millikan v. Security Trust Co. (1918)* — Ind. —, 118 N. E. 568, overruling *National State Bank v. Ringel and Krieg v. Palmer Nat. Bank (Ind.)* supra; *Hatch v. First Nat. Bank* (1900) 94 Me. 348, 80 Am. St. Rep. 401, 47 Atl. 908.

Kirkwood v. First Nat. Bank (1894) 40 Neb. 484, 24 L.R.A. 444, 42 Am. St. Rep. 683, 58 N. W. 1016; *Pardee v. Fish* (1875) 60 N. Y. 265, 19 Am. Rep. 176 (payable in current bank notes); *Howe v. Hartness* (1860) 11 Ohio St. 449, 78 Am. Dec. 312; *Pomeroy Nat. Bank v. Huntington Nat. Bank* (1913) 72 W. Va. 534, 79 S. E. 662.

Klauber v. Biggerstaff (1879) 47 Wis. L.R.A. 1918C.

that "we think that the modern and better doctrine is that the term 'current funds,' when used in commercial transactions as the expression of the medium of payment, should be construed to mean current money, funds which are current by law as money, and that when thus construed a certificate of deposit payable in current funds is in this respect negotiable."

A certificate of deposit which recites the deposit of "twenty-one hundred and eighty and ⁰⁰/₁₀₀ dollars in cks., payable to the order of himself, on the return of this certificate properly indorsed," does not contain a promise to pay money, and is therefore not negotiable.³⁹

Special statutory requirements as to negotiability.

Negotiability may depend upon special statutory requisites; if the certificate does not comply with these, it is not negotiable.⁴⁰ Thus, under a statute interpreted to require that paper be payable at a bank in order to be negotiable, a certificate of deposit has been held to be non-negotiable where it is not expressly made payable at a bank.⁴¹ But the contrary view has been taken and the

551, 32 Am. Rep. 773, 3 N. W. 357, holding that a certificate of deposit payable "in currency" is negotiable. A statute declared instruments negotiable which contained a promise to pay "any sum of money as therein mentioned." A previous statute had made instruments containing a promise to pay "any sum of money therein mentioned" negotiable, and the court holds that the insertion of the word "as" in the amended statute indicated an intention to make instruments payable in currency negotiable.

This is expressly made the rule by a statute which governed *Piner v. Clary* (1856) 17 B. Mon. (Ky.) 645. See *Tobin v. McKinney* (1901) 15 S. D. 257, 91 Am. St. Rep. 694, 88 N. W. 572, supra, note 12.

³⁷ *Millikan v. Security Trust Co. (1918)* — Ind. —, 118 N. E. 568.

³⁸ *Hatch v. First Nat. Bank* (1900) 94 Me. 348, 80 Am. St. Rep. 401, 47 Atl. 908.

³⁹ *First Nat. Bank v. Greenville Nat. Bank* (1892) 84 Tex. 40, 19 S. W. 334. It was admitted in this case that the abbreviation "cks." stood for checks.

⁴⁰ *Renfro Bros. v. Merchants & M. Bank* (1887) 83 Ala. 425, 3 So. 776.

⁴¹ *Renfro Bros. v. Merchants & M. Bank* (Ala.) supra. The fact that the certificate was headed with the names of the bankers by whom issued and the city or town in which they did business, and that it was payable on the return of the certificate, was held not to be a naming of the bank as the place of payment, within the meaning of such a statute. The purpose of such a statute is to require the place of payment

ordinary certificate of deposit held to be payable at a bank within the meaning of these statutory requirements.⁴²

The omission of the words, "for value received," renders the instrument non-negotiable under some statutes.⁴³

III. *Minority rule that certificate is not a negotiable instrument.*

The view has been taken that a cer-

to be designated with certainty, and not left to inference or implication. The certificate of deposit was accordingly held subject, in the hands of an assignee, to payment and set-off under the provisions of the statute that all contracts and writings, except bills of exchange and promissory notes payable in money at a bank or private banking house and paper issued to circulate as money, shall be subject to all payments, set-offs, and discounts had or possessed against the same previously to notice of the assignment or transfer.

⁴² *Bingham v. Newton Bank* (1918) — Ind. App. —, 118 N. E. 318, holding that a certificate of deposit containing the name of the issuing bank at the top, and certifying to the deposit of money, which is made "payable to the order of self . . . on the return of this certificate properly indorsed," is payable at a bank within the meaning of such a statute.

Pomeroy Nat. Bank v. Huntington Nat. Bank (1913) 72 W. Va. 534, 79 S. E. 662.

It was not necessary for the court, in *Krieg v. Palmer Nat. Bank* (1912) 51 Ind. App. 34, 95 N. E. 613, to decide whether the certificate of deposit was payable at a bank, nor did it do so; but it expressed an opinion that "a fair and reasonable interpretation of the instrument leads to the conclusion that it is payable at the Huntington County Bank, Huntington, Indiana." The certificate in question contained the bank's name at the top and recited that the depositor had deposited in the bank a stated sum of money "payable to the order of himself in current funds on the return of this certificate properly indorsed."

⁴³ *International Bank v. German Bank* (1877) 3 Mo. App. 362, reversed on other grounds in (1879) 71 Mo. 183, 36 Am. Rep. 468; *Savings Bank v. National Bank* (1889) 38 Fed. 800 (involving a Missouri contract).

⁴⁴ *Patterson v. Poindexter* (1843) 6 Watts & S. (Pa.) 227, 40 Am. Dec. 554.

Charnley v. Dulles (1844) 8 Watts & S. (Pa.) 353, holding a certificate of deposit reciting that a named person "has this day deposited in this bank \$3,000 for the use of J. S. Skinner, and payable only to his order upon the return of this certificate," not a negotiable instrument.

Lebanon Bank v. Mangan (1857) 28 Pa. 452, holding a certificate reciting that the depositor "has deposited in this bank . . . subject to his order, and payable only on the return of this certificate," not a negotiable instrument.

Loudon Sav. Fund Soc. v. Hagerstown L.R.A. 1918C.

tificate of deposit is not a negotiable instrument in the ordinary meaning of that term.⁴⁴ The certificate is likened to a promissory note, and the theory upon which this conclusion is based is that a promissory note must contain an express promise to pay; an implied promise is not sufficient.⁴⁵ A promise to pay on the return of the certificate makes the promise contingent according to these

Sav. Bank (1860) 36 Pa. 498, 78 Am. Dec. 390, holding a certificate of deposit reciting the deposit of money payable to the order of the depositor six months after date, in currency, on the return of the certificate, not a negotiable instrument.

Dempsey v. Harm (1887) 7 Sadler (Pa.) 428, 20 W. N. C. 266, 12 Atl. 27, holding a certificate reciting the deposit of money payable to the depositor or order on the return of the certificate properly indorsed not a negotiable instrument.

A mint certificate which is evidence of so much bullion in the mint is held not to be negotiable in *Hegeman v. McCall* (1855) 1 Phila. (Pa.) 529.

But in *Dutton v. Merchants' Nat. Bank* (1884) 16 Phila. (Pa.) 94, a clearing house duebill reciting that there is "due by the Merchants National Bank to banks \$1,900. This duebill is only good when signed by one and countersigned by another authorized person, and is payable only in the exchange through the clearing house the day after issue," is a negotiable instrument; the court stating that the whole tenor of the instrument, together with the usual custom of the banks and of the mercantile community, tends to establish the fact that these instruments are regarded as payable to bearer as such deposited as cash, and paid on presentation by the bank of issue through the clearing house.

The Pennsylvania Negotiable Instrument Act has been interpreted by a Federal court to include certificates of deposit in its description of negotiable instruments. *Forrest v. Safety Bkg. & T. Co.* (1909) 174 Fed. 245.

O'Neill v. Bradford (1844) 1 Pinney (Wis.) 390, 42 Am. Dec. 574. That such instruments are not negotiable was, however, doubted in this state. In *Lindsey v. McClelland* (1864) 18 Wis. 481, 86 Am. Dec. 786, and in the subsequent case of *Klauber v. Biggerstaff* (1879) 47 Wis. 551, 32 Am. Rep. 773, 3 N. W. 357, the *O'Neill* Case was finally overruled and such certificates held negotiable. The rule of the *Klauber* Case has subsequently been followed in this jurisdiction. See *Curran v. Witter* (1887) 68 Wis. 16, 60 Am. Rep. 827, 31 N. W. 706, note 12, *supra*.

⁴⁵ The promise to pay contained in a certificate reciting that the depositor, naming him, "has deposited in this bank, payable twelve months from 1st May, 1839. . . . and payable only to their order upon the return of this certificate," is not an express promise within the meaning of this

authorities, and therefore prevents the certificate from being a promissory note.⁴⁶ The agreement as to interest has also been held to prevent some certificates being regarded as promissory notes.⁴⁷ Such a certificate does not be-

come a check or inland bill of exchange upon the indorsement thereof.⁴⁸ But for purposes of transfer merely, such a certificate is held to be transferable by indorsement.⁴⁹

rule, but an implied promise. *Patterson v. Poindexter* (Pa.) supra.

Lebanon Bank v. Mangan (Pa.) supra; *O'Neill v. Bradford* (Wis.) supra, overruled, see comment in note 44.

⁴⁶ *Patterson v. Poindexter* and *Lebanon Bank v. Mangan* (Pa.) supra.

⁴⁷ Thus, in *Patterson v. Poindexter* (Pa.) supra, a certificate of deposit issued on July 2d, 1839, and payable "twelve months from 1st May, 1839, with 5% (five per cent) till due, per annum," is held not to be such a plain, unambiguous, and unconditional promise to pay as to make of the instrument a promissory note.

⁴⁸ *Patterson v. Poindexter* (1843) 6 Watts & S. (Pa.) 227, 40 Am. Dec. 554. Compare with *Piner v. Clary* (1856) 17 B. Mon. (Ky.) 645, supra, note 14.

The holding in *O'Neill v. Bradford*, supra, note 44, that such a certificate is not a bill of exchange, has been overruled.

⁴⁹ *Patterson v. Poindexter* and *Charney v. Dulles* (Pa.) supra.

In *O'Neill v. Bradford*, overruled, supra, note 44, the court states that the certificate is "probably" transferable by indorsement. W. A. E.

KENTUCKY COURT OF APPEALS.

STEWART DRY GOODS COMPANY, Appt.,
v.

MRS. A. L. HUTCHISON.

(177 Ky. 757, 198 S. W. 17.)

Master and servant — holding over after expiration of year — effect of increase of salary.

1. The mere increase of an employee's salary in accordance with the original understanding does not change the presumption that one who, having been employed for a year, continues in service after its expiration, is to serve for another year.

For other cases, see *Master and Servant*, I. e, in *Dig. 1-52 N. S.*

Same — damages — value of services.

2. One wrongfully discharged from another's service is not bound to credit on the claim for breach of contract the value of his services in a business of his own which he undertakes to establish, if such business proves to be unprofitable.

For other cases, see *Damages*, III. s, in *Dig. 1-52 N. S.*

Same — breach of contract — absence of evidence.

3. The jury cannot consider in an action for damages for wrongful discharge of an employee, the question of his own breach of contract, if there is no evidence in the case as to the terms of the contract.

For other cases, see *Master and Servant*, I. e, in *Dig. 1-52 N. S.*

(November 16, 1917.)

Note. — As to presumption from continuing in employer's service after the expiration of the original term, see annotation following this case, post, 706.

Generally, as to remedy of wrongfully

A PPEAL by defendant from a judgment of the Common Pleas Branch, Third Division of the Circuit Court for Jefferson County, in favor of plaintiff in an action brought to recover damages for breach of a contract of employment. Affirmed.

The facts are stated in the Commissioner's opinion.

Mr. R. C. Kinkadee for appellant.

Mr. Matt O'Doherty for appellee.

Clay, C., filed the following opinion:

Mrs. A. L. Hutchison brought this suit against the Stewart Dry Goods Company to recover damages for a breach of contract of employment. From a verdict and judgment in her favor, the defendant company appeals.

According to plaintiff's evidence, she was employed by the defendant in January, 1912, as manager of its lace and trimmings department, for a term of one year at an agreed salary of \$1,500 a year, with the further understanding, however, that her salary was to be increased from time to time if such increase was deserved. Pursuant to this agreement her salary was first increased to \$1,800 per year, and in 1914 to \$2,400 per year. She continued in defendant's service from January, 1912, to August, 1915, when she claimed she was wrongfully discharged. She further testified that after her discharge, she made diligent efforts to find other employment for the balance of the year, but was unable to do so because she was discharged in August, and contracts for such employment were usually made in Jan-

discharged servant by action for damages for breach of contract. see note to *Howay v. Going-Northrup Co.* 6 L.R.A. (N.S.) 49; and specifically as to effect of servant engaging in his own business, see page 104.

uary or July. Failing to find other employment she entered business for herself in December, 1915, but this venture resulted in a loss. According to the evidence for defendant, plaintiff was not employed for any definite period of time, and she was discharged because she failed to observe the same business hours usually observed by its other employees.

1. While we have not had occasion to pass on the precise question, it is the well-settled rule in other jurisdictions that where one enters the service of another for a definite period, and continues in the employment after the expiration of that period without a new contract, it is presumed that the old contract continues; and this presumption must prevail, unless overcome by a new agreement or facts sufficient to show that a different hiring was intended by the parties. Hence, where an employee, originally hired for a year, is allowed to go on working after the end of the term, he is deemed to be serving under a new contract for another year, which results by operation of law from a continuance of the employment. *Labatt, Mast. & S. § 141; 26 Cyc. 976; Glendale Fruit Co. v. Hirst, 6 Ariz. 428, 59 Pac. 103; Ewing v. Janson, 57 Ark. 237, 21 S. W. 430; Hermann v. Littlefield, 109 Cal. 430, 42 Pac. 443; State Bd. of Agri. v. Meyers, 20 Colo. App. 139, 77 Pac. 372; Standard Oil Co. v. Gilbert, 84 Ga. 714, 8 L.R.A. 410, 11 S. E. 491; Crane Bros. Mfg. Co. v. Adams, 142 Ill. 125, 30 N. E. 1030; Lalande v. Aldrich, 41 La. Ann. 307, 6 So. 28; Lister's Agri. Chemical Works Co. v. Pender, 74 Md. 15, 21 Atl. 636; Sines v. Wayne County, 58 Mich. 303, 25 N. W. 485; Bennett v. Mahler, 90 App. Div. 22, 85 N. Y. Supp. 669; Tatterson v. Suffolk Mfg. Co. 106 Mass. 56; Laughlin v. School Dist. 98 Mich. 523, 57 N. W. 571; Chipley v. Atkinson, 23 Fla. 206, 11 Am. St. Rep. 367, 1 So. 934. Though conceding this to be the rule, counsel for the defendant insist that it is not applicable to this case because plaintiff herself admits that the original contract was changed by the subsequent increases in her salary. In considering the effect of this change, it must be remembered that according to the testimony of plaintiff, such increases were contemplated by the original contract. Not only so, but these changes affected only the amount of plaintiff's compensation, and not the duration or period of her employment. These changes were not sufficient, therefore, to rebut the legal presumption that the original term or period of plaintiff's employment was extended for each of the subsequent years by plaintiff's continuing in the service of the defendant after the expiration of those periods. In this connection it is also suggested that the acceptance of a proposi-*

tion for employment at a specified rate per year is not an employment for a year, but one merely at will. *Cuppy v. Stollwerck Bros. 158 App. Div. 628, 143 N. Y. Supp. 967; Doolittle v. Pacific Coast Safe & Vault Co. 79 Or. 498, 154 Pac. 753. While this proposition may be true, plaintiff does not claim that she was merely employed at so much per year, but states emphatically that she was originally employed for a period of one year. It follows that the above rule has no application to the facts of this case.*

2. The point is also made that the trial court erred in failing to instruct the jury to diminish plaintiff's damages by the reasonable value of her services in the business in which she engaged in the month of December, 1915. It is the rule that where an employee under contract to perform services for a stipulated time is wrongfully discharged by his employer before the expiration of the term of his services, the measure of damages is the contract price, less what the discharged employee has earned or might by reasonable diligence have earned. *John C. Lewis Co. v. Scott, 95 Ky. 484, 44 Am. St. Rep. 251, 26 S. W. 192. Though a discharged employee is only required to seek other like employment, his damages will be reduced by amounts earned at any employment during the unexpired term. Elliott, Contr. § 2156; Tenzer v. Gilmore, 114 Mo. App. 210, 89 S. W. 341; Toplitz v. Ullman (N. Y. City Ct.) 46 N. Y. S. R. 294, 20 N. Y. Supp. 50, affirmed in 2 Misc. 130, 20 N. Y. Supp. 863. Hence it is held that if a discharged employee engages in business for himself during the unexpired term, his damages should be reduced by his earnings in that business. While there is some difference of opinion as to whether his earnings should be measured by profits or the pecuniary value of his services in the business (Lee v. Hampton, 79 Miss. 321, 30 So. 721; Kramer v. Wolf Cigar Stores Co. 99 Tex. 602, 91 S. W. 775; Richardson v. Hartmann, 68 Hun, 9, 22 N. Y. Supp. 645; Huntington v. Ogdensburgh & L. C. R. Co. 33 How. Pr. 416), all the authorities agree that the time of the discharged employee must be profitably occupied, and we have been unable to find any case holding that the damages should be reduced where his services in his own behalf did not result in any profit or pecuniary benefit of any kind. On the contrary, it has been held that where the business in which the discharged employee engaged was unprofitable, it was immaterial and improper to say why such result was brought about. *Heagy v. Irondale Lead Co. 101 Mo. App. 361, 73 S. W. 1006. It has also been held that where the discharged employee participates in the conduct of a partnership business, and it was impossible**

to tell whether the profits were derived from the capital invested by him, or from his personal services in the partnership business, or, if derived from both, what part thereof arose from such services, the jury were not required to reduce his damages by the amount of such profits. *Kyle v. Pou*, 96 Ga. 166, 23 S. E. 114. Here the evidence shows that plaintiff engaged in business for herself for a period of one month during the unexpired term of her contract. Instead of proving remunerative, the business did not pay expenses, and plaintiff lost a portion of her capital. It was not made to appear that her efforts, though unprofitable for that month, resulted in building up a business which subsequently proved profitable. In other words, her services were of no pecuni-

ary value whatever. Under these circumstances, the refusal to give an instruction authorizing a reduction of damages on account of such services was not error.

3. Lastly it is insisted that the trial court erred in refusing to give the following instruction offered by the defendant: "If the jury believe from the evidence that the plaintiff, after notice that she was not performing her duties in accordance with her contract, failed or refused to so perform them, then the law is for the defendant, and the jury should so find."

This instruction was properly refused because no witness claiming to know the terms of the original contract of employment testified to any violation thereof by plaintiff. Judgment affirmed.

Annotation—Presumption from continuing in employer's service after the expiration of the original term.

Generally, as to duration of contract of hiring which specifies no term, but fixes compensation at a certain amount per day or month or year, see note to *Warder v. Hinds*, 25 L.R.A.(N.S.) 529, and the supplemental annotation to *Reasnor v. Watts, R. & Co.* 51 L.R.A.(N.S.) 629.

At common law—general rule.

The great weight of authority is to the effect that an employee originally hired for a definite term who continues

to render the same services after the expiration of such term without explicitly entering into a new agreement is prima facie presumed or deemed to be serving under a new contract having the same terms and conditions as the original one, the continuance in the employment of the hirer with the consent of the latter after the time specified in the contract being equivalent to a new hiring for the same length of time, on the same terms.¹ And in at least one juris-

¹ The following cases either announce or recognize this rule: *Horton v. Wollner* (1882) 71 Ala. 452; *Ewing v. Janson* (1893) 57 Ark. 237, 21 S. W. 430; *Hermann v. Littlefield* (1895) 109 Cal. 430, 42 Pac. 443; *State Bd. of Agri. v. Meyers* (1904) 20 Colo. App. 139, 77 Pac. 372; *Standard Oil Co. v. Gilbert* (1890) 84 Ga. 714, 8 L.R.A. 410, 11 S. E. 491; *Grover & B. Sewing Mach. Co. v. Bulkley* (1868) 48 Ill. 189; *Ingalls v. Allen* (1890) 132 Ill. 170, 23 N. E. 1026, reversing on other grounds (1889) 33 Ill. App. 458; *Crane Bros. Mfg. Co. v. Adams* (1892) 142 Ill. 125, 30 N. E. 1030; *Morgan & Wright v. McCaslin* (1904) 114 Ill. App. 427, affirmed in (1904) 213 Ill. 358, 72 N. E. 1066; *Moline Plow Co. v. Booth* (1885) 17 Ill. App. 574; *Mears v. O'Donoghue* (1895) 58 Ill. App. 345; *Fish v. Marzluff* (1906) 128 Ill. App. 549; *Akron Mill. Co. v. Leiter* (1914) 57 Ind. App. 394, 107 N. E. 99; *STEWART DRY GOODS Co. v. HUTCHINSON*, ante, 704; *McCullough Iron Co. v. Carpenter* (1887) 67 Md. 554, 11 Atl. 176; *Lister's Agri. Chemical Works v. Pender* (1891) 74 Md. 15, 21 Atl. 686; *Travelers' Ins. Co. v. Parker* (1900) 92 Md. 22, 47 Atl. 1042; *Bell v. Peper Tobacco Warehouse Co.* (1907) 205 Mo. 475, 103 S. W. 1014; *Morris v. Z. T. Briggs Photographic Supply Co.* (1915) 192 Mo. App. 145, 179 S. W. 783; *Hale v. Shee-*

han (1894) 41 Neb. 102, 59 N. W. 554; *Home F. Ins. Co. v. Barber* (1903) 67 Neb. 644, 60 L.R.A. 927, 108 Am. St. Rep. 716, 93 N. W. 1024; *Leidigh v. Keever* (1903) 5 Neb. (Unof.) 207, 97 N. W. 801; *Fitch v. Martin* (1905) 74 Neb. 538, 104 N. W. 1072; *Capron v. Strout* (1876) 11 Nev. 304, 9 Mor. Min. Rep. 391; *Passino v. Brady Brass Co.* (1912) 83 N. J. L. 419, 84 Atl. 615; *Huntingdon v. Claffin* (1868) 38 N. Y. 182; *Adams v. Fitzpatrick* (1891) 125 N. Y. 124, 28 N. E. 143, affirming (1889) 24 Jones & S. 580, 5 N. Y. Supp. 181; *Bacon v. New Home Sewing Mach. Co.* (1891) 59 Hun. 624, 37 N. Y. S. R. 56, 13 N. Y. Supp. 359, affirmed without opinion in (1892) 129 N. Y. 658, 30 N. E. 65; *Wallace v. Devlin* (1885) 36 Hun (N. Y.) 275; *Mason v. Secor* (1894) 76 Hun, 178, 27 N. Y. Supp. 570; *Mendelson v. Bronner* (1908) 124 App. Div. 396, 108 N. Y. Supp. 807; *Mason v. New York Produce Exch.* (1908) 127 App. Div. 282, 111 N. Y. Supp. 163; *Caldwell v. Caldwell Co.* (1904) 88 N. Y. Supp. 970; *Hodge v. Newton* (1888) 14 Daly, 372, 13 N. Y. S. R. 139; *Kelly v. Carthage Wheel Co.* (1900) 62 Ohio St. 598, 57 N. E. 984, reversing (1898) 8 Ohio S. & C. P. Dec. 549; *Wallace v. Floyd* (1857) 29 Pa. 184, 72 Am. Dec. 620; *Ranck v. Albright* (1860) 36 Pa. 367; *Booth v. National India Rubber Co.* (1897)

diction such a presumption is declared by express statutory provision to exist. Thus, in California, by Civil Code, § 2012, it was expressly provided that "where after the expiration of an agreement respecting wages and the term of service the parties continue the relation of master and servant they are presumed to have renewed the agreement for the same wages and term of service."²

But this presumption that the employment is continued upon the same conditions and terms is rebuttable and may be overcome by proof of a new contract, or of facts and circumstances that show that the parties in fact understood that the terms of the old contract were not to apply to the continued service.³ And the questions whether the original contract was continued or whether it was abandoned and a new contract made are ones exclusively of fact,⁴ with the burden of proof upon the party maintaining the existence of a new and independent relation, where the other party affirmatively asserts the presumption of a continuance of the original contract.⁴

Some of the decisions go no further than to assert that the original hiring and the bare continuance of service after the expiration of the definite term are facts from which a jury may

infer that the contract of service has been renewed by implication for another term of the same length and at the same salary as the original contract called for.⁵ And where it also appears that the original contract provided that if either party did not wish to continue or renew it, he should give thirty days' notice, and no notice was given, it has been held that the facts justify a finding of an implied renewal.⁶ However, the above rulings are perhaps not in conflict with the general rule that there is a presumption of continuance, but have taken the form indicated because of the way in which the questions arose, and are in effect but another form of the rule as laid down by one case⁷ which declares that if nothing is said or done by either party at the end of the term to terminate the contract, but, on the contrary, the person performing service is allowed to continue on without objection, "the facts raise the presumption" from which it may be found that both parties have assented to the contract continuing in force for another term.

In one jurisdiction,⁸ in seeming conflict with the general rule stated supra, it has been expressly held that a servant employed for one year at a definite salary, who continued to perform the same services after the expiration of the

19 R. I. 696, 36 Atl. 714; Houston Ice & Brewing Co. v. Nicolini (1906) — Tex. Civ. App. —, 96 S. W. 84; Conrad v. Ellison-Harvey Co. (1917) 120 Va. 458, 91 S. E. 763; Norfolk Hosiery & Underwear Mills Co. v. Westheimer (1917) — Va. —, 92 S. E. 922; Kellogg v. Citizens' Ins. Co. (1896) 94 Wis. 554, 69 N. W. 362; Dickinson v. Norwegian Plow Co. (1898) 101 Wis. 157, 76 N. W. 1108; Appleton Waterworks Co. v. Appleton (1907) 132 Wis. 563, 113 N. W. 44; Halter v. Goody (1911) 4 Sask. L. R. 161, 17 West. L. R. 261; Short v. Laery (1891) 11 N. Z. L. R. (S. C.) 17, as quoted in 1 Labatt, Mast. & S. p. 711. And see infra, text and notes 15 and 39.

² See Gabriel v. Bank of Suisun (1904) 145 Cal. 266, 78 Pac. 736.

³ See, generally, Standard Oil Co. v. Gilbert (1890) 84 Ga. 714, 8 L.R.A. 410, 11 S. E. 491; Mears v. O'Donoghue (1895) 58 Ill. App. 345; Akron Mill. Co. v. Leiter (1914) 57 Ind. App. 394, 107 N. E. 99; STEWART DRY GOODS CO. v. HUTCHISON, ante, 704; Faber v. Abatoir Co. 3 La. A. (Orleans) 3, as cited in 1914-17 Cyc. Ann. p. 1848; McCullough Iron Co. v. Carpenter (1887) 67 Md. 554, 11 Atl. 176; Travelers Ins. Co. v. Parker (1900) 92 Md. 22, 47 Atl. 1042; Hale v. Sheehan (1894) 41 Neb. 102, 59 N. W. 554; Home F. Ins. Co. v. Barber (1903) 67 Neb. 644, 60 L.R.A. 927, 108 Am. St. Rep. 716, 93 N. W. 1024; Summers v. Phenix Ins. Co. (1906) 50 Misc. 181, 98 L.R.A. 1918C.

N. Y. Supp. 226; and Conrad v. Ellison-Harvey Co. (1917) 120 Va. 458, 91 S. E. 763. And see also infra, text and notes 35 and 45.

⁴ Travelers Ins. Co. v. Parker (1900) 92 Md. 22, 47 Atl. 1042.

⁵ Connor v. Hackley (1841) 2 Met. (Mass.) 613; Tatterson v. Suffolk Mfg. Co. (1870) 106 Mass. 56; O'Connor v. Briggs (1903) 182 Mass. 387, 65 N. E. 836; Dunton v. Derby Desk Co. (1904) 186 Mass. 35, 71 N. E. 91; Maynard v. Royal Worcester Corset Co. (1908) 200 Mass. 1, 85 N. E. 877; Tallon v. Grand Portage Copper Min. Co. (1884) 55 Mich. 147, 20 N. W. 878, followed in Laughlin v. School Dist. (1894) 98 Mich. 523, 57 N. W. 571; Chamberlain v. Detroit Stove Works (1894) 103 Mich. 124, 61 N. W. 532; Wright v. Elk Rapids Iron Co. (1902) 129 Mich. 543, 89 N. W. 335.

⁶ Allen v. Chicago Pneumatic Tool Co. (1910) 205 Mass. 569, 91 N. E. 887.

⁷ Sines v. Wayne County (1885) 58 Mich. 503, 25 N. W. 485. And see Laughlin v. School Dist. (1894) 98 Mich. 523, 57 N. W. 571.

⁸ Harnwell v. Parry Sound Lumber Co. (1897) 24 Ont. App. Rep. 110. And see this case as set out infra, text and note 19. But see also Halter v. Goody (1911) 4 Sask. L. R. 161, 17 West. L. Rep. 261, wherein the Harnwell Case was seemingly not regarded as in conflict with the general rule.

term, without any new agreement, is not presumed to be serving under a new contract having the same terms and conditions as the original one. This decision was put upon the ground that the employer's tacit acceptance of the services after the beginning of the second year did not, of itself, justify the inference that the new contract was, like the original one, binding for a year.

And it has been held that a continuance in service after the expiration of a contract for a definite period does not raise a presumption that the terms on which the same services are rendered are the same as those during the original period, where the parties bear the relation of parent and child, it having been said that in such a case the ground for the presumption fails.⁹ And no presumption that a former contract is renewed arises either where the services rendered after the original term has expired are of a materially different character from those previously rendered under such contract,¹⁰ or where the continued services are rendered to a different employer; as, for instance, where the original contract was with an individual and the continued services were rendered for a partnership which

the original employer had formed with another,¹¹ or where the original contract was with certain trustees of a railroad and a corporation was subsequently formed which took over the road and for which the same character of services were performed,¹² or were continued under an individual who purchased the business of the original employer.¹³

And in order to rely upon a contract arising by implication from continued services the plaintiff must set up his cause of action as it exists, it having been held insufficient merely to plead that a contract was entered into on a certain date, which date was that of the expiration of the original contract.¹⁴

—duration of continued employment.

A corollary of the general rule, stated supra, text 1, is that where the relation of master and servant is continued after the expiration of the agreed term, a presumption arises that the parties intended that the renewed engagement should be for the same period as that covered by the original contract;¹⁵ at least, where the original term of employment does not exceed one year, or is for one year,¹⁶ and provided that the parties do not bear such a relation to

⁹ *Rex v. Sow* (1817) 1 Barn. & Ald. 178, 106 Eng. Reprint, 66. In this case, however, it also appeared that the parent had stopped paying wages with the expiration of the original term of employment.

¹⁰ *White v. United States Gypsum Co.* (1911) 168 Mich. 238, 133 N. W. 501. And see *infra*, text and notes 50–52.

¹¹ *Mason v. Secor* (1894) 76 Hun, 178, 27 N. Y. Supp. 670. And see *Lichtenhein v. Fisher* (1896) 6 App. Div. 385, 39 N. Y. Supp. 553.

¹² *Morrison v. Ogdensburgh & L. C. R. Co.* (1868) 52 Barb. (N. Y.) 173.

¹³ *Bain v. Anderson* (1898) 28 Can. S. C. 481. And see *infra*, text and note 55.

¹⁴ *Treffinger v. M. Groh's Sons* (1905) 100 App. Div. 433, 91 N. Y. Supp. 837, holding that an allegation that plaintiff was hired for a year, beginning at a certain date, was not sustained by proof of an earlier employment for a year and its annual continuance.

¹⁵ The following cases support this rule: *State Bd. of Agri. v. Meyers* (1904) 20 Colo. App. 139, 77 Pac. 372; *Leahy v. Cheney* (1916) 90 Conn. 611, L.R.A.1917D, 809, 98 Atl. 132; *Standard Oil Co. v. Gilbert* (1890) 84 Ga. 714, 8 L.R.A. 410, 11 S. E. 491; *Moline Plow Co. v. Booth* (1885) 17 Ill. App. 674; *Lister's Agri. Chemical Works v. Pender* (1891) 74 Md. 15, 21 Atl. 686; *Passino v. Brady Brass Co.* (1912) 83 N. J. L. 419, 84 Atl. 815; *Douglass v. Merchants Ins. Co.* (1890) 118 N. Y. 484, 7 L.R.A. 822, 23 N. E. 806; *Bacon v. New Home Sewing L.R.A.1918C.*

Mach. Co. (1891) 59 Hun, 624, 37 N. Y. S. R. 56, 13 N. Y. Supp. 359, affirmed without opinion in (1892) 129 N. Y. 658, 30 N. E. 65; *Wallace v. Devlin* (1885) 36 Hun (N. Y.) 275; *Mason v. Secor* (1894) 76 Hun, 178, 27 N. Y. Supp. 570; *Ball v. Stover* (1894) 82 Hun, 460, 31 N. Y. Supp. 781; *Bennett v. Mahler* (1904) 90 App. Div. 22, 85 N. Y. Supp. 669; *Treffinger v. M. Groh's Sons* (1906) 112 App. Div. 250, 98 N. Y. Supp. 291, affirmed without opinion in (1906) 185 N. Y. 610, 78 N. E. 1114; *Mendelson v. Bronner* (1908) 124 App. Div. 396, 108 N. Y. Supp. 807; *Mason v. New York Produce Exch.* (1908) 127 App. Div. 282, 111 N. Y. Supp. 163; *Kelly v. Carthage Wheel Co.* (1900) 62 Ohio St. 598, 57 N. E. 934, reversing (1898) 8 Ohio S. & C. P. Dec. 549; *Wallace v. Floyd* (1857) 29 Pa. 184, 72 Am. Dec. 620; *Conrad v. Ellison-Harvey Co.* (1917) 120 Va. 458, 91 S. E. 763; *Broughton v. Brantford* (1869) 19 U. C. C. P. 434; *Rex v. Hales* (1794) 5 T. R. 668, 101 Eng. Reprint, 372; *Short v. Laery* (1891) 11 N. Z. L. R. (S. C.) 17, as quoted in 1 Labatt, Mast. & S. p. 711.

¹⁶ *Standard Oil Co. v. Gilbert* (1890) 84 Ga. 714, 8 L.R.A. 410, 11 S. E. 491; *Akron Mill. Co. v. Leiter* (1914) 57 Ind. App. 394, 107 N. E. 99; *STEWART DRY GOODS Co. v. HUTCHISON*, ante, 704; *Adams v. Fitzpatrick* (1889) 24 Jones & S. 580, 5 N. Y. Supp. 181, affirmed in (1891) 125 N. Y. 124, 26 N. E. 143; *Brightson v. h. B. Claffin Co.* (1904) 180 N. Y. 76, 72 N. E. 920, reversing on other grounds (1903) 84 App. Div. 557, 82

each other as not to afford a ground for the presumption; as, for instance, has been held to be the case where the relationship was that of parent and child.¹⁷

So in California, by express statutory provision (Civ. Code, § 2012), it is provided that where, after the expiration of an agreement respecting the term of services, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same term of service.¹⁸ However, it has been expressly held in one case¹⁹ that continuing the same services after the expiration of an express hiring for one year certainly does not raise a presumption that it is to continue for another year absolutely. Of course there can be no presumption of a new term of longer duration than the original period.²⁰ And it has been held that the presumption does not attach to a continuance in service unless there

was a prior contract for a whole year, and continued service thereunder for the whole period.²¹ Also that where the original contract exceeds one year the law cannot imply a contract for a new period of equal duration, since it cannot make that valid without a writing which the law requires shall be in writing.²² But where the original contract is for a term greater than one year, it has been held that the implied contract of renewal is for the term of one year on the terms of the original contract,²³ although the contrary has also been held.²⁴

As to the terminability of the continued employment, the rule is that it may be terminated before the expiration of the renewal period, provided the original contract granted a right of removal at any time,²⁵ the general rule being that the presumption regarding the similarity of terms extends to the conditions under which the original con-

N. Y. Supp. 667; *Wallace v. Devlin* (1885) 36 Hun (N. Y.) 275; *Hodge v. Newton* (1888) 14 Daly, 372, 13 N. Y. S. R. 139; *Greer v. People's Teleph. & Teleg. Co.* (1884) 18 Jones & S. (N. Y.) 517; *Kellogg v. Citizens' Ins. Co.* (1896) 94 Wis. 554, 69 N. W. 362; *Dickinson v. Norwegian Plow Co.* (1898) 101 Wis. 157, 76 N. W. 1108, on former appeal in (1897) 96 Wis. 376, 71 N. W. 606; *Appleton Waterworks Co. v. Appleton* (1907) 132 Wis. 563, 113 N. W. 44; *Cotes v. Sadler* (1667) 2 Keble, 16, 84 Eng. Reprint, 11; *Bullock v. Wimmera Fellmongery Co.* (1879) 5 Vict. L. R. 362, 1 Austr. L. T. 59, as quoted and set out in 1 Labatt, Mast. & S. p. 711.

¹⁷ *Rex v. Sow* (1817) 1 Barn. & Ald. 178, 106 Eng. Reprint 66, per Bayley, J.

¹⁸ See *Gabriel v. Bank of Suisun* (1904) 145 Cal. 266, 78 Pac. 736.

¹⁹ *Harnwell v. Parry Sound Lumber Co.* (1897) 24 Ont. App. Rep. 110, holding that the fact that the previous hiring was expressly for one year certain could not help the court to infer an implied contract for a similar period. And see *Halter v. Goody* (1911) 4 Sask. L. R. 161, 17 West. L. R. 261, as set out infra, note 29.

²⁰ *White v. United States Gypsum Co.* (1911) 168 Mich. 238, 133 N. W. 501, holding that where the original contract is for less than a year, no presumption of renewal for a full year on the same terms arises by reason of continuance in the same service. And see *Caldwell v. Caldwell Co.* (1904) 88 N. Y. Supp. 970, wherein it was held that, in the absence of a prior contract for a whole year and continued service thereunder for the full period, no presumption of a contract for another year arises from a continuing in the same service.

²¹ *Caldwell v. Caldwell Co.* (N. Y.) supra (original service was for ten months); *Barnes v. Summit Silk Mfg. Co.* (1909) 113 L.R.A.1918C.

N. Y. Supp. 977 (expressly holding that where an employee was hired from March to December of one year, and held over into the following January, there was no renewal of the contract for the same period for which he was originally hired, which would have been the balance of the year from March 1st); *Moskowitz v. Mawhinney* (1912) 137 N. Y. Supp. 903 (holding that where a contract of employment was for six months, with the privilege of renewal for six months more, which privilege was exercised and the service was continued after the expiration of the second six months' period, there was no presumption that the parties had agreed to a renewal of the contract for a third six months' period). But see *Wood v. Miller* (1912) 78 Misc. 377, 138 N. Y. Supp. 562, wherein it was said that where an employee is hired for a definite term of six months, a renewal of that term will be implied from a continuance of the service after the expiration of the original period.

²² *Schott v. La Campagnie Générale Trans-Atlantique* (1906) 52 Misc. 236, 102 N. Y. Supp. 901.

²³ *Adams v. Fitzpatrick* (1889) 24 Jones & S. 580, 5 N. Y. Supp. 181, affirmed in (1891) 125 N. Y. 124, 26 N. E. 143; *Brightson v. H. B. Clafin Co.* (1903) 84 App. Div. 557, 82 N. Y. Supp. 667, reversed on pleading and practice point in (1904) 180 N. Y. 76, 72 N. E. 920; *Broughton v. Brantford* (1869) 19 U. C. C. P. 434.

²⁴ *Schott v. La Campagnie Générale Trans-Atlantique* (N. Y.) supra (original contract was for the two years).

²⁵ *Douglass v. Merchants' Ins. Co.* (1890) 118 N. Y. 484, 7 L.R.A. 822, 23 N. E. 806; *Gilles v. Bank of Victoria* (1872) 3 Vict. L. R. 46, 3 Austr. Jur. 35, as set out in 1 Labatt, Mast. & S. p. 722.

tract was subject to rescission. Consequently where there was no provision for rescission during the original term, the parties are each entitled to fulfillment of the contract for the full period of renewal.²⁶ And according to a New Zealand authority, to terminate a renewed hiring at the end of any year where it is regarded as one from year to year, a reasonable notice must be given.²⁷ And of course, where it is held, as in Ontario,²⁸ that a continuing of service after the expiration of a term for one year does not raise a presumption of a continuance for a like period, the employee can be dismissed upon proper notice at any time after the expiration of the original contract.²⁹

In Michigan it has been held that a new period of service for the same term as the original contract cannot be implied from a continuance of labor on one side and the payment for services on the other, where the original contract was invalid under the Statute of Frauds, as purporting to cover a period of a year, commencing in futuro.³⁰ And in one New York case³¹ it has been held that where the original contract was for a year, and was not in writing, either party is entitled to terminate the relation arising from continued services at will; but in other later cases³² in the same state the position has been taken that even though the original contract was unenforceable so long as it remained executory, yet, when fully and

voluntarily performed by both parties, its invalidity could no longer be asserted by either, and afforded an adequate basis upon which to predicate an inference of fact as to the intention of the parties in proceeding in accordance with its terms upon a further term than that provided by it. And it has been held that a contract implied from a continuing employment, since it arises by implication of law, is not within the purview of the Statute of Frauds.³³ And of course, the original term not being within the Statute of Frauds, the implied contract, which begins and is to be performed within one year,³⁴ is not within the statute.

The general presumption of a renewed contract for a period equal to the original contract may be overcome by proof of a new agreement, or of facts sufficient to show that a different hiring was intended by the parties,³⁵ or that, after the expiration of the original contract, the work was continued in a capacity other than that of a servant.³⁶ Under this rule it has been judicially decided that where the change affects only the amount of salary, and not the duration or period of employment, as, for instance, where the salary is increased from time to time, the change is not sufficient to rebut the presumption that continuing in the service was for another term equal to the original term,³⁷ especially where the increase was made during the original term.³⁸

²⁶ *Cotes v. Sadler* (1867) 2 Keble. 16, 84 Eng. Reprint, 11. And see *Mackenzie v. Union F. & M. Ins. Co.* (1879) 1 N. S. W. L. R. 103, as set out in 1 Labatt, Mast. & S. p. 722.

²⁷ *Wood v. Wellington Woolen Co.* (1895) 14 N. Z. L. R. 296, condemning and disapproving, according to 1 Labatt on Master & Servant, p. 722, a dictum to the contrary effect in *Short v. Laery* (1891) 11 N. Z. L. R. (S. C.) 17.

²⁸ See supra, text and note 19.

²⁹ *Harnwell v. Parry Sound Lumber Co.* (1897) 24 Ont. App. Rep. 110. And in connection with this case, see *Halter v. Goody* (1911) 4 Sask. L. R. 161, 17 West. L. R. 261, wherein it was held that although the continued service raised a presumption that there was a new hiring upon the same terms and for the same period, the master could terminate the new contract upon reasonable notice to the employee.

³⁰ *Lally v. Crookston Lumber Co.* (1902) 85 Minn. 257, 88 N. W. 846.

³¹ *Tucker v. Philadelphia & R. Coal & I. Co.* (1889) 53 Hun, 139, 6 N. Y. Supp. 134.

³² *Adams v. Fitzpatrick* (1891) 125 N. Y. 124, 26 N. E. 143; *Ball v. Stover* (1894) 82 Hun, 460, 31 N. Y. Supp. 781; *Hodge v. L.R.A.* 1918C.

Newton (1888) 14 Daly, 372, 13 N. Y. S. R. 139.

³³ *Passino v. Brady Brass Co.* (1912) 83 N. J. L. 419, 84 Atl. 615; *Bennett v. Mahler* (1904) 90 App. Div. 22, 85 N. Y. Supp. 669; *Hodge v. Newton* (N. Y.) supra. But see *Brightson v. H. B. Claffin Co.* (1904) 180 N. Y. 76, 72 N. E. 920, reversing (1903) 84 App. Div. 557, 82 N. Y. Supp. 667.

³⁴ *Conrad v. Ellison-Harvey Co.* (1917) 120 Va. 458, 91 S. E. 763.

³⁵ *STEWART DRY GOODS CO. v. HUTCHISON*, ante, 704; *Summers v. Phenix Ins. Co.* (1906) 50 Misc. 181, 98 N. Y. Supp. 226; *Conrad v. Ellison-Harvey Co.* (Va.) supra; *Dickinson v. Norwegian Plow Co.* (1898) 101 Wis. 157, 76 N. W. 1108, on former appeal in (1897) 96 Wis. 376, 71 N. W. 606; *Rex v. Macclesfield* (1789) 3 T. R. 76, 100 Eng. Reprint 76.

³⁶ *Rex v. Sow* (1817) 1 Barn. & Ald. 178, 106 Eng. Reprint, 66 (continued services were held to have been rendered under the relation of child to her parent).

³⁷ *STEWART DRY GOODS CO. v. HUTCHISON*; *Conrad v. Ellison-Harvey Co.* (1917) 120 Va. 458, 91 S. E. 763.

³⁸ *Houston Ice & Brewing Co. v. Nicolini* (1906) — Tex. Civ. App. —, 96 S. W. 84.

—remuneration under continued employment.

Another corollary of the general rule that a servant continuing in the master's service after the expiration of a definite term is *prima facie* presumed to continue under the terms of the old contract is that there is an implied agreement that the employer will continue to pay the employee the same remuneration specified in the original contract.³⁹ The reason for this general rule has been stated as follows: "If the employee remains in the same employment, after his term of service has expired, without making demand for increased pay, the employer may well presume that no increased compensation is expected or will be required; and having acted upon that presumption, and failed to protect himself by a new contract, the employee will be held to have assented to a performance of the service at the original

price. The rights of the employee and employer are mutual and reciprocal. So, where the employer permits a continuation of the service after the term has expired, without a new stipulation as to the price, it will be presumed that he expected and intended to pay for the service the original compensation stipulated."⁴⁰ In California by express statute (Civ. Code, § 2012) it is provided that where, after the expiration of an agreement respecting wages, the parties continued the relation of master and servant, they are presumed to have renewed the agreement for the same wages.⁴¹

But it has been ruled that no presumption arises when the original contract was merely for compensation for past services extending over a definite period, without any reference to services thereafter to be rendered.⁴² Nor does the presumption arise where the rate of

³⁹ For cases embodying or recognizing this rule, see *Horton v. Wollner* (1882) 71 Ala. 452; *Ewing v. Janson* (1893) 57 Ark. 237, 21 S. W. 430; *Westbrook Grain & Commission Co. v. Rice* (1916) 125 Ark. 503, 189 S. W. 39; *Nicholson v. Patchin* (1855) 5 Cal. 474; *Perry v. J. Noonan Furniture Co.* (1908) 8 Cal. App. 35, 95 Pac. 1128; *State Bd. of Agri. v. Meyers* (1904) 20 Colo. App. 139, 77 Pac. 372; *Leahy v. Cheney* (1916) 90 Conn. 611, L.R.A.1917D, 809, 98 Atl. 132; *Standard Oil Co. v. Gilbert* (1890) 84 Ga. 714, 8 L.R.A. 410, 11 S. E. 491; *Jackson v. Doolittle* (1917) — Ga. App. —, 94 S. E. 595; *Grover & B. Sewing Mach. Co. v. Bulkley* (1868) 48 Ill. 189; *Ingalls v. Allen* (1890) 132 Ill. 170, 23 N. E. 1028, reversing on other grounds (1889) 33 Ill. App. 458; *Crane Bros. Mfg. Co. v. Adams* (1892) 142 Ill. 125, 30 N. E. 1030; *Borg v. Strauss* (1910) 247 Ill. 462, 93 N. E. 296; *Moline Plow Co. v. Booth* (1885) 17 Ill. App. 574; *Painter v. Durham* (1915) 195 Ill. App. 468; *Munchoff v. Ford* (1896) 17 Ind. App. 131, 46 N. E. 357; *Akron Mill. Co. v. Leiter* (1914) 57 Ind. App. 394, 107 N. E. 99; *Laubach v. Cedar Rapids Supply Co.* (1904) 122 Iowa, 643, 98 N. W. 511; *Hahnel v. Highland Park College* (1915) 171 Iowa, 492, 152 N. W. 571; *Curtis v. Dodd* (1915) 172 Iowa, 521, 154 N. W. 872; *Thompson v. Detroit & L. S. Copper Co.* (1890) 80 Mich. 422, 45 N. W. 189; *Morris v. Z. T. Priggs Photographic Supply Co.* (1915) 192 Mo. App. 145, 179 N. W. 783; *Capps v. Adams Company* (1889) 27 Neb. 360, 43 N. W. 114; *Hale v. Sheehan* (1894) 41 Neb. 102, 59 N. W. 554; *Home F. Ins. Co. v. Barber* (1903) 67 Neb. 644, 60 L.R.A. 927, 108 Am. St. Rep. 716, 93 N. W. 1024; *Leidigh v. Keever* (1903) 5 Neb. (Unof.) 207, 97 N. W. 801; *New Hampshire Iron Factory Co. v. Richardson* (1830) 5 N. H. 294; *Chamberlain v. Davis* (1856) 33 N. H. 121; *Rindge v. Lamb* (1878) 58 N. H. L.R.A.1918C.

278; *Smith v. Velie* (1875) 60 N. Y. 106; *Adams v. Fitzpatrick* (1891) 125 N. Y. 124, 26 N. E. 143, affirming (1889) 24 Jones & S. 580, 5 N. Y. Supp. 181; *Bacon v. New Home Sewing Mach. Co.* (1891) 59 Hun, 624, 37 N. Y. S. R. 56, 13 N. Y. Supp. 359; affirmed without opinion in (1892) 129 N. Y. 658, 30 N. E. 65; *Cox v. United Surety Co.* (1911) 128 N. Y. Supp. 622; *Eicke v. Wittemann Co.* (1913) 157 App. Div. 412, 142 N. Y. Supp. 190; *Vail v. Jersey Little Falls Mfg. Co.* (1860) 32 Barb. (N. Y.) 564; *Kelly v. Carthage Wheel Co.* (1900) 62 Ohio St. 598, 57 N. E. 984, reversing (1898) 8 Ohio S. & C. P. Dec. 549; *Wallace v. Floyd* (1857) 29 Pa. 184, 72 Am. Dec. 620; *Ranck v. Albright* (1860) 36 Pa. 367; *Norfolk Hosiery & Underwear Mills Co. v. Westheimer* (1917) — Va. —, 92 S. E. 922; *Burden v. Cropp* (1893) 7 Wash. 198, 34 Pac. 834; *Weise v. Milwaukee County* (1881) 51 Wis. 564, 8 N. W. 295; *Kellogg v. Citizens Ins. Co.* (1896) 94 Wis. 554, 69 N. W. 362; *Appleton Waterworks Co. v. Appleton* (1907) 132 Wis. 563, 113 N. W. 44; *Broughton v. Brantford* (1869) 19 U. C. C. P. 434; *Halter v. Goody* (1911) 4 Sask. L. R. 161, 17 West. L. R. 261; *Mansfield v. Scott* (1833) 1 Clark & F. 319, 6 Eng. Reprint, 936.

⁴⁰ *Ingalls v. Allen* (1890) 132 Ill. 170, 23 N. E. 1026. And practically the same language was used in *Leidigh v. Keever* (1903) 5 Neb. (Unof.) 207, 97 N. W. 801, and *Ranck v. Albright* (1860) 36 Pa. 367.

⁴¹ See *Gabriel v. Bank of Suisun* (1904) 145 Cal. 266, 78 Pac. 736.

⁴² *Bell v. Peper Tobacco Warehouse Co.* (1907) 205 Mo. 475, 103 S. W. 1014 (holding that a contract to pay a servant a certain salary for each of three years, already served, could form no basis for a presumption that continued services of the same kind were to be paid for at the same rate); *Smith v. Velie* (1875) 60 N. Y. 106 (holding that continued services rendered after the

compensation was not fixed by the original agreement.⁴³ And it has been ruled in an early English case⁴⁴ that there is no presumption of a continuance upon the old terms where the relationship of the parties is such that the continued services are deemed to be rendered in a different capacity, as where the contracting parties are parent and child.

And the presumption which arises on a servant's continuing in the master's service after the expiration of a definite term of employment at a fixed salary, that the employer will continue to pay him the same salary or wages paid during the original period, is rebuttable by proof that a new contract for the continued period has been entered into, or by facts and circumstances showing that the parties did not intend to continue upon the terms and conditions of the original contract.⁴⁵ And such a new contract is competent to destroy the implied agreement that the master would continue to pay according to the old terms, even though it was void under the Statute of Frauds.⁴⁶ But, in the absence of any new agreement in regard to salary, some change in the services

required and performed, such as the assumption of some additional duties, or a diminution of the labor, or slightly different and less exacting labors or duties,⁴⁷ even when accompanied by a change in the place of employment, does not rebut or destroy the presumption that the salary is to be the same as under the original contract, provided it can be said that such service is a continuation of the original service, and within the scope generally of the original employment,⁴⁸ and that if the services were slightly different and less exacting, the servant was ready at all times to perform the same services as formerly, if required.⁴⁹ But the presumption depends upon a continuance of the same character of service; or, in other words, does not arise where the character of the service is materially and radically altered,⁵⁰ for it has been said that it would be contrary to reason if it applied where the character of the services is altered.⁵¹ Likewise it has been held that where the services are of a materially different character and an interval of unemployment has preceded the later work, there is no continuity of service or continuance of the former employ-

expiration of an agreement entered into after the original commencement of the services, fixing the wages for a specified time, cannot form the basis for a presumption of renewal). But see *Vail v. Jersey Little Falls Mfg. Co.* (1860) 32 Barb. (N. Y.) 564.

⁴³ *Leidigh v. Keever* (1903) 5 Neb. (Unof.) 207, 97 N. W. 801.

⁴⁴ *Rex v. Sow* (1817) 1 Barn. & Ald. 178, 106 Eng. Reprint, 66, holding that the fact that the parties were parent and child removed all ground for a presumption that the continued services were rendered on the old terms.

⁴⁵ *Horton v. Wollner* (1882) 71 Ala. 452; *Borg v. Strauss* (1910) 247 Ill. 462, 93 N. E. 296; *Hahnel v. Highland Park College* (1915) 171 Iowa, 492, 152 N. W. 571; *Hale v. Sheehan* (1894) 41 Neb. 102, 59 N. W. 554 (holding that a renewal is not so strongly implied as to preclude the admission of parol evidence of different terms); *Home F. Ins. Co. v. Barber* (1903) 67 Neb. 644, 90 L.R.A. 927, 108 Am. St. Rep. 716, 93 N. W. 1024 (acceptance of reduction in salary precludes recovery of back pay in the amount of the reduction at the end of the renewed term); *Burden v. Cropp* (1893) 7 Wash. 198, 34 Pac. 834. And see *Curtis v. Dodd* (1915) 172 Iowa, 521, 154 N. W. 872, wherein it was said that the presumption controlled "in the absence of other testimony as to the value of the services."

⁴⁶ *Horton v. Wollner* (Ala.) supra. And see *Hahnel v. Highland Park College* (1915) 171 Iowa, 492, 152 N. W. 571. L.R.A.1918C.

⁴⁷ *Westbrook Grain & Commission Co. v. Rice* (1916) 125 Ark. 503, 189 S. W. 39; *Leahy v. Cheney* (1916) 90 Conn. 611, L.R.A. 1917D, 809, 98 Atl. 132 (holding that additional duties of a domestic servant, caused by an increase in the master's family, do not affect the presumption); *Ingalls v. Allen* (1890) 132 Ill. 170, 23 N. E. 1026, reversing on other grounds (1889) 33 Ill. App. 458; *Painter v. Durham* (1915) 195 Ill. App. 468; *Lehigh v. Keever* (Neb.) supra; *Ranck v. Albright* (1860) 36 Pa. 367.

⁴⁸ *Westbrook Grain & Commission Co. v. Rice* (Ark.) (employee became manager of a newly formed branch store); *Ingalls v. Allen* (Ill.) and *Leidigh v. Keever* (Neb.) supra (services transferred from city to farm).

⁴⁹ *Painter v. Durham* (1915) 195 Ill. App. 468.

⁵⁰ *Ewing v. Janson* (1893) 57 Ark. 237, 21 S. W. 430; *Ingalls v. Allen* (Ill.) supra; *White v. United States Gypsum Co.* (1911) 168 Mich. 238, 133 N. W. 501.

⁵¹ *Ewing v. Janson* (Ark.) supra. In this case the court illustrated the application of the rule as follows: "If one should complete his term of service as a carpenter, and continue service as a plowman or a teamster, there would be no reason to presume that the parties understood he was to receive the same rate of compensation, and we are aware of no authority to support such a principle."

ment sufficient to warrant the finding of an implied contract for another term of the same length and at the same salary as the original contract,⁵³ although the fact alone that the employer ceased to carry on his business for a part of the term, and that, during such period, there was nothing for the employee to do, does not have the same effect, provided he held himself ready to and did perform all such services as were required and for which his contract called.⁵³ Again, it has been held that where the employer changes his place of residence and engages in a new business, and a servant is paid up and discharged and later assumes a position at similar work in the new place and business, the facts do not necessarily raise a presumption of a continuing contract of hiring at the former rate of wages.⁵⁴ So, where the same work is continued under a different employer, without any express agreement as to wages, no prima facie presumption arises that the remuneration shall be the same as under the original contract, and the servant may recover the value of his services;⁵⁵ but in such a case the remuneration stipulated in the original contract is an element of evidence from which the jury may or may not infer that the same wages are to be paid.⁵⁶

Under the rule of a presumption of a continuance of the old rate of remuneration recovery can only be had at the rate of wages stipulated in the original contract, the presumption precluding a recovery on a quantum meruit for the value of work performed during the period of continued employment.⁵⁷ And it, of course, follows that, in the absence of special circumstances, the servant is entitled to remuneration for the full renewal period,⁵⁸ and that neither party can change the terms of the contract during the period covered thereby without the consent of the other.⁵⁹ However, it has been held, but without show of reason, that although the new contract is presumed to be for a like period and upon the same terms as the original one, it may be terminated upon reasonable notice, so that recovery could not be had for the full term in case "reasonable" notice of termination was given.⁶⁰

In civil law jurisdictions — Louisiana.

In Louisiana continuation in an employer's service after the expiration of a definite term without any new agreement is what is known as "tacite réconduction," which imports a renewal of the original contract as regards all its terms.⁶¹ This, of course, would render the new term of the same dura-

⁵³ O'Connor v. Briggs (1903) 182 Mass. 387, 65 N. E. 386.

⁵⁴ Vail v. Jersey Little Falls Mfg. Co. (1860) 32 Barb. (N. Y.) 564.

⁵⁵ Reed v. Swift (1873) 45 Cal. 255 (servant worked in hotel under original contract and as a domestic on the employer's farm after termination of the original contract); Ingalls v. Allen (Ill.) supra (manager of ranch had services terminated upon sale of ranch, and some time later served in hotel and livery stable in another state).

⁵⁶ Connor v. Hackley (1840) 2 Met. (Mass.) 613 (construction contract was assigned to defendant, who continued plaintiff in his employment).

⁵⁷ Connor v. Hackley (Mass.) supra.

⁵⁸ Nicholson v. Patchin (1885) 5 Cal. 474; Perry v. J. Noonan Furniture Co. (1908) 8 Cal. App. 35, 95 Pac. 1128; Grover & B. Sewing Mach. Co. v. Bulkley (1868) 48 Ill. 189; Ingalls v. Allen (Ill.) supra; Munchoff v. Ford (1896) 17 Ind. App. 131, 46 N. E. 357; Ranck v. Albright (1860) 36 Pa. 367; Weise v. Milwaukee County (1881) 51 Wis. 564, 8 N. W. 295. But see McMillan v. Page (1888) 71 Wis. 655, 38 N. W. 173, wherein it was held that where a girl entered the service of a stranger for a specified time at an agreed price, and, after the expiration thereof, continued in the same service without other compensation than board and clothing, the law implied a promise on the employer's part to pay the real R.A.1918C.

sonable value of the services; but the question whether the original contract controlled the rights and liabilities of the parties was not considered.

⁵⁹ See generally cases cited supra, note 15, and especially Wallace v. Devlin (1883) 36 Hun (N. Y.) 275; Ball v. Stover (1894) 82 Hun, 460, 31 N. Y. Supp. 781; Kelly v. Carthage Wheel Co. (1900) 62 Ohio St. 598, 57 N. E. 984, reversing (1898) 8 Ohio S. & C. P. Dec. 549; and Conrad v. Ellison-Harvey Co. (1917) 120 Va. 458, 91 S. E. 763.

⁶⁰ See Dickinson v. Norwegian Plow Co. (1898) 101 Wis. 157, 76 N. W. 1108; and Appleton Waterworks Co. v. Appleton (1907) 132 Wis. 563, 113 N. W. 44.

⁶¹ Halter v. Goody (1911) 4 Sask. L. Rep. 161, 17 West. L. R. 261, following on this point Harnwell v. Parry Sound Lumber Co. (1897) 24 Ont. App. Rep. 110, in which, however, the ruling seems to have been that there was no presumption of a renewal for a new period on the old terms. See case as set out supra, text and notes 8, 19, and 29.

⁶² Alba v. Moriarty (1884) 36 La. Ann. 680; Lalande v. Aldrich (1889) 41 La. Ann. 307, 6 So. 28; Sullivan v. New Orleans Stave & Head Co. (1892) 44 La. Ann. 787, 11 So. 89; Burton v. Behan (1895) 47 La. Ann. 117, 16 So. 769; National Automatic Fire Alarm Co. v. New Orleans & N. E. R. Co. (1905) 115 La. 633, 39 So. 738. And see Vowell v. Metairie Asso. (1867) 19 La.

tion as the original one,⁶³ and at the same salary,⁶³ and entitle a servant wrongfully discharged during such term to recover salary for the unexpired part of the term. At least, the salary would be the same down to the formal termination thereof.⁶⁴ But this presumption of renewal of the original contract is rebuttable and may be overcome; as, for example, by proof that the servant was notified before the expiration of his term that, in the event of the happening of a certain contingency, his services would no longer be required, and that such contingency actually happened,⁶⁵ or that a new contract was entered into.⁶⁶

— Quebec.

In Quebec, by Civil Code, art. 1667, it is provided that a contract of personal services may be prolonged by "tacit relocation," which means tacit renewal.⁶⁷ This doctrine of tacit renewal, it has been said,⁶⁸ rests not on an arbitrary statute or legal enactment, but originates in the natural and reasonable presumption that the parties have so willed; wherefore the Quebec statute seems to be largely the embodiment of the earlier civil as well as common-law doctrines.

And where there has been a re-employment of a servant for a year by tacit relocation the servant may, if wrongfully dismissed during the year,

recover salary for the entire year,⁶⁹ and the employer cannot discharge his liability for such salary by offering the servant another position.⁷⁰

And where, by the terms of the original contract, the master cannot end the employment at the end of the term except by the giving of notice, a renewal of the contract results from the failure to give such notice and a continuation of the services.⁷¹

— Scotland.

As is stated in 1 Labatt on Master & Servant, p. 725, under the law of Scotland a continuance of employment after the expiration of a contract period without any new agreement results in what is known as "tacit relocation,"—a phrase which is defined in Fraser on Master & Servant, p. 58, as "a presumed renovation of the contract from the period at which the former one expired, and it is held to arise from implied consent of parties, in consequence of their not having signified their intention that the agreement should terminate at the period stipulated;" which doctrine the latter author says is borrowed from the Roman law. This "tacit relocation," or presumed renewal of the contract, is with one exception⁷² upon the same terms as the original one, the terms of the new contract being regulated by those of the original one.⁷³

Ann. 298, wherein it was held that a superintendent of a race course who continued in the association's service after the expiration of his contract without any new agreement was entitled to the same rate of wages as originally until the grounds were taken over by military forces.

⁶² *Alba v. Moriarty and Lalande v. Aldrich* (La.) *supra*.

⁶³ *Lalande v. Aldrich* (La.) *supra*; *Sullivan v. New Orleans Stave & Head Co.* (1892) 44 La. Ann. 787, 11 So. 89, holding that recovery cannot be had upon a quantum meruit.

⁶⁴ *National Automatic Fire Alarm Co. v. New Orleans & N. E. R. Co.* (1905) 115 La. 633, 39 So. 738.

⁶⁵ *Burton v. Behan* (1895) 47 La. Ann. 117, 16 So. 769 (servant remained a few days after the expiration of the original term, evidently in the hope that the contingency would not happen and that his services would be needed).

⁶⁶ *Faber v. Abatoir Co.* 3 La. A. (Orleans) 3, as cited in 1914-17 Cyc. Ann. p. 1848.

⁶⁷ See *Delaney v. Love* (1897) Rap. Jud. Quebec 14 C. S. 40 (wherein it was held that a continuation of the same services after the expiration of a definite period raised the inference that there was a tacit renewal of the original contract for another period of the same length); and *Dugdale v. L.R.A.* 1918C.

Montreal (1860) Q. B. 3 Legal News (L. C.) 204, and *Les Commissaires d'E'cole v. Canfield* (1889) 18 Rev. Leg. (Q. B. Quebec) 297, both of which hold, as is set out in 1 Labatt on Master & Servant, p. 728, that a contract for services had been renewed for one year by "tacite réconduction."

⁶⁸ *Delaney v. Love* (Quebec) *supra*.

⁶⁹ *Dugdale v. Montreal* (L. C.) and *Les Commissaires d'E'cole v. Canfield* (Quebec) *supra*.

⁷⁰ *Les Commissaires d'E'cole v. Canfield* (Quebec) *supra*.

⁷¹ *School Comrs. v. Desmeules* (1883) 15 Quebec L. R. 226, 12 Legal News (L. C.) 371, 17 Rev. Leg. (Q. B.) 84.

⁷² See 1 Labatt on Master & Servant, § 236, text 2, wherein the learned author said: "Though the original contract may have been for a longer period than one year, the renewed agreement can never be for more than one year because no verbal contract of location can extend longer. The renewal may, however, be held to be only for half a year or other period, according to the presumption in law applicable to the particular kind of service in question."

⁷³ See *Mansfield v. Scott* (1831) 4 Sc. Sess. Cas. 1st series, 325, affirmed in (1833) 6 Wilson & S. 277, 1 Clark & F. 319, 6 Eng. Reprint, 936 (holding that a contract for a year was renewed in all its parts by tacit

And in Scotland, at least, in case of certain classes of servants such as agricultural, domestic, and the like, it is held that express notice must be given at least forty days before the expiration of the original contract in order to prevent tacit relocation or renewal of the contract.⁷⁴ And this necessity of giving notice to prevent tacit relocation cannot be eliminated by a local usage

allowing dismissal without warning unless such usage is proved to be uniform and notorious.⁷⁵ But it has been held that the rule of tacit relocation is an artificial one, depending on custom, and therefore is not applicable to any servants except those in respect to whom the prevalence of such custom is established.⁷⁶

relocation from year to year by a continuing of the service); *Tait v. Mackintosh* (1841) 16 F. C. (Sc.) 658 (holding, as is set out in 3 Scot's Dig. (1800-1873) col. 231, that a manager of a farm, who was engaged on certain terms for a year, was entitled during the service and for three subsequent years by tacit relocation to the same terms); *Day v. Liquidators of Pattison* (1900) 8 Scot. L. T. 30 (holding, as shown by the quotation in 1 Labatt on Master & Servant, p. 726, that there is a tacit renewal of the old contract as to period of notice where the duties, the salary, and the time of payment, all continue the same as under the original contract); *Stevenson v. North British R. Co.* (1905) 42 Scot. L. R. 768, 7 Sc. Sess. Cas. 5th series, 1106 (holding, according to 1 Labatt on Master & Servant, p. 726, that a tacit relocation was inferred where the servant had been at first employed "for one year certain," and the relation was continued several years without any new agreement).

⁷⁴ *MacLean v. Fyfe* (1813) 1 F. C. (Sc.) 698 (holding with respect to a gardener

that notice by inference was not sufficient); *Anderson v. Wishart* (1818) 1 Murray (Sc.) 429 (farm overseer); *Morrison v. Allardyce* (1823) 1 Sc. Sess. Cas. 1st series, 337 (cook-maid); *Cameron v. Scott* (1870) 9 Sc. Sess. Cas. 3d series, 343 (cattleman on farm). And see *Lennox v. Allan* (1880) 18 Scot. L. R. 13, 8 Sc. Sess. Cas. 4th series, 38; and *Morrison v. Abernethy School Bd.* (1876) 3 Sc. Sess. Cas. 4th series, 945, as set out in 1 Labatt, Mast. & S. p. 727.

⁷⁵ *Morrison v. Allardyce* (1823) 1 Sc. Sess. Cas. 1st series, 337.

⁷⁶ *Lennox v. Allan* (1880) 18 Scot. L. R. 13, 8 Sc. Sess. Cas. 4th series, 13 (holding, as set out in 1 Labatt on Master & Servant, p. 726, that the rule does not apply to artisans); *Brenan v. Campbell* (1898) 25 Sc. Sess. Cas. 4th series, 423 (holding, according to 1 Labatt on Master & Servant, p. 727, that a civil engineer and architect, who was employed as a factor, was not entitled to notice of termination of his employment with the expiration of the original contract period, since he was not employed as a servant). G. J. C.

MISSOURI SUPREME COURT. (Division No. 1.)

BERTIE A. HAYS

v.

R. S. HOGAN et al.

(— Mo. —, 200 S. W. 286.)

Appeal — reasons for granting new trial.

1. Although the appellate court cannot consider the reasons given by the trial court for granting a new trial, if they were not entered of record as required by statute, yet it may consider them as throwing light upon the viewpoint of the court during the

Note. — The liability of the owner for injuries inflicted by an automobile while being used by a member of his family is considered in the notes to *McNeal v. McKain*, 41 L.R.A. (N.S.) 775; *Birch v. Abercrombie*, 50 L.R.A. (N.S.) 59; *Griffin v. Russell*, L.R.A. 1916F, 223; and *Van Blaricom v. Dodgson*, L.R.A. 1917F, 363; and see later cases, *Hutchins v. Haffner*, L.R.A. 1918A, 1008; *Blair v. Broadwater*, L.R.A. 1918A, 1011; and *Halverson v. Blosser*, L.R.A. 1918B, 498.

On making *prima facie* case of respon-

sibility for negligence of driver of automobile by proof of defendant's ownership of car or employment of driver, see note to *White Oak Coal Co. v. Rivoux*, 46 L.R.A. (N.S.) 1091.

For other cases, see *Appeal and Error*, IV. b, in *Dig. 1-52 N. S.*

Parent and child — liability of owner for negligence of child in operating automobile.

2. The owner of an automobile maintained for the use and pleasure of his family is not liable for injuries caused by negligence of his son in driving it, if the son, who is a member of his family and permitted at times to use the car, has it out against orders, for his own pleasure, at the time of the accident.

For other cases, see *Parent and Child*, I. in *Dig. 1-52 N. S.*

For notes on related questions, see L.R.A. Indexes under the title, "Automobiles."

For excessive or inadequate damages for personal injuries resulting in death, see note to *St. Louis, I. M. & S. R. Co. v. Craft*, L.R.A. 1916C, 817.

Evidence — presumption of agency in driving automobile.

3. No presumption arises from the fact that at the time of an accident a son was driving his father's automobile, that he was acting within the scope of his authority, which will cast upon the father the burden of showing the contrary.

For other cases, see Evidence, II. c, 1, in Dig. 1-52 N. S.

Constitutional law — special legislation — requiring care by automobilist.

4. A statute requiring an owner of an automobile operated upon a highway to stop the same when signaled to do so by a driver of horses, and to exercise the highest degree of care, is not unconstitutional special legislation.

For other cases, see Statutes, I. g, 2, in Dig. 1-52 N. S.

Trial — verdict — sufficiency.

5. A verdict finding for plaintiff and assessing damages at \$6,500, Six Thousand \$5.00 Dollars," is not too uncertain to support a judgment, when supported by affidavits of jurors that the jury agreed upon \$6,500 as the amount of the verdict.

For other cases, see Trial, V. c, in Dig. 1-52 N. S.

Damages — death — excess.

6. \$6,500 is not excessive to award for the death of a man fifty-seven years old, who supported his wife and eight children, although one leg was off below the knee and one arm was smaller than the other.

For other cases, see Damages, III. i, 4, b, in Dig. 1-52 N. S.

(December 22, 1917.)

CERTIFICATION by the Springfield Court of Appeals for determination by the Supreme Court of questions arising upon directions to the Circuit Court for Greene County to reinstate the verdict and judgment in favor of plaintiff in an action brought to recover damages for the death of plaintiff's husband, alleged to have been caused by defendants' negligence. Affirmed as to main defendant; reversed as to the other.

Statement by Woodson, J.:

The plaintiff brought this suit in the circuit court of Howell county against the defendants to recover \$10,000 damages for the death of her husband, through the alleged negligence of the latter in so running and operating an automobile as to frighten the team of mules hitched to the wagon in which he was riding, and thereby causing it to run away and overturn the wagon, and in so doing fell upon and crushed and killed him. The verdict and judgment were for the plaintiff, and on motion a new trial was ordered, from which order the plaintiff duly appealed the cause to the Springfield court of appeals, which reversed the judgment or L.R.A.1918C.

dering the new trial and remanded the cause, with directions to the circuit court to reinstate the verdict and judgment as originally entered therein. On motion for a rehearing one of the judges of the court of appeals dissented from the former opinion and certified the cause here, because, as stated, it was in conflict with certain decisions of this court. The facts of the case are few and largely undisputed. The facts, as disclosed by the record, are these:

The plaintiff and the deceased were husband and wife; that on May 27, 1912, he was killed by means of a farm wagon in which he was riding, turning over and upon him, and crushing him to death, caused by the team of mules hitched thereto becoming frightened at the automobile owned by defendant, R. S. Hogan, and driven by his son, J. E. Hogan, the other defendant. The occurrence took place on a public highway in Howell county, Missouri. R. S. Hogan owned the car, and had done so for a year or more prior to the date of the injury; that he purchased it for the use of himself and family; that while the son, J. E. Hogan, had, with the permission of his father, driven the car in the performance of his duties to the latter, and for the pleasure of his mother and other members of the family, yet he was instructed by the father, R. S. Hogan, to never take the car out or drive it for his own purposes without his permission or that of his mother. Upon this occasion the son was driving the car for his own purposes without the authority of his father or mother; that the son, J. E. Hogan, was a member of his father's family; that the father kept no hired chauffeur; that the machine had been bought and maintained for the use of the family as a pleasure vehicle; and that it was driven and used prior to the accident by the son, J. E. Hogan, and two brothers of defendant J. E. Hogan. The father himself testified in a deposition which was offered by plaintiff as a part of her case without objection: "Well, we use it just as a family vehicle, as a pleasure car, and for such use as the family might desire; just a family vehicle."

Both defendants testified that the son lived at the home of his father as a member of the family, paid no board whatever, and was employed in the bank in which the defendant father was president. It appeared from the depositions of the defendants introduced by the plaintiff that the son had used the machine from time to time for a period of more than a year, and that the father granted him the use of it whenever he asked for it. The testimony of a number of witnesses was to the effect that the defendant's son had been seen by them driving this automobile on various occasions prior

to the time of the accident, both in the daytime and in the evening, sometimes with other members of the Hogan family in the machine as passengers, and at other times with only himself and his wife or other friends riding with him. The testimony further disclosed that the machine was kept in a garage at the father's home, and that defendant J. E. Hogan learned to drive from the use of this very machine in question.

The plaintiff introduced the depositions of R. S. and J. E. Hogan in presenting her case in chief. By these depositions it is shown that R. S. Hogan did not permit his son Jack to use the automobile at pleasure; that none of his sons were at liberty to use the machine at pleasure; and in answer to the question, "Was he permitted to use the machine for his own pleasure and that of his friends?" the answer was, "Not without permission." From this deposition it further shows that defendant R. S. Hogan did not know of the son ever taking the automobile without asking either him or his mother, and that he never knew of his taking the machine out and using it for himself and friends, outside of the family. The father was not at home on the day of the accident, but was in another part of the state. There was evidence tending to prove that the automobile was being carelessly and negligently driven at the time of the accident, and that was the cause of the team becoming frightened and running away, which resulted in the injury, as before stated. There was also evidence tending to show the contrary. Since, however, the jury has passed upon that question, no useful purpose would be served by detailing it here.

Messrs. Wilfley, McIntyre, & Nardin and O. L. Haydon, for plaintiff:

The verdict in the case at bar is, on the record, without ambiguity, and clearly shows that the verdict agreed to by the jury and returned into court was a verdict for six thousand five hundred (\$6,500) dollars.

State v. Underwood, 57 Mo. 52, 1 Am. Crim. Rep. 251; State v. Rush, 95 Mo. 206, 8 S. W. 221; Devoy v. St. Louis Transit Co. 192 Mo. 219, 91 S. W. 140; Hamburg-Bremen F. Ins. Co. v. Pelzer Mfg. Co. 22 C. C. A. 283, 42 U. S. App. 123, 76 Fed. 481; Capen v. Stoughton, 16 Gray, 364; West v. Bank of Americus, 63 Ga. 230; Heinkin v. Barbrey, 40 Ga. 252; Mattox v. United States, 146 U. S. 148, 36 L. ed. 920, 13 Sup. Ct. Rep. 50; Davis v. Huber Mfg. Co. 119 Iowa, 56, 93 N. W. 78; Jackson ex dem. Noah v. Dickenson, 15 Johns, 309; Peters v. Fogarty, 55 N. J. L. 386, 26 Atl. 855; Dalrymple v. Williams, 63 N. Y. 361, 20 Am. L.R.A.1918C.

Rep. 544; Wolfgram v. Schoepke, 123 Wis. 19, 100 N. W. 1054, 3 Ann. Cas. 398.

Where one owns and maintains an automobile for the use and pleasure of himself and family, and an injury is inflicted through the negligence of the person in charge of the automobile while using the machine for one of the purposes for which it is kept, the owner is liable, whether the person driving the machine at the time is a member of the family or a hired chauffeur.

Denison v. McNorton, 142 C. C. A. 631, 228 Fed. 401; Stowe v. Morris, 147 Ky. 386, 39 L.R.A.(N.S.) 224, 144 S. W. 52; McNeal v. McKain, 33 Okla. 449, 41 L.R.A.(N.S.) 775, 126 Pac. 742; Campbell v. Arnold, 219 Mass. 100, 106 N. E. 599; Bourne v. Whitman, 209 Mass. 155, 35 L.R.A.(N.S.) 701, 95 N. E. 404, 2 N. C. C. A. 318; Smith v. Jordan, 211 Mass. 269, 97 N. E. 761; Kayser v. Van Nest, 125 Minn. 277, 51 L.R.A.(N.S.) 970, 146 N. W. 1091; Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745; Guignon v. Campbell, 80 Wash. 543, 141 Pac. 1031; Switzer v. Sherwood, 80 Wash. 19, 141 Pac. 181, Ann. Cas. 1917A, 216; Birch v. Abercrombie, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020; Allen v. Bland, — Tex. Civ. App. —, 168 S. W. 35; Hazzard v. Carstairs, 244 Pa. 122, 90 Atl. 556; Moon v. Matthews, 227 Pa. 488, 29 L.R.A.(N.S.) 856, 136 Am. St. Rep. 902, 76 Atl. 219; Cowell v. Saperston, 149 App. Div. 373, 134 N. Y. Supp. 284, 208 N. Y. 619, 102 N. E. 1100; McHarg v. Adt, 163 App. Div. 782, 149 N. Y. Supp. 244; Missell v. Hayes, 86 N. J. L. 348, 91 Atl. 322; Davis v. Littlefield, 97 S. C. 171, 81 S. E. 487; Winn v. Haliday, 109 Miss. 691, 69 So. 685; Carrier v. Donovan, 88 Conn. 37, 89 Atl. 894; Hiroux v. Baum, 137 Wis. 197, 19 L.R.A.(N.S.) 332, 118 N. W. 533; Lashbrook v. Patten, 1 Duv. 317; Winfrey v. Lazarus, 148 Mo. App. 388, 128 S. W. 276; Daily v. Maxwell, 152 Mo. App. 422, 133 S. W. 351; Marshall v. Taylor, 168 Mo. App. 240, 153 S. W. 527, 6 N. C. C. A. 313; Hays v. Hogan, 180 Mo. App. 237, 165 S. W. 1125.

The ownership of the machine being conceded by the defendants, the presumption follows that when the defendant's son was using it, he had his father's consent, and the burden was then cast on the defendant father to prove to the satisfaction of the jury that no consent, express or implied, had been given by him to the son.

Shamp v. Lambert, 142 Mo. App. 567, 121 S. W. 770; Marshall v. Taylor, 168 Mo. App. 240, 153 S. W. 527, 6 N. C. C. A. 313; Christensen v. Christiansen, — Tex. Civ. App. —, 155 S. W. 995; Birch v. Abercrombie, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020; Hazzard v. Carstairs, 244 Pa. 122, 90 Atl. 556; Boon v. Matthews, 227

Pa. 488, 29 L.R.A.(N.S.) 856, 136 Am. St. Rep. 902, 76 Atl. 219.

The constitutional question attempted to be raised for the first time in the motion for a new trial comes too late, and will be regarded by this court as having been waived.

Hartzler v. Metropolitan Street R. Co. 218 Mo. 562, 117 S. W. 1124; Lohmeyer v. St. Louis Cordage Co. 214 Mo. 685, 113 S. W. 1108; State v. Gamma, 215 Mo. 100, 114 S. W. 619; Dahnke-Walker Mill. Co. v. Blake, 242 Mo. 23, 145 S. W. 438; George v. Quincy, O. & K. C. R. Co. 249 Mo. 197, 155 S. W. 463.

Messrs. Green & Green, W. J. Orr, J. D. Brooks, Hamlin & Seawell, and Lewis Luster, for defendants:

The higher courts never interfere with the order of the lower court granting a new trial unless its discretion is abused. Then, too, if there is any good reason appearing on the record for granting a new trial, the order granting it will be upheld.

Warren v. Cowden, 107 Mo. App. 485, 151 S. W. 501; Green v. Terminal R. Asso. 211 Mo. 18, 109 S. W. 715; Smart v. Kansas City, 208 Mo. 162, 14 L.R.A.(N.S.) 565, 123 Am. St. Rep. 415, 105 S. W. 709, 13 Ann. Cas. 932; Lovell v. Davis, 52 Mo. App. 342; Iron Mountain Bank v. Armstrong, 92 Mo. 265, 4 S. W. 720; Farrell v. St. Louis Transit Co. 103 Mo. App. 457, 78 S. W. 312.

The verdict of the jury is uncertain and ambiguous, and the trial court was justified in arresting the judgment and granting a new trial because of the ambiguous verdict; and after the jury is discharged, the court is not authorized to amend the verdict to conform to what he believes to be the intention of the jury, and the appellate court certainly could not assume such power.

Newton v. St. Louis & S. F. R. Co. 168 Mo. App. 199, 153 S. W. 495; Haumuller v. Ackermann, 130 Mo. App. 387, 109 S. W. 857; Gaither v. Wilmer, 71 Md. 361, 5 L.R.A. 757, 17 Am. St. Rep. 542, 18 Atl. 590; Dyer v. Combs, 65 Mo. App. 148; Poulson v. Collier, 18 Mo. App. 604.

The petition does not state facts sufficient to constitute a cause of action against either defendant, because based upon an unconstitutional law, and this question can be raised at any time.

McGrew v. Missouri P. R. Co. 230 Mo. 496, 132 S. W. 1076; Simpson v. Witte Iron Works, — Mo. App. —, 144 S. W. 895; Saxton Nat. Bank v. Bennett, 138 Mo. 494, 40 S. W. 97; Bennett v. Missouri P. R. Co. 105 Mo. 642, 16 S. W. 947; Logan v. Field, 192 Mo. 66, 90 S. W. 127.

The statute relating to motor vehicles, as enacted by the legislature of 1911, and found L.R.A.1918C.

on page 322 of Session Acts of 1911, is unconstitutional.

Daugherty v. Thomas, 174 Mich. 371, 45 L.R.A.(N.S.) 699, 140 N. W. 615, Ann. Cas. 1915A, 1163; Berry v. Metzger Motor Car Co. 175 Mich. 466, 141 N. W. 529; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; Hannibal v. Missouri & K. Teleg. Co. 31 Mo. App. 23; State ex rel. Harris v. Herrmann, 75 Mo. 346; State v. Granneman, 132 Mo. 326, 33 S. W. 784; Witzmann v. Southern R. Co. 131 Mo. 618, 33 S. W. 181; St. Louis v. Weitzel, 130 Mo. 616, 31 S. W. 1045; State ex rel. Kirkwood v. Heege, 133 Mo. 112, 36 S. W. 614.

Where a father purchases an automobile and maintains it as a family vehicle, with restricted uses, and a son is cautioned not to use the car without first obtaining permission, and the son, violating this injunction, uses the car without permission upon an independent pleasure trip of his own, accompanied by no other member of the father's family, the father cannot be held responsible in case the son, while negligently driving the car, causes injury.

Parker v. Wilson, 179 Ala. 361, 43 L.R.A.(N.S.) 87, 60 So. 150; Riley v. Roach, 168 Mich. 294, 37 L.R.A.(N.S.) 834, 134 N. W. 14; Danforth v. Fisher, 75 N. H. 111, 21 L.R.A.(N.S.) 93, 139 Am. St. Rep. 670, 71 Atl. 535; Cunningham v. Castle, 127 App. Div. 580, 111 N. Y. Supp. 1057; Neff v. Brandeis, 91 Neb. 11, 39 L.R.A.(N.S.) 933, 135 N. W. 232; Lotz v. Hanlon, 217 Pa. 339, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 66 Atl. 525, 10 Ann. Cas. 731; Cohen v. Borgenecht, 83 Misc. 28, 144 N. Y. Supp. 399; Maher v. Benedict, 123 App. Div. 579, 108 N. Y. Supp. 228; Patterson v. Kates, 152 Fed. 481; Slater v. Advance Thresher Co. 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133; Stewart v. Brauch, 103 App. Div. 577, 93 N. Y. Supp. 161; Reynolds v. Buck, 127 Iowa, 601, 103 N. W. 946, 18 Am. Neg. Rep. 412; Doran v. Thomsen, 76 N. J. L. 754, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296; Garretzen v. Duenckle, 50 Mo. 104, 11 Am. Rep. 405; Evans v. Supply Dyke Automobile Co. 121 Mo. App. 266, 101 S. W. 1132; Maddox v. Brown, 71 Me. 432, 36 Am. Rep. 336; Broadstreet v. Hall, 10 L.R.A.(N.S.) 933, and note, 168 Ind. 192, 120 Am. St. Rep. 356, 80 N. E. 145; Howe v. Leighton, 75 N. H. 601, 75 Atl. 102; Spelman v. Delano, 177 Mo. App. 28, 163 S. W. 300; Linville v. Nissen, 162 N. C. 95, 77 S. E. 1096; Tanzer v. Read, 160 App. Div. 584, 145 N. Y. Supp. 708; McFarlane v. Winters, 47 Utah, 598, L.R.A. 1916D, 618, 155 Pac. 437; Heissenbittel v. Meagher, 162 App. Div. 752, 147 N. Y. Supp. 1097; B. & R. Co. v. McLeod, — Alberta,

—, 7 D. L. R. 579; Farthing v. Strouse, 172 App. Div. 523, 158 N. Y. Supp. 841; Loehr v. Abell, 174 Mich. 590, 140 N. W. 926; Armstrong v. Sellers, 182 Ala. 582, 62 So. 28; Schumer v. Register, 12 Ga. App. 743, 78 S. E. 731; Roberts v. Schanz, 83 Misc. 139, 144 N. Y. Supp. 824; University of Missouri Bulletin 1914, Law Series 5, p. 30; Case & Comment (Aug. 1915) p. 220; 28 Harvard L. Rev. (Nov. 1914) p. 91; Van Blaricom v. Dodgson, 220 N. Y. 111, L.R.A. 1917F, 363, 115 N. E. 443.

Any verdict under the evidence in this case for more than nominal damages would be excessive, even in case of liability; and the instruction given on behalf of plaintiff on the measure of damages is erroneous.

Hickman v. Missouri P. R. Co. 22 Mo. App. 345; Knight v. Sattler Lead & Zinc Co. 75 Mo. App. 541; Schaub v. Hannibal & St. J. R. Co. 106 Mo. 93, 16 S. W. 924; McGowan v. St. Louis Ore & Steel Co. 109 Mo. 533, 19 S. W. 199; Parsons v. Missouri P. R. Co. 94 Mo. 296, 6 S. W. 464; Goss v. Missouri P. R. Co. 50 Mo. App. 614; Coleman v. Himmelberger-Harrison Land & Lumber Co. 105 Mo. App. 254, 79 S. W. 981; Leahy v. Davis, 121 Mo. 227, 25 S. W. 941.

Woodson, J., delivered the opinion of the court:

I. This case is properly here, not only on account of the fact that the court of appeals certified it here under the mandate of the Constitution, but also because certain constitutional questions are involved, which will be presently considered. For the reasons stated, we will pay no further attention to the question of the jurisdiction of this court over this case.

II. The large question presented by this record for determination is stated by counsel for appellant in this language: "Where one owns and maintains an automobile for the use and pleasure of himself and family and an injury is inflicted through the negligence of the person in charge of the automobile while using the machine for one of the purposes for which it is kept, the owner is liable. And this is true whether the person driving the machine at the time is a member of the family or a hired chauffeur."

In support of this proposition we are cited to the following authorities: Denison v. McNorton, 142 C. C. A. 631, 228 Fed. 401; Stowe v. Morris, 147 Ky. 386, 39 L.R.A. (N.S.) 224, 144 S. W. 52; McNeal v. McKain, 33 Okla. 449, 41 L.R.A. (N.S.) 775, 126 Pac. 742; Campbell v. Arnold, 219 Mass. 160, 106 N. E. 599; Bourne v. Whitman, 209 Mass. 155, 35 L.R.A. (N.S.) 701, 95 N. E. 404, 2 N. C. C. A. 318; Smith v. Jordan, 211 Mass. 269, 97 N. E. 761; Kayser v. Van Nest, 125 Minn. 277, 51 L.R.A. (N.S.) 970, L.R.A. 1918C.

146 N. W. 1091; Ploetz v. Holt (1913) 124 Minn. 169, 144 N. W. 745; Guignon v. Campbell, 80 Wash. 543, 141 Pac. 1031; Switzer v. Sherwood, 80 Wash. 19, 141 Pac. 181, Ann. Cas. 1917A, 216; Birch v. Abercrombie, 74 Wash. 486, 50 L.R.A. (N.S.) 59, 133 Pac. 1020; Allen v. Bland (1914)—Tex. Civ. App.—, 168 S. W. 35; Hazzard v. Carstairs, 244 Pa. 122, 90 Atl. 556; Moon v. Matthews, 227 Pa. 488, 29 L.R.A. (N.S.) 856, 136 Am. St. Rep. 902, 76 Atl. 219; Cowell v. Saperston, 149 App. Div. 373, 134 N. Y. Supp. 284, also 208 N. Y. 619, 102 N. E. 1100; Missell v. Hayes, 86 N. J. L. 348, 91 Atl. 322; Davis v. Littlefield, 97 S. C. 171, 81 S. E. 487; Winn v. Haliday (1915) 109 Miss. 691, 89 So. 685; McHarg v. Adt (1914) 163 App. Div. 782, 149 N. Y. Supp. 244; Carrier v. Donovan, 88 Conn. 37, 89 Atl. 894; Hiroux v. Baum, 137 Wis. 197, 19 L.R.A. (N.S.) 332, 118 N. W. 533; Lashbrook v. Patten, 1 Duv. 317; Winfrey v. Lazarus, 148 Mo. App. 388, 128 S. W. 276; Daily v. Maxwell, 152 Mo. App. loc. cit. 422, 133 S. W. 351; Marshall v. Taylor, 108 Mo. App. 240, 153 S. W. 527, 6 N. C. C. A. 313; Hays v. Hogan, 180 Mo. App. 237, 165 S. W. 1125.

Preliminary to the discussion of this question, it may not be improper to state that the trial court granted the new trial because under the record it was of the opinion the defendant R. S. Hogan was not liable, and that the verdict of the jury was so indefinite and uncertain a proper judgment could not be rendered thereon; in that connection the court also stated that it did not sustain the motion for a new trial because the verdict was not supported by the evidence or was against the weight of the evidence, nor on the ground of passion or prejudice of the jury against the defendants. Counsel for respondents contend that this court has no authority to consider the reasons assigned by the trial court for granting the new trial, because those reasons were not entered of record as required by § 2023, Mo. Rev. Stat. 1909, but were preserved, if at all, in the bill of exceptions.

This court has repeatedly held that where a statute such as this requires a matter to be spread of record, it must be done, and cannot be preserved in a bill of exceptions, and vice versa, if required to be saved in the bill of exceptions, it cannot be preserved by the record proper. Hewitt v. Steele, 118 Mo. 463, 24 S. W. 440; Taylor v. Scherpe & K. Architectural Co. 47 Mo. App. 257; Pennowsky v. Coerver, 205 Mo. 135, 103 S. W. 542. Notwithstanding this insistence, which is well founded, still we may consider the same as throwing light upon the view the circuit court took of the case during the progress of the trial, and the view he

had of it when passing on the motion for a new trial. This carries us back to the large proposition before quoted. By reading it in the light of the remarks made by the trial court in granting the new trial, it is apparent that during the trial the court was of the same opinion as counsel for appellant as to the liability of R. S. Hogan, namely, that he was liable by virtue of the facts that he was the owner of the car, that it was for the use and pleasure of himself and family, that it was being used at the time of the injury for the pleasure of the son (a member of the family) and his friends, and the further fact that it was being negligently driven by the son; and that is true whether the son was driving the car for his own use with or without the authority of the father. In short, the father was liable in this case because he permitted his son, a member of his family, to drive the car upon other occasions, a piece of dangerous machinery, even though he was not about the father's business, but his own. But upon reflection the trial court, in passing upon the motion for a new trial, evidently changed its mind as to the liability of the father under those facts, which, as that court said, were clearly established by the evidence, but held he was not liable thereunder.

From those two rulings it is clear the court was of the opinion that there was no evidence introduced tending to show that J. E. Hogan, the son, was the agent and servant of R. S. Hogan, or that he was at the time of the injury acting for his father. In other words, that there was no evidence tending to show that the relation of master and servant existed between them, and therefore the father was not liable to the plaintiff on account of permitting his son, a member of his family, to use a dangerous piece of machinery on a public highway. We are likewise of the opinion that this record fails to show that J. E. Hogan was the agent of R. S. Hogan in driving the car upon the occasion in question, or that he was performing any duty for the father at that time. In fact the evidence shows he was not; consequently the plaintiff is not entitled to a recovery in this case against R. S. Hogan upon the ground that J. E. Hogan was his agent and servant. By this process of elimination we now return to the question, Is the father liable to the plaintiff in this case for the reason that he permitted his son to use this car, a dangerous piece of machinery, as counsel for plaintiff terms it, for his personal use or pleasure? Counsel for plaintiff, as before stated, contend for the affirmative of this proposition, while those for the defendant insist to the contrary. We have carefully read all the L.R.A.1918C.

authorities heretofore cited by counsel for plaintiff, and are satisfied that many of them are directly in point, and others announce the general doctrine that a father, in such a case, is liable for negligence of the son.

There has been so much said and written upon that question as shown by the copious quotations taken from the opinions of courts of the various states, which appear in briefs of counsel for plaintiff, it would be difficult to add anything new thereto; so we will content ourselves by saying that the authorities cited fully sustain the rule of law contended for by counsel for plaintiff. But the authorities are not all one way upon that question. Nor are we satisfied with the soundness of the rule announced by the authorities cited by counsel for plaintiff. The position of counsel for defendants upon that question is stated in this language: "Where a father purchases an automobile and maintains it as a family vehicle, with restricted uses, and a son had been cautioned not to use the car without first obtaining permission, and the son, violating this injunction, uses the car without permission upon an independent pleasure trip of his own, accompanied by his friends, but by no other member of the father's family, the father cannot be held responsible in case the son, while negligently driving the car, causes injury."

And in support thereof we are cited to the following cases: *Parker v. Wilson*, 179 Ala. 361, 43 L.R.A.(N.S.) 87, 60 So. 150; *Riley v. Roach*, 168 Mich. 294, 37 L.R.A.(N.S.) 834, 134 N. W. 14; *Danforth v. Fisher*, 75 N. H. 111, 21 L.R.A.(N.S.) 93, 139 Am. St. Rep. 670, 71 Atl. 535; *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Supp. 1037; *Neff v. Brandeis*, 91 Neb. 11, 39 L.R.A.(N.S.) 933, 135 N. W. 232; *Lotz v. Hanlon*, 217 Pa. 339, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 66 Atl. 525, 10 Ann. Cas. 731; *Cohen v. Borgenecht*, 83 Misc. 28, 144 N. Y. Supp. 399; *Maher v. Benedict*, 123 App. Div. 579, 108 N. Y. Supp. 228; *Patterson v. Kates* (C. C.) 152 Fed. 481; *Slater v. Advance Thresher Co.* 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133; *Stewart v. Baruch*, 103 App. Div. 577, 93 N. Y. Supp. 161; *Reynolds v. Buck*, 127 Iowa, 601, 103 N. W. 946, 18 Am. Neg. Rep. 412; *Doran v. Thomsen*, 76 N. J. L. 754, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296; *Garretzen v. Duencel*, 50 Mo. 104, 11 Am. Rep. 405; *Evans v. A. L. Dyke Automobile Supply Co.* 121 Mo. App. 266, 101 S. W. 1132; *Maddox v. Brown*, 71 Me. 432, 36 Am. Rep. 336; *Broadstreet v. Hall*, 10 L.R.A.(N.S.) 933, and note (168 Ind. 192, 120 Am. St. Rep. 356, 80 N. E. 145); *Howe v. Leighton*, 75 N. H. 601, 75 Atl. 102; *Spcl-*

man v. Delano, 177 Mo. App. 28, 163 S. W. 300; Linville v. Nissen, 162 N. C. 95, 77 S. E. 1096; Tanzer v. Read, 160 App. Div. 584, 145 N. Y. Supp. 708; McFarlane v. Winters, 47 Utah, 598, L.R.A.1916D, 618, 155 Pac. 437; Heissenbuttel v. Meagher, 162 App. Div. 752, 147 N. Y. Supp. 1087; B. & R. Co. v. McLeod, — Alberta, —, 7 D. L. R. 579; Farthing v. Strouse, 172 App. Div. 523, 158 N. Y. Supp. 841; Loehr v. Abell, 174 Mich. 590, 140 N. W. 926; Armstrong v. Sellers, 182 Ala. 582, 62 So. 28; Schumer v. Register, 12 Ga. App. 743, 78 S. E. 731; Roberts v. Schana, 83 Misc. 139, 144 N. Y. Supp. 824; University of Missouri Bulletin, Law Series 5 (Dec. 1914) p. 30; Case & Comment (Aug. 1915) p. 220; 28 Harvard L. Rev. (Nov. 1914) p. 91.

By carefully reading the position of counsel for defendants before quoted, it will be seen that it includes all the facts that can possibly be deducted from the evidence preserved in this record; and if defendant R. S. Hogan's liability cannot be predicated upon those facts, then a recovery cannot be had against him in this case. Preliminary to the legal discussion of this question, it may add clarity thereto to restate the fact that this record is totally barren of all evidence tending to show that J. E. Hogan was the agent or servant of R. S. Hogan, or that the former was driving the car at the time of the injury for his use or benefit, without, as previously stated, the facts that J. E. Hogan was a member of the former's family, that the car was purchased for the family use, and that it was being driven by the latter at the time of the injury, created that relation. This latter proposition will be considered later. Attending the former, in the case of Garretzen v. Duenckel, 50 Mo. 104, 11 Am. Rep. 405, the court said: "A master is not responsible for any act or omission of his servants which is not connected with the business in which they serve him, though in general he is responsible for the manner in which they execute his orders, and for their negligence in selecting means by which the orders are to be carried out. In determining whether a particular act is done in the course of a servant's employment, it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act was done while the servant was at liberty from his service, and pursuing his own ends exclusively, there can then be no question that the master is not responsible, even though the injuries complained of could not have been committed without the facilities afforded by the servant's relations to his master."

While it is true that court held the defendant liable in that case, yet it was because the servant was acting within the L.R.A.1918C.

scope of his authority when he was showing the gun. This case has been cited with approval of this court so often it would be useless to refer to them. But it should be borne in mind that in the case at bar, in the very act of driving the machine, J. E. Hogan violated the orders of R. S. Hogan, for he had no authority whatever to drive it without first obtaining the latter's permission to so do. That fact differentiates this case from the Garretzen-Duenckel Case just considered. Nor will it be inappropriate to here state that it has never been the law of this state that the father is liable for the torts of even his minor children; that is, liable therefor merely because of the relationship of parent and child. Bassett v. Riley, 131 Mo. App. 676, 111 S. W. 596; Baker v. Haldeman, 24 Mo. 219, 69 Am. Dec. 430; Paul v. Hummel, 43 Mo. 119, 97 Am. Dec. 381. For stronger reasons the father should not be liable for the torts of his adult son.

The reports are full of cases holding that where a servant, even with the master's consent, takes the latter's car, and while using it for his own purposes negligently injures a person thereby, the master is not liable. Guthrie v. Holmes, — Mo. —, 198 S. W. 854, decided by this court in banc at present term; Cunningham v. Castle, 127 App. Div. 580, 111 N. Y. Supp. 1057; Howe v. Leighton, 75 N. H. 601, 75 Atl. 102; Patterson v. Kates (C. C.) 152 Fed. 481; Slater v. Advance Thresher Co. 97 Minn. 305, 5 L.R.A. (N.S.) 598, 107 N. W. 133; Lotz v. Hanlon, 217 Pa. 339, 10 L.R.A. (N.S.) 202, 118 Am. St. Rep. 922, 66 Atl. 525, 10 Ann. Cas. 731; Neff v. Brandeis, 91 Neb. 11, 39 L.R.A. (N.S.) 933, 135 N. W. 232; Danforth v. Fisher, 75 N. H. 111, 21 L.R.A. (N.S.) 93, 139 Am. St. Rep. 670, 71 Atl. 635; Daily v. Maxwell, 152 Mo. App. 426, 133 S. W. 351. In the case of Maddox v. Brown, 71 Me. 432, 36 Am. Rep. 336, where a minor son who had been permitted to use his father's horse and wagon without restriction took them upon one occasion, in the absence and without the knowledge of the father, on business of his own, and left the horse unhitched in the street, and the horse ran away and injured the plaintiff's carriage, it was held that the father was not liable for the damage done the carriage, because the son was not the agent or servant of the father. In Parker v. Wilson, 179 Ala. 361, 43 L.R.A. (N.S.) 87, 60 So. 150, where an eighteen-year-old boy took his father's automobile for his own use without the father's knowledge, but by his implied general permission, it was held that the son was not the agent of the father, and that the latter was not liable for the negligence of the former in operating the car. In Maher

v. Benedict, 123 App. Div. 579, 108 N. Y. Supp. 228, it was held that the owner of an automobile is not liable for injuries resulting from the negligence of his son in driving a car, merely because of the relationship, or because he permitted his son to drive the car.

The same rule is announced in the case of *Reynolds v. Buck*, 127 Iowa, 601, 103 N. W. 946, 18 Am. Neg. Rep. 412. See also *Parker v. Wilson*, 179 Ala. 361, 43 L.R.A. (N.S.) 87, 60 So. 150, where the court used this language: "The meager facts before us, though interpreted with favor to the appellant, present the case of a mere permissive use of the father's vehicle by the son for his own purposes of business or pleasure. On what principle can it be said, in this state of the case, that the son was the servant of the defendant and acting within the course or scope of his employment? It seems clear that the ordinary rule of master and servant has no application to such a case, and prior to the advent of the automobile, the contrary doctrine had no general currency in this country or England. [Citing many cases and continuing:] We find *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351; *Stowe v. Morris*, 147 Ky. 386, 39 L.R.A. (N.S.) 224, 144 S. W. 52, and *Moon v. Matthews*, 227 Pa. 488, 29 L.R.A. (N.S.) 856, 136 Am. St. Rep. 902, 76 Atl. 219, referred to as sustaining appellant's contention for appellee's liability in this case. The first named of these cases is closely in point, and does clearly hold with the appellant. In the second there were members of the family other than the driver in the machine. The third may be discriminated on the very substantial ground that the machine was being operated by a driver regularly employed for the purpose. The doctrine contended for amounts to this, that the pleasure of the family in its utmost detail is the business of the father. As applied to the case at hand, it means that the son, in pursuit of his own pleasure, with an automobile owned by his father, was engaged in the business of the father. But the doctrine, we think, has no firm foundation in reason or common sense. In theory it overlooks well-settled principles of law; in practice it would interdict the father's generosity and his reasonable care for the pleasure, or even the well-being, of his children by imposing a universal responsibility for their acts. As said in *Doran v. Thomsen*, 76 N. J. L. 756, 19 L.R.A. (N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296: 'It would subject a parent to liability if he bought for his son a baseball or for his daughter a golf club, and, by permitting them to be used by his children for their appropriate purposes, injury occurred. It bases the crea-

tion of the relation of master and servant upon the purpose which the parent had in mind in acquiring ownership of the vehicle and its permissive use by the child. This proposition ignores an essential element in the creation of that status as to third persons; that such use must be in furtherance of, and not apart from, the master's service and control, and fails to distinguish between a mere permission to use and a use subject to the control of the master and connected with his affairs.' In the case from which we have just quoted it was held, on facts substantially identical with those in the case at bar, that the owner of the automobile and father of the driver was not liable. So in *Maier v. Benedict*, 123 App. Div. 579, 108 N. Y. Supp. 228. The same conclusion finds support in *Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761, which case is stated and commented upon in 75 Cent. L. J. 43, as follows: 'Thus, in the Massachusetts case, a father purchased an automobile for the use of his family, and his minor son was the only member of the family licensed to operate it. The wife had permission to use it at her pleasure, and the son was expected to obey any request of his mother to take her out in the car. Plaintiff was injured by the son's negligence when he was taking his mother out at her request. The court said: "If, instead of hiring a stranger, the father chose to have the same work performed by his minor son, to whose time and services he was entitled as a matter of law, it could not be ruled as a matter of law that a jury might not find the business to be that of the father. This is not a case of mere permissive use of the father's vehicle by the son for his own pleasure." This authority, therefore, might even be deemed against, rather than in support of, the principal case (*Stowe v. Morris*, 147 Ky. 386, 39 L.R.A. (N.S.) 224, 144 S. W. 52), especially when it was stated in another part of the opinion: "If the act is not done by the son in furtherance of the father's business, but in performance of some independent design of his own, the father is not liable." Liability was placed merely on the fact that there was room in the evidence for the jury to find that a request by defendant's wife was equivalent to direction by him for his son, as his hired man, to perform for him a service.'

In *Doran v. Thomsen*, 76 N. J. L. 754, 19 L.R.A. (N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296, the father owned an automobile which he kept upon his premises, and his daughter, about nineteen years of age, was accustomed to drive it, and did so whenever she felt like it; asking permission to use it when the father was at home, but when not at home took it sometimes with-

out permission. There was no proof that the daughter was actually employed by the father to operate the machine. The court said: "No other member of the family was with her; so that the machine was then being run by the daughter upon no errand of the father."

She was allowed to operate the machine from time to time, and drove it whenever she felt like it, as also did her brother; and defendant testified that he bought the machine "for our own use," the same as a person might buy a horse or carriage for the family, and that it was operated mostly by his son and daughter. On the day of the accident the father was absent in New York city, and did not know that his daughter was intending to use the automobile, but he knew that she did use it whenever she desired to do so. On this occasion she took it of her own accord without asking permission, and had three friends in the car with her and was out for her own pleasure. In this case against the father on account of the daughter negligently injuring a person in the highway, it was held that such proof was not sufficient to constitute the daughter a servant or agent of the master, and that a motion for direction of a verdict for the defendant should have prevailed. This case was well considered and many authorities cited, and as said by counsel for defendants: "The facts are in many respects similar to the case at bar, but the case at bar is even stronger on behalf of the father for the reason that defendant J. E. Hogan was directed never to use the car without first asking permission of his father or mother, and on the day of the accident in question was using the machine in direct violation of this injunction."

In *Riley v. Roach*, 168 Mich. 294, 37 L.R.A. (N.S.) 834, 134 N. W. 14, it was held that if the owner of an automobile, upon leaving home, instructs the chauffeur not to take the machine out without orders from himself or wife, he is not liable for injury done by the machine while it is being used to take out one of his guests, his wife's sister, but when so used it was not with the expressed consent of the owner or his wife. In *B. & R. Co. v. McLeod*, — Alberta, —, 7 D. L. R. 579, a son was held to be using the automobile for his own purpose, and not to be acting as his father's agent at the time the accident occurred, where it appeared that he had driven his father's car for three years, and had an opportunity to take the car and use it whenever he liked; that on the day of the accident, he went to the garage, took the car for a ride with some friends, and during the course of the ride the accident occurred. The court approved the decision in *Doran v. Thomsen*, supra, L.R.A.1918C.

where the parent was held not liable in a case where the child was using the car alone for her own purposes. In *Tanzer v. Read*, 160 App. Div. 584, 145 N. Y. Supp. 708, the wife was driving the car purchased for family use. She was out for her own pleasure, and the courts held that while engaged in such recreation she was not in any sense acting as her husband's agent, even though she utilized his property as a means for pleasure. In *Farthing v. Strouse*, 172 App. Div. 523, 158 N. Y. Supp. 841, the court held that there was no presumption that the defendant's wife was in his service and engaged in his business, and that the principle of respondeat superior does not apply where it appeared that the wife was using the car alone for her own purposes, although the husband had given her authority to use it for pleasure, or for any purpose whatever.

The case of *Heissenbuttel v. Meagher*, 162 App. Div. 752, 147 N. Y. Supp. 1087, is "on all fours" with the case at bar. The opinion is short and to the point. In discussing the question the court said: "The plaintiff, while standing in a public street waiting for a surface car, was struck and injured by an automobile belonging to defendant and driven by his son, a young man twenty-four years of age. This son was pursuing his studies as a law student, and lived with his father as a member of his family. The automobile was a pleasure vehicle kept by defendant for the use of himself and his family. His son was privileged to use it for his individual purposes whenever he so desired. It was customary also for the son to act as chauffeur of the car when it was used by defendant or other members of the family. On the occasion of the accident, the son had taken the car out for a pleasure drive, accompanied by several of his friends. Neither defendant nor any other member of his family, except his son, was in the party. It is evident from these facts that when the accident happened the car was neither expressly nor constructively in the use or service of the defendant, and that in driving the car the son was in no way acting as defendant's agent. Under these circumstances, we hold that defendant is not liable for his son's negligent operation of the car. The principle involved has been applied in so many cases that the citation of but a few will suffice. *Tanzer v. Read*, supra; . . . *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Supp. 1057; *Maher v. Benedict*, 123 App. Div. 579, 108 N. Y. Supp. 228. The judgment and order appealed from should be reversed, with costs, and the complaint dismissed, with costs. All concur."

In *Loehr v. Abell*, 174 Mich. 590, 140 N.

W. 926, it was held that a father is not liable for the negligence of his minor son when using the automobile with the father's permission, but for his own pleasure; the son being a licensee only. In *Armstrong v. Sellers*, 182 Ala. 582, 62 So. 28, it was held that the owner of an automobile who habitually consented to his wife's use of the machine is not liable, in the absence of statute, to one run down by the machine, which was being driven by a third person who had the privilege to use the machine, and with whom the owner's wife was riding. In *Schumer v. Register*, 12 Ga. App. 743, 78 S. E. 731, it was held that no cause of action was set forth against the owner of an automobile by a count which alleged that the defendant, a widow, having exclusive control of her minor daughter, was the owner of an automobile, and that the daughter was riding in it, having authority and command over its movement, and that it was being driven by a third party, when it was negligently run into the plaintiff. It was further held that this count would set forth no cause of action under a statute making every person liable for the torts committed by his child or servant by his command, or in the prosecution of his business, although an amendment of the count alleged that the automobile was kept for the comfort and pleasure of the owner's family, who were authorized to use it at any time for their pleasure; it being held that, in order to render the parent liable under such statute, the child must have been engaged in his parent's business. In *McFarlane v. Winters*, 47 Utah, 598, L.R.A.1916D, 618, 155 Pac. 437, where all the authorities are reviewed, the court, in speaking of the rule announced by the Missouri courts of appeals, says: "Such a doctrine, in the ordinary affairs of life, would be monstrous to say the least. But, if it were assumed that a distinction should be made between automobiles and other vehicles and instrumentalities, it should be made by the legislature, the lawmaking power, and not by the courts, who merely declare the law as they find it. We, however, can conceive neither reason nor logic in attempting to make such a distinction."

In *Linville v. Nissen*, 162 N. C. 95, 77 S. E. 1096, where a son about twenty years old was driving with three of his friends in the car, there was evidence that the car was maintained for the use of the owner and his family. There the court held that the trial judge should have directed a nonsuit as to the father, for the reason that the evidence is undisputed that the son at the time of the accident was not engaged in any business for the owner, but was about his own business or pleasure, and no jury question was raised on that point. This is one of the

many cases which hold as a matter of law that the father is not liable. In commenting upon the latter case, the University of Missouri Bulletin, vol. 15, No. 34, Law Series 5, December, 1914, said: "The statement from *Doran v. Thomsen*, above quoted, points out the fallacy of the Missouri cases. The creation of the relation of master and servant should not be based upon the purpose which the parent had in mind in buying the automobile and the permissive use by a member of his family. One might keep an automobile for the use of the members of a club, the students of a certain school, the residents of a certain town, or for the general public; yet who will say, in case he permits such persons to use the machine and they injure a third party, that the relation of master and servant existed, and that, in using the automobile for one of the purposes for which it was bought, the clubman or the student, or a member of the general public, was in the business of the owner, and that he is therefore liable for their acts. If public interest demands that ownership, coupled with a permissive use of an automobile by a member of the owner's family, be made a basis of liability for injuries to third parties, this result can be reached only by a departure from the established law of agency. It is submitted that *Sturgis, J.*, was right in holding *Hays v. Hogan*, 180 Mo. App. 237, 165 S. W. 1165, in conflict with *Walker v. Hannibal & St. J. R. Co.* 121 Mo. 575, 24 L.R.A. 363, 42 Am. St. Rep. 547, 26 S. W. 360, and *Garretzen v. Duenckel*, 50 Mo. 104, 11 Am. Rep. 405. Suppose, however, a frail son, or one injuring his health by too zealous an application to work: His affectionate, though wealthy, father is much concerned. He buys a machine, and tells his son to use it in the pursuit of health and pleasure. While thus pursuing, the son pursues and runs down the plaintiff instead. If these facts could be proved, a not unwilling jury might find that the son's frolic was not 'a frolic of his own,' but really of his father's. The question is whether any father does this. It is submitted that most of them do not. Such an idea of vicarious enjoyment is far too fanciful,—as much so in the case of an automobile as it would be, for instance, if the father bought a pair of roller skates for the son, or told him to use the family roller skates. The argument might as well be extended to a chauffeur who is occasionally allowed the use of the car so that he will be more satisfied with his work," and concludes the discussion with the remark: "Let not the ancient maxim be transformed to read: 'Qui facit per auto facit per se.'"

In *Case and Comment*, August number, 1915, at page 220, in an article by Joseph

T. Winslow, of the Massachusetts Bar, on the subject of the owner's liability for injury occurring while the automobile is being used by members of his family, announces the general rule to be that "a father cannot be held liable for the negligent operation of his car by his son merely because he owned the car, or because he permitted the son to drive it whenever he wished, or because the driver was his son."

And after reviewing the authorities he says in the summary (page 226): "It seems that where a child acts as the chauffeur for the family, of a car kept for family purposes, the owner will generally be held liable for injuries resulting from the negligent operation of the car by the child while he is driving it for other members of the owner's family who have permission to use it. It appears, however, that where a child or a member of the owner's family at the time an injury occurs is driving the car for his or her own purposes, the owner will not as a rule be liable, although the Missouri court of appeals in some cases has taken the view that a parent may be held liable under such circumstances if the car was one which was kept for general family use, upon the theory that it was being used by the owner's agent for one of the purposes for which it was kept by him. In case the owner of a car kept for family use furnishes a chauffeur other than a member of his family, he is ordinarily liable for an injury occurring while the chauffeur is driving the car under orders of some member of the owner's family."

The writer concludes by stating that the cases decided by the Missouri appellate courts, are, in his opinion, unsound upon principle, and unsupported by the weight of authority.

After a careful consideration of all the authorities cited, we have reached the same conclusion, and hold that the mere ownership of an automobile purchased by a father for the use and pleasure of himself and family does not render him liable in damages to a third person for injuries sustained thereby, through the negligence of his minor son while operating the same on a public highway in furtherance of his own business or pleasure; and the fact that he had the father's special or general permission to so use the car is wholly immaterial.

III. It is next insisted by the counsel for plaintiff that the ownership of the car by the father, and that it was being driven by his son at the time of the injury with the former's consent, raise a presumption that the latter was acting within the scope of his authority, and therefore the burden of proof rests upon the father to show the contrary. The vice of this insistence con-

sists in assuming that the ownership of the car by the father and his consent of its use by the son constituted the latter his agent and servant, and therefore at the time of the injury the car of R. S. Hogan was being driven by his servant, J. E. Hogan. That is non sequitur. That sequence would no more follow in this case than it would in case a member of this court should lend his car to a friend to drive to Fulton, and while en route he should negligently run over and injure a third person. In both cases the agency would have to be first established, and then, and not until then, would the presumption arise that the son or friend was acting within the scope of his authority, and thereby shift the burden of proof upon the father. *Guthrie v. Holmes*, — Mo. —, 198 S. W. 854.

Moreover, if the insistence of counsel for plaintiff is correct, then the court would be required to enforce one presumption upon another; namely, first, that the son was the agent of the father; and, second, that the agent was acting within the scope of his authority. This is never done. A presumption must be based upon a fact, and not upon inference or upon another presumption. *Yarnell v. Kansas City, Ft. S. & M. R. Co.* 113 Mo. 570, 18 L.R.A. 599, 21 S. W. 1, 4 Am. Neg. Cas. 714; *Bigelow v. Metropolitan Street R. Co.* 48 Mo. App. 367; *State v. Lackland*, 136 Mo. 26, 37 S. W. 812; *Glick v. Kansas City, Ft. S. & M. R. Co.* 57 Mo. App. 97.

The same rule governs expert opinions. It is not proper to predicate an expert opinion upon another. They must be based either upon the facts, or facts assumed to be true stated in the hypothetical question. *McAnany v. Henrici*, 238 Mo. 103, 141 S. W. 633. The points so far decided affect R. S. Hogan, the father alone, but the remaining questions are common to both defendants.

IV. Counsel for defendants contend that §§ 8 and 9 of the Act of 1911 (Laws 1911, p. 322), requiring the operator of an automobile upon a public highway to stop the same when signaled to do so by a driver of a team of horses, etc., and to exercise the highest degree of care, etc., are unconstitutional, null, and void. This contention is not well founded. This court in the case of *State v. Swagerty*, 203 Mo. 517, 10 L.R.A. (N.S.) 601, 102 S. W. 483, 120 Am. St. Rep. 671, 11 Ann. Cas. 725, held the Act of 1903, approved March 23, 1903 (Laws 1903, p. 162), which, for the purposes of this case, is practically the same as the Act of 1911, constitutional. That case had received the approval of this court in the cases of *St. Louis v. Hammond*, — Mo. —, 199 S. W. 411, and *Roper v. Greenspon*, — Mo. —, 193 S. W. 1107, both decided at the present term

of this court, the latter in banc, neither of which have yet been officially reported. We therefore rule this contention against the defendants.

V. Counsel for defendants insist that the order of the trial court granting the new trial was proper for the reason that the verdict of the jury was so indefinite and uncertain that a valid judgment could not be rendered thereon. The following is a copy of the verdict: "We, the jury, find the issues in favor of the plaintiff and against both defendants, J. E. Hogan and R. S. Hogan, and assess her damages at the sum of \$6,500, Six Thousand \$5.00 Dollars."

In support of the verdict six of the jurors filed affidavits stating that the amount of the verdict agreed upon by the jury was for the sum of \$6,500.

That such affidavits are competent is no longer an open question in this state. *State v. Underwood*, 57 Mo. 40, loc. cit. 52, 1 Am. Crim. Rep. 251; *State v. Rush*, 95 Mo. 199, loc. cit. 206, 8 S. W. 221; *Devoy v. St. Louis Transit Co.* 192 Mo. 197, loc. cit. 218, 219, 91 S. W. 140. The reports of other courts are also rich with such rulings. *Hamburg-Bremen F. Ins. Co. v. Pelzer Mfg. Co.* 22 C. C. A. 283, 42 U. S. App. 123, 76 Fed. 481; *Capen v. Stoughton*, 18 Gray, 364; *West v. Bank of Americus*, 63 Ga. 230; *Heinkin v. Barbrey*, 40 Ga. loc. cit. 252; *Mattox v. United States*, 146 U. S. loc. cit. 148, 36 L. ed. 920, 13 Sup. Ct. Rep. 50; *Davis v. Huber Mfg. Co.* 119 Iowa, 56, 93 N. W. 78; *Jackson ex dem. Noah v. Dickenson*, 15 Johns. 309, 8 Am. Dec. 236; *Peters v. Fogarty*, 55 N. J. L. 386, 26 Atl. 855; *Dalrymple v. Williams*, 63 N. Y. 361, 20 Am. Rep. 544; *Wolfgang v. Schoepke*, 123 Wis. 19, 100 N. W. 1054, 3 Ann. Cas. 398.

When we read the verdict in this case in the light of the affidavits filed, there can be no reasonable doubt but that the jury agreed upon the sum of \$6,500 as the amount thereof. This is also manifest from the figures \$6,500, the first sum stated therein, but when the attempt was thereafter made to state the amount in words, the scrivener wrote the words "Six Thousand," and for some reason undisclosed added "\$5.00 Dollars," thereby making the entire verdict as to the amount read, "at the sum of \$6,500, Six Thousand \$5.00 Dollars." It is perfectly clear from the face of the entire record, that is, the petition, answer, evidence, verdict, and affidavits filed, that through inadvertence the scrivener placed the punctuation point before instead of after the last two naughts found in the verdict. Had it been placed after them instead of before, both statements of the amount would have corresponded, and this question would not have been here; but as it L.R.A.1918C.

stands, it contradicts the remainder of the verdict and the affidavits, but if transposed the entire verdict becomes harmonious and in keeping with the record, as before stated. This view of the verdict was taken by the court of appeals in the case of *Gurley v. O'Dwyer*, 61 Mo. App. 348. In that case the suit was on a promissory note for \$103.70, and the jury returned the following verdict: "We, the jurors, do find a verdict in favor of the plaintiff for \$1.12, 16-100."

The court rendered judgment therein for the sum of \$112.16. Thereupon the defendant moved the court set aside verdict and judgment, and enter judgment on the verdict for \$1.12 and 16-100, according to the literal finding of the jury, which it was contended was a perfect verdict for \$1.12 $16\frac{16}{100}$, and therefore the court had no authority to change it to \$112.16. In passing upon that question, the St. Louis court of appeals said: "Touching the second complaint, we see no reason why an inaccurate punctuation should destroy a verdict which is responsive to the issues any more than inaccurate grammar or spelling, so long as the meaning of the verdict is perfectly clear in the light of surrounding circumstances. In *State v. McNamara*, 100 Mo. 100, 13 S. W. 938, the jury in their verdict assessed the defendant's punishment to two years in the 'Per-tentiary.' In *Snyder v. United States*, 112 U. S. 216, 28 L. ed. 697, 5 Sup. Ct. Rep. 118, the jury made a still greater blunder in spelling. Both Supreme Courts held that the meaning was perfectly plain, and that the verdict was good. In the case at bar there was no pretense that anything was paid on the note. The only defense interposed was non est factum. As the verdict for the jury was for the note with interest, and as that is the only verdict which they could have rendered in conformity with the evidence, provided they found for the plaintiff at all, the court did not err in entering the verdict according to the obvious intent of the jury, and rejecting the literal reading or erroneous punctuation. Besides this, we are bound to assume, in support of the action of the court, that the verdict was read to the jury, as is universally done, and that they assented to it as a verdict for \$112.16. We have never heard of a jury going down to fractions of a cent in their calculation of damages. Section 2100 of the Revised Statutes of 1889 provides that errors not affecting substantial rights of the adverse parties shall be disregarded."

And we fully agree with the court of appeals in saying there is no reason why an inaccuracy in punctuation should destroy a verdict which is responsive to the issues any more than inaccuracy in grammar or spelling, so long as the meaning of the verdict

is perfectly clear in the light of the surrounding facts and circumstances. No one can read this verdict in the light of the facts and circumstances disclosed by this record and reach any other conclusion than that it was the intention of the jury to find, and it did find, for the plaintiff in the sum of \$6,500. This point is ruled against defendants.

VI. It was finally insisted that the court properly granted a new trial because the verdict was excessive. We have carefully examined the evidence upon this point and are of the opinion that this insistence is not well grounded. Whilst it is true the evidence shows the deceased was fifty-seven

years old, with one leg off 6 inches below the knee, and one arm was somewhat smaller than the other, yet it further shows that he supported himself and family, composed of his wife and eight children. Under that evidence, we are unable to say the verdict was excessive.

We are therefore of the opinion that the judgment of the Circuit Court as to R. S. Hogan should be affirmed, and reversed and remanded as to J. E. Hogan, with direction for the court to reinstate the judgment on the verdict as to him.

All concur except Bond, J., absent.

NEBRASKA SUPREME COURT.

ALLEN G. FISHER
v.
DELIA O'HANLON et al.
and
JAMES ROWAN, Appt.

(93 Neb. 529, 141 N. W. 157.)

Bills and notes — mortgage security — option as to payment — negotiability.

1. Where a promissory note negotiable in form, by which the maker promises to pay a certain sum in money at a certain specified time, is made, and the note is secured by a mortgage, the reservation in the mortgage of an option on the part of the mortgagor to pay a part of the amount due at any time he may elect before maturity does not destroy the negotiability of the note secured by the mortgage.

For other cases, see Bills and Notes, I. d, 2, in Dig. 1-52 N. S.

Same — holder in due course.

2. A holder of a negotiable promissory note "in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face. (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact. (3) That he took it in good faith and for value. (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Comp. Stat. 1911, chap. 41, § 52.

For other cases, see Bills and Notes, V. d, in Dig. 1-52 N. S.

Headnotes by REESE, Ch. J.

Note. — As to garnishment of debt evidenced by negotiable paper, see annotation following this case, post, 731.

Generally as to provision in bill or note accelerating maturity as affecting negotiability, see note to Kennedy v. Broderick, L.R.A.1915B, 472. L.R.A.1918C.

Garnishment — money due on note.

3. The indebtedness of the maker upon a promissory note, before its maturity, is not the subject of attachment. His obligation is not to the payee named in the note, but to the holder, whoever he may be.

For other cases, see Garnishment, I. c, 1, in Dig. 1-52 N. S.

(April 17, 1913.)

APPEAL by defendant Rowan from a judgment of the District Court for Daves County in plaintiff's favor in a proceeding to collect a claim against Delia O'Hanlon by garnishment of the amount alleged to be due her on a promissory note. Reversed.

The facts are stated in the opinion.

Mr. Albert W. Crites, for appellant:

To subject such property to attachment, it must be within the jurisdiction of the court.

American Cent. Ins. Co. v. Hettler, 37 Neb. 849, 40 Am. St. Rep. 522, 56 N. W. 711; Edney v. Willis, 23 Neb. 63, 36 N. W. 300; Reimers v. Seatco Mfg. Co. 30 L.R.A. 364, 17 C. C. A. 228, 37 U. S. App. 426, 70 Fed. 573; Heard v. Dubuque County Bank, 8 Neb. 10, 30 Am. Rep. 811; Stark v. Olsen, 44 Neb. 654, 63 N. W. 37; Cook v. Satterlee, 6 Cow. 108, 16 Am. Dec. 432; Dobbins v. Oberman, 17 Neb. 163, 22 N. W. 356; Charlton v. Reed, 61 Iowa, 166, 47 Am. Rep. 808, 16 N. W. 64; Frost v. Fisher, 13 Colo. App. 322, 58 Pac. 872; Clark v. Skeen, 61 Kan. 526, 49 L.R.A. 190, 78 Am. St. Rep. 337, 60 Pac. 327; Wilson v. Campbell, 110 Mich. 580, 35 L.R.A. 544, 68 N. W. 278; Chicago R. Equipment Co. v. Merchants' Nat. Bank, 136 U. S. 268, 34 L. ed. 349, 10 Sup. Ct. Rep. 999; First Nat. Bank v. Buttery, 17 N. D. 326, 16 L.R.A.(N.S.) 878, 116 N. W. 341, 17 Ann. Cas. 52; National Bank v. Kenney, 98 Tex. 293, 83 S. W. 368; Farmer v. Bank of Graettinger, 130 Iowa,

469, 107 N. W. 170; First Nat. Bank v. Skeen, 101 Mo. 689, 11 L.R.A. 748, 14 S. W. 732; Pemberton v. Hoosier, 1 Kan. 108; Capron v. Capron, 44 Vt. 410; Smith v. Ellis, 29 Me. 422; Protection Ins. Co. v. Bill, 31 Conn. 534; Riker v. Sprague Mfg. Co. 14 R. I. 402, 51 Am. Rep. 413; White v. Smith, 77 Ill. 351, 20 Am. Rep. 251; Story, Promissory Notes, § 29; Goshen & M. Turnp. Road v. Hurtin, 9 Johns. 217, 6 Am. Dec. 273.

Messrs. William D. Elmer, Andrew M. Morrissey, and William P. Rooney, for appellee:

The note was in Chadron with the mortgage when garnishment was served on the debtor, also residing there; hence the debt might be attached by garnishment.

Campbell v. Nesbitt, 7 Neb. 303.

The garnishment and judgment having created an assignment of the note and mortgage, Rowan was charged with a duty to examine the records, and this county court judgment amounting to and being an assignment, the plaintiff was entitled to record the evidence of this assignment.

Ames v. Miller, 65 Neb. 208, 91 N. W. 250; Rice v. Winters, 45 Neb. 532, 63 N. W. 830; Stewart v. Walker, 80 Neb. 68, 127 Am. St. Rep. 747, 113 N. W. 814.

The note was not negotiable by delivery.

Lederer v. Union Sav. Bank, 52 Neb. 137, 71 N. W. 954; Rumery v. Loy, 61 Neb. 755, 86 N. W. 478; Roblee v. Union Stock Yards Nat. Bank, 69 Neb. 184, 95 N. W. 61.

This court has held such note not to be negotiable.

Allen v. Dunn, 71 Neb. 832, 99 N. W. 680; Garnett v. Meyers, 65 Neb. 287, 91 N. W. 400, 94 N. W. 803; Consterdine v. Moore, 65 Neb. 299, 101 Am. St. Rep. 620, 91 N. W. 399, 96 N. W. 1021; Roblee v. Union Stock Yards Nat. Bank, 69 Neb. 183, 95 N. W. 61; Iowa Nat. Bank v. Carter, 144 Iowa, 715, 123 N. W. 237.

Mr. Allen G. Fisher also for appellee.

Reese, Ch. J., delivered the opinion of the court:

On the 9th day of November, 1908, Henry Hern and Maria Hern executed their promissory note to Delia O'Hanlon for the sum of \$500, due five years after date, with interest from date at the rate of 6 per cent per annum. The note is negotiable in form; and, so far as the note itself upon its face is concerned, it is conceded to be negotiable. However, it was secured by a mortgage, which contains a stipulation that "the said Henry Hern and Maria Hern to have the privilege of paying the sum of \$25 or \$50 at any time during the five years on account of said principal sum." Otherwise the reference to the note is in the usual L.R.A.1918C.

form. The note, as appears upon its face, matures November 9, 1913. Sometime prior to the 12th day of November, 1908, plaintiff commenced suit against Mrs. Delia O'Hanlon in the county court of Dawes county. On the 7th day of December, 1908, the sheriff of the county made a return to the county court of summons and writ of attachment and garnishment, "from which the court finds that due and legal service of each of said writs has been made on November 23, 1908, by delivery to defendant in person in said county of true and certified copy of each writ, together with all indorsements thereon," and on said date Henry Hern and various banks "have each been attached as garnishee and their fees paid, and that thereby there was attached on said date a certain note and mortgage dated November 9, 1908, payable five years after date, from Henry Hern to defendant," the same being the note and mortgage above herein referred to. The answer of the garnishee was taken, and upon the request of plaintiff the cause was set down for trial upon the calendar for December 12, 1908, at 9 o'clock A. M., to which date the cause was continued. On that day the cause was tried in the absence of an appearance by defendant. The court found due and legal service of summons and writ of attachment had been made and rendered judgment against defendant in favor of plaintiff for \$750. Hern was ordered to pay the money due upon the note into court as it matured. The defendant was ordered to surrender the note and mortgage to the sheriff or the court, with order of sale of the attached property. The defendant was "forbidden to receive, receipt for, or collect" any of the money due thereon, and the garnishee "forbidden to pay any portion of the debt" to "any person except into court or its officer." The above reference to the proceedings is taken from a partial transcript of the proceedings filed in the office of the county clerk of Dawes county, which was offered in evidence on the trial of this cause in the district court. No formal transcript of the judgment was offered. The possession of neither the note nor mortgage was ever obtained under the garnishment proceedings, nor was either sold under any order of sale. Plaintiff brought this suit in the district court to foreclose the mortgage, alleging substantially the foregoing facts, and making Henry Hern, Maria Hern, Mrs. O'Hanlon, Mrs. Jackson, and James Rowan defendants. Rowan filed his answer with a cross petition, alleging his ownership of the note and mortgage, their transfer to him in due course of trade before maturity, the failure to pay interest due, and seeking a foreclosure thereof. Mrs. O'Hanlon and

Mrs. Jackson failed to answer. A decree was entered with findings in favor of plaintiff, declaring the note due by reason of the failure to pay interest, and ordering the foreclosure in favor of plaintiff. Defendant Rowan appeals.

It appears that Mrs. O'Hanlon and Mrs. Jackson are sisters, both well along in years, and neither familiar with the customs of trade and commerce. Mrs. Jackson was possessed of some means. Mrs. O'Hanlon was practically destitute, with the exception of the 160 acres of land in Dawes county, which had come to her by inheritance. It had been necessary for her to make a number of trips from her home in Chicago, Illinois, to Chadron; and, in order to do so, she borrowed the necessary money to pay her expenses from Mrs. Jackson until the indebtedness amounted to \$525. Soon after receiving the note and mortgage from Hern, and on the 25th day of November, 1908, she executed an assignment of the note and mortgage to Mrs. Jackson, and caused them to be sent to her by mail to Beaver Dam, Wisconsin, where Mrs. Jackson resided. Soon thereafter they met, and Mrs. O'Hanlon paid Mrs. Jackson the \$25 remaining due, thus satisfying her obligation to Mrs. Jackson. At a later date, alleged to be on or about the 22d day of October, 1909, Rowan purchased the note and mortgage from Mrs. Jackson, the evidence showing that he paid the sum of \$500 in money therefor. The depositions of Mrs. O'Hanlon, Mrs. Jackson, and Mr. Rowan were taken at Chicago. Mrs. O'Hanlon testified to the transfer of the note and mortgage to Mrs. Jackson, the time and consideration, the indebtedness to Mrs. Jackson, and the subsequent payment of the \$25 remaining due. These facts were testified to by Mrs. Jackson, and that the note and mortgage were received by mail and accepted by her as payment on the \$525 debt due from Mrs. O'Hanlon, and that at the time of the acceptance of the note and mortgage and the final satisfaction of the balance due her and cancellation of the indebtedness she had no knowledge or information that any effort had been made by plaintiff to reach the debt and the note and mortgage by attachment or other process. She also testified to their sale to Rowan and the receipt of the sum of \$500 in money therefor. Mr. Rowan testified to the payment of the money and the receipt of the note and mortgage indorsed by Mrs. O'Hanlon and Mrs. Jackson without any knowledge or information of the attachment proceedings.

As the note is not yet due, according to its terms, there is no doubt that what was done in the way of its transfer was before maturity. But it is contended by plaintiff

that the clause in the mortgage giving the makers of the note the option of paying sums of \$25 and \$50 on the debt at any time they might desire to do so destroyed the negotiability of the note, and rendered it non-negotiable under the rule that the note and mortgage, considered together, constituted the contract. If the provision in the mortgage rendered the note non-negotiable, it may be conceded that, so long as it remained in the hands of the attachment defendant, the debt was liable to attachment process. If the note was negotiable and passed into the hands of innocent purchasers for value before maturity, the purchaser would be protected. We are not aware that this identical question has been decided by this court. We are therefore required to consult the decisions of other courts of last resort, for we find nothing in the statute of this state settling the question.

In *Bowie v. Hume*, 13 App. D. C. 286, a negotiable promissory note was executed by the makers, and at the foot of the instrument and below the signatures were the words, "With privilege of paying all or any portion any time before maturity," signed by the makers. It was held that this did not affect the negotiability of the note. See also *Louisville Bkg. Co. v. Gray*, 123 Ala. 251, 82 Am. St. Rep. 120, 26 So. 205, where the same rule in principle is applied, and *Louisville Bkg. Co. v. Howard*, 123 Ala. 380, 82 Am. St. Rep. 126, 26 So. 207. In *Independent School Dist. v. Hall*, 113 U. S. 135, 23 L. ed. 954, 5 Sup. Ct. Rep. 371, the school district had issued its negotiable bond under the provision of a statute which declared that the instrument should be "payable at the pleasure of the district at any time before due," and it was held that this did not destroy the negotiability of the bond, that it created only an option of the maker to pay before maturity, but that the holder could not exact payment until the day of maturity had passed. In *Mattison v. Marks*, 31 Mich. 421, 18 Am. Rep. 197, it was held that a promissory note by which the maker agreed to pay a certain sum "on or before" a day named was a negotiable instrument; the words "on or before" only gave the maker the option before the date of maturity, but conferred upon the holder no right to enforce payment before that time. See also § 4, chap. 41, Comp. Stat. 1911. In *Cunningham v. McDonald*, 98 Tex. 316, 83 S. W. 372, it was held that "a promissory note is not rendered non-negotiable by the fact that the maker, promising to pay by a day certain, reserves to himself by its terms the right to pay sooner." In *Leader v. Plante*, 95 Me. 339, 85 Am. St. Rep. 415, 50 Atl. 54, a promissory note was

made payable "within one year after date," and it was held to be negotiable. The option to pay did not destroy its negotiability. The authorities are not entirely harmonious upon the question of what recitals in a note render it non-negotiable. But we have found no case where it is directly held that the reservation of a mere option on the part of the maker of an otherwise negotiable note or bond to pay a part of the debt before maturity, the exact time for maturity being fixed, destroys the negotiability of the note. In so far as the time when the payee may demand and enforce payment, this note, even with the stipulation of the mortgage included as a part of it, complies strictly with the requirements of § 1, chap. 41, Comp. Stat. 1911, known as the "Negotiable Instruments Law." The case of *Campbell v. Nesbitt*, 7 Neb. 300, is relied upon by plaintiff as sustaining his view of the right to attach the debt in question, but it gives us no real light upon the question as the note in that case became due on the 10th day of March, 1872, and was attached in 1874, long after its maturity, and while yet in the hands of the payee, who did not transfer it until in November, 1874, and after judgment had been rendered against the garnishee. The note was clearly dishonored, and had lost its negotiable quality at the time of its transfer to plaintiff Campbell. Without pursuing this subject further, we hold that the reservation of the option in the mortgage did not destroy the negotiability of the note.

As to the defendant Rowan being a bona fide holder for value before maturity, the evidence is all one way. Whether true or false, he testified that he made the purchase without any knowledge of the attachment proceedings, in good faith, and paid the sum of \$500, the face of the note, in money. He is supported in this by Mrs. Jackson, who testified that he paid her the money, and that she indorsed and delivered the note to him. It is provided by § 52, chap. 41, Comp. Stat. 1911, that a holder in due course is one who has taken the instrument under the conditions that it is complete and regular upon its face; that he became the holder before it was overdue, and without notice of any previous dishonor, if such was the fact; that he took it in good faith and for value, and without notice of any infirmity in the instrument or defect in the title of the person negotiating it. So far as is shown by the evidence, he appears to have come within the provisions of this section. It is true that he had never seen the land, and knew little or nothing about its quality or the condition of the title, except what information he had obtained from the indorsers with L.R.A.1918C.

whom he had been acquainted for many years; and it would be quite natural for one of his want of experience in commercial affairs to rely upon their fairness, and to presume that 160 acres of Nebraska land would be sufficient security for \$500.

The note being negotiable, and its possession and custody not having been obtained under the attachment and garnishment proceedings, the question arises as to what rights, if any, plaintiff acquired by his action. In *Gregory v. Higgins*, 10 Cal. 339, in an opinion by Judge Field, it is said: "The indebtedness of the garnishee was upon a promissory note, which did not mature for several months thereafter. From the very nature of a promissory note, it is evident that, before its maturity, the indebtedness of the maker thereon cannot be the subject of attachment. His obligation is not to the payee named in the note, but to the holder, whoever he may be. From its negotiability it may often pass into the possession of parties entire strangers to the maker, and, even if held by the defendant at the time of garnishment, it does not follow that it would be in his hands at its maturity, and, if transferred before maturity to a bona fide holder, it could be enforced, even if paid upon the attachment. *McMillan v. Richards*, 9 Cal. 418, 70 Am. Dec. 655; *Sheets v. Culver*, 14 La. 452, 33 Am. Dec. 593. It follows that the notice served upon Marshall previous to the maturity of his note did not operate as a garnishment of the amount in his hands. Nor would the notice served subsequent to the maturity have any greater effect unless the note was, at the time, in the possession of the defendant, from whom its delivery could be enforced on its payment upon the attachment." In *Clough v. Buck*, 6 Neb. 343, Judge Gantt, in writing the opinion of the court, said: "It seems to be a general rule that a negotiable note or bill is not, before maturity, subject to attachment. The reason of the rule is well stated in *Gregory v. Higgins*, 10 Cal. 340,"—and quite a lengthy excerpt is copied from the opinion with approval. In 2 *Wade*, on Attachment, § 458, it is said: "Whatever be the form of commercial paper that evidences the original liability of the party summoned, as a general rule, he cannot be charged as the debtor of the payee, if the paper was negotiable when issued, and still retains its negotiability,"—citing a number of cases, and stating the reasons for the rule in the text with considerable elaboration. In 1 *Daniel*, on Negotiable Instruments, 5th ed. § 800a, it is said: "The purchaser of a bill, note, or other negotiable instrument for value and before maturity is not, as a general rule, affected

by any litigation to which he is not a party, which may then be pending, and in which the instrument is involved, nor will a decree or judgment, when rendered in such litigation, affect him; the doctrine of lis pendens having no application to negotiable instruments." See also Drake, Attachment, 7th ed. §§ 582 et seq.

Some questions involving the procedure are presented, but they need not be noticed. After a patient and careful investigation of the subject, we are led to the conclusion that plaintiff acquired no rights by his garnishee process, and that the decree of the district court foreclosing the mortgage in his favor cannot be sustained; that, as Rowan was made a defendant and presented his mortgage, asking a foreclosure thereof, the court should retain the case and make a final disposition of it. Henry Hern, the maker of the note, sold the mortgaged premises to William Hern, who assumed

the payment of the mortgage debt, and who is made a party defendant herein, and subsequent to such sale, and during the pendency of this suit, the said Henry Hern died, but no serious question arises from these facts, the said William Hern being a party defendant.

The decree of the District Court, foreclosing the mortgage in favor of plaintiff and dismissing Rowan's cross petition as a first lien, is reversed and the cause is remanded to the District Court, with directions to dismiss plaintiff's suit, and to enter a decree in favor of Rowan, foreclosing the mortgage.

Reversed.

Barnes, Letton, and Sedgwick, JJ., concur. Fawcett, Hamer, and Rose, JJ., not sitting.

Petition for rehearing denied.

Annotation—Garnishment of debt evidenced by negotiable paper.

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With the question, What gives the quality of negotiability to a piece of paper when it is an evidence of indebtedness? this annotation is uncontentious. The note is confined to cases which deal with the question of garnishability upon the assumption that the paper in question was negotiable, and is not concerned with cases which decide that question upon the assumption that the paper was non-negotiable. The cases, therefore, which have turned upon the lack of negotiability of the writing which evidenced the debt sought to be reached by attachment or garnishment have not been collated.

The cases discussed embrace for the most part those which have involved promissory notes and bills of exchange, but there are others in which was concerned commercial paper in other forms; notably, negotiable bank certificates of deposit.

The garnishment of a debt after the garnishee had delivered a check to pay it was the subject of a note to *National Park Bank v. Levy Bros. & Co.* 19 L.R.A. 475, which is supplemented in an annotation to *American Agri. Chemical Co. v. Seringer*, L.R.A.1917F, 394.

Cases dealing with attempts to apply debts due upon negotiable paper to the payment of judgments pursuant to statutes governing proceedings supplementary to execution have not been included in this annotation because they are esteemed beyond its scope, or, at least, to be in a class apart, so as to be more wisely discussed separately.

The question of attachment in the sense of an actual levy and seizure of the note as a chattel is not within the scope of the note.¹ Otherwise no distinctions have been made in the annotation among attachment, garnishment, and trustee process. In respect of commercial paper none appears necessary.^{1a}

II. The common law and negotiable paper as a subject of garnishment.

At common law commercial paper cannot be seized and sold upon execution.² The power of the court of chancery must be invoked to reach and apply it to the payment of the holder's debts.³ And as negotiable promissory notes are not subject to seizure and sale on execution, unless by express statute, they are not, in the absence of a statute, subject to attachment or garnishment.⁴ Now to sub-

¹ The liability of a promissory note to levy and seizure under attachment or execution is considered in the note to *Fishburn v. Londershausen*, 14 L.R.A.(N.S.) 1234.

^{1a} Garnishments are a species of attachment. *Willis v. Lyman* (1858) 22 Tex. 268.

² *Jones v. Norris* (1841) 2 Ala. 526; *Field v. Lawson* (1844) 5 Ark. 376; *McGehee v. Cherry* (1849) 6 Ga. 550; *Crawford v. Schmitz* (1892) 130 Ill. 564, 29 N. E. 40; *McClelland v. Hubbard* (1830) 2 Blackf. (Ind.) 361; *Johnson v. Crawford* (1843) 6 Blackf. (Ind.) 377; *Smith v. Kennebec & P. R. Co.* (1858) 45 Me. 547; *People ex rel. Martin v. Wayne County* (1858) 5 Mich. 223; *Ingalls v. Lord* (1823) 1 Cow. (N. Y.) 240; *People v. National Mut. Ins. Co.* (1897) 19 App. Div. 247, 46 N. Y. Supp. 102; L.R.A.1918C.

Rhoads v. Megonigal (1845) 2 Pa. St. 39; *Moore v. Pillow* (1842) 3 Humph. (Tenn.) 448; *Price v. Brady* (1858) 21 Tex. 614.

³ *Matheny v. Hughes* (1873) 10 Heisk. (Tenn.) 401.

⁴ *Maine F. & M. Ins. Co. v. Weeks* (1811) 7 Mass. 438; *Perry v. Coates* (1813) 9 Mass. 537.

It is no defense to the maker of a promissory note when sued by the holder, that it was attached and sold as personal property to a stranger who claimed to own it, because title to commercial paper cannot be transferred that way. *Prout v. Grout* (1874) 72 Ill. 456.

Commercial paper—bills, checks, drafts, notes, etc.—is not subject to garnishment or attachment, nor to levy on execution, be-

ject current negotiable commercial paper to attachment, garnishment, or trustee process is derogatory to the common law merchant, which insures the freest and least embarrassed circulation of such paper in business transactions.⁵

By the law merchant every bona fide indorsee of a negotiable bill of exchange, promissory note, or other form of commercial paper which he acquired for value before maturity, in the usual course of business, holds it free from all equitable defenses which may exist between the original parties to the instrument.⁶ By the law merchant the buyer of an unmatured current negotiable bill or note has the right to presume it unpaid.⁷ By the law merchant he obtains the right to collect it from the maker.⁸ He gets an absolute and unconditioned title to the paper,⁹ for, unlike all other property, bills of exchange and promissory notes, negotiable in form, carry on their face the whole evidence of their title,¹⁰ and the disputant of that title has the burden of proving a defense to it.¹¹

III. Legislation respecting garnishment of negotiable paper.

a. Necessity for such legislation.

Attachments and garnishments are, of course, creatures of statutes. It requires a statute to make negotiable paper a subject of garnishment or attachment,¹² especially before its maturity.¹³ Unless a

statute makes choses in action and commercial paper subjects of attachment or garnishment, one in possession thereof to collect for a defendant cannot be made liable as garnishee.¹⁴ The law merchant may be modified by statute so as to render negotiable promissory notes subject to attachment or garnishment under certain conditions, while they are current and unmatured,¹⁵ but when such a note is not within the statute, it is not subject to the trustee process on attachment.¹⁶ If a statute does not authorize a judgment against the maker of a promissory note as trustee for the payee, the court has no power to render it; and if it assumes such power, the judgment it renders is inoperative.¹⁷ Strict conformity to law is essential to the validity of garnishments.¹⁸

b. Statutes subjecting negotiable paper to garnishment *stricti juris*.

A statute subjecting negotiable commercial paper while current to attachment or garnishment should be strictly construed. It should not be construed so as to defeat long-established rules of the law merchant when that is a part of the general body of the law.¹⁹ It should not be construed any more broadly or given any greater effect than its terms and obvious purpose require.²⁰ And to charge the maker of a negotiable promissory note as trustee or garnishee of the payee in a case within the statute, the proceedings it prescribes must be

cause choses in action are incapable of being sold on legal process. *Fitch v. Waite* (1823) 5 Conn. 117; *Grosvenor v. Farmers & M. Bank* (1839) 13 Conn. 104; *Price v. Brady* (1858) 21 Tex. 614.

To charge one as trustee or garnishee of a defendant, the latter must have a cause of action against him, or else he must have in keeping personal property belonging to the defendant, capable of seizure and sale on execution. *Maine F. & M. Ins. Co. v. Weeks* (Mass.) supra.

It has always been considered as settled in this state, it was said in the opinion of the court in *Stone v. Dean* (1831) 5 N. H. 502, that a trustee who has given a negotiable note to the principal cannot be charged as a trustee on account of such note.

⁵ *Hall v. Bowker* (1871) 44 Vt. 77.

⁶ *Cruett v. Jenkins* (1880) 53 Md. 217.

⁷ *Hinsdill v. Afford* (1839) 11 Vt. 309.

⁸ *Brown v. Fisher* (1905) 35 Ind. App. 549, 74 N. E. 632.

⁹ *Mayberry v. Morris* (1878) 62 Ala. 113.

¹⁰ *Kieffer v. Ehler* (1852) 18 Pa. 388.

¹¹ *First Nat. Bank v. Texas* (1873) 20 Wall. (U. S.) 88, 22 L. ed. 298.

¹² *Maine F. & M. Ins. Co. v. Weeks* (1811) L.R.A.1918C.

⁷ Mass. 438; *Perry v. Coates* (1813) 9 Mass. 537.

¹³ *Ludlow v. Bingham* (1799) 4 Dall. (Pa.) 47, 1 L. ed. 736.

¹⁴ *Price v. Brady* (1858) 21 Tex. 614.

¹⁵ *Kimball v. Gay* (1844) 16 Vt. 131.

¹⁶ *Kibling v. Burley* (1850) 20 N. H. 359.

¹⁷ *Horn v. Thompson* (1855) 31 N. H. 562.

The court in that case, after citing the state statute authorizing judgments against makers of negotiable promissory notes as trustees for payees, said that it conferred no general powers upon the courts respecting commercial paper, but specified only promissory notes, and restricted the law's operation to such only as had been made and were payable in New Hampshire, or had been made by persons who, at the time, resided in the state; and added, that if one should be charged as trustee in a case where the negotiable paper was not included in the statute, the judgment would be inoperative for want of judicial power to render it.

¹⁸ *Willis v. Lyman* (1858) 22 Tex. 268.

¹⁹ *Carson v. Allen* (1850) 2 Pinney (Wis.) 457, 2 Chand. (Wis.) 123, 54 Am. Dec. 148

²⁰ *Hall v. Bowker* (1871) 44 Vt. 77.

strictly followed, unless all the parties in interest voluntarily waive its safeguards.²¹

c. Garnishment of negotiable paper under statutes in general language.

Without undertaking at this point to deal with the question whether or not a debt evidenced by negotiable paper is subject to garnishment before maturity, or with other conditions affecting garnishment in particular instances, it may be observed here that, as a matter of statutory construction, notwithstanding the rule of strict construction just referred to, it is almost unanimously held or assumed that general laws describing the subjects of garnishment embrace debts evidenced by negotiable paper if neither expressly excluded nor included.²² It has, indeed, once been held that a statute authorizing in general terms the garnishment of property, money, and effects does not embrace unmatured negotiable commercial paper,²³ but it has, on the other hand, several times been held that a debt evidenced by a negotiable promissory note is included in a statute authorizing the garnishment of goods, chattels, money, credits, and effects belonging to a defendant.²⁴ Under a statute making all sorts of debts subject to garnishment, a debt due upon a negotiable promissory note cannot, it has been held, be made an exception,²⁵ and a statute making all debts, whether due or to become due, without regard to the form of the evidence of them, expressly subject to garnishment, includes debts owing the defendant upon negotiable instruments.²⁶ A debt due upon commercial paper is held to be within a statute providing that any debtor of an attachment defendant may be subjected to garnishment, and from the day of the service of the summons shall be account-

able for the debt to the attachment plaintiff.²⁷

At times, though rarely, there appears evidence of some judicial misgiving over holding current negotiable paper subject to attachment under statutes couched in general language, but it is never sufficiently potent to influence the decision.²⁸

d. Special legislation subjecting negotiable paper to garnishment.

In some states resort has been had to explicit legislation to subject in certain circumstances negotiable commercial paper to attachment or garnishment. The states of New Hampshire and Vermont are instances.

In the former state, according to its supreme court,²⁹ a debtor upon a negotiable promissory note previous to the year 1841 could not be charged as trustee, and holders had been accustomed by transfers to put their property beyond the reach of their creditors. The injury to these creditors was thought to outweigh the benefits of an unrestricted circulation of commercial paper, and the legislature attempted to restore the balance by enacting a statute subjecting, in certain conditions, debts due upon negotiable paper to the trustee process, and subordinating the after-title of an indorsee to the attachment lien, without regard to whether the paper was transferred before maturity or after it became due.³⁰ The distinction between the law of states where the law merchant prevails unaffected by legislation, and New Hampshire, under the operation of that statute, was pointed out in a case decided a few years after its enactment, wherein it was said that if a note is indorsed in good faith, for a valuable consideration, before it falls due, by the principles of the common law the indorsee holds it free from any claims of creditors of the payee; but, by

²¹ Horn v. Thompson (1855) 31 N. H. 562; Thompson v. Carroll (1857) 36 N. H. 21.

²² Hightower v. Smith (1834) 7 Yerg. (Tenn.) 44, note; Huff v. Mills (1834) 7 Yerg. (Tenn.) 42; Turner v. Armstrong (1836) 9 Yerg. (Tenn.) 412; Daniel v. Rawlings (1846) 6 Humph. (Tenn.) 403; Matheny v. Hughes (1873) 10 Heisk. (Tenn.) 401.

²³ Hubbard v. Williams (1858) 1 Minn. 54. Gil. 37, 55 Am. Dec. 66.

²⁴ Smith v. Spinnenweber (1914) 114 Ark. 384, 170 S. W. 84; Scott v. Hill (1831) 3 Mo. 88, 22 Am. Dec. 462; Quarles v. Porter (1848) 12 Mo. 76; Briant v. Reed (1862) 14 N. J. Eq. 271. L.R.A.1918C.

²⁵ King v. Carhart (1855) 18 Ga. 650.

²⁶ Secor v. Witter (1883) 39 Ohio St. 218.

²⁷ Cleaneay v. Junction R. Co. (1866) 26 Ind. 375.

²⁸ Whilst we are sensible of the difficulties that present themselves in holding that debts evidenced by negotiable paper may be attached in the hands of the payor to satisfy an execution debt of the payee, it was said by the court in Quarles v. Porter (1848) 12 Mo. 76, yet such appear to be the statutory provisions of this state.

²⁹ Peck v. Maynard (1849) 20 N. H. 183.

³⁰ Vide, N. H. Rev. Stat. chap. 208, §§ 10, 14, 18.

the New Hampshire statute, the indorsee in such cases takes the note subject to the claim of any creditor who may have laid an attachment upon it by the service of a trustee process at any time before it is transferred in the case of notes made or made payable within the state, by or to residents of the state.³¹

This statute did not impair the negotiable quality of promissory notes,³² nor did it apply to notes neither made nor payable in New Hampshire, by and to residents of other states.³³ Under its operation a debtor upon a negotiable promissory note made and payable outside of the state, to an inhabitant of another state, although a resident himself of New Hampshire, was not chargeable as trustee;³⁴ but a negotiable promissory note made in the state and payable generally, without particular designation of the place of payment, was held to be made and to be payable within the state, so as to render the maker chargeable as trustee in an attachment against the holder.³⁵

Under the operation of that statute, in order for the maker of a negotiable promissory note attached as a debt owing the payee by the service of trustee process to escape being charged as trustee where the paper had been transferred to another holder, it had to appear that the note was transferred before the trustee process was served, or that it was made or payable outside of the state, or that the parties to it resided beyond the borders of the state.³⁶

The contemporary legislation of Vermont followed an expression of opinion by the supreme court of the state to the effect that while a statute relating to actions by indorsees of negotiable paper, which should provide that the makers should have offsets of all debts due them from the payees before notice of the indorsement, and might give in evidence aught which in equity would discharge

them in actions by the payees, would protect a maker of a negotiable promissory note charged as trustee of the payee, before notice of its transfer, from the claim of the holder, a statute which went no further than to provide that any debt taken by judgment from a trustee should acquit him from any action brought to recover it by the principal debtor would afford no protection in an action upon a promissory note by an indorsee for value before maturity.³⁷

After the decision embodying that opinion was rendered, the legislature enacted a statute³⁸ by which all debts owing by promissory notes, either unmatured or past due, without exception, and regardless of the places designated for their payment or the convenience of the parties to them, were made subject to attachment in actions against the payees by their creditors by trustee process served on the makers until notice should have been given to the trustees of transfers of the paper to other holders. Later this statute was modified in such wise as to exempt from trustee process commercial paper transferred before maturity to domestic banks.³⁹ Under the operation of the modifying legislation, banks in Vermont which discounted negotiable promissory notes in due course before maturity were no longer required to give notice of their holdings, and were protected against trustee process previously served on the makers as debtors of payees⁴¹ even though their indorsers intended to evade an attachment by transferring the paper, provided the discounting banks acted in good faith in the transaction.⁴²

The New Hampshire and Vermont legislation just noticed has been attacked as violative of one or more provisions of the Constitution of the United States, but the state courts have upheld its validity.⁴³

³¹ *Amoskeag Mfg. Co. v. Gibbs* (1854) 28 N. H. 316.

³² *Peck v. Maynard* (N. H.) *supra*.

³³ *Kibling v. Burley* (1850) 20 N. H. 350.

³⁴ *Carbee v. Mason* (1885) 64 N. H. 10, 4 Atl. 791.

³⁵ *Orcutt v. Hough* (1874) 54 N. H. 472.

³⁶ *Amoskeag Mfg. Co. v. Gibbs* (N. H.) *supra*.

³⁷ *Hinsdill v. Safford* (1839) 11 Vt. 309.

³⁸ Act of 1841, Vt. Comp. Stat. chap. 32, § 45.

³⁹ *Kimball v. Gay* (1844) 16 Vt. 131; *Seward v. Garlin* (1861) 33 Vt. 583.

⁴⁰ Vt. Gen. Stat. chap. 34, § 47.

⁴¹ *Sargent v. Wood* (1878) 51 Vt. 597.

⁴² *Hall v. Bowker* (1871) 44 Vt. 77. L.R.A.1918C.

⁴³ The New Hampshire statute respecting attachment of negotiable promissory notes by trustee process on the maker as debtor to the payee was held not open to the objection of unconstitutionality upon the score of impairing the obligation of a contract. *Philbrick v. Philbrick* (1859) 39 N. H. 468.

The immunity from hostile legislation of the states which belongs to national banks as instrumentalities or agencies of the United States government is in no sense invaded by the Vermont statute respecting attachment of negotiable paper by service of trustee process upon the maker after the debtor who held it has transferred it, unless, before the service of such

e. Legislation exempting negotiable paper from garnishment.

In sundry states legislation has been enacted protecting from attachment or garnishment commercial paper in some or all of its forms, and the acts have generally been held efficient by the local courts.

There was a statute of Illinois⁴⁴ which was held to exempt from garnishment a bank's certificate of deposit, payable only when returned to the bank, properly indorsed by the depositor, even when it continued to be held by the defendant payee.⁴⁵

A statute of Massachusetts⁴⁶ provided that no person should be considered or adjudged to be a trustee within its intent and meaning by reason or on account of his having made, given, indorsed, negotiated, or accepted any negotiable security whatever. The supreme judicial court of the commonwealth declared that this statute was in such plain and comprehensive language that it was not permitted to hold liable a garnishee who came within its terms, and decided, therefore, that the payee of a negotiable promissory note could not be held liable for the sum due upon it as trustee for his indorsee upon an attachment by the latter's creditor before any judgment had been rendered against him, although he had been sued on the note by the defendant, and a verdict against him had been returned, and the note itself was on file in court, so that it could not be transferred to a new holder.⁴⁷

In Oklahoma, by statute (Comp. Laws 1909, § 5725) no judgment may be rendered upon the liability of a garnishee which arises by reason of his having drawn, accepted, made, indorsed, or guaranteed any negotiable bill, draft, note, or other security.⁴⁸

process, notice of the transfer was given by the new holder to the maker, but exempting domestic banks which discount commercial paper from the necessity of giving any notice, while leaving open to the operation of the statute banks out of the state, whether national or state institutions, which discount such paper in the same manner. *Hawley v. Hurd* (1900) 72 Vt. 122, 52 L.R.A. 195, 82 Am. St. Rep. 922, 47 Atl. 401.

Nor does that statute, in discriminating against foreign and in favor of domestic banks in the manner aforesaid, infringe either the provision of the Federal Constitution (art. 4, § 2), entitling the citizens of each state to all the privileges and immunities of citizens in the several states, nor the prohibition (§ 1 of the 14th Amendment) against making or enforcing any L.R.A.1918C.

By a statute of Rhode Island all debts secured by bills of exchange or negotiable promissory notes were exempted in express terms, without limitation, from attachments, and under its operation debts due upon overdue commercial paper, even when it was still held by the payee, equally with those evidenced by unmaturred paper, were held not subject to garnishment.⁴⁹

Under the Vermont statute⁵⁰ exempting from trustee process all commercial paper transferred before maturity to banks within the state, a promissory note actually discounted by a domestic bank before it became due is exempt from the process although the bank did not receive it until after judgment had been taken against the maker as trustee for the payee.⁵¹

But despite a positive statute forbidding any person to be adjudged a trustee by reason of any negotiable note made by him, the fact that a debtor for merchandise purchased, charged as trustee of the debt in an action against the seller, gave the latter his promissory note, negotiable in form, to apply on the contract of sale of which the purchase was a part, will not prevent judgment against him for the debt actually due, where the whole contract was abandoned and the note was never negotiated, but was instead deposited with a bailee pending the execution of the contract, and surrendered to the maker and destroyed.⁵²

IV. Garnishability as affected by the question of maturity.

a. Before maturity.

In a goodly number of cases it has been held that, as a general rule, while a negotiable promissory note is current, unmaturred, and subject to be transferred

state law abridging the privileges or immunities of citizens of the United States, because incorporated banks are not citizens within the meaning and purview of either of such sections. *Ibid.*

⁴⁴ *Starr v. C. Anno. Stat. chap. 62, § 15.*

⁴⁵ *Auten v. Crahan* (1899) 81 Ill. App. 502.

⁴⁶ Act of Feb. 28, 1795, § 12.

⁴⁷ *Eunson v. Healey* (1806) 2 Mass. 32.

⁴⁸ *First State Bank v. Latimer* (1915) 48 Okla. 104, 149 Pac. 1099.

⁴⁹ *Oakdale Mfg. Co. v. Clarke* (1908) 29 R. I. 192, 69 Atl. 681.

⁵⁰ Vt. Gen. Stat. chap. 34, § 47.

⁵¹ *National Bank v. Webster* (1874) 47 Vt. 43.

⁵² *Woodman v. Carter* (1897) 90 Me. 302, 38 Atl. 169.

before maturity to a bona fide indorsee for value and without notice, the maker of it cannot be charged as garnishee of the payee,⁵³ cannot be held,⁵⁴ cannot be bound,⁵⁵ cannot be subjected to liability,⁵⁶ or held liable.⁵⁷

In several cases the courts have gone beyond this and held that, in the absence of an authorizing statute, debts due upon negotiable promissory notes cannot be garnished or attached before the maturity of the paper;⁵⁸ that they are not subject to garnishment or attachment when out in circulation, unmatured, and liable to be transferred to innocent holders,⁵⁹ and that the process is not available against the maker of a negotiable promissory note to the creditor of the payee or indorsee until it has ceased to be negotiable by falling due.⁶⁰

The reasons adduced why negotiable commercial paper is not and ought not to be subject before maturity to attachment or garnishment are weighty and persuasive. If, it has been said, negotiable securities were subject to attachment or garnishment, their credit in commercial transactions would be materially injured, if not ruined;⁶¹ that their negotiability would be entirely destroyed if the sums payable by them could be attached in the hands of the

makers as debts due the payees;⁶² and that, if it could be maintained that a judgment of condemnation against a maker of a negotiable promissory note, summoned as garnishee in an attachment against the payee or his indorsee, and the payment thereof, would protect such garnishee from liability upon his obligation if subsequently sued by a holder who had acquired the paper without notice, for value, and before maturity, the doctrine would be destructive of the negotiability of all promissory notes, and would interfere injuriously with the daily business and transactions of men dealing with commercial paper.⁶³

Another authority has declared that to hold that an attachment prevents a subsequent bona fide indorsee of negotiable commercial paper from acquiring a good title would be almost a destruction of one of the essential characteristics of negotiable instruments.⁶⁴

The peculiar character of the obligation furnishes the ground for exempting from the garnishee process a negotiable promissory note before it becomes due.⁶⁵ A statutory exemption of unmatured negotiable paper from attachment has been referred to as based on the strongest of reasons, because such paper is in its nature commercial, and its facile sale

⁵³ *Wohl v. First Nat. Bank* (1908) 154 Ala. 332, 46 So. 231; *Stone v. Dean* (1831) 5 N. H. 502; *Carbee v. Mason* (1835) 64 N. H. 10, 4 Atl. 791; *Iglehart v. Moore* (1858) 21 Tex. 501; *Bassett v. Garthwaite* (1858) 22 Tex. 230, 73 Am. Dec. 257; *Kapp v. Teel* (1870) 33 Tex. 811; *Willis v. Heath* (1889) 75 Tex. 124, 16 Am. St. Rep. 876, 12 S. W. 971; *Marble Falls Ferry Co. v. Spittler* (1894) 7 Tex. Civ. App. 82, 25 S. W. 985.

It has been confessed that the weight of authority sustains the statement of the text. *Gatchell v. Foster* (1891) 94 Ala. 622, 10 So. 434.

The Texas supreme court has said that the statement of the text may be considered the settled law of the state. *Bassett v. Garthwaite* (1858) 22 Tex. 230, 73 Am. Dec. 257, *supra*.

Afterwards, the same court, citing the cases of *Dobbin v. Wybrants* (1848) 3 Tex. 457, and *Iglehart v. Moore* (1858) 21 Tex. 501, *supra*, said, ament the proposition, the "question has been ably argued and we think correctly settled, and we are not now inclined to attempt to disturb those decisions." *Kapp v. Teel* (1870) 33 Tex. 811, *supra*.

⁵⁴ *Hubbard v. Williams* (1868) 1 Minn. 54, Gil. 37, 55 Am. Dec. 66.

⁵⁵ *Huot v. Ely* (1880) 17 Fla. 775.

⁵⁶ *Gaffney v. Bradford* (1831) 2 Bail. L. (S. C.) 441, citing as decisive *Brown v. Rogers* (1827; S. C.) Columbia spring term.

⁵⁷ *Matheny v. Hughes* (1873) 10 Heisk L.R.A.1918C.

(Tenn.) 401; *Hutcheson v. King* (1904) 37 Tex. Civ. App. 161, 83 S. W. 216, in which the court said that this "is the general rule, we believe, well established by the authorities in this state as well as elsewhere."

A corporation which has issued and delivered a series of mortgage bonds maturing at the end of a term of years, payable to bearer with interest annually upon presentation of attached coupons, cannot be made liable as garnishee in an action against an individual holder, because the bonds are unmatured, negotiable instruments in circulation, which may pass at any time to an innocent transferee against whom the garnishment would be no protection. *Marble Falls Ferry Co. v. Spittler* (1894) 7 Tex. Civ. App. 82, 25 S. W. 985.

⁵⁸ *Gregory v. Higgins* (1858) 10 Cal. 330; *Perkins v. Guy* (1873) 2 Mont. 15; *Ludlow v. Bingham* (1760) 4 Dall. (Pa.) 47, 1 L. ed. 736; *Wybrants v. Rice* (1848) 3 Tex. 458.

⁵⁹ *Sheets v. Culver* (1840) 14 La. 449, 33 Am. Dec. 593; *Kimball v. Plant* (1840) 14 La. 511; *Clough v. Buek* (1877) 6 Neb. 343; *Guillot v. Wallace* (1914) — Tex. Civ. App. —, 168 S. W. 978.

⁶⁰ *Littlefield v. Hodge* (1850) 6 Mich. 326.

⁶¹ *Jones v. Gorham* (1807) 2 Mass. 375.

⁶² *Wybrants v. Rice* (1848) 3 Tex. 458.

⁶³ *Cruett v. Jenkins* (1879) 63 Md. 217.

⁶⁴ *Kieffer v. Ehler* (1862) 18 Pa. 338.

⁶⁵ *Perkins v. Guy* (1873) 2 Mont. 15.

passage from man to man as a medium of exchange is of great public utility.⁶⁶

A further reason why the maker of a negotiable bill or note, not yet due, is not liable upon it as garnishee, is not alone because it is or may be in circulation, but, because of its negotiability, he is liable upon it to whosoever may be its holder, whether known or unknown.⁶⁷ As one authority has put it, from the very nature of a promissory note it is evident that before it matures the indebtedness of the maker upon it cannot be the subject of an attachment: his obligation is not to the payee, but to the holder; from its negotiability it may pass to entire strangers to the maker, and even if, when garnished, it is held by the payee, it does not follow that he would hold it when it fell due; and if, before it matured, he should transfer it to a bona fide indorsee, the latter could enforce it even though the maker had paid it on attachment.⁶⁸

It is impossible, according to another authority, for the maker of a negotiable promissory note put in circulation and not yet matured, or anybody else except the actual holder, to tell at any given hour during its currency to whom the maker is liable upon it.⁶⁹ The difficulty of subjecting a credit represented by an unmatured negotiable promissory note to the process of garnishment, it has also been said, is to be found not only in

the nature and character of negotiable commercial paper, but also in the fact that it puts the garnishee in a worse position than otherwise he would have occupied, and subjects him to the danger of having to pay the same debt twice.⁷⁰ The law exempts the maker of a negotiable promissory note from garnishment while it is current and not yet due, because otherwise the judgment would not protect him from liability to the holder.⁷¹ If, another court has said, the maker of an outstanding unmatured negotiable promissory note could be charged as trustee of the payee on account of it, it might happen that either a bona fide holder of the paper must lose the amount of it, or the maker, without any fault of his own, be compelled to pay it twice.⁷²

Notwithstanding this array of decisions and the potency of the reasons adduced to support them, the authorities are conflicting upon the question whether an unmatured negotiable bill or note can be impounded and ultimately collected by means of attachment or garnishment.⁷³ A difference of opinion exists among jurists respecting whether or not debts evidenced by commercial paper negotiated before maturity are subject to attachment or garnishment.⁷⁴ In numerous cases it has been held that the mere fact that commercial paper is negotiable does not exempt it from

⁶⁶ Jones v. Gorham (Mass.) supra.

⁶⁷ Price v. Brady (1858) 21 Tex. 614; Hutcherson v. King (Tex.) supra.

⁶⁸ Gregory v. Higgins (1858) 10 Cal. 330.

⁶⁹ Hubbard v. Williams (Minn.) supra.

The general rule that a negotiable bill or note is not attachable before its maturity is founded upon the nature of the paper and the impossibility of determining to whom the maker is indebted thereon at any given time, since his obligation is not to the payee, but to the holder, whoever he may be; and as the paper, passing from hand to hand, may come into the possession of an unknown stranger, the latter, if a bona fide holder, may enforce it against the maker and prior indorsers, although he may have acquired it after the service of the attachment, and even though the maker may have paid it as garnishee. Clough v. Buck (1877) 6 Neb. 343.

⁷⁰ Cruett v. Jenkins (Md.) supra.

The reason the maker of a negotiable promissory note may not be charged as garnishee before it matures is because, if this were done, he would be put to the hazard of having to pay the same debt twice. Willis v. Heath (1889) 75 Tex. 124, 16 Am. St. Rep. 876, 12 S. W. 971, supra.

This is the underlying principle of the rule that the maker of negotiable paper is L.R.A.1918C.

not liable to garnishment before its maturity. Marble Falls Ferry Co. v. Spitzer (1894) 7 Tex. Civ. App. 82, 25 S. W. 985, supra.

⁷¹ Thompson v. Gainesville Nat. Bank (1886) 66 Tex. 156, 18 S. W. 350.

⁷² Stone v. Dean (1831) 5 N. H. 502, supra.

The attachment or garnishment of debts due upon commercial paper out in circulation before maturity, as another authority put it, is impracticable because it involves either the loss of his investment by an innocent holder, or a double payment by the unlucky maker. Hubbard v. Williams (1858) 1 Minn. 54, Gil. 37, 55 Am. Dec. 66, supra.

⁷³ Smith v. Spinnenweber (1914) 114 Ark. 384, 170 S. W. 84.

⁷⁴ St. Louis Perpetual Ins. Co. v. Cohen (1845) 9 Mo. 421.

Whether or not a judgment creditor could reach and apply on his judgment a promissory note held by the judgment debtor by means of garnishee process against the maker, after a transfer of the paper to a third person, was left an open, undecided question in Jones v. Norris (1841) 2 Ala. 524, in which the court held that the note could not be taken through garnishment process served upon the indorsee.

garnishment.⁷⁵ A negotiable instrument may be the subject of garnishment,⁷⁶ and, it has been said, a debt due upon a negotiable promissory note is as much liable to attachment as any other debt.⁷⁷

As long as the defendant continues to be the owner and holder of a negotiable promissory note, it is, according to sundry cases, subject to garnishment⁷⁸ or attachment.⁷⁹ If the garnishee is served with process before the maturity of the paper and while the defendant is still the owner, and if the latter continues to be the holder of it until it matures and becomes past due, the garnishee is held liable.⁸⁰

An attachment or garnishment by service upon the maker of a negotiable security belonging to the defendant before it matures is said to be effectual

against everyone except a bona fide indorsee for value who acquires it before it falls due.⁸¹

But a negotiable promissory note is current, as the mercantile phrase is, until it becomes due,⁸² and garnishing the maker of it before it matures, as debtor of the payee, does not stop its currency as commercial paper;⁸³ it does not prevent its transfer to a bona fide holder without notice and for value before it becomes due.⁸⁴ The maker of a negotiable promissory note is not liable upon it as trustee of the payee when it has been indorsed and transferred to another holder in good faith, irrespective of whether or not the notice of the transfer was given,⁸⁵ and regardless of whether the transfer preceded or followed the garnishment.⁸⁶

⁷⁵ *Mills v. Stewart* (1847) 12 Ala. 90; *Leslie v. Merrill* (1877) 58 Ala. 322; *Gatchell v. Foster* (1891) 94 Ala. 622, 10 So. 434; *Enos v. Tuttle* (1819) 3 Conn. 27; *Snider v. Ridgeway* (1869) 49 Ill. 522; *Colcord v. Daggett* (1853) 18 Mo. 557; *Hill v. Kroft* (1857) 29 Pa. 186; *Day v. Zimmerman* (1871) 68 Pa. 72, 8 Am. Rep. 157; *Bell v. Philadelphia Binding & Mailing Co.* (1899) 10 Pa. Super. Ct. 38; *Hightower v. Smith* (1834) 7 Yerg. (Tenn.) 44, note; *Huff v. Mills* (1834) 1 Yerg. (Tenn.) 42; *Turner v. Armstrong* (1836) 9 Yerg. (Tenn.) 412; *Daniel v. Rawlings* (1846) 6 Humph. (Tenn.) 403; *Matheny v. Hughes* (1873) 10 Heisk. (Tenn.) 401.

A debt evidenced by a negotiable promissory note was long ago held garnishable under the Missouri general statute of the time, before its maturity, by process served on the maker by an execution creditor of the payee. *Quarles v. Porter* (1848) 12 Mo. 76.

Later it was declared to be well settled in that state that the maker of negotiable paper was subject to garnishment at the suit of a creditor of him who held the note at the time of the service of the process. *Colcord v. Daggett* (1853) 18 Mo. 557.

⁷⁶ *Mims v. West* (1868) 38 Ga. 18, 95 Am. Dec. 379.

⁷⁷ *Culver v. Parish* (1851) 21 Conn. 408.

⁷⁸ *Mills v. Stewart* (1847) 12 Ala. 90; *Leslie v. Merrill* (1877) 58 Ala. 322; *Gatchell v. Foster* (1891) 94 Ala. 622, 10 So. 434.

⁷⁹ *Bills v. National Park Bank* (1882) 89 N. Y. 343; *Day v. Zimmerman* (1871) 68 Pa. 72, 8 Am. Rep. 157.

⁸⁰ *Leslie v. Merrill* (Ala.) supra; *Bills v. National Park Bank* (N. Y.) supra.

The supreme court of Illinois, in *Snider v. Ridgeway* (1869) 49 Ill. 522, could perceive, it said, no valid objection to commencing proceedings in garnishment to reach an indebtedness on a promissory note not yet due, provided judgment was not L.R.A.1918C.

rendered against the garnishee until after the note had matured.

Its contemporary, the supreme court of Indiana, in *Cleneay v. Junction R. Co.* (1866) 26 Ind. 375, understood the weight of authority to be on the side of the proposition that the maker of unmatured commercial paper was liable upon it in garnishment proceedings in an action against the payee or holder, but only after proof had been made that the paper had matured and had not in the meantime been transferred to a bona fide holder. And afterwards the Texas supreme court thought it had been settled by the weight of authority that attaching a negotiable promissory note before it became due, if it was past due and held by the defendant when judgment was taken against the garnishee, rendered him liable to pay the debt. *Thompson v. Gainesville Nat. Bank* (1886) 66 Tex. 156, 18 S. W. 350.

⁸¹ *Bills v. National Park Bank* (N. Y.) supra.

⁸² *Hinsdill v. Safford* (1839) 11 Vt. 309.

⁸³ *Littlefield v. Hodge* (1859) 6 Mich. 326.

⁸⁴ *Peck v. Maynard* (1849) 20 N. H. 183.

A judgment creditor of an owner of land whose judgment did not become a lien upon the land until after the landowner had entered into a contract of sale and had agreed to convey it upon full payment of the purchase price, of which a part was presently paid in cash and the balance was represented by the purchaser's negotiable promissory note, due in future, which was indorsed in due course of business by the payee before maturity to a bona fide holder for value, without knowledge of the judgment, is neither entitled to the amount of the note from the maker, nor to the lien on the land as against the indorsee, *Riddle v. Berg* (1886) 3 Sadler (Pa.) 566, 7 Atl. 232.

⁸⁵ *Hutchins v. Evans* (1841) 13 Vt. 541.

⁸⁶ A plaintiff in attachment is not entitled to a judgment of condemnation against the maker of a negotiable promissory note summoned as garnishee of the payee or indorsee

It follows that an attachment, garnishment, or trustee process of a debt owing by a negotiable bill of exchange or promissory note before the paper becomes due fails and is defeated by a subsequent transfer of the bill or note before maturity to a new and bona fide holder for value and without notice. It has accordingly been held in numerous cases that the lien acquired by service of an attachment or garnishee process on the maker of unmaturing and current negotiable commercial paper is a tentative and qualified one which is defeated by the negotiation of the paper before it matures, in the usual course of business, to an innocent purchaser for value.⁸⁷ The reason for this is the inapplicability of the doctrine of *lis pendens* to dealings in negotiable commercial paper before maturity.

In the opinion of one distinguished

when such note was transferred to a third person for value before it became due, without notice of the attachment, either before or after service of garnishee process on the maker. *Cruett v. Jenkins* (1880) 53 Md. 217, overruling *Somerville v. Brown* (1847) 5 Gill (Md.) 399.

⁸⁷ *Mayberry v. Morris* (1878) 62 Ala. 113; *Enos v. Tuttle* (1810) 3 Conn. 27; *Culver v. Parish* (1851) 21 Conn. 408; *Mims v. West* (1868) 38 Ga. 18, 95 Am. Dec. 379; *Burton v. Wynne* (1876) 55 Ga. 615; *Long v. Johnson* (1884) 74 Ga. 4; *Wilson v. McEachern* (1911) 9 Ga. App. 584, 71 S. E. 946; *Greer v. Powell* (1867) 1 Bush (Ky.) 489; *Kimball v. Plant* (1840) 14 La. 511; *Cruett v. Jenkins* (1880) 53 Md. 217; *Littlefield v. Hodge* (1859) 6 Mich. 326; *Peck v. Maynard* (1840) 20 N. H. 183; *Fitch v. Brower* (1866) 42 N. J. Eq. 300, 11 Atl. 330; *Bills v. National Park Bank* (1882) 89 N. Y. 343; *Ormond v. Moye* (1850) 33 N. C. (11 Ired. L.) 564; *Stone v. Elliott* (1860) 11 Ohio St. 252; *Howe v. Hartness* (1860) 11 Ohio St. 449, 78 Am. Dec. 312; *Kieffer v. Ehler* (1852) 18 Pa. 388; *Kimbrough v. Hornsby* (1904) 113 Tenn. 606, 84 S. W. 613; *Price v. Brady* (1858) 21 Tex. 614; *Hutchins v. Evans* (1841) 13 Vt. 541; *Camp v. Scott* (1842) 14 Vt. 387; *State ex rel. Rogers v. Burton* (1860) 11 Wis. 50.

Although by statute debts due by negotiable promissory notes are subjects of garnishment, garnisheeing the maker of one in an action by the payee's creditor will not hold after the paper passes before maturity to a bona fide holder for value. *King v. Carhart* (1856) 18 Ga. 650.

A summons of garnishment on the maker of a negotiable instrument does not impound the money it represents, so that its transfer in good faith before it falls due will not defeat the garnishment. *Wilson v. McEachern* (1911) 9 Ga. App. 584, 71 S. E. 946.

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American jurist, as appears by the report of one of his decisions, the question of the effect of judicial proceedings upon commercial paper has most frequently arisen in cases of garnishment, by which process a maker of such paper has been sought to be held for some debt of the payee; and the general current and decided weight of authority is in favor of the doctrine that such process is inoperative in respect of such paper.⁸⁸

The doctrine of *lis pendens* does not apply in case of garnishment of a debt evidenced by a negotiable promissory note before its maturity, according to a decision of the supreme court of Georgia, nearly contemporaneous,⁸⁹ while both before and after it had been and was held in Pennsylvania that the doctrine of implied notice by *lis pendens* is totally inapplicable to cases of attach-

A debt owing upon negotiable paper to a defendant in attachment may, by a transfer to a bona fide holder for value and before maturity, cease to be such, and become a debt due the indorsee instead; and, if so transferred, cannot be appropriated through garnishee process against the debtor or to the payment of the claim against the attachment defendant. *Secor v. Witter* (1883) 39 Ohio St. 218.

An attachment of the amount payable upon a negotiable promissory note indorsed in blank and in commercial form by service upon the maker while the defendant had possession, such note being afterwards transferred before it matured, to a third person, without notice, for a full consideration, cannot stand. *Ludlow v. Bingham* (1799) 4 Dall. (Pa.) 47, 1 L. ed. 736.

An attachment of a negotiable promissory note in the hands of the maker before its maturity, at the suit of a creditor of the payee, is worthless against a holder who acquired the paper in due course of business, in good faith, without notice, before its maturity, either before or after the attachment. *Hill v. Kroft* (1857) 29 Pa. 186; *Day v. Zimmerman* (1871) 68 Pa. 72, 8 Am. Rep. 157; *Bell v. Philadelphia Binding & Mailing Co.* (1899) 10 Pa. Super. Ct. 38.

The maker of a negotiable promissory note, no statute being in force to the contrary, cannot be adjudged trustee of the payee where the latter has, before the paper became due, indorsed and transferred it to an innocent holder for value, even though the trustee process was served prior to the transfer, and the indorsee gave no notice of it. *Hinsdill v. Safford* (1839) 11 Vt. 309; *Little v. Hale* (1839) 11 Vt. 482.

⁸⁸ *Mr. Justice Miller in Durant v. Iowa County* (1864) 1 Woolw. 69, Fed. Cas. No. 4,189.

⁸⁹ *Mims v. West* (1868) 38 Ga. 18, 95 Am. Dec. 379.

ment of negotiable commercial paper before maturity.⁹⁰

The Supreme Court of the United States has held that the rule requiring everyone to take notice of a pending litigation over the title to property he is about to buy from one of the litigants does not apply to commercial paper purchased before its maturity.⁹¹

There have been several decisions in harmony with those just mentioned, so that it may safely be said that the inapplicability of the *lis pendens* doctrine to bona fide transfers of negotiable paper for value and before maturity is generally conceded.⁹²

The reason for excepting negotiable paper from the operation of the *lis pendens* rule is to protect the commercial community by removing all obstacles to the free circulation of such paper; since, if such paper, when regular upon its face, were to be subject to the possibility of a suit being pending between the original parties to it, its negotiability would be seriously affected and innumerable commercial transactions would be checked.⁹³

The doctrine of *lis pendens*, it has been well said, is founded on no principle of natural equity, but solely on considerations of public policy; and the policy which excepts negotiable paper from its operation is at least as wise, as import-

ant, and as well established, as that on which the doctrine rests.⁹⁴

b. After maturity.

An overdue negotiable promissory note has ceased to be current.⁹⁵ It is upon the same footing, it has been said, as other choses in action.⁹⁶ At maturity it becomes subject to defenses which theretofore were unavailable.⁹⁷ A past-due promissory note cannot be transferred to an innocent holder so as to cut off defenses which the maker may have against the previous holder.⁹⁸ As a general rule, the purchaser of commercial paper after it is overdue and dishonored is put on inquiry respecting any defenses which may be set up against it.⁹⁹ He may well presume that it has been wholly or partly paid, or that it ought not to be paid, and, hence, he takes the risk of a good defense to it.¹⁰⁰ If he buys it, he takes it subject to all the defenses which the maker of it had while it was the property of the preceding holder.¹⁰¹ He acquires it subject to all existing equities between the original parties.¹⁰²

It follows that the indorsee of a negotiable bill or note who takes it after it has matured, takes it subject to any attachment or garnishment previously served upon the maker as debtor of the payee or prior holder.¹⁰³ A fortiori does the indorsee of an overdue promissory

⁹⁰ Kieffer v. Ehler (1852) 18 Pa. 388; Hill v. Kroft (1857) 29 Pa. 186; Day v. Zimmerman (1871) 68 Pa. 72, 8 Am. Rep. 157; Bell v. Philadelphia Binding & Mailing Co. (1899) 10 Pa. Super. Ct. 38.

⁹¹ Warren County v. Marey (1878) 97 U. S. 107, 24 L. ed. 981.

⁹² The general rule that the pendency of a litigation respecting real property is notice to all persons dealing with its subject, whether applicable or not to personal property in general, does not apply to transfers of negotiable paper before maturity. Winston v. Westfeldt (1853) 22 Ala. 760, 58 Am. Dec. 278.

The general rule that all persons dealing with property the subject of a pending suit can acquire from any party or privy to it only a title liable to be divested by the judgment or decree in such suit does not extend to negotiable paper. Mayberry v. Morris (1878) 62 Ala. 113.

The doctrine of *lis pendens* does not apply in cases of transfer of negotiable commercial paper before maturity, for value, to bona fide holders. Stone v. Elliott (1860) 11 Ohio St. 252; Howe v. Hartness (1860) 11 Ohio St. 449, 78 Am. Dec. 312; Kimbrough v. Hornsby (1904) 113 Tenn. 605, 84 S. W. 613; Wilson v. McEachern (1911) 9 Ga. App. 584, 71 S. E. 946.

It does not apply to dealings in com-

mercial paper. Hall v. Bowker (1871) 44 Vt. 77.

⁹³ Warren County v. Marey (U. S.) supra.

⁹⁴ Stone v. Elliott (Ohio) supra.

⁹⁵ Hinsdill v. Safford (1839) 11 Vt. 309.

⁹⁶ Hutchins v. Evans (1841) 13 Vt. 541.

⁹⁷ McCormack v. Williams (1915) 88 N. J. L. 170, L.R.A.1917E, 535, 95 Atl. 978.

⁹⁸ Thompson v. Gainesville Nat. Bank (1886) 66 Tex. 156, 18 S. W. 350.

⁹⁹ First Nat. Bank v. Texas, 20 Wall. (U. S.) 88, supra; 22 L. ed. 298.

¹⁰⁰ Hinsdill v. Safford (Vt.) supra.

¹⁰¹ Camp v. Scott (1842) 14 Vt. 387.

¹⁰² First Nat. Bank v. Texas (U. S.) supra.

The general rule that a negotiable bill of exchange or promissory note, transferred when overdue, passes to the new holder subject to all the equities of the previous parties affecting it, was recognized and conceded in Ames v. Meriam (1867) 98 Mass. 294; but in that case it was held that the rule did not apply to a bank check indorsed over to a new holder a few days after it had been drawn and delivered.

¹⁰³ Day v. Zimmerman (1871) 68 Pa. 72, 8 Am. Rep. 157; Daniel v. Rawlings (1846) 6 Humph. (Tenn.) 403.

It has been said that there is no contrariety of opinion in respect of a plea that a debt due by bill of exchange, negotiated

note take it subject to a garnishment previously served upon the maker when he well knows of such garnishment.¹⁰⁴ Trustee process served upon the maker of a negotiable promissory note as debtor of the payee takes precedence over and has priority to rights subsequently acquired by an indorsee of the paper after it has become past due.¹⁰⁵ As against a garnishment, an over due promissory note has ceased to be negotiable.¹⁰⁶ Therefore, after a negotiable promissory note has fallen due and remains unpaid, and while it is still the property of the defendant it is subject to attachment or garnishment by the service of process upon the maker,¹⁰⁷ and the latter's liability as garnishee or trustee thereby becomes fixed.¹⁰⁸

V. Garnishment of negotiable paper after its transfer.

a. Before maturity.

It has never been questioned by any authority worthy of respect where the

after its maturity to a plaintiff claiming it had been recovered by another on a process of attachment, is good at common law. *St. Louis Perpetual Ins. Co. v. Cohen* (1845) 9 Mo. 421.

¹⁰⁴ *Stevens v. Pugh* (1861) 12 Iowa, 430.

¹⁰⁵ *Camp v. Scott* (Vt.) supra.

¹⁰⁶ *Hutcheson v. King* (1904) 37 Tex. Civ. App. 151, 83 S. W. 215.

¹⁰⁷ *Somers v. Losey* (1882) 48 Mich. 294, 12 N. W. 188; *Serviss v. Washtenaw Circuit Judge* (1898) 116 Mich. 101, 72 Am. St. Rep. 507, 74 N. W. 310; *Bills v. National Park Bank* (1882) 89 N. Y. 343.

This has been declared to be law well settled by authority. *Smith v. Spinnenweber* (1914) 114 Ark. 384, 170 S. W. 84; *Thompson v. Gainesville Nat. Bank* (Tex.) supra.

After a debt due upon a promissory note secured by a mortgage has become due and has been attached by a judgment creditor of the mortgagee upon garnishee process against the maker and mortgagor, and the latter has been judicially ordered to pay the attaching creditor the sum due upon his judgment, a subsequent assignee of the note and mortgage takes them subject to the attachment, and becomes entitled to collect from the garnishee only the surplus above the attaching creditor's claim. *Campbell v. Nesbitt* (1878) 7 Neb. 300.

¹⁰⁸ The maker of a promissory note, indebted thereon to the payee after it has become due, is liable as garnishee in a suit against the payee by one of his creditors, notwithstanding the transfer of the note after service of the garnishment is known to the garnishee before he answers. *Stevens v. Pugh* (Iowa) supra.

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law merchant prevails unaffected by legislation that negotiable commercial paper after it has passed, before maturity, from a defendant to another holder in good faith for value, cannot be subjected to attachment or garnishment. It has gone beyond the reach of these processes. A bona fide indorsee of a negotiable promissory note transferred by the holder to him before it has become due, for a good consideration of value, takes it and the right to collect it from the maker wholly unaffected by a later garnishment as a debt owing the previous owner.¹⁰⁹ An attempt to garnishee a debt evidenced by an unmatured negotiable promissory note which had passed, before the service of the garnishee process, to a bona fide holder for value, necessarily fails because the garnishee is not indebted upon the paper to the defendant.¹¹⁰ To entitle attaching creditors to judgment against the maker of a negotiable promissory note who was served as garnishee of the defendant, they are bound to prove that he held the

note, summoned as trustee in attachment of the payee, is chargeable as such, where the note was overdue at the time the writ was served, and is not shown to have been transferred. *Scott v. Hawkins* (1868) 99 Mass. 550.

¹⁰⁹ *Brown v. Fisher* (1905) 35 Ind. App. 549, 74 N. E. 632.

A bona fide purchaser for value and before maturity from the holder of a negotiable promissory note which had been pledged to a bank as collateral security for a loan or discount, who gave notice of his purchase to the bank and demanded of it the possession of the instrument before an attachment had been issued and served by a creditor of his indorser, obtained a title and a right superior to those of the attaching creditor, although he did not get from the bank manual possession of the note. *Howe v. Ould* (1876) 28 Gratt. (Va.) 1.

By a transfer before maturity, made in good faith to repay an actual loan of money by the transferee, even from a husband to his wife, a negotiable promissory note is put out of the reach of an after-issued attachment through trustee process against the maker, as debtor of the payee. *Clough v. Russell* (1875) 55 N. H. 279.

An indorsement and transfer of a negotiable receipt for the payment of money when collected by the signer, made in good faith to a bona fide holder for value, with intent to vest the whole title to the paper in the indorsee, prior to the service of garnishee process upon the receptor, prevents the garnishment from taking effect. *Beck v. Cole* (1862) 16 Wis. 96.

¹¹⁰ *Lorain v. Lorain Sav. & Bkg. Co.* (1895) 2 Ohio N. P. 108, 4 Ohio S. & C. P. Dec. 84.

paper at the time the attachment was served.¹¹¹ No judgment can be rendered against a garnishee indebted upon a negotiable promissory note to whosoever holds it, when, before it matured, and before service was made upon the garnishee, the note had been indorsed and transferred for value to an innocent third person by the defendant.¹¹²

b. After maturity.

An overdue negotiable promissory note continues to be negotiable in the sense that it is transferable by indorsement and delivery as before maturity.¹¹³ It continues negotiable in this sense until it is paid, if not restrictively indorsed by the holder.¹¹⁴ The transfer of a negotiable promissory note by indorsement and delivery after it has matured vests a complete legal title to it in the indorsee.¹¹⁵ Anyone who disputes that title takes up the burden of establishing by evidence a good defense.¹¹⁶

Accordingly it has been decided that a bona fide indorsee for value of an overdue negotiable promissory note takes a good title to it, and gains a right to recover the amount due upon it from the maker and indorser superior to an attachment or garnishment which was not served until after he had become the owner and holder of the paper;¹¹⁷ that garnishment is no defense to the maker in an action upon a negotiable promissory note by a bona fide indorsee for value who acquired it before the garnishee process was served, whether he got

it before or after its maturity;¹¹⁸ that for the maker of a negotiable promissory note, whether unmatured or past due, to be charged as garnishee of a defendant, the latter must be the owner and holder of it when the garnishment process is served;¹¹⁹ that the maker of a negotiable promissory note which has matured cannot be charged as garnishee of the payee unless it affirmatively is shown to have belonged to such payee when the writ was served;¹²⁰ and that no judgment charging a garnishee for a debt due by negotiable commercial paper can be rendered where it appears that he is liable for it to a bona fide holder, not the defendant, to whom the paper was transferred prior to the garnishment, either before or after it had matured.¹²¹

c. Until notice is given.

1. Of transfers of immature paper.

It may be asserted with the utmost confidence that, in the absence of a positive statute requiring it, no notice to the maker of a negotiable instrument of its transfer before its maturity is ever necessary to guard an indorsee against a later attachment of the paper as an evidence of the maker's debt to a prior holder. The new owner is under no obligation where the law merchant prevails without change to notify the maker of his ownership in order to protect himself from a subsequent attachment or garnishment in an action against a prior holder or the payee;¹²² for this purpose

¹¹¹ Scott v. Hill (1831) 3 Mo. 88, 22 Am. Dec. 462.

¹¹² Walden v. Valiant (1852) 15 Mo. 409; Secor v. Witter (1883) 39 Ohio St. 218; Davis v. Pawlette (1864) 3 Wis. 300, 62 Am. Dec. 690.

The statements in the text have further support in Fay v. Sears (1872) 111 Mass. 154; Edney v. Willis (1888) 23 Neb. 56, 36 N. W. 300; Shuler v. Bryson (1871) 65 N. C. 201; Knisely v. Evans (1877) 34 Ohio St. 158.

If a negotiable security was not due when the maker was served with process in attachment against the then holder, before he can be compelled to pay it must be proved that the defendant was the holder of it when the attachment was served. Bills v. National Park Bank (1892) 89 N. Y. 343.

The maker of a negotiable promissory note attached as a debt due to the payee by the service upon him of trustee process, pursuant to the New Hampshire statute of 1842 (Rev. Stat. chap. 208, § 18; Comp. Stat. 529), would not be charged as trustee when the paper had been transferred to a new and bona fide holder before the process was L.R.A.1918C.

served. Amoskeag Mfg. Co. v. Gibbs (1854) 28 N. H. 316.

¹¹³ First Nat. Bank v. Texas (1873) 20 Wall. (U. S.) 88, 22 L. ed. 298; Edney v. Willis (1888) 23 Neb. 56, 36 N. W. 300; Shuler v. Bryson (1871) 65 N. C. 201; Knisely v. Evans (1877) 34 Ohio St. 158; Lorain v. Lorain Sav. & Bkg. Co. (1895) 2 Ohio N. P. 108, 4 Ohio S. & C. P. Dec. 84. See also note in 46 L.R.A. 753.

¹¹⁴ Oakdale Mfg. Co. v. Clarke (1908) 20 R. I. 192, 69 Atl. 681.

¹¹⁵ Knisely v. Evans (1877) 34 Ohio St. 158.

¹¹⁶ First Nat. Bank v. Texas (1873) 20 Wall. (U. S.) 88, 22 L. ed. 298.

¹¹⁷ Shuler v. Bryson (1871) 65 N. C. 201.

¹¹⁸ Knisely v. Evans (1877) 34 Ohio St. 158, and Shuler v. Bryson (1871) 65 N. C. 201, supra.

¹¹⁹ Edney v. Willis (1888) 23 Neb. 56, 36 N. W. 300.

¹²⁰ Bassett v. Garthwaite (1856) 22 Tex. 230, 73 Am. Dec. 257.

¹²¹ Secor v. Witter (1883) 39 Ohio St. 218.

¹²² Jefferson County v. Fox (1840) 1 Morris (Iowa) 48.

no notice of transfer is necessary.¹²³ One who acquires a negotiable promissory note in good faith, for value, and before maturity, is neither bound to anticipate an after attachment against a prior holder, nor to give the maker any notice of the transfer to protect himself against a subsequent garnishment.¹²⁴ The rule that the assignee of a debt is entitled to its payment in preference to third persons who may have garnisheed the debtor only in case he has given previous notice to the debtor of the assignment of the debt does not apply to debts due by negotiable commercial paper indorsed in blank, and passing before maturity from holder to holder by mere delivery.¹²⁵

So rarely have the doctrines just stated been challenged that it has been asserted that, as to promissory notes negotiable in terms, indorsed in blank, and circulating from hand to hand by mere delivery before they mature, "it has never been nor can it be pretended that any notice of transfer is necessary" to protect a holder against a subsequent garnishment of the maker as debtor of a previous holder.¹²⁶

2. Of transfers of overdue paper.

With respect to the necessity for the holder of negotiable commercial paper who acquires it after it has become payable and is dishonored to notify the maker of its transfer in order to be protected against a subsequent attachment or garnishment, the courts are far from agreement. It is the general rule that negotiable commercial paper acquired after it is past due is subject to the same defenses as if it were not negotiable;¹²⁷ and it is certainly true that the maker of a promissory note payable to a defendant in attachment cannot be charged as trustee if it was transferred to another person before the service of the writ, and proper notice of such transfer was given to the maker, whether the note was or was not negotiable.¹²⁷

That it is necessary for the purchaser of commercial paper which has lost its

negotiability in general by becoming overdue to notify the maker that he has acquired it, in order to forestall an attachment or garnishment, is a proposition that has been both denied and affirmed by the courts.

On the one hand, it has been held that an overdue negotiable promissory note cannot be reached by garnishee process upon the maker as a debt due to the payee after it has been transferred to a third person by indorsement and delivery, whether the maker has or has not had notice of the transfer,¹²⁸ because once the payee has indorsed and transferred such a note to another, whether before or after it has matured, he no longer has a cause of action upon it against the maker, whether the latter knows or is ignorant of the transfer.¹²⁹ According to this authority notice to the maker of the transfer of his past-due negotiable promissory note by a defendant to a later bona fide holder has nothing to do with his liability as garnishee, the question being simply who was the legal holder of the paper, with the right to recover upon it, at the time of garnishment.¹³⁰ The indorsee of an overdue negotiable instrument when not so required by a statute is not, according to another authority, bound to notify the maker that a transfer of the paper has taken place, in order to protect himself against a subsequent attachment or garnishment, since the maker, on the transfer of the paper, ceased to be indebted to the former holder, regardless of his knowledge or ignorance that its ownership had changed.¹³¹ According to another decision, a negotiable promissory note transferred to a bona fide holder for value after it has become due, and before any attachment or garnishment has issued, is thereby put out of the reach of garnishee process on the maker as a debt due the former holder, irrespective of whether or not he had received any notice of the transfer.¹³²

On the other hand, several courts have taken the affirmative side of the proposition.

¹²³ *Sheets v. Culver* (1840) 14 La. 449, 33 Am. Dec. 593.

¹²⁴ *Myers v. Beeman* (1848) 31 N. C. (9 Ired. L.) 116.

¹²⁵ *Sheets v. Culver* (La.) *supra*.

¹²⁶ *Fairfield County Nat. Bank v. Hammer* (1915) 89 Conn. 592, 95 Atl. 31; *Austin v. First Nat. Bank* (1912) 150 Ky. 113, 150 S. W. 8; *McKim v. King* (1882) 58 Md. 502, 42 Am. Rep. 340; *Jacobus v. Jamestown Mantel Co.* (1912) 149 App. Div. 856, 134 N. Y. Supp. 418, affirmed in (1914) 211 N. L.R.A.1918C.

Y. 154, 105 N. E. 210; *Marsh v. Marshall* (1866) 53 Pa. 396; *Davis v. Miller* (1857) 14 Gratt. (Va.) 1; *Cottrell v. Watkins* (1893) 89 Va. 801, 19 L.R.A. 754, 37 Am. St. Rep. 897, 17 S. E. 328.

¹²⁷ *Fay v. Sears* (1872) 111 Mass. 154.

¹²⁸ *Edney v. Willis* (Neb.) *supra*.

¹²⁹ *Kuisely v. Evans* (Ohio) *supra*.

¹³⁰ *Lorain v. Lorain Sav. & Bkg. Co.* (1895) 2 Ohio N. P. 108, 4 Ohio S. & C. P. Dec. 84.

An assignment of a non-negotiable promissory note, it has been held, imposes no obligation upon the maker to the assignee until notice of the assignment has been given;¹³¹ and a promissory note not transferred until it is past due is subject to all defenses existing between the maker and the payee until notice has been given of the transfer;¹³² and, therefore, the maker of a negotiable promissory note payable on demand, summoned when the paper is overdue, as trustee of the payee, is chargeable if he has had no notice of a transfer.¹³³

Again, it has been held that the maker of a negotiable promissory note which the payee owned at the time it matured, but which he transferred after it became due, to a third person, was liable as garnishee in an action against the payee, unless and until the indorsee gave notice of the transfer and of his ownership of the paper.¹³⁴

If, it has been said, the maker of an overdue negotiable promissory note, who had been charged as trustee on attachment against the payee, should pay it to the attaching creditor without having had any notice that the note had been transferred to another holder, he would have a good defense to an action afterwards brought thereon by an indorsee,¹³⁵ for it has been held that the payment of a negotiable promissory note after its maturity, by the maker as garnishee, without any notice that the paper had been transferred to another holder than the defendant, protects him against liability in a later suit by an indorsee who did not get title to the note until after it fell due.¹³⁶ A judgment against the maker of a negotiable promissory note as trustee of the payee before he has been notified of any transfer of the paper has been declared to be a good defense to an action upon it by a post-maturity indorsee.¹³⁶

Anyone who takes overdue negotiable paper is held to take it subject to garnishment, against which he can protect himself only by giving notice to the maker prior to the garnishment.¹³⁷ The indorsee of a past-due negotiable prom-

issory note is said to be in danger of losing his right to recover upon it by an intervening judgment against the maker as trustee of the payee until he gives the maker notice that the note has been transferred to him.¹³⁸

These views have been approved elsewhere.¹³⁹

The purchaser of overdue negotiable commercial paper is held to be bound, in order to insure his right to recover upon it, to give notice that he has acquired it to the maker in season to enable the latter to set up the transfer in his answer in the garnishment proceeding, for the reason that if the maker, in his answer as garnishee, unwittingly and in good faith admits his debt upon the paper to the defendant, and in consequence suffers judgment to be taken against him, that judgment will and should be a bar to an action on the paper by the delinquent indorsee, as the maker cannot and ought not to be compelled to pay his obligation twice.¹⁴⁰

3. Legislation making notice requisite to protect from garnishment.

In the past there have been enacted statutes requiring indorsees of negotiable paper to give notice of their ownership to makers to protect themselves against attachments and garnishments of payees and indorsers.

The state of Vermont is conspicuous for such legislation. A statute of that state¹⁴¹ provided that all negotiable paper, whether unmatured or past due, might be attached by and should be subject to trustee process unless and until it had been negotiated and notice of the negotiation had been given to the maker or indorser before he was served with process.¹⁴²

As the statute subjected to the trustee process as debts due the payees all promissory notes, without exception, regardless of time or place of payment or convenience of the parties, until notice had been given to the makers that they had been transferred to other holders, it was held that, under its operation, a bank which, in the usual course of business, had discounted a negotiable promissory

¹³¹ Comstock v. Farnum (1806) 2 Mass. 96.

¹³² Scott v. Hawkins (1868) 99 Mass. 550.

¹³³ McCoid v. Beatty (1861) 12 Iowa, 299; Hinsdill v. Safford (1839) 11 Vt. 309.

¹³⁴ Scott v. Hawkins (Mass.) supra.

¹³⁵ Somers v. Losey (1882) 48 Mich. 294, 12 N. W. 188.

¹³⁶ Hinsdill v. Safford (Vt.) supra.

¹³⁷ McCoid v. Beatty (Iowa) supra. I.R.A.1918C.

¹³⁸ Hinsdill v. Safford (Vt.) supra.

¹³⁹ Vide, Mills v. Stewart (1847) 12 Ala. 90.

¹⁴⁰ Walters v. Washington Ins. Co. (1855) 1 Iowa, 404, 63 Am. Dec. 451; McCoid v. Beatty (Iowa) supra; Yocum v. White (1873) 36 Iowa, 288.

¹⁴¹ Act of 1841, Comp. Stat. chap. 32, § 45.

¹⁴² Seward v. Garlin (1861) 33 Vt. 583.

note payable at its own banking house in the future, and had neglected to give notice to the maker of the change of ownership, held the paper subject to a trustee process served on the maker as the payee's debtor.¹⁴³ Under that statute, too, it was held necessary that every transfer of a negotiable commercial instrument to a new holder should in turn be brought to the knowledge of the maker for the holder to be safe against attachments in actions against prior holders along the line.¹⁴⁴ The statute afterwards was amended so as to exempt domestic banks which had discounted commercial paper from the necessity of notifying the makers in order to protect themselves from subsequent attachments by trustee processes, but the amendment was held not to extend to or cover negotiable promissory notes turned over to the banks as collateral securities for other discounts.¹⁴⁵

4. Form and sufficiency of notice.

In the case just cited it was further held that the mentioning by the payee to the maker of a purpose to use negotiable promissory notes as collateral security in some one or more banks, at the time the notes were delivered, and the payee's later voluntary statement to the maker that he had used them as collateral security for sundry discounts at a named bank, was insufficient notice of their transfer to protect the bank against an attachment by trustee process served on the maker for the benefit of a creditor of the payee.¹⁴⁶

But a notice of transfer given to one of two makers of a joint and several negotiable promissory note has been held sufficient to give the indorsee a prior right to recover the sum due upon it over a creditor of the payee claiming under a subsequent attachment in virtue of trustee process served upon the other maker.¹⁴⁶

And an action brought against the maker by an indorsee of an overdue negotiable promissory note, followed by a submission to arbitration of all matters in difference between the plaintiff, the defendant, and the payee of the paper, carried to a hearing before the

arbitrator, was held sufficient and ample notice of transfer of the note to satisfy the statutory requirement of such notice in order to give exemption from after-served trustee process.¹⁴⁷

Inasmuch, however, as a general statute making all personal property subject to be mortgaged does not embrace choses in action, the giving of a chattel mortgage upon a promissory note, and the filing of it pursuant to law, cannot take the place of a notice of indorsement and transfer of the note which the statute respecting trustee process requires to be given to the maker to render negotiable commercial paper passed to other holders than banks exempt from attachment.¹⁴⁸

VI. Rights, after garnishment, of bona fide holders of negotiable paper acquired for value, before maturity.

By the law merchant an indorsee of a negotiable promissory note who acquires it for value, in good faith, before maturity, and without notice, obtains an absolute, unqualified title.¹⁴⁹ His title is secure against all equitable defenses existing between the original parties to the instrument.¹⁵⁰ The law merchant assures to everyone who obtains a bill of exchange or promissory note, negotiable in terms, before maturity, by regular indorsement, for a valuable consideration, and without either actual notice of any adverse claim or of such suspicious circumstances as put him on inquiry, the right to recover upon it.¹⁵¹

This title of a bona fide indorsee of negotiable paper obtained for value before maturity is therefore superior to a garnishment served before the paper was transferred.¹⁵² The rights of such a bona fide purchaser of a negotiable commercial instrument are paramount to those of a garnisheeing creditor.¹⁵³ When acquired in the usual course of business those rights are paramount to all claims of other persons, by garnishee process or otherwise.¹⁵⁴ The interest acquired by a bona fide holder of a negotiable promissory note received while it was still current, in due course of business, cannot be defeated by a pending trustee process against the maker as the

¹⁴³ Kimball v. Gay (1844) 16 Vt. 131.

¹⁴⁴ Seward v. Garlin (Vt.) supra.

¹⁴⁵ Farmers' & M. Bank v. Drury (1863) 35 Vt. 469.

¹⁴⁶ Ayott v. Smith (1868) 40 Vt. 532, 94 Am. Dec. 436.

¹⁴⁷ Austin v. Ryan (1878) 51 Vt. 110.

¹⁴⁸ Woodward v. Laporte (1898) 70 Vt. 399, 41 Atl. 443.
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¹⁴⁹ Mayberry v. Morris (1878) 62 Ala. 113.

¹⁵⁰ Cruett v. Jenkins (1880) 53 Md. 217.

¹⁵¹ Kieffer v. Ehler (1852) 18 Pa. 388.

¹⁵² Mayberry v. Morris Ala. supra.

¹⁵³ Wilson v. McEachern (1911) 9 Ga. App. 584, 71 S. E. 946.

¹⁵⁴ Secor v. Witter (1883) 39 Ohio St. 218.

payee's debtor.¹⁵⁵ A bona fide indorsee of a negotiable promissory note before maturity, for value, in the usual course of trade, holds it unaffected by a prior garnishment of the maker.¹⁵⁶ An attachment cannot affect such a holder's rights.¹⁵⁷ It is wholly ineffectual against him.¹⁵⁸

The indorsee of commercial paper in good faith, for value, and before maturity, has his remedy upon it against the maker and indorser unaffected by garnishee proceedings to which he was no party.¹⁵⁹ His remedy cannot be affected by a garnishment of the maker in an action by the creditor of a prior holder, because the proceeding was *res inter alios*.¹⁶⁰ The pendency of garnishment proceedings against the maker is no defense to him when sued upon his negotiable promissory note by a bona fide holder for value, before maturity;¹⁶¹ neither is a judgment against him as garnishee,¹⁶² even when taken upon his

admission of indebtedness to the defendant because of his lack of notice that the paper had been transferred to the plaintiff;¹⁶³ and a decree in chancery directing him to pay into court the amount due upon his obligation to satisfy a judgment against one who held it when the suit was begun affords him no better defense to a subsequent action upon the paper by an indorsee who took it before its maturity, during the pendency, but without notice, of the suit in chancery.¹⁶⁴ The case is no better for the unfortunate maker of negotiable commercial paper, who, as garnishee of a defendant in ignorance that it had been transferred before it fell due, actually pays it; he still has no defense based on such payment to an action upon it by a bona fide holder for value before maturity.¹⁶⁵ If he pays as garnishee, he does so at his peril.¹⁶⁶ His liability to the indorsee cannot be thus extinguished.¹⁶⁷ It is, of course, different

¹⁵⁵ *Camp v. Scott* (1842) 14 Vt. 387.

¹⁵⁶ *Kimbrough v. Hornsby* (1904) 113 Tenn. 605, 84 S. W. 613.

¹⁵⁷ *Kimball v. Plant* (1840) 14 La. 511.

¹⁵⁸ *Day v. Zimmerman* (1871) 68 Pa. 72, 8 Am. Rep. 157; *Bell v. Philadelphia Binding & Mailing Co.* (1899) 10 Pa. Super. Ct. 38.

¹⁵⁹ *State ex rel. Rogers v. Burton* (1860) 11 Wis. 50.

¹⁶⁰ *Cruett v. Jenkins* (Md.) *supra*, wherein it was pronounced inconsistent with reason and contrary to public policy where the law merchant prevailed and legislation had made immune the bona fide holder for value of negotiable paper before maturity against all equitable defenses existing between prior parties, to allow his rights to be defeated or abridged by any proceeding to which he was not a party, instituted by a stranger against his debtor.

¹⁶¹ *Mason v. Noonan* (1859) 7 Wis. 609.

The mere fact that the maker of a negotiable promissory note has been served with an attachment in an action by the payee's creditor, as trustee for the defendant, where the law merchant has been changed by a statute subjecting such notes to attachment if the parties to them reside and they are payable within the state, is not a bar to an action upon the note, brought by a bona fide indorsee before maturity, but at most is a plea in abatement, or ground for a stay of proceedings, since the attachment may never be perfected by judgment and satisfaction. *Peck v. Maynard* (1849) 20 N. H. 183.

¹⁶² *Brittain v. Anderson* (1874) 8 Baxt. (Tenn.) 316.

¹⁶³ *Myers v. Beeman* (1848) 31 N. C. (9 Ired. L.) 116; *Ormond v. Moyer* (1850) 33 N. C. (11 Ired. L.) 564.

¹⁶⁴ *Stone v. Elliott* (1860) 11 Ohio St. 252.

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¹⁶⁵ *Cruett v. Jenkins* (Md.) *supra*; *Littlefield v. Hodge* (1859) 6 Mich. 328; *Corey v. Webber* (1893) 96 Mich. 357, 55 N. W. 982.

¹⁶⁶ *Jefferson County v. Fox* (1840) 1 Morris (Iowa) 48.

¹⁶⁷ *Gillam v. Huber* (1853) 4 G. Greene (Iowa) 155.

It is no defense to the maker of a promissory note, sued thereon by the holder, that he had previously been garnisheed as debtor of the payee, and compelled to pay the attaching creditor, notwithstanding he had set up the transfer of the note in answer to the garnishment. *Gates v. Kerby* (1850) 13 Mo. 157; *Funkhouser v. How* (1856) 24 Mo. 44.

A garnishee indebted upon a negotiable instrument who pays the money due thereby into court, pursuant to an order of a court which had not acquired jurisdiction of the defendant or subject-matter in the action, cannot set the order and payment up as a defense to a suit to recover the garnisheed debt, even against the defendant in the garnishment. *First State Bank v. Latimer* (1915) 48 Okla. 104, 149 Pac. 1099.

An early Maryland case, meagerly reported, appears to have held that by the garnishment of a debt due by a negotiable promissory note payable to a defendant by service of process on the maker before he had been notified of any transfer of the paper, a lien was acquired by the garnisher superior to the claim of a later indorsee, irrespective of whether the paper had been transferred before or after maturity. *Stewart v. West* (1804) 1 Harr. & J. (Md.) 53d.

But, long afterwards, the Maryland court of appeals decided that the garnishment of a negotiable promissory note as a debt due the payee, by service of process on the maker, was defeated by a subsequent transfer before maturity to a bona fide indorsee for value. In so deciding the court

where the law merchant has been changed by legislation.¹⁶⁸

VII. Garnishment of commercial paper negotiated *mała fides*.

If it is thought that undue stress is laid upon bona fides in transferring negotiable paper as a factor in frustrating garnishment, it should be remembered that innocence and good faith are vital elements in protecting an indorsee.

An indorsee of a negotiable promissory note who takes it before maturity from the payee, but after garnishment of the maker as the payee's debtor, with knowledge of the garnishment, receives it encumbered by and subject to such garnishment.¹⁶⁹

The general rule that a negotiable bill or note is beyond the reach of an attachment before it matures is subject to the exception that a voluntary transfer of it, or one fraudulently made of purpose to protect the payee from the claims of his creditors, leaves it open to attachment or garnishment while it is in the hands of the indorsee, because he is not a bona fide holder.¹⁷⁰ The indorsement and transfer of a negotiable promissory note even before it falls due, by a payee in bad faith, to defraud his creditors, to an indorsee who is privy to the fraud, is worthless to defeat a garnishment by the payee's judgment creditor against the maker.¹⁷¹ The holder of a promissory note which was transferred to him by the payee in fraud of creditors, who

was privy to the fraud, cannot recover upon it from the maker, who paid it on garnishee process after its fraudulent transfer.¹⁷² A transfer of negotiable commercial paper by a debtor holder to an indorsee as a gift, without consideration, being a fraud upon creditors and void as to them, leaves the sum due upon it subject to garnishment.¹⁷³

An attaching creditor who has garnished the maker of negotiable promissory notes is held to have a right to litigate the question whether or not the defendant transferred them with intent to defraud his creditors, to an indorsee who was a party or privy to the fraud;¹⁷⁴ and if, in an action by an indorsee of a negotiable promissory note which has been attached before its maturity as the property of a prior indorser, circumstances make doubtful the time when the plaintiff received it, the burden is held to be cast upon him of showing that the transfer took place before maturity and in the usual course of business.¹⁷⁵

Good faith in the maker of negotiable commercial paper is just as essential to safeguard him in case of garnishment as it is to protect the indorsee.

The law, it has been declared, does not shield the maker of a negotiable promissory note from a judgment in garnishment where he colluded with the payee to defeat the garnishor's right.¹⁷⁶ A negotiable promissory note given for property purchased of an absconding

cited *Steuart v. West*, supra, and distinguished it by saying that it did not distinctly appear by the report that the note there involved was in the hands of a bona fide holder for value, before maturity, and therefore the case could not be considered a distinct adjudication of the question then at bar. *Cruett v. Jenkins* (Md.) supra.

¹⁶⁸ An indorsee for value and in good faith, before maturity, of a negotiable promissory note made and payable in New Hampshire, by and to a resident of that state, takes it under the statute thereof, subject to an attachment and trustee process previously issued and served upon maker and payee. *Cox v. Severance* (1899) 70 N. H. 86, 85 Am. St. Rep. 602, 46 Atl. 739.

A debt for which the debtor has made his promissory note payable to his creditor or order, and which has been attached upon garnishee process by the latter's judgment creditor before the maturity of the paper, has been held to be actually owing the payee, and not a holder by indorsement before maturity, and after garnishment, in British Columbia. *Girard v. Cyrs* (1896) 5 B. C. 45.

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¹⁶⁹ *Enos v. Tuttle* (1819) 3 Conn. 27; *Glanton v. Griggs* (1848) 5 Ga. 424; *Gillam v. Huber* (1853) 4 G. Greene (Iowa) 165.

¹⁷⁰ *Clough v. Buck* (1877) 6 Neb. 343.

¹⁷¹ *Le Brun v. Romero* (1907) 3 Porto Rico Fed. Rep. 225.

¹⁷² *Gillam v. Huber* (Iowa) supra.

A holder of a negotiable promissory note who acquired it after it matured, from a prior holder, who took it with knowledge of the fact that the payee had indorsed and delivered it to a third person without consideration, and of purpose to defraud his creditors, shortly before it became due, cannot recover in an action thereon against the maker a sum of money paid by the latter under judicial order as garnishee of the payee, to one of his defrauded creditors, in garnishment proceedings while they were in full force and effect, although the garnishment afterwards lapsed. *Clough v. Buck* (Neb.) supra.

¹⁷³ *Beck v. Cole* (1862) 16 Wis. 95.

¹⁷⁴ *Luckemeyer v. Seltz* (1883) 61 Md. 313.

¹⁷⁵ *Hill v. Kroft* (1857) 29 Pa. 186.

¹⁷⁶ *Thompson v. Gainesville Nat. Bank* (1886) 86 Tex. 156, 18 S. W. 350.

debtor, and made payable to a third person, in order to defraud creditors, has been subjected to attachment notwithstanding its transfer before maturity, where both maker and indorsee had knowledge of the fraud.¹⁷⁷ A maker indebted on a past-due negotiable promissory note still retained by the payee, which was given for part of the price of property purchased from a fraudulent debtor, held in his wife's name, to escape the claims of creditors, is liable as garnishee where the wife, the payee of the note, was privy to the fraud.¹⁷⁸

Not all the courts are in full harmony upon the question under consideration.

It has been held, for example, that the fact that the maker of a negotiable promissory note knew when he made

and delivered it that by its means the payee purposed to defraud his creditors,—a purpose the maker meant to facilitate,—did not make him liable to be charged as garnishee while the paper was outstanding and unmatured.¹⁷⁹

It has also been held that the maker of a negotiable promissory note which was delivered and accepted in payment of a just debt could not be charged thereon as trustees by process afterwards issued and served, even though the transaction was for the express purpose of avoiding and evading an expected attachment or garnishment.¹⁸⁰

Again, it has been held that the making and delivery of negotiable promissory notes in advance of and for the purpose of escaping an anticipated at-

¹⁷⁷ *Enos v. Tuttle* (Conn.) *supra*. That case was afterwards explained by saying that in it the absconding debtor, designing to defraud his creditors, conveyed his property to the maker of the note, and took for its price paper payable to his own son, who indorsed it over to one who was privy to the fraud, and, hence, the court had properly adjudged the maker to be trustee for the fraudulent debtor. *Starr v. Carlington* (1820) 3 Conn. 278.

The maker of negotiable promissory notes given for the purchase price of property, payable at the vendor's request to a third person, to carry out a scheme to hinder, delay, and defraud creditors, may, after the maturity of the paper, be charged as trustee of the vendor, where the nominal payee has been cited to show cause, and has appeared and disclaimed all personal interest in the paper. *Green v. Doughty* (1834) 6 N. H. 572.

¹⁷⁸ *Patton v. Gates* (1873) 67 Ill. 164.

A trustee not indebted when summoned, to the defendant in attachment, but who, being his boarder, pays his board in advance, sometimes in cash and sometimes by making and delivering his negotiable promissory note for the amount, pursuant to a scheme to defeat the trustee process, has been held chargeable as trustee upon the notes he gave and paid or which were outstanding after he was summoned as trustee, and between the service and his disclosure, by virtue of a statute making a trustee liable not only for funds in his hands belonging to the defendant when summoned; but also for whatever might come into his hands or become due from him between the service of the writ and his disclosure. *Cowdry v. Walker* (1880) 59 N. H. 533.

For the money paid in advance for board, it was said by the court, the trustee is not chargeable, because, at the time of payment, it was neither money in his hands nor was it a debt due from him to the defendant. It is otherwise as to the notes. They were made after the writ was served, and, with one exception, had been paid. It does not appear from the disclosure to L.R.A.1918C.

whom they were paid or who is the holder of the note now outstanding, and it is not material. If the note is held by a third party, it was not transferred to him before the service of the writ upon the trustee. Whatever may be the rights of the holder of such a note, which we do not decide, the giving and payment of the notes, being for the purpose of defeating the trustee process, was in fraud of the plaintiffs, and the trustee is chargeable for the amount of the notes given to the defendant after the service of the writ upon the trustee.

In one case the opinion was expressed that the maker of negotiable promissory notes delivered in payment of property purchased from the payee to enable him to defraud his creditors would be charged as trustee of the fraudulent vendor in an action by a defrauded creditor, not because the maker was indebted on the paper to the defendant, but because he had participated in the fraud and had possession of property justly applicable to the payment of the creditors' demands. This opinion, however, was obiter dicta, and must be deemed merely the views of the individual judge who wrote it; for, while the fraudulent character of the transaction and the intent to defraud creditors appeared to have been established in the case, the notes involved were paid out to bona fide creditors of the payee to discharge honest debts, and he had a legal right, if he chose to exercise it, to prefer the indorsees to the plaintiff in attachment; the notes therefore, were valid and enforceable obligations of the maker in the hands of the indorsees, and the plaintiff was not legally defrauded by the conversion of the defendant's property into choses in action, and the application of the latter to the payment of debts due creditors equal in equity to the plaintiff. The maker was therefore discharged as trustee. *Gregory v. Harrington* (1860) 33 Vt. 241.

¹⁷⁹ *Willis v. Heath* (1889) 75 Tex. 124, 16 Am. St. Rep. 876, 12 S. W. 971.

¹⁸⁰ *Wood v. Bodwell* (1832) 12 Pick. (Mass.) 268.

tachment, by a maker afterwards summoned as trustee of the payee, where it was done pursuant to a valid contract entered into long before, effectually frustrated an attachment and absolved the garnishee from liability as trustee.¹⁸¹

An innocent purchaser of property who paid for it in good faith by making and delivering his negotiable promissory notes for the purchase price, payable to the seller's wife, is not liable as garnishee upon such of them as remain unpaid and are current and unmatured in an action by a creditor of the seller, defrauded by the transaction, notwithstanding the payee was a privy to the fraud, where the notes had been negotiated to a third person whose participation in or knowledge of the fraud was not established.¹⁸²

VIII. Garnishment of negotiable paper payable on demand.

a. In general.

According as a negotiable commercial instrument payable on presentation and demand is considered in any given case as immature or overdue it is differently affected by garnishment, and the rights of the parties to it vary. An actual presentation and demand of payment is not essential to make it past due. A promissory note payable on demand automatically becomes overdue if it is not presented for payment within a reasonable time after its date.¹⁸³ An indorsee of a negotiable promissory note payable on demand, shown to have been still held by the payee two months after its date, takes it as overdue paper and subject to a trustee process served during the intervening time on the maker as the payee's debtor.¹⁸⁴ An actual presentation and demand of payment, especially if repeated, no matter how soon it follows the date, makes such a note past due immediately, and subject to an attachment of which the lien takes precedence to the claim of a subsequent indorsee.¹⁸⁴

b. Certificates of deposit.

It has been asserted that whatever may be the rule respecting the maturity

of commercial paper payable on demand, a negotiable security payable at sight or when presented cannot be deemed overdue until after its presentation for payment;¹⁸⁵ but it is improbable that thereby was meant that the time for presenting such an instrument was without limit.

A bank's certificate that a specific sum of money has been deposited with it, payable to the order of the depositor on presentation, in current funds with interest, is said to be a negotiable promissory note.¹⁸⁶ Before such a certificate can be regarded as overdue a time reasonably sufficient to negotiate and present it for payment must have elapsed;¹⁸⁶ and its negotiation two days after it bears date is a transfer of it before maturity.¹⁸⁸

The obligation assumed by a bank or banker who issues a negotiable certificate of deposit is to pay the fund on presentation to the holder of it, whoever he may happen to be, and not to repay the amount deposited to the depositor, hence, once a certificate has been issued, negotiable in terms, and while it is current, the bank or banker has nothing in hand belonging to the depositor upon which an attachment can fasten.¹⁸⁷

It is no defense to a bank sued by a bona fide holder for value, before maturity, of a certificate of deposit, negotiable and payable only after a stated time has elapsed, that it paid the amount thereby represented as garnishee under a garnishment in an action by third persons against the depositor.¹⁸⁸

A bank which has issued to a defendant certificates of deposit payable to him or his order on presentation and surrender, and has received notice that they have been negotiated and belong to another, cannot, while they are outstanding and unpaid, be charged as garnishee;¹⁸⁹ it is not liable as garnishee upon such certificates in an action against the alleged principal of the person who made the deposits, after the paper has been transferred to strangers, even where it was converted in fraud of the defendant's rights.¹⁹⁰

Bankers who have delivered to a de-

¹⁸¹ Collins v. Smith (1859) 12 Gray (Mass.) 431.

¹⁸² Diefendorf v. Oliver (1871) 8 Kan. 365.

¹⁸³ Camp v. Scott (1842) 14 Vt. 387.

¹⁸⁴ Culver v. Parish (1851) 21 Conn. 408.

¹⁸⁵ Ormond v. Moye (1850) 33 N. C. (11 Ired. L.) 564.

¹⁸⁶ Howe v. Hartness (1860) 11 Ohio St. 449, 78 Am. Dec. 312.

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¹⁸⁷ McMillan v. Richards (1858) 9 Cal. 365, 70 Am. Dec. 655.

¹⁸⁸ Union State Bank v. First Nat. Bank (1916) 122 Ark. 612, 184 S. W. 411.

¹⁸⁹ Karp v. Citizens Nat. Bank (1889) 76 Mich. 679, 43 N. W. 680.

¹⁹⁰ St. Louis Perpetual Ins. Co. v. Cohen (1845) 9 Mo. 421.

positor an interest-bearing negotiable certificate of deposit are not liable as garnishees in an attachment against him, served on the day the certificate was issued, but after it had left the bankers' control, and before 'it came' into the actual possession of the depositor, who, having no notice of the attachment, immediately indorsed and transferred it to a bona fide holder for value in due course of business before it possibly could have been presented for payment.¹⁹¹ The indorsee in such a case is entitled to recover on the certificate from the bankers notwithstanding the service of the attachment antedating in time his title.¹⁹¹

In one state, by statute,¹⁹² certificates of deposit payable only when returned and surrendered to the bank of issue, properly indorsed, are said to be exempt from garnishment, even if held by the payees.¹⁹³

A bank, however, indebted upon a certificate of deposit payable to the depositor's order on demand and when returned properly indorsed, overdue because payment was refused to an indorsee of the payee when he presented it, was held liable as garnishee in an action against such indorsee notwithstanding he had subsequently transferred it to a third person, to whom the bank paid it after the garnishment.¹⁹⁴

c. Drafts and bills of exchange.

As the indebtedness of the drawee of a bill of exchange does not arise until he accepts it, before acceptance it is not subject to garnishment.¹⁹⁵ Before presentation and acceptance the acceptor of a bill of exchange, or of an order for the

payment of money, is not liable as garnishee in a suit against the payee where the latter had previously transferred the paper to a third person.¹⁹⁶ The indorsee for value of a draft before acceptance by the drawee is the owner of the paper, and the drawer is not, and therefore the sum to be had by means of it is not garnishable as a debt owing the drawer.¹⁹⁶ It is recognized as a sound doctrine, founded on the commercial policy of sustaining the credit and circulation of negotiable paper, that an innocent holder of a bill of exchange negotiated before maturity is entitled to recover upon it and shut out almost every equitable defense.¹⁹⁷

To be subject to garnishment, debts due by bills of exchange must be within the statute which gives the remedy. Under a statute authorizing attachments which extends only to bills of resident makers that are payable within the state, a foreign insurance company which, after adjusting a local loss, had drawn and delivered to the policyholder to pay it a negotiable draft or inland bill of exchange upon itself, payable at its home office, was held not liable as trustee in an action against the payee.¹⁹⁸

d. Orders to pay money.

Orders, other than bank checks, for the payment of money, are not, strictly speaking, commercial paper, but sometimes they have its characteristics in cases of garnishment. These cases are not numerous and may justifiably be noticed.

It was held in one case that a consignee of merchandise for sale on commission for account of the consignor was

¹⁹¹ Howe v. Hartness (Ohio) supra.

¹⁹² Starr & C. Anno. Stat. (Ill.) chap. 62, § 15.

¹⁹³ Auten v. Crahan (1898) 81 Ill. App. 502.

¹⁹⁴ Exchange Bank v. Gulick (1880) 24 Kan. 359.

¹⁹⁵ Dibble v. Gaston (1835) R. M. Charlt. (Ga.) 444.

¹⁹⁶ Thus, a draft accompanying a bill of lading, drawn for the purchase price of a consignment of merchandise and discounted by a bank at the place of shipment for the consignor, belongs to the bank, and its proceeds are not subject to garnishment at the place of delivery of the consignment in an action upon a demand against the consignor. Merchants Nat. Bank v. Parker (1914) 142 Ga. 265, 82 S. E. 658.

And a bank which takes from a regular customer a draft drawn by himself to his own order, for the purchase price of a consignment of goods, upon the consignee, indorsed for deposit to his credit, and gives

him credit for it in his account as cash subject to check, becomes the owner of such draft for value and before maturity, and entitled to its proceeds when collected, free from garnishment in an action by the consignee against the consignor for damages accruing from defects in the consigned goods. Fourth Nat. Bank v. Mayer (1892) 80 Ga. 108, 14 S. E. 891; National Bank v. Everett (1911) 136 Ga. 372, 71 S. E. 660.

Inland bills of exchange, drawn previously to the suit and transferred for value to third persons, verbally accepted by the drawees, to be paid out of the proceeds of cotton consigned to them for sale on the drawer's account, have priority over the claims of the drawer's creditors, resting upon a garnishment of the drawees. Kane v. Robertson (1874) 26 La. Ann. 335.

¹⁹⁷ St. Louis Perpetual Ins. Co. v. Cohen (1845) 9 Mo. 421.

¹⁹⁸ Chadbourn v. Gilman (1885) 63 N. H. 353.

chargeable as trustee before he had disposed of the consignment upon attachment against the consignor, although he had, before the process was served, accepted an order to pay to the consignor or on his order, at the end of a stated number of days, a certain sum of money, or whatever amount might prove to be then due after deducting advances and expenses.¹⁹⁹ The reason assigned for this decision was that such an accepted order was not a negotiable instrument.¹⁹⁹

But in another case, differentiated upon material facts, it was said that whether an order for the payment of money was to be regarded as a bill of exchange or a mere chose in action, inasmuch as the person upon whom it was drawn did not become indebted upon it to anybody until it had been presented to and accepted by him, and then only to the holder, he could not be garnisheed as the debtor of the payee, who had transferred the order to a third person prior to presentation or acceptance.²⁰⁰

These cases are readily distinguishable.

e. Warehouse receipts.

In the case of an attachment upon whisky belonging to the defendant, held for delivery upon his order in a distiller's warehouse, upon the surrender of negotiable warehouse certificates or receipts by the holder, no judgment can be taken against the warehouseman as garnishee while the certificates are outstanding and in circulation, held by unknown persons, until adequate indemnifying security against liability upon the paper has been furnished to the garnishee.²⁰¹

f. Government warrant.

An attachment has been held to lie against the acting Secretary of the Treasury of the United States to reach an undivided interest in a Treasury certificate issued or about to be issued to the defendant and another person for the purpose of paying them an award made by the commissioners appointed to

carry into effect the convention between the United States and Mexico, where the certificate, although negotiable, had not yet been negotiated.²⁰²

IX. The debtor and creditor relation in garnishment of negotiable paper.

It has been dogmatically asserted that there is no liability as garnishee or trustee unless the person summoned is indebted when served.²⁰³ The process of garnishment reaches only what the garnishee may owe the defendant at the time he is served.²⁰⁴ It is essential to the incidence of an attachment, or to subject one to garnishment, that the relation of debtor and creditor subsist between the garnishee and the defendant.²⁰⁵ To charge a garnishee as debtor of the defendant, it must be shown affirmatively that, at the time of garnishment, the defendant had a cause of action against the garnishee to recover a legal debt due or to grow due by the efflux of time.²⁰⁶

These are statements of an undoubted general rule.

Accordingly it is held that for a debt evidenced by negotiable paper to be subjected to garnishment there must exist between the garnishee and the defendant the relation of debtor and creditor.²⁰⁷

Now the maker of a negotiable promissory note out in circulation, unmaturing, cannot be said to be indebted to the payee upon it so as to be subject to garnishment,²⁰⁸ because once such a note passes into circulation, the maker owes whomsoever may happen to own and hold it, and he cannot know who that is until it is presented for payment.²⁰⁹ After a negotiable promissory note has been negotiated, its maker is no longer a debtor of the payee.²⁰⁹ The indebtedness of a trustee upon his promissory note to the defendant in attachment is essential to his liability, and the question as to who is his real creditor on the paper is one of fact.²¹⁰

Unless it is shown that a defendant in attachment is still the owner of a negotiable promissory note upon which the garnishee is indebted, or that such note

¹⁹⁹ *Cushman v. Haynes* (1838) 20 Pick. (Mass.) 132.

²⁰⁰ *Dibble v. Gaston* (Ga.) *supra*.

²⁰¹ *Rondebush v. Hollis* (1898) 21 Pa. Co. Ct. 324.

²⁰² *Stratton v. Young* (1845) 1 Hayw. & H. 229, Fed. Cas. No. 13,528.

²⁰³ *Williams v. Marston* (1825) 3 Pick. (Mass.) 65.

²⁰⁴ *Lorain v. Lorain Sav. & Bkg. Co.* (1895) 2 Ohio N. P. 108, 4 Ohio S. & C. P. Dec. 84.

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²⁰⁵ *Turner v. Armstrong* (1836) 9 Yerg. (Tenn.) 412; *Maury v. McDonald* (1909) 55 Tex. Civ. App. 50, 118 S. W. 812.

²⁰⁶ *Edney v. Willis* (1888) 23 Neb. 56, 36 N. W. 300.

²⁰⁷ *Dibble v. Gaston* (1835) R. M. Charlt. (Ga.) 444.

²⁰⁸ *Hubbard v. Williams* (1858) 1 Minn. 54, Gil. 37, 55 Am. Dec. 66.

²⁰⁹ *Wybrants v. Rice* (1848) 3 Tex. 458.

²¹⁰ *Leland v. Sabin* (1853) 27 N. H. 74.

had not been transferred to another holder before it matured, it is not established that the garnishee is defendant's debtor.²¹¹

Accordingly, if no statute exists to compel a different ruling, a maker of negotiable paper cannot be made liable upon it as garnishee under attachment, garnishment, or trustee process, where the payee is the defendant, without proof that the payee still holds and owns the paper.²¹² The rule is that one bound to pay a negotiable obligation can be made garnishee as debtor of the payee only after it is past due and in defendant's hands.²¹³ If the obligation was negotiated and transferred before it became due, by the defendant, to a third person, the garnishee is not liable on the garnishment, because he is not indebted to the defendant, but to the holder of the paper.²¹⁴ Inasmuch as the maker of a negotiable promissory note which has passed into circulation owes no one but the holder the debt it represents, he cannot be adjudged to pay it as garnishee without proof that the defendant is the holder and owner.²¹⁵ It has been declared to be a well-settled principle that no judgment can be rendered against the maker of negotiable paper as

garnishee until it has been affirmatively established that such paper is still owned by the person whose property the garnishment essayed to condemn.²¹⁶

In sundry other cases in point the courts have been almost equally emphatic.

It has been held that before a judgment can be rendered against a garnishee as debtor of a defendant upon commercial negotiable paper the plaintiff must show that such paper had become payable and was held by the defendant, or not held by a bona fide holder.²¹⁷

Also, that a maker of a negotiable promissory note, summoned as garnishee of the payee, cannot be charged in judgment without proof that the note is still held and owned by the defendant.²¹⁸

And again, that no judgment can be taken against a garnishee in attachment, indebted upon a negotiable promissory note, if he elects to stand upon his rights, without proof that the defendant is the holder of the note and had not transferred it before it matured.²¹⁹

Ample support for the doctrines just stated may be found in divers other cases in which there entered other elements of importance.²²⁰

²¹¹ Ormond v. Moye (1850) 33 N. C. (11 Ired. L.) 564.

²¹² Jefferson County v. Fox (1840) 1 Morris (Iowa) 48.

²¹³ Marble Falls Ferry Co. v. Spittler (1894) 7 Tex. Civ. App. 82, 25 S. W. 985.

²¹⁴ Warne v. Kendall (1875) 78 Ill. 598.

²¹⁵ Denham v. Pogue (1868) 20 La. Ann. 195.

²¹⁶ Mayberry v. Morris (1878) 62 Ala. 113.

²¹⁷ Cleneay v. Junction R. Co. (1866) 26 Ind. 375.

²¹⁸ Carson v. Allen (1850) 2 Pinney (Wis.) 457, 2 Chand. 123, 54 Am. Dec. 148.

²¹⁹ Ormond v. Moye (N. C.) supra.

²²⁰ Vide, Cruett v. Jenkins (1879) 53 Md. 217, overruling Somerville v. Brown (1847) 5 Gill (Md.) 399; Walden v. Valiant (1852) 15 Mo. 409; Secor v. Witter (1883) 39 Ohio St. 218; Hutchins v. Evans (1841) 13 Vt. 541; Timm v. Stegman (1893) 6 Wash. 13, 32 Pac. 1004; Davis v. Pawlette (1864) 3 Wis. 300, 62 Am. Dec. 690.

Merely because one has made and delivered to a defendant a piece of negotiable paper in fulfillment of a contract to lend money, and as a substitute for cash, to enable the defendant to get the money by putting it in circulation, he does not become indebted to the defendant, and therefore cannot be made liable as garnishee. Maury v. McDonald (1909) 55 Tex. Civ. App. 50, 118 S. W. 812.

When the evidence discloses that the

garnishee made a promissory note nominally in favor of the principal debtor, but actually as trustee for others, and that the note has not matured and is held by a stranger not before the court, no judgment can be rendered against the garnishee. Timm v. Stegman (1893) 6 Wash. 13, 32 Pac. 1004.

An administrator of an insolvent intestate who had made a negotiable promissory note to secure the payee against liabilities as surety for the maker upon other commercial paper cannot be charged as trustee for the payee in an action by a creditor of the latter, where the defendant, although his property had been attached thereon, had not taken up the paper upon which he was surety for the intestate, notwithstanding his claim upon the indemnifying note had been presented and allowed against the maker's estate. Commercial Bank v. Neally (1855) 39 Me. 402.

When by statute debts due upon negotiable securities are not subject to garnishment, an agent of the maker of negotiable paper not yet due, who has been intrusted by the maker with the means of paying it before maturity, cannot be held as garnishee of the holder of the paper before the transaction is completed, even where the latter has agreed to accept premature payment, and has discharged collateral security which he held. Husso v. Sikorski (1898) 101 Wis. 131, 76 N. W. 1117.

X. Garnishment of negotiable paper owned but not possessed by defendant.

a. Pledged as collateral security.

1. To creditors.

As a general rule, uncollected bills, notes, and other commercial securities put in pledge by debtors to their creditors as collateral security for debts owing to the pledgees are unavailable for the purposes of attachment or garnishment.²²¹ The maker of a negotiable promissory note that is in pledge as collateral security for a debt owing by the payee to a third person is not liable as garnishee in an action against the pledgeor until the debt for which it was pledged has been paid and the note has been surrendered.²²² The rule applies although the debt for which the paper was pledged is much less in amount than the value of the collateral securities.²²³

The lien of the pledgee of commercial paper pledged in good faith to secure an actual indebtedness takes precedence of the lien of a subsequent attachment;²²⁴ his right to the pledges and the money to be obtained by their means is paramount to the rights of other creditors of the pledgeor until the debt is paid, and is unaffected by garnishment.²²⁵

But while the pledgee of commercial paper who holds it as security for a debt due him from the pledgeor is entitled to be paid that debt in full out of the proceeds, any surplus of such proceeds over and above what is due such pledgee is subject to garnishment.²²⁶

2. To sureties.

The same principles govern when paper is pledged to indemnify sureties against losses upon obligations assumed by them for the pledgeors.

The right of the holder of a negotiable promissory note indorsed to him in pledge to secure him against liability as surety for the payee is superior to and takes precedence of a garnishment afterwards served in an action against the pledgeor by his creditor.²²⁷

The lien of an attachment issued in an action against an owner of negotiable paper after the defendant had pledged it in good faith to indemnify his surety against a loss as such is subordinate to the lien of the pledgee of the paper.²²⁸

A surety in possession of an unmatured promissory note holding as security against his liability upon a personal obligation assumed for the payee has a right to its proceeds for his indemnity as against the payee's attaching creditor, even though he is a member of a partnership which made the note.²²⁹

Sureties in possession of negotiable promissory notes delivered by a defendant in attachment to indemnify them against liability on the bailor's account are not chargeable as trustees in advance of any demand for a return of the paper after it has ceased to be necessary for the purposes of the bailment.²³⁰

But the custodian of negotiable promissory notes belonging to an attachment defendant, pledged to the possessor for the double purpose of indemnifying him against a contingent liability as surety on a bond signed for the pledgeor and to secure collaterally the payment of sundry debts owing by the pledgeor, may be summoned under the New Hampshire statute and charged as trustee in respect of any surplus recovered upon the pledged paper over and above the sums necessary to satisfy the purposes of the pledge.²³¹

²²¹ *Grosvenor v. Farmers & M. Bank* (1839) 13 Conn. 104; *Hall v. Page* (1848) 4 Ga. 428, 48 Am. Dec. 235; *Lochrane v. Solomon* (1868) 38 Ga. 290; *Long v. Johnson* (1884) 74 Ga. 4; *Erwin v. Commercial & R. Bank* (1848) 3 La. Ann. 186, 48 Am. Dec. 447.

²²² *Dickinson v. Davis* (1914) 164 Iowa, 449, 145 N. W. 957.

²²³ *Grosvenor v. Farmers & M. Bank* (Conn.) supra.

²²⁴ *Fling v. Goodall* (1860) 40 N. H. 216.

²²⁵ *Hall v. Page* (Ga.) supra.

²²⁶ *Dickinson v. Davis* (Iowa) and *Fling v. Goodall* (N. H.) supra.

Under the Vermont statute (Gen. Stat. chap. 34, § 47) which exempts from trustee process commercial paper transferred before maturity to a bank within the state, a negotiable promissory note indorsed as collateral security for a less debt to a do-
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estic bank is exempt only to the extent necessary to pay the debt secured, and the maker is subject to be charged as trustee for the surplus. *Sargent v. Wood* (1878) 51 Vt. 597.

Any surplus which may become due to a defendant in garnishment from a negotiable receipt for the payment of money to be collected by the signer from collateral transferred to him by the owner to pay certain debts due to the transferee and other creditors from such defendant is subject to garnishment. *Beck v. Cole* (1862) 16 Wis. 95.

²²⁷ *King v. Carhart* (1855) 18 Ga. 650.

²²⁸ *Fling v. Goodall* (N. H.) supra.

²²⁹ *Huot v. Ely* (1880) 17 Fla. 775.

²³⁰ *Maine F. & M. Ins. Co. v. Weeks* (1811) 7 (Mass.) 438.

²³¹ *Fling v. Goodall* (N. H.) supra.

b. In custody of bailees.

Jurists have differed in opinion as to the attachability of commercial paper in the keeping of bailees.

According to one authority the only way that negotiable instruments can be attached in an action against the owner is by taking actual possession of them, or by seizing them when held by a third person for the defendant's use,²³² and another has declared that only the person in possession of negotiable promissory notes belonging to an absent debtor, and not their maker, may be made a garnishee in attachment.²³³

On the other hand it is asserted that in garnisheeing a debt due on a negotiable promissory note it is the maker, and not the custodian of the paper, who must be made the garnishee,²³⁴ and that the bailee of choses in action cannot be charged as trustee of the bailor by reason of their deposit in his keeping.²³⁵

In the trial of an issue arising on an answer of a garnishee, averring his own ownership of effects of an execution debtor, a promissory note of a third person cannot be taken to satisfy the claim of the execution creditor.²³⁶ Garnishment will not lie against the possessor of promissory notes and other choses in action received by him from the defendant, which he claims to hold in his own right.²³⁷

The reason assigned why a custodian of commercial paper for collection on the defendant's account cannot, in respect of it, be made liable as garnishee without an express statute authorizing it, is because such evidences of debt cannot be seized and sold on execution.²³⁸

Bills and notes delivered to an agent or attorney by a defendant for collection, and which have not been collected, cannot, it has been held, be subjected to attachment or garnishment in the hands of the custodian, for the reason, among others, that the custodian is not indebted to the defendant.²³⁹

In conflict with this, it has been held that a writ of attachment, against an absent debtor creates a lien on all choses in action belonging to the defendant in the hands, power, or possession of a garnishee intrusted with them to collect for the defendant's account,²⁴⁰ and that that lien is superior to any intervening encumbrance or alienation unaccompanied by a delivery of the paper.²⁴¹

It has been held that the payee of a bill of exchange who restrictively indorsed it and deposited it in a bank to his credit, for collection on his account, continued the owner and entitled to the proceeds of such bill, and that these proceeds, while in the hands of the collecting bank, were subject to garnishment in an action against such payee.²⁴²

A general assignee for creditors, empowered by the deed of assignment to sell the assigned property on credit and accept the promissory notes of the purchasers for the purchase price, cannot, it has been held, be charged as trustee in an action begun by attachment against the assignor after the power has been exercised and negotiable notes not yet due have been received, because the assignee is not personally responsible for either the property sold or its proceeds, and because, also, immature negotiable

²³² *Erwin v. Commercial & R. Bank* (1848) 3 La. Ann. 186, 48 Am. Dec. 447.

²³³ *Gaffney v. Bradford* (1831) 2 Bail. L. (S. C.) 441.

A promissory note payable to the order of and indorsed in blank by a defendant, and then put in the custody of a bailee to hold as an indemnity against the maker's liability as defendant's surety, and against an encumbrance on real estate bought by the maker of the payee, is subject to an attachment by the latter's creditors upon garnishee process against the custodian as long as the paper remains undelivered, and while any part of the purposes of the bailment remains unperformed, notwithstanding the issue by the bailor of an order to the bailee, not accepted by him, to deliver the note to a third person, on the ground that the liability of the maker as surety had been extinguished. *Lassiter v. Bussey* (1859) 14 La. Ann. 710.

²³⁴ *Cottingham v. Greely-Barnham Grocery Co.* (1900) 129 Ala. 200, 87 Am. St. Rep. 58, 30 So. 560.
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²³⁵ *Stone v. Dean* (1831) 5 N. H. 502.

²³⁶ *Jones v. Norris* (1841) 2 Ala. 526.

²³⁷ *Levisohn v. Waganer* (1884) 76 Ala. 412.

²³⁸ *Price v. Brady* (1858) 21 Tex. 614.

²³⁹ *Fitch v. Waite* (1823) 5 Conn. 117.

²⁴⁰ *M'Bride v. Floyd* (1831) 2 Bail. L. (S. C.) 209. In that case the proceeds of a promissory note belonging to an absent debtor, in the hands of a sheriff, and not paid over to an attorney employed to collect it, realized by judgment and execution, attached before collection by service on the attorney as garnishee, were awarded to the attaching creditor in preference to a judgment creditor of the same defendant upon a senior unsatisfied execution held by the same sheriff.

²⁴¹ *Freeman v. Exchange Bank* (1891) 87 Ga. 45, 13 S. E. 160. This case later was distinguished where the depositor was credited with his deposit as cash, and allowed to draw against it by check. *Fourth Nat. Bank v. Mayer* (1892) 89 Ga. 108.

promissory notes are not subject to attachment.²⁴²

c. In keeping of makers.

An exception to the general rule that the maker of a current negotiable promissory note cannot be charged as garnishee before it matures in an action against the payee has been recognized in those cases where the maker has actual possession and control of his own obligation, so that he is in a position to protect himself against its transfer.²⁴³ The rule rests upon the ground that the maker shall not be put in peril of paying his debt twice, and fails when that ground does not exist.²⁴⁴ The reason failing, the rule becomes inoperative when the maker has his obligation in his own hands, since it is obvious that it cannot be transferred in the ordinary course of business while the maker keeps it and can protect himself against a double liability.²⁴⁵

It follows and accordingly more than once it has been held that the maker of unmatured negotiable commercial paper who has actual possession and control of it may be charged as garnishee or trustee of the debt it evidences in an action against the payee.²⁴⁶

As long as the maker of negotiable commercial paper keeps it in his own possession, he is in no danger of being liable upon it to a subsequent indorsee for it cannot be regarded as current.²⁴⁷ He cannot escape liability as garnishee by delivering the paper to a third person to hold in escrow unless, in addition to parting with its manual possession, he resigns all power and dominion over it.²⁴⁸

But a negotiable unmatured promissory note made by partnership cannot be said to be in the possession of the makers

so as to be the subject of garnishment when it is in the keeping of one member of the firm, to secure him against liability upon his personal obligation as surety for the payee.²⁴⁹ And a debtor who has a right by previous valid contract, entered into in good faith, to discharge his debt by making and delivering to his creditor his negotiable promissory time notes of fixed dates and amounts, cannot be held to answer as trustee in attachment against the defendant creditor before any of such notes has matured, although none of them has been delivered.²⁵⁰

XI. The debtor in garnishment of negotiable paper.

a. Status.

It is said to be fundamental law that the liability of a garnishee to the plaintiff in the garnishment is no greater than it would be if the defendant were calling upon him to respond under the same state of facts.²⁵¹ By garnishment the garnishee ought not to be put to the hazard of having to pay the same debt twice.²⁵² No one, it has been declared, should be adjudged a trustee unless the judgment against him would be a defense to any action which might afterwards be brought to recover the same debt;²⁵³ and, unless by his own fault, a garnishee will not be put in a position where he will be compelled to pay the garnisheed debt a second time.²⁵⁴

The garnishee's liability is limited to the payment of his debt. He is not liable for the costs of the garnishment proceeding.²⁵⁵

Although in the abstract the courts generally profess to regard a garnishee as a mere disinterested stakeholder who should be spared risk and loss and be

²⁴² *Hopkins v. Ray* (1840) 1 Met. (Mass.) 79.

²⁴³ *Huot v. Ely* (1880) 17 Fla. 775.

²⁴⁴ *Marble Falls Ferry Co. v. Spittler* (1894) 7 Tex. Civ. App. 82, 25 S. W. 985.

²⁴⁵ *Stone v. Dean* (1831) 5 N. H. 502.

²⁴⁶ *Ibid.*; and *Marble Falls Ferry Co. v. Spittler* (Tex.) supra; *Hutcheson v. King* (1904) 37 Tex. Civ. App. 151, 83 S. W. 215.

²⁴⁷ *Lehigh Coal & I. Co. v. West Superior Iron & Steel Co.* (1895) 91 Wis. 221, 64 N. W. 746; *Hutcheson v. King* (Tex.) supra.

A negotiable instrument in the actual possession of the maker, which had been attached before its maturity in an action against the payee by due service of process on the maker, is bound by the attachment notwithstanding its transfer before maturity to a holder who knew all about the at-

tachment and took title for the purpose of defeating it, with the knowledge and co-operation of the maker. *Bills v. National Park Bank* (1882) 89 N. Y. 343.

²⁴⁸ *Lehigh Coal & I. Co. v. West Superior Iron & Steel Co.* (Wis.) supra.

²⁴⁹ *Huot v. Ely* (Fla.) supra.

²⁵⁰ *Fuller v. O'Brien* (1877) 121 Mass. 422.

²⁵¹ *Dickinson v. Davis* (1914) 164 Iowa, 449, 145 N. W. 937.

²⁵² *Willis v. Heath* (1889) 75 Tex. 124, 16 Am. St. Rep. 876, 12 S. W. 971; *Marble Falls Ferry Co. v. Spittler* (1894) 7 Tex. Civ. App. 82, 25 S. W. 985.

²⁵³ *Hinsdill v. Safford* (1899) 11 Vt. 309.

²⁵⁴ *Dickinson v. Davis* (Iowa) supra.

²⁵⁵ *Huff v. Mills* (1834) 7 Yerg. (Tenn.) 42.

inconvenienced as little as possible through the garnishment, practically his path to repose is beset with thorns and pitfalls to avoid which he is required to be both wary and vigilant.²⁶⁴

b. Rights.

1. To have his obligation mature before he is liable.

Before a judgment can be taken against the maker of a negotiable commercial instrument the paper must have matured.²⁶⁷ No judgment charging a garnishee can be rendered until the garnished debt falls due.²⁶⁸ No judgment in favor of an attaching creditor against a garnishee is permissible for a debt upon a negotiable promissory note not yet payable.²⁶⁹ Garnishee proceedings against the maker of a negotiable promissory note cannot be carried into judgment while it is not yet due and is current and liable to be transferred to a new holder.²⁶⁶ The maker of a negotiable promissory note cannot be made to pay it before it matures by means of garnishment,²⁶¹—he cannot be garnished as debtor of the payee until the paper is past due.²⁶² While a negotiable promissory note is outstanding and current, and before it becomes due, the maker is not subject to liability as trustee of the payee.²⁶³

All this is a general rule²⁶⁴ and a principle of law well settled.²⁶⁵

2. To a surrender of his obligation.

There have been some decisions which have recognized as reasonable the right of a maker of negotiable paper to have it delivered up to him and canceled before or at least when he is called upon to pay

it as a garnishee. He has a right, it has been held, to insist upon the production and surrender of his obligation or upon indemnity against liability upon it if it is not produced before any judgment is taken against him.²⁶⁶ It has also been held that to render the maker of an unmatured negotiable instrument liable upon it as garnishee requires a decree in chancery which shall insure its delivery for cancellation;²⁶⁷ and the opinion has been expressed that notice of garnishment served upon the maker of a negotiable promissory note after it has matured would not be effective unless the note was in the possession of the defendant at the time, and he could be compelled to give it up on payment of the attachment claim.²⁶⁸

A garnishment has been held to have been rightly discharged where the debt of the garnishee was evidenced by negotiable promissory notes not yet due, not surrendered, held by unknown persons, and against liability upon which to indorsees no indemnity was given or tendered.²⁶⁹

The right of a garnishee of a debt evidenced by his negotiable obligation to have it delivered up, canceled, or to be exonerated upon it, or to be indemnified against liability thereon when he pays it as a condition precedent to judgment, has been secured by statute.²⁷⁰

3. To interplead rival claimants.

The only concern of a garnishee is in respect of to whom he shall lawfully pay his debt.²⁷¹ It has been shown that the doctrine of *lis pendens* does not apply to transfers of current negotiable commercial paper, and the principle that judgments bind only those who are parties or

²⁶⁴ Vide, *Gatchell v. Foster* (1891) 94 Ala. 622, 10 So. 434; *Cross v. Haldeman* (1854) 15 Ark. 200; *A. J. Harwi Hardware Co. v. Klippert* (1903) 67 Kan. 743, 74 Pac. 254; *Yarborough v. Thompson* (1844) 3 Smedes & M. (Miss.) 291, 41 Am. Dec. 626; *Peck v. Maynard* (1840) 20 N. H. 183; *Myers v. Beeman* (1848) 31 N. C. (9 Ired. L.) 116; *Ormond v. Moye* (1850) 33 N. C. (11 Ired. L.) 564; *Shuler v. Bryson* (1871) 65 N. C. 201; *Huff v. Mills* (Tenn.) supra; *Brittain v. Anderson* (1874) 8 Baxt. (Tenn.) 316.

²⁶⁷ *Mayberry v. Morris* (1878) 62 Ala. 113; *Gregory v. Higgins* (1858) 10 Cal. 339; *Huot v. Ely* (1880) 17 Fla. 775; *Snider v. Ridgeway* (1889) 49 Ill. 522; *Cleaneay v. Junction R. Co.* (1866) 26 Ind. 375; *Jefferson County v. Fox* (1840) 1 Morris (Iowa) 48.

²⁶⁸ *Secor v. Witter* (1883) 39 Ohio St. 218.

²⁶⁹ *Bell v. Philadelphia Binding & Mailing Co.* (1899) 10 Pa. Super. Ct. 38. L.R.A.1918C.

²⁶⁶ *Carson v. Allen* (1850) 2 Pinney (Wis.) 457, 2 Chand. 123, 54 Am. Dec. 148.

²⁶¹ *Willis v. Heath* (1889) 75 Tex. 124, 16 Am. St. Rep. 876, 12 S. W. 971.

²⁶² *Marble Falls Ferry Co. v. Spittler* (1894) 7 Tex. Civ. App. 82, 25 S. W. 985.

²⁶³ *Hutchins v. Evans* (1841) 13 Vt. 541.

²⁶⁴ *Marble Falls Ferry Co. v. Spittler* (Tex.) supra.

²⁶⁵ *Mayberry v. Morris* (Ala.) supra.

²⁶⁶ *Shuler v. Bryson* (1871) 65 N. C. 201.

²⁶⁷ *Matheny v. Hughes* (1873) 10 Heisk. (Tenn.) 401.

²⁶⁸ *Gregory v. Higgins* (1858) 10 Cal. 339.

²⁶⁹ *Hughes v. Powers* (1897) 99 Tenn. 480, 42 S. W. 1; *Kimbrough v. Hornsby* (1904) 113 Tenn. 605, 84 S. W. 613.

²⁷⁰ *Yocum v. White* (1873) 36 Iowa, 288.

²⁷¹ *Bassett v. Garthwaite* (1858) 22 Tex. 230, 73 Am. Dec. 257.

privies to them is hornbook law. And so it has been asserted by one court of last resort that the indorsee of a negotiable promissory note having acquired by its transfer a legal title to it and the debt it represents cannot be deprived of his right of property in it by any judgment or proceeding against the maker and the payee to which he was no party.²⁷²

There are decisions that the maker of a negotiable promissory note who has been charged upon it as garnishee of the payee when he has been sued upon it by one who claims ownership of the paper as an indorsee before maturity is entitled to have the garnishment creditor brought into the action to litigate the question whether he or the plaintiff is entitled to the proceeds of the note, and to enjoin the collection until that question shall be determined;²⁷³ and legislation has been enacted making provision in case of attachment of debts due by commercial negotiable paper for bringing into the trustee proceeding persons who claim to own and hold the paper by transfers from the defendants.²⁷⁴

The right of the garnishee of a debt due upon negotiable promissory notes known to be held under a claim of ownership by another than the defendant in the garnishment to go into chancery and file a bill of interpleader against the garnisher and the claimant has been recognized and upheld.²⁷⁵

But it has been held that after the maker of a promissory note has suffered judgment to go against him as a garnishee indebted thereon to the payee

when he well knew that the defendant had transferred the paper to a third person, it is too late for him to get relief by a bill in equity to interplead the judgment creditor with the holder of the note.²⁷⁶

c. Duties.

It is the duty of a garnishee to make disclosure. He is obligated fully and fairly to state all that he knows concerning his indebtedness to the defendant.²⁷⁷

It is his further duty to take the proper steps to protect himself against duplicating his liability. If he is protected by statute from paying his debt twice, he must seasonably invoke its protective proceedings to obtain its benefits.²⁷⁸ If he would avoid a double payment he must protect himself by setting up the facts and taking the proper proceedings to escape.²⁷⁹ If the attached debt is evidenced by the garnishees' negotiable promissory note he should, in addition, before allowing the attaching creditor to take judgment against him, insist upon proof that his obligation had not passed to a stranger before it matured, but that it was still owned and held by the defendant.²⁸⁰

If a garnishee indebted upon negotiable commercial paper omits in due season to claim the benefit of a statute enacted to afford him protection against duplicate liability, he must bear the consequent loss.²⁸¹

It is also the duty of a debtor garnisheed on account of his negotiable promissory note to act in good faith

²⁷² *Garrott v. Jaffray* (1874) 10 Bush (Ky.) 413.

²⁷³ *Dobbin v. Wybrants* (1848) 3 Tex. 457; *Westmoreland v. Miller* (1852) 8 Tex. 168; *Iglehart v. Moore* (1858) 21 Tex. 501; *Iglehart v. Mills* (1858) 21 Tex. 545.

²⁷⁴ *Horn v. Thompson* (1855) 31 N. H. 562; *Thompson v. Carroll* (1857) 36 N. H. 21.

²⁷⁵ *Briant v. Reed* (1862) 14 N. J. Eq. 271; *Fitch v. Brower* (1887) 42 N. J. Eq. 300, 11 Atl. 330.

In the first of these cases it was the opinion of the court of chancery that, irrespective of whether the right of an indorsee of a negotiable promissory note transferred for value before maturity, and taken in good faith, is or is not superior to the right of an attaching creditor of the payee who had served a garnishee process on the maker before the paper was transferred, to recover the amount due thereon, there is doubt enough concerning the priority of their conflicting claims to make it unsafe for the garnishee to elect between them which he will pay, and, hence, to escape the hazard L.R.A.1918C.

of a double payment, the garnishee is entitled to pay his debt into court and be discharged through a bill of interpleader.

In the second of these cases the first one was approved, and the court added that though it should be conceded that a negotiable promissory note transferred before maturity to a bona fide holder for value was not subject to an attachment against the payee even if served prior to the transfer, nevertheless, as the attaching creditor has a right where he has garnisheed the maker in advance to contest the good faith of the subsequent transfer of the paper, the garnishee is put in jeopardy of being compelled to pay his note twice, and should be spared that danger by a bill of interpleader.

²⁷⁶ *Yarborough v. Thompson* (1844) 3 Smedes & M. (Miss.) 201, 41 Am. Dec. 626.

²⁷⁷ *Bassett v. Garthwaite* (Tex.) supra.

²⁷⁸ *Yocum v. White* (Iowa) supra.

²⁷⁹ *Peck v. Maynard* (1849) 20 N. H. 183.
²⁸⁰ *Ormond v. Moye* (1850) 33 N. C. 111
Ired. L.) 564.

²⁸¹ *Yocum v. White* (Iowa) supra.

toward the plaintiff in garnishment. A garnishee who conspires with the payee to defeat creditors forfeits his claim to protection.²⁸² He will be held liable if he co-operates with the payee to defraud the latter's creditors.²⁸³

But mere knowledge on the maker's part that the purpose of the payee in obtaining a negotiable promissory note was to dispose of it in fraud of creditors, if the paper was made and delivered for a just debt, and the maker did nothing actively to promote the payee's fraudulent design, will not subject him to liability as garnishee while his obligation is outstanding and current.²⁸⁴

XII. Answer in garnishment of negotiable paper.

A garnishee can be charged only on his own answer.²⁸⁵ The answer is evidence against him.²⁸⁶ The facts set up in it, if not contradicted, determine the garnishee's liability.²⁸⁷ The averments in it, if not put in issue by the attaching plaintiff, must be taken as admitted.²⁸⁸ The answer is presumptively conclusive.²⁸⁹ It is conclusive respecting the indebtedness when no statute provides otherwise.²⁹⁰ And it is evidence against the plaintiff until outweighed by competent testimony.²⁹¹

In order that a garnishee indebted upon a promissory note may avail himself of the defense that it is subject to be transferred before maturity to a bona

fide holder for value, without notice, it must affirmatively be disclosed by his answer that the note was negotiable.²⁹² An answer in such a case, averring that a negotiable promissory note made and delivered by the garnishee was indorsed before maturity by the payee and afterwards by two other persons, and was then held for collection by a named bank, sufficiently shows a want of indebtedness to the payee, and is good to prevent judgment on the garnishment.²⁹³ A maker of a negotiable promissory note served as garnishee of the payee, who answers according to the fact, that he made and delivered such note and is indebted upon it to the holder, and that he has been notified of its negotiation to a third person, cannot be condemned to pay it to the garnisher.²⁹⁴ In the case of garnishment by service on the maker of negotiable promissory notes supposedly belonging to the defendant, an answer of the garnishee that he does not know by whom his notes are held has been decided to be sufficient to prevent judgment against him because his debt upon such notes is owing only to whosoever may happen to own them when they mature.²⁹⁵

An admission by a garnishee that he made and delivered to the defendant a negotiable promissory note which is outstanding and not yet due is not an admission of indebtedness upon it to the defendant.²⁹⁶ An answer of a garnishee

²⁸² *Thompson v. Gainesville Nat. Bank* (1886) 66 Tex. 156, 18 S. W. 350.

²⁸³ *Enos v. Tuttle* (1819) 3 Conn. 27.

²⁸⁴ *Wood v. Bodwell* (1832) 12 Pick. (Mass.) 268; *Collins v. Smith* (1859) 12 Gray (Mass.) 431; *Willis v. Heath* (1889) 75 Tex. 124, 16 Am. St. Rep. 876, 12 S. W. 971.

²⁸⁵ *Daniel v. Rawlings* (1846) 6 Humph. (Tenn.) 403.

²⁸⁶ *Bassett v. Garthwaite* (1858) 22 Tex. 230, 75 Am. Dec. 257.

²⁸⁷ *Comstock v. Farnum* (1806) 2 Mass. 96.

²⁸⁸ *Davis v. Pawlette* (1854) 3 Wis. 300, 62 Am. Dec. 690.

²⁸⁹ *Fay v. Sears* (1872) 111 Mass. 154.

²⁹⁰ *Huff v. Mills* (1834) 7 Yerg. (Tenn.) 42; *Turner v. Armstrong* (1836) 9 Yerg. (Tenn.) 412.

²⁹¹ *Bassett v. Garthwaite* (Tex.) supra.

²⁹² *Gatchell v. Foster* (1891) 94 Ala. 622, 10 So. 434.

²⁹³ *Wohl v. First Nat. Bank* (1908) 154 Ala. 332, 46 So. 231.

²⁹⁴ *Yarborough v. Thompson* (1844) 3 Smedes & M. (Miss.) 291, 41 Am. Dec. 626.

²⁹⁵ *Sheets v. Culver* (1840) 14 La. 440, 33 Am. Dec. 593. In that case the court supported its decision by reasoning thus:

"As to notes indorsed in blank which circulate and pass from hand to hand by mere delivery, it has never been nor can it be pretended that any notice of transfer is necessary. If, then, no such notice is ever given, how is a garnishee who has issued his promissory note indorsed in blank to know in whose hands it happens to be at the precise moment when he is called upon to answer interrogatories? And if, perchance, he were to know that his note was still the property of the defendant, and were so to declare it, could such a proceeding restrain its negotiability? Could it affect the rights of a bona fide holder? Surely not. The ownership of negotiable paper is incessantly varying before its maturity, and the obligation of the maker of such instruments is not to pay any particular person, but the holder at maturity, whoever he may be. Thus it is obvious that the garnishee in this case could give no other answer than that he has made, and it is equally obvious that, by pursuing this course, the plaintiffs have attached no property out of which their judgment can be satisfied." *Ibid.*

²⁹⁶ *Littlefield v. Hodge* (1859) 6 Mich. 326.

that he made and delivered to the defendant his negotiable promissory note or bill single, but that he does not know who holds it, neither admits an indebtedness to the defendant nor entitles the attaching creditor to a judgment.²⁹⁷

But an answer by a garnishee indebted upon an overdue promissory note, pleading ignorance as to whether or not the defendant still held and owned it when the process was served, is not conclusive to shut out further inquiry.²⁹⁸

And an answer by the maker of a negotiable promissory note as garnishee upon process in favor of an execution creditor of the payee, setting up that his note had been transferred to another holder before its maturity, may be traversed and proof may be received to show that the transfer was made without consideration, of purpose to hinder, delay, and defraud the defendant's creditors.²⁹⁹

Suppose the maker of a negotiable promissory note admits in his answer as garnishee that he is indebted in the sum due upon it to the defendant in garnishment, what is the effect of such an admission?³⁰⁰

It cannot affect the rights of a prior indorsee who is the holder of the paper in good faith; no admission that the garnishee makes can conclude him.³⁰⁰

The effect upon himself may be disastrous.

The maker of a negotiable promissory note who should, in answer to a garnishment, admit without reserve or qualification an indebtedness upon it to the defendant, would, it has been said, do so at his peril, and would certainly render himself liable as garnishee.³⁰¹ An answer of a garnishee acknowledging an indebtedness to the defendant at the time of the service of the garnishment upon an unpaid, overdue, negotiable security which had not been transferred, makes him liable to the attaching creditor.³⁰² A maker of a negotiable promissory note who suffers a judgment to be taken against him as garnishee of the payee knowing that the paper has been

transferred to a stranger puts himself in the position of a defendant who, by failing to set up his defense in an action, permits judgment to go against him by default.³⁰³

If a maker of a negotiable promissory note which the payee had transferred without his knowledge before it matured to a bona fide holder for value, negligently, ignorantly, or inadvertently upon a subsequent garnishment admits being indebted to the payee, and allows judgment to be taken against him as garnishee, he alone must bear the consequences, and cannot transfer his loss to the indorsee of the paper.³⁰⁴ If, in such a case, the garnishee fails to insist upon either a surrender of the paper or indemnity against it, he must pay twice if it turns out that his note had passed to a bona fide holder for value before it matured.³⁰⁵

The unfortunate garnishee who may have answered and admitted his indebtedness to a defendant upon his negotiable commercial obligation, and then discovered later that it had been transferred to and was held by a stranger, has not invariably been mulcted by double payment; on occasions the door has been held open for his escape.

Should the maker of a negotiable promissory note who has been garnished as debtor thereon to a supposed holder learn and be able to show before he pays it that it does not belong to the defendant, but to another person, he may, it is said, take steps (presumably efficient) to arrest the garnishment proceedings.³⁰⁶ Again, it has been held that although a garnishee indebted upon a negotiable promissory note may have answered the garnishment and admitted an indebtedness to the defendant, nevertheless, if, in fact, such note had been previously negotiated to a bona fide holder, a payment to him will protect the garnishee against the garnishment plaintiff.³⁰⁷

And if a maker of a negotiable promissory note who had admitted in his answer as garnishee his debt upon it to the defendant discovers before final

²⁹⁷ *Huff v. Mills and Turner v. Armstrong* (Tenn.) supra; *Matheny v. Hughes* (1873) 10 Heisk. (Tenn.) 401.

²⁹⁸ *Serviss v. Washtenaw* Circuit Judge (1898) 116 Mich. 101, 72 Am. St. Rep. 507, 74 N. W. 310.

²⁹⁹ *Quarles v. Porter* (1848) 12 Mo. 76.

³⁰⁰ *Lorain v. Lorain Sav. & Bkg. Co.* (1895) 2 Ohio N. P. 108, 4 Ohio S. & C. P. Dec. 84.

³⁰¹ *Cross v. Haldeman* (1854) 15 Ark. 200.

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³⁰² *Daniel v. Rawlings* (1846) 6 Humph. (Tenn.) 403.

³⁰³ *Yarborough v. Thompson* (Miss.) supra.

³⁰⁴ *Myers v. Beeman* (1848) 31 N. C. (9 Ired. L.) 116.

³⁰⁵ *Shuler v. Bryson* (1871) 65 N. C. 201; *Brittain v. Anderson* (1874) 8 Baxt. (Tenn.) 316.

³⁰⁶ *Colcord v. Daggett* (1853) 18 Mo. 557.

³⁰⁷ *Long v. Johnson* (1884) 74 Ga. 4.

judgment that it had been negotiated and transferred to another holder, he may, it has been said, apply to the court for leave to set up such negotiation and transfer, and should be given an opportunity to prove it.³⁰⁸ Notwithstanding the garnishee admitted his indebtedness to the defendant in his answer to the garnishment, and had a judgment taken against him, if, in point of fact, his note had previously been indorsed over to a bona fide holder before it became due, he is held to be entitled to have the judgment set aside and to amend his answer so as to set up the negotiation and transfer of the paper upon making a prompt application to the court during the same term.³⁰⁹

But such a garnishee is held bound to diligence in applying for relief. If he delays his application until after the term has expired at which the judgment was taken against him on his admission of indebtedness in his answer, he is considered to be too late; he is held to be not then entitled to have the judgment vacated upon proof that when he answered he was ignorant that his note had been negotiated and no longer belonged to the defendant.³¹⁰

An attaching creditor has been held entitled to a judgment against a garnishee upon his answer which averred that he had made and delivered to the defendant his bill single, and did not allege that it had been negotiated to another, but merely alleged that the de-

fendant had sued him upon it, and that the action was pending yet.³¹¹

XIII. Effect of garnishee's payment to holder of negotiable paper.

A debt evidenced by a negotiable promissory note held by a defendant, but discharged and extinguished by the payment of money and property accepted as full satisfaction, is not a subject of garnishment.³¹² Neither is a debt evidenced by negotiable promissory notes made and delivered to the defendant, but transferred by him before maturity to a third person, and collected by him from the maker.³¹³ The payment of a negotiable promissory note by the maker to a purchaser in good faith, for value, before it fell due, is a protection against garnishment;³¹⁴ but such a payment is no protection when it is made to one who acquired the paper by indorsement after maturity.³¹⁵ It is no defense to the maker of a negotiable instrument who was served with process of garnishment in an action against one who held and owned it when it matured that he afterwards paid it to a subsequent indorsee.³¹⁶

The opinion was expressed in an early Massachusetts case that a trustee who, in good faith, should make a payment upon or give a negotiable note or acceptance for an attached debt before he had any actual notice of the attachment, although it might have been legally but not personally served, would doubtless be protected against liability as trustee.

reporter's note, reads: "We have examined with solicitude to see if there was any way of excepting out of the general law relating to garnishments those [cases] where the indebtedness arose upon negotiable paper. We are aware of the hardships that have arisen and that may arise under a determination that reaches by garnishment such as have given and have outstanding negotiable paper. But there is no way to escape from it. The acts make no exception and we can make none. The remedy for the evil is with the legislature."

³¹² Greer v. Powell (1867) 1 Bush (Ky.) 489.

³¹³ Burton v. Wynne (1876) 55 Ga. 615.

³¹⁴ Ibid.; and also Thompson v. Gainesville Nat. Bank (1886) 66 Tex. 156, 18 S. W. 350.

³¹⁵ Exchange Bank v. Gulick (1880) 24 Kan. 359.

The payment after garnishment of commercial paper to the defendant or his general assignee for creditors is no defense to the garnishee. Cleneay v. Junction R. Co. (1866) 26 Ind. 375.

³⁰⁸ Cross v. Haldeman (Ark.) supra.

³⁰⁹ Patterson Produce & Provision Co. v. Wilkes (1907) 1 Ga. App. 430, 57 S. E. 1047.

³¹⁰ A. J. Harwi Hardware Co. v. Klippert (1903) 67 Kan. 743, 74 Pac. 254.

³¹¹ Huff v. Mills (1834) 7 Yerg. (Tenn.) 42, supra. After the court in its opinion in this case had said that the question whether or not a debt secured by negotiable paper could be attached by service on the maker as garnishee depended upon the answer, which, in Tennessee, was conclusive, and added that if he answered that he had executed his negotiable note or bill single, and knew not where it was or who held it, a judgment could not be taken against him because the answer disclosed no indebtedness to the defendant, it went on to say that if the garnishee answered that he had executed his negotiable bill single for the debt, and had been sued upon it by the defendant, and it had not been assigned, to his knowledge, he would then be liable as garnishee to a judgment. To support this statement the court cited the case of Hightower v. Smith, decided at Nashville in 1831, the opinion in which, according to the L.R.A.1918C.

tee;³¹⁶ and, conformably, afterwards in the same state it was held that a debtor of a defendant in attachment who, without notice of the service of trustee process, had paid his debt in part in cash and the remainder by making and delivering his negotiable promissory note in good faith, could not be charged as trustee.³¹⁷

XIV. Effect of renewing negotiable paper under garnishment.

The opinion that efforts to avoid or defeat attachments and garnishments of debts due upon negotiable commercial paper by renewing it with like paper are doomed to failure appears to prevail without dissent.

The maker of promissory notes under garnishment before they have matured cannot escape liability as garnishee by renewing them as they severally mature with other negotiable notes, the holders of which are unknown.³¹⁸

A garnishment of the maker of a negotiable promissory note as the debtor of the payee cannot be defeated by a subsequent transfer of it before maturity to a new holder, and its after-surrender and cancellation upon the making and delivery of a new note, payable to the indorsee or his order.³¹⁹

In one case the maker of a negotiable promissory note who had innocently and in entire good faith taken it up with another, payable to an indorsee who received the original without giving a consideration, and to further a scheme of the payee to defraud his creditors, notwithstanding the renewal note had been paid after an action had been brought upon it by the holder in another state, but after trustee process had been served on the maker as the first payee's debtor, was charged as trustee and compelled to pay a second time.³²⁰

XV. Garnishment as a protection to garnishee against claim of indorsee of negotiable paper.

The reason for exempting the maker of

a negotiable promissory note from garnishment as a debtor of the payee fails whenever a judgment against him as garnishee will protect him from liability upon his obligation to a later holder.³²¹

In the absence of a protective statute, such a judgment will not protect the garnishee if his note is transferred before it has matured, to an innocent holder for value, and he cannot be charged as trustee of the payee, whether he has or has not knowledge of the transfer of the paper.³²²

A judgment against the maker of a negotiable promissory note out in circulation as garnishee of the payee or his indorsee is no protection to him when a later holder sues him for the debt,³²³ even when, in ignorance that his note has been negotiated, he admits being indebted thereon to the defendant in garnishment, and thus suffers a judgment.³²⁴ A judgment against a garnishee as defendant's debtor upon negotiable paper is no defense to him in an action by a subsequent holder of it, who acquired it before the garnishment, when the garnishee neglected to invoke the benefit of a statute which required the delivery of the paper to him, or that he be exonerated or indemnified before he should be made liable.³²⁵

In respect of commercial paper negotiated before maturity to a bona fide holder for value, it may be said to be virtually undisputed, where no statute interferes, that garnishment is no protection whatever to the maker when the holder calls upon him to pay his obligation.

It was indeed held in an early case in Maryland that a judgment condemning the maker of a negotiable promissory note which had been attached as a credit belonging to the defendant to pay as garnishee protected him from liability in a subsequent action by a later holder of the paper, who had acquired it before maturity and without notice of the garnishment,³²⁶ but afterwards that case

³¹⁶ Williams v. Marston (1825) 3 Pick. (Mass.) 65.

³¹⁷ Robinson v. Hall (1841) 3 Met. (Mass.) 301.

³¹⁸ Leslie v. Merrill (1877) 58 Ala. 322.

³¹⁹ Girard v. Cyrs (1896) 5 B. C. 45.

³²⁰ Wheeler v. Winn (1865) 38 Vt. 125.

The court went upon the theory that the original payee continued the beneficial owner of the renewal note, and that the payment of it to the fraudulent indorsee before he recovered a judgment was a voluntary one: hence, the debt was at the mercy of the trustee process.

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³²¹ Thompson v. Gainesville Nat. Bank (1886) 66 Tex. 156, 18 S. W. 350.

³²² Hinsdill v. Safford (1839) 11 Vt. 309; Little v. Hale (1839) 11 Vt. 482.

³²³ Denham v. Pogue (1868) 20 La. Ann. 195.

³²⁴ Myers v. Beeman (1848) 31 N. C. (9 Ired. L.) 116.

³²⁵ Yocum v. White (1873) 36 Iowa, 288.

³²⁶ Somerville v. Brow (1847) 5 Gill (Md.) 399.

was virtually overruled and the contrary was decided.³²⁷

It is different in cases of garnishment of debts due upon negotiable paper held by the defendants when it matures, and not transferred until overdue and dishonored. The right to charge the makers of such paper as garnishees of the payees in such cases is said to be generally recognized.³²⁸

A maker of an overdue promissory note who has disclosed an indebtedness thereon to the defendant in garnishment, and, without waiting for judgment, has paid the plaintiff the debt, is fully protected thereby against the claim of an indorsee after maturity of the paper, if he had no notice of his transfer,³²⁹ and a judgment in the garnishment proceedings against the garnishee affords him a good defense in a later action upon his note by a holder who did not acquire it until after it was past due.³³⁰

Garnisheeing the maker of a negotiable promissory note as debtor of the payee after he has had notice that the note had been transferred to another has no effect upon the right of the indorsee to recover upon it, and therefore a judgment against the garnishee, taken afterwards, affords him no defense when the indorsee sues him on the note.³³¹

A judgment against the maker of a negotiable promissory note as trustee of the payee is no protection to him in New Hampshire against the claim of an indorsee who was not given the notice of the trustee proceedings required by the statute of that state.³³²

In Ohio an attachment of a debt due upon a negotiable promissory note in justice's court, and an order of the justice directing the maker of it to pay the sum due upon it to the plaintiff, is not conclusive. It only confers upon the

plaintiff a right of action against the garnishee, who may show in defense that before the garnishment, or before the note became due, it was indorsed over to a bona fide holder for value, and that he is entitled to the proceeds.³³³

In the Dominion of Canada it appears to be the law that a payment by a garnishee of the sum owing by him upon an overdue negotiable promissory note to an attaching creditor will constitute a good defense and protect him in a later action brought by an indorsee of such note.³³⁴

XVI. Right of indorsee of negotiable paper to recover from garnishee money collected by garnishment.

Privity of contract and estate is wholly lacking between an indorsee of a negotiable instrument and a creditor of a prior holder; hence there is difficulty in perceiving a logical ground upon which to rest a right of the former to recover of the latter money collected by means of an attachment or garnishment of the debt due upon such an instrument from the obligor. Jurists have, however, differed in opinion respecting the existence of such right. It has been held that the holder and indorsee of a negotiable promissory note transferred to him in good faith, for value, and before maturity, cannot, in an action for money had and received to his use, recover from a creditor of the payee the money that he collected thereon from the maker upon garnishee process, for the reason that his right to recover upon the note from the maker was unaffected and unimpaired by the garnishment and payment under it;³³⁵ but, again, it has been held that a creditor of the payee of a negotiated promissory note who collected his debt from the maker by means of a gar-

the plaintiff in the garnishment without waiting for a judicial order or judgment directing him to do so, and the conclusion of the court rested upon the view that negotiable instruments were not within the statute.

The opposite doctrine was adopted later by the Canadian supreme court in Roblee v. Rankin (1884) 11 Can. S. C. 137, where it was held that an overdue negotiable promissory note, was subject to garnishment under the statute, and, if attached and paid by the garnishee, certainly after a judicial order, and in compliance therewith, such payment would and did constitute a complete defense in a subsequent action upon the note, brought by an indorsee after maturity.

³³⁵ Corey v. Webber (1893) 96 Mich. 357, 55 N. W. 982.

³²⁷ Cruett v. Jenkins (1880) 53 Md. 224.

³²⁸ Thompson v. Gainesville Nat. Bank (Tex.) supra.

³²⁹ Somers v. Losey (1882) 48 Mich. 294, 12 N. W. 188.

³³⁰ Hill v. Kroft (1857) 29 Pa. 186; Daniels v. Rawlings (1846) 6 Humph. (Tenn.)

⁴⁰³: Thompson v. Gainesville Nat. Bank (Tex.) supra; Hinsdill v. Safford (Vt.) supra.

³³¹ Yarborough v. Thompson (1844) 3 Smedes & M. (Miss.) 291, 41 Am. Dec. 626.

³³² Horn v. Thompson (1855) 31 N. H. 562; Thompson v. Carroll (1857) 36 N. H. 21.

³³³ Secor v. Witter (1883) 39 Ohio St. 218.

³³⁴ The contrary was held in Rankin v. McFadyen (1881) 2 Pr. Edw. Isl. 461, in which the garnishee had paid his note to L.R.A.1918C.

nishment to which the holder by a previous transfer was not a party was liable over to such holder for the sum received from the garnishee, in a subsequent action.³³⁶

At one time, in Missouri, the latter ruling agreed with the views of several judges.³³⁷ Later, however, the doctrine of accountability and responsibility of an attaching creditor for money collected by garnishment from the maker of commercial paper to the holder thereof was repudiated by the courts of that state.³³⁸

In New Hampshire, where an attaching creditor through trustee process had collected from the maker the amount of a negotiable promissory note without strict compliance with the state statute in respect of notifying a later holder of the paper of the proceedings, so that the judgment against the trustee was erroneous and gave him no protection in a subsequent suit upon the note by an indorsee, the court adjudged the attaching creditor to make restitution with costs, to the end that the maker might not be compelled to pay his note twice.³³⁹

XVII. *Legal presumptions in garnishments of negotiable paper.*

The courts indulge certain presumptions in cases where debts due upon negotiable paper have been attached or garnisheed.

It is presumed that a negotiable promissory note sued upon by an indorsee was transferred to its holder before it ma-

tured, in the usual course of business.³⁴⁰ In the absence of all evidence to the contrary, a negotiable promissory note in the possession of an indorsee is presumed to have been indorsed and transferred to him at or about its date.³⁴¹ In an action upon a negotiable promissory note by a plaintiff having possession of and asserting his property in it, there is a presumption in his favor, as against a garnishment creditor of a prior holder, that he became the owner of the note before it matured.³⁴²

This presumption is not a strong one, and slight suspicious circumstances are sufficient to overcome and rebut it;³⁴³ but, nevertheless, the garnishor is bound to overcome it by proof that the defendant in garnishment owned the paper when it fell due and when the process was served.³⁴⁴

The New York court of appeals has declared that there is no presumption that a negotiable instrument attached before maturity was held by and belonged to the attachment defendant, but that the fact must be proved;³⁴⁵ but the supreme court of Illinois is authority for the statement that while it must appear, to warrant a judgment against a garnishee indebted upon a promissory note payable to the defendant, and attached before its maturity, that it had not been transferred to another holder before it fell due, there is, nevertheless, a presumption that the payee continued to hold it until it matured, where no cir-

³³⁶ *Garrott v. Jaffray* (1874) 10 Bush (Ky.) 413.

³³⁷ *Tompkins, J.*, who, in *Scott v. Hill* (1831) 3 Mo. 88, 22 Am. Dec. 462, dissented from the conclusion of the court that an attaching creditor in a garnishment of the maker of a negotiable promissory note indorsed to the defendant was not entitled to judgment against the garnishee until he proved that the defendant was the holder of the paper when the attachment was served, took the ground that the judgment would protect the garnishee against the claim of an indorsee because the latter might come in and interplead under the attachment, or, if he had no notice of it, might have his action afterwards against the attaching creditor to recover money had and received to his use.

The statute, said the court, in *Quarles v. Porter* (1848) 12 Mo. 76 (referring to the act under which, as construed by it, debts due by makers of negotiable paper were attachable to satisfy judgments against the payees), prescribes no mode by which an assignee can be brought before the court and have his rights litigated; but, as the judgment is not conclusive against him under R.A. 1918C.

less he has notice and chooses to come in and interplead, he would have a right at any subsequent time before the money was paid over to the attaching creditor to arrest the payment, or, after payment, a right to his action to recover it back; we apprehend no very serious injury could result to him.

Again, according to the court in *Colcord v. Daggett* (1853) 18 Mo. 557, a creditor of a defendant who, to all appearances, was the owner and holder of a negotiable promissory note which had been collected from the maker by means of garnishee process, would be liable over to the true owner and holder should he be another person.

³³⁸ *Funkhouser v. How* (1856) 24 Mo. 44; *Dickey v. Fox* (1856) 24 Mo. 217.

³³⁹ *Thompson v. Carroll* (1857) 36 N. H. 25.

³⁴⁰ *Hill v. Kroft* (1857) 20 Pa. 186.

³⁴¹ *Mason v. Noonan* (1859) 7 Wis. 609.

³⁴² *Bassett v. Garthwaite* (1858) 22 Tex. 230, 73 Am. Dec. 257.

³⁴³ *Hill v. Kroft* (Pa.) supra.

³⁴⁴ *Bassett v. Garthwaite* (Tex.) supra.

³⁴⁵ *Bills v. National Park Bank* (1882) 89 N. Y. 343.

cumstances indicate and no testimony is adduced to prove the contrary.³⁴⁸

XVIII. Conclusion.

Little need be said in conclusion. One constantly should keep in mind that any conclusion may be disturbed, profoundly modified, or even reversed, by pertinent local legislation. Disregarding for the nonce all statutes that so operate, it may be asserted with some confidence that the following statements are supported by the weight of authority: Debts owing a defendant, evidenced by negotiable paper due or to grow due by mere efflux of time, ordinarily are liable to garnishment. If the paper is immature and held by a bona fide indorsee for value, garnishment will not reach the debt it represents. Debts represented by negotiable paper under garnishment escape the process when the paper is transferred before maturity to a bona fide indorsee for value. Overdue negotiable paper under garnishment passes to such an indorsee subject to the garnishment. If the plaintiff in garnishment can successfully establish mala fides or want of consideration in the negotiation of the paper, he can maintain the supremacy of the garnishment lien against the indorsee whether the garnishment preceded or followed the negotiation, and whether the transfer was made before or after the paper matured. An unassailable title to negotiable paper transferred either before or after it falls due is acquired by a bona fide indorsee for value in the usual course of business, and his title as against the lien of a previous garnishment, if acquired before the maturity of

the paper, is superior, but inferior and subject to the garnishment if not acquired until the paper was past due. The garnishee of a debt evidenced by negotiable paper is entitled to every possible protection afforded in law against liability to pay his debt twice, but he is bound to diligence in invoking and securing the protective aid of the courts.

Whether the claim of a bona fide indorsee of overdue negotiable paper is superior or subordinate to a garnishment served after he acquired it, but before he notified the maker of the transfer to him, the courts are not agreed. Although it be conceded, in conformity to the common-law rule respecting assignments of choses in action where the assignee has neglected to give notice to the debtor of the assignment, that the maker of an overdue negotiable obligation known to have been held by the payee when it fell due, who has had no notice of any transfer of it to another, would be fully protected if he should pay it to the payee or to the plaintiff in a garnishment in all respects regular, against the indorsee's claim, this does not settle the rival rights of indorsee and garnishor, because, when the paper was negotiated, the maker ceased to be indebted to the payee and became the debtor of the new holder, whether he knew it or not, and garnishment reaches no debts evidenced by negotiable paper that are not owing to the defendant. The rule of the common law was obviously made to protect the debtor from duplicating a payment made in good faith in discharge of his debt. The extension of the rule to give an advantage to a creditor of the creditor to which otherwise he would not be entitled seems unwarrantable. J. B. G.

³⁴⁸ Snider v. Ridgeway (1869) 49 Ill. 522.

UNITED STATES SUPREME COURT.

HENRY M. JONES et al., Plffs. in Err.,
v.
CITY OF PORTLAND.

(245 U. S. 217, 62 L. ed. —, 38 Sup. Ct. Rep. 112.)

Constitutional law — municipal taxation — establishing coal and fuel yard.

Municipal taxation to raise the money necessary to enable the municipality to es-

tablish and maintain a permanent coal and fuel yard for the purpose of selling wood, coal, and fuel to its inhabitants without financial profit, conformably to state legislation purporting to be passed in the public interest, and so declared to be by the highest court of the state, cannot be said to deny the taxpayers the protection which the constitutional guaranty of due process of law affords against the taking of their property for uses that are private.

For other cases, see *Constitutional Law*, II. b, 2, in *Dig. 1-52 N. S.*

(December 10, 1917.)

Note.—The right of a municipal corporation to engage in an enterprise generally regarded as of a private character, including the sale of coal, is discussed in the notes to *Holton v. Camilla*, 31 L.R.A. (N.S.) 116, and *Laughlin v. Portland*, 51 L.R.A.1918C.

L.R.A.(N.S.) 1143; and see later cases *Union Ice & Coal Co. v. Ruston*, L.R.A. 1915B, 859; *Andrews v. South Haven*, L.R.A.1916A, 908; and *Milligan v. Miles City*, L.R.A.1916C, 395.

ERROR to the Supreme Judicial Court of the State of Maine to review a decree sustaining a demurrer to and dismissing a bill filed to enjoin the establishment of a municipal coal and fuel yard. Affirmed.

The facts are stated in the opinion.

Mr. Eben Winthrop Freeman, for plaintiffs in error:

Taxation for a use not public is invalid.

Nichols, Taxn. in Mass. 1913, p. 47, note 2; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Re Tuthill, 163 N. Y. 133, 49 L.R.A. 781, 79 Am. St. Rep. 574, 57 N. E. 303; Brannon, 14th Amend. 1901, p. 160; Cooley, Const. Lim. 696 et seq.; Gray, Limitations Taxing Power, §§ 169 et seq.; Allen v. Jay, 60 Me. 124, 11 Am. Rep. 185.

What is or is not a public use is a question of general jurisprudence which the Federal courts will determine for themselves.

McGehee, Due Process of Law, p. 230; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 159, 41 L. ed. 369, 388, 17 Sup. Ct. Rep. 56.

The conduct of private business is not a public purpose.

1 Cooley, Taxn. 1903, p. 206; State ex rel. Garth v. Switzler, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245; Brooks v. Brooklyn, 146 Iowa, 136, 26 L.R.A. (N.S.) 425, 124 N. W. 868; Baker v. Grand Rapids, 142 Mich. 687, 106 N. W. 208; Opinion of Justices, 155 Mass. 601, 15 L.R.A. 809, 30 N. E. 1142, 182 Mass. 610, 60 L.R.A. 592, 66 N. E. 25; Pond, Pub. Utilities, 1913, §§ 58, 61; State ex rel. Mueller v. Thompson, 149 Wis. 488, 43 L.R.A. (N.S.) 339, 137 N. W. 20, Ann. Cas. 1913C, 774; State v. Nelson County, 1 N. D. 88, 8 L.R.A. 283, 26 Am. St. Rep. 609, 45 N. W. 33; Genesee v. Genesee Natural Gas, Coal, Oil, Salt & Mineral Co. 55 Kan. 358, 40 Pac. 655; Vail v. Attica, 8 Kan. App. 668, 57 Pac. 137; Keen v. Waycross, 101 Ga. 588, 29 S. E. 42; Hayward v. Redcliff, 20 Colo. 33, 36 Pac. 795; Mauldin v. Greenville, 33 S. C. 1, 8 L.R.A. 291, 11 S. E. 434; Atty. Gen. v. Detroit, 150 Mich. 310, 121 Am. St. Rep. 625, 113 N. W. 1107; People ex rel. Detroit & H. R. Co. v. Salem, 20 Mich. 462, 4 Am. Rep. 400; State ex rel. Monnett v. Guilbert, 56 Ohio St. 575, 38 L.R.A. 519, 60 Am. St. Rep. 756, 47 N. E. 551; State ex rel. Toledo v. Lynch, 88 Ohio St. 71, 48 L.R.A. (N.S.) 720, 102 N. E. 670, Ann. Cas. 1914D, 949; Bussey v. Gilmore, 3 Me. 191; Opinion of Justices, 58 Me. 590; Libby v. Portland, 105 Me. 370, 26 L.R.A. (N.S.) 141, 74 Atl. 805, 18 Ann. Cas. 547; Opinion of Justices, 190 Mass. 611, 77 N. E. 820, 204 Mass. 607, 27 L.R.A. (N.S.) 483, 91 N. E. 405, 211 Mass. 624, 42 L.R.A. (N.S.) 221, 98 N. E. 611; Wheelock v. Lowell, 196 Mass. 220, 124 Am. St. Rep. 543, 81 N. E. 977, 12 L.R.A. 1918C.

Ann. Cas. 1109; Cooley, Const. Lim. p. 696; Judson, Taxn. § 350; Abbott, Pub. Securities, 1913, § 101, note p. 213; Nichols, Taxn. in Mass. p. 49.

Messrs. Carroll S. Chaplin, Guy H. Sturgis, and Henry P. Frank, for defendant in error:

The constitutionality of a legislative enactment is to be presumed until the contrary is shown beyond a reasonable doubt.

Henderson Bridge Co. v. Henderson, 173 U. S. 592, 614, 43 L. ed. 823, 831, 19 Sup. Ct. Rep. 653; Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 608.

The question of a public exigency is a question of fact, and, if the use is public, the determination by the legislature that an exigency exists, and that a proposed law is necessary for the use, benefit, and welfare of the public, is final and conclusive. The legislature is to determine the wisdom, propriety, and necessity of a contemplated use, and whether or not the object in view will be accomplished by the means proposed.

Allen v. Jay, 60 Me. 124, 11 Am. Rep. 185; Opinion of Justices, 58 Me. 590, 155 Mass. 508, 607, 15 L.R.A. 809, 30 N. E. 1142; Laughlin v. Portland, 111 Me. 499, 51 L.R.A. (N.S.) 1143, 90 Atl. 318, Ann. Cas. 1916C, 734; Talbot v. Judson, 16 Gray, 417; Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39; Livingston County v. Darlington, 101 U. S. 407, 416, 25 L. ed. 1015, 1019.

The nature of the use, whether public or private, is ultimately a judicial question.

Hairston v. Danville & W. R. Co. 208 U. S. 508, 52 L. ed. 637, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1068.

A public use must subserve some public interest or demand, and be available to all persons alike. It must be such a use as the public needs and requires for its welfare and prosperity, and which, under existing conditions, can best be provided by the government itself.

Cooley, Const. Lim. 7th ed. p. 768; Weimer v. Douglas, 64 N. Y. 100, 21 Am. Rep. 586; Sun Printing & Pub. Asso. v. New York, 152 N. Y. 264, 37 L.R.A. 788, 46 N. E. 499; Gaylord v. Sanitary Dist. 204 Ill. 576, 63 L.R.A. 582, 98 Am. St. Rep. 235, 68 N. E. 522; Opinions of Justices, 150 Mass. 597, 8 L.R.A. 487, 24 N. E. 1084; Brown v. Gerald, 100 Me. 372, 70 L.R.A. 472, 109 Am. St. Rep. 526, 61 Atl. 785.

One of the requisites of a public use is that existing conditions demand it. These conditions may be new, arising from the advancement of society and the development and growth of new wants necessary for the comfort and welfare of the people, unknown and unnecessary in earlier times.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; State ex rel. Atty. Gen. v. Toledo, 48 Ohio St. 112, 11 L.R.A. 729, 26 N. E. 1061; Re Tuthill, 36 App. Div. 500, 55 N. Y. Supp. 657; Holton v. Camilla, 134 Ga. 560, 31 L.R.A.(N.S.) 116, 68 S. E. 472, 20 Ann. Cas. 199; Judson, Taxn. § 346; Laughlin v. Portland, 111 Me. 491, 51 L.R.A.(N.S.) 1143, 90 Atl. 318, Ann. Cas. 1916C, 734; Olmstead v. Camp, 33 Conn. 532, 89 Am. Dec. 221; Sun Printing & Pub. Co. v. New York, 8 App. Div. 230, 40 N. Y. Supp. 607.

The establishment and maintenance of a municipal fuel yard under the authority and limitations of the statute in question sub-serves a public demand for heat in the colder latitudes where the people need and require heat for their welfare and prosperity, and is, to this extent, within the accepted definition of a public use.

Laughlin v. Portland, 111 Me. 500, 51 L.R.A.(N.S.) 1143, 90 Atl. 318, Ann. Cas. 1916C, 734; Holton v. Camilla, 134 Ga. 560, 31 L.R.A.(N.S.) 116, 68 S. E. 472, 20 Ann. Cas. 199; Gibbs v. Consolidated Gas Co. 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; State ex rel. Atty. Gen. v. Toledo, 48 Ohio St. 112, 11 L.R.A. 729, 26 N. E. 1061; Opinions of Justices, 211 Mass. 624, 42 L.R.A.(N.S.) 221, 98 N. E. 611, 150 Mass. 595, 8 L.R.A. 487, 24 N. E. 1084; 155 Mass. 607, 15 L.R.A. 809, 30 N. E. 1142, 182 Mass. 611, 60 L.R.A. 592, 66 N. E. 25; Baker v. Grand Rapids, 142 Mich. 687, 106 N. W. 208.

Taxation and eminent domain rest substantially on the same foundation, as each implies the taking of private property for the public use.

Cooley, Const. Lim. 7th ed. p. 715.

Mr. Justice Day delivered the opinion of the court:

By an act of the legislature of the state of Maine, approved March 19, 1903, § 87, chapter 4, Revised Statutes of Maine 1903, it was provided:

"Any city or town may establish and maintain, within its limits, a permanent wood, coal, and fuel yard, for the purpose of selling, at cost, wood, coal, and fuel to its inhabitants. The term 'at cost' as used herein, shall be construed as meaning without financial profit."

The city of Portland, Maine, voted to establish and maintain within its limits a permanent coal and fuel yard for the purposes of selling at cost wood, coal, and fuel to its inhabitants, and that the money necessary for such purposes be raised by taxation, and that the term "at cost," as used in said vote, should be construed as meaning without financial profit. On Feb-

ruary 3, 1913, the common council of the city, at a legal meeting, passed the vote, and on the same date it was passed by the board of aldermen of the city, and on February 4, 1913, the mayor of the city approved it, whereupon it became the vote of the city of Portland. The city voted to appropriate the sum of \$1,000, to be devoted to carrying out the purposes of the vote, and the appropriation was passed by the common council, the board of aldermen, and approved by the mayor of the city.

This suit was brought by citizens and taxpayers of Portland in the supreme judicial court of Maine, in equity, to enjoin the establishment of the yard. The supreme judicial court sustained a demurrer to the bill, and dismissed it. 113 Me. 123, 93 Atl. 41. A writ of error brings the case here because of alleged violation of rights secured to the plaintiffs in error by the 14th Amendment. The contention is that the establishment of the municipal wood yard is not a public purpose; that taxation to accomplish that end amounts to the taking of the property of the plaintiffs in error without due process of law.

The decision of the case turns upon the answer to the question whether the taxation is for a public purpose. It is well settled that moneys for other than public purposes cannot be raised by taxation, and that exertion of the taxing power for merely private purposes is beyond the authority of the state. Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455.

The act in question has the sanction of the legislative branch of the state government, the body primarily invested with authority to determine what laws are required in the public interest. That the purpose is a public one has been determined upon full consideration by the supreme judicial court of the state, upon the authority of a previous decision of that court. Laughlin v. Portland, 111 Me. 486, 51 L.R.A.(N.S.) 1143, 90 Atl. 318, Ann. Cas. 1916C, 734.

The attitude of this court towards state legislation purporting to be passed in the public interest, and so declared to be by the decision of the court of last resort of the state passing the act, has often been declared. While the ultimate authority to determine the validity of legislation under the 14th Amendment is rested in this court, local conditions are of such varying character that what is or is not a public use in a particular state is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information. In that view the judgment of the highest court of the state upon what should be deemed a public use in a particular state is entitled to

the highest respect. *Hairston v. Danville & W. R. Co.* 208 U. S. 598, 607, 52 L. ed. 637, 641, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008. In *Union Lime Co. v. Chicago & N. W. R. Co.* 233 U. S. 211, 58 L. ed. 924, 34 Sup. Ct. Rep. 522, this court declared that a decision of the highest court of the state, declaring a use to be public in its nature, would be accepted 'unless clearly not well founded, citing *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 160, 41 L. ed. 369, 389, 17 Sup. Ct. Rep. 56; *Clark v. Nash*, 198 U. S. 361, 369, 49 L. ed. 1085, 1088, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; *Strickley v. Highland Boy Gold Min. Co.* 200 U. S. 527, 531, 50 L. ed. 581, 583, 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174; *Offield v. New York, N. H. & H. R. Co.* 203 U. S. 372, 377, 51 L. ed. 231, 236, 27 Sup. Ct. Rep. 72; *Hairston v. Danville & W. R. Co.* supra. This doctrine was reiterated in *O'Neill v. Leamer*, 239 U. S. 244, 253, 60 L. ed. 249, 265, 36 Sup. Ct. Rep. 54.

In the case of *Laughlin v. Portland*, supra, the matter was fully considered by the supreme judicial court of that state. After reviewing the cases which establish the general authority of municipalities in the interest of the public health, convenience, and welfare to make provisions for supplying the inhabitants of such communities with water, light, and heat by means adequate for that purpose, the court came to consider the distinction sought to be made between the cases which sustain the authority of the state to authorize municipal action for the purposes stated, and the one under consideration, because of the fact that, in the instances in which municipal authority had been sustained, the use of the public streets and highways for mains, poles, and wires in the distribution of water, light, and heat had been required under public authority, whereas, in supplying fuel to consumers, under the terms of the law in question, no such permission was essential; the court said (111 Me. 486, 496):

"Let us look at the question from a practical and concrete standpoint. Can it make any real and vital difference and convert a public into a private use that, instead of burning the fuel at the power station to produce the electricity, or at the central heating plant to produce the heat, and then conducting it in the one case by wires and in the other by pipes to the user's home, the coal itself is hauled over the same highway to the same point of distribution? We fail to see it. It is only a different and simpler mode of distribution, and, if the legislature has the power to authorize municipalities to furnish heat to its inhabitants, 'it can do this by any appropriate

means which it may think expedient.' The vital and essential element is the character of the service rendered, and not the means by which it is rendered. It seems illogical to hold that a municipality may relieve its citizens from the rigor of cold if it can reach them by pipes or wires placed under or above the highways, but not if it can reach them by teams traveling along the identically same highway. It will be something of a task to convince the ordinarily intelligent citizen that an act of the legislature authorizing the former is constitutional, but one authorizing the latter is unconstitutional beyond all rational doubt. For we must remember that we are considering the existence of the power in the legislature, which is the only question before the court, and not the wisdom of its exercise, which is for the legislature alone."

Answering the objection that sustaining the act in question opens the door to the exercise of municipal authority to conduct other lines of business and commercial activity to the destruction of private business, the court said (111 Me. 500):

"But it is urged, why, if a city can establish a municipal fuel yard, can it not enter upon any kind of commercial business, and carry on a grocery store or a meat market or a bakery. The answer has been already indicated. Such kinds of business do not measure up to either of the accepted tests. When we speak of fuel, we are dealing not with ordinary articles of merchandise for which there may be many substitutes, but with an indispensable necessity of life; and more than this, the commodities mentioned are admittedly, under present economic conditions, regulated by competition in the ordinary channels of private business enterprise. The principle that municipalities can neither invade private liberty nor encroach upon the field of private enterprise should be strictly maintained, as it is one of the main foundations of our prosperity and success. If the case at bar clearly violated that principle, it would be our duty to pronounce the act unconstitutional; but, in our opinion, it does not. The element of commercial enterprise is entirely lacking. The purpose of the act is neither to embark in business for the sake of direct profits (the act provides that fuel shall be furnished at cost), nor for the sake of the indirect gains that may result to purchasers through reduction in price by government competition. It is simply to enable the citizens to be supplied with something which is a necessity in its absolute sense to the enjoyment of life and health, which could otherwise be obtained with great difficulty and at times perhaps not at all,

and whose absence would endanger the community as a whole."

Bearing in mind that it is not the function of this court, under the authority of the 14th Amendment, to supervise the legislation of the states in the exercise of the police power beyond protecting against extensions of such authority in the enactment and enforcement of laws of an arbitrary character, having no reasonable relation to the execution of lawful purposes, we are unable to say that the statute now under consideration violates rights of the taxpayer by taking his property for uses which are private.

The authority to furnish light and water by means of municipally owned plants has long been sanctioned as the accomplishment of a public purpose justifying taxation with a view to making provision for their establishment and operation. The right of a municipality to promote the health, comfort, and convenience of its inhabitants by the establishment of a plant for the dis-

tribution of natural gas for heating purposes was sustained, and we think properly so, in *State ex rel. Atty. Gen. v. Toledo*, 48 Ohio St. 112, 11 L.R.A. 729, 26 N. E. 1061. We see no reason why the state may not, if it sees fit to do so, authorize a municipality to furnish heat by such means as are necessary and such systems as are proper for its distribution. Heat is as indispensable to the health and comfort of the people as is light or water. In any event we are not prepared to say that when a state authorizes a municipality to tax with a view to providing heat at cost to the inhabitants of the city, and that purpose is declared by the highest court of the state to be a public one, that the property of a citizen who is taxed to effect such purpose is taken in violation of rights secured by the Constitution of the United States. As this view decides the questions open to consideration, it follows that the judgment of the Supreme Judicial Court of Maine must be affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

R. S. ESKRIDGE et al.

v.

WELLINGTON THOMAS

and

TRADERS' NATIONAL BANK OF BUCK-
HANNON, Appt.

(— W. Va. —, 91 S. E. 7.)

Usury — effect of Negotiable Instru- ments Law.

1. The act known as the Negotiable Instruments Law does not, by implication or otherwise, repeal, limit, or qualify in any degree or in any particular, § 5, chap. 96, Code 1913 (§ 4164), declaring all contracts for the loan of money at a greater interest rate than now allowed by law void as to such excess.

For other cases, see Usury, I. a, in Dig. 1-52 N. S.

Same — effect.

2. A contract by statute declared void, because in part usurious, is, as to such usury, a nullity, and, although negotiable in form, no currency in the market and no innocence or ignorance on the part of the holder can impart validity to it.

For other cases, see Usury, II. in Dig. 1-52 N. S.

Headnotes by LYNCH, J.

Note. — For usury as a defense against a bona fide purchaser of a bill or note, see annotation following this case, post, 773. L.R.A.1918C.

Discovery — injunction against action at law.

3. A bill merely praying an injunction to restrain the prosecution of an action at law until a discovery can be had in aid of the defense thereto, also prayed, is purely a bill of discovery, and not one for relief.

For other cases, see Discovery and Inspection, I. in Dig. 1-52 N. S.

Injunction — discovery — dissolution.

4. An injunction, awarded on such a bill, generally ought not to be dissolved on motion until defendant has a reasonable opportunity to answer the interrogatories propounded to him, or plaintiff a like opportunity to coerce such answer by proper procedure.

For other cases, see Injunction, II. in Dig. 1-52 N. S.

Same — speeding cause.

5. A defendant who answers such a bill may, in lieu of a motion to dissolve the injunction, move for an order to require plaintiff to speed the cause as to a defendant not answering, under penalty of a dismissal thereof or dissolution of the injunction, enforceable thereafter by notice and motion.

For other cases, see Injunction, II. in Dig. 1-52 N. S.

Discovery — termination of suit.

6. A bill framed for the purpose of discovery to aid in defense of a law action is limited to that object, and its attainment by an answer to interrogatories operates to end the suit, although the bill also prays for an injunction to restrain temporarily the prosecution of that action.

For other cases, see Discovery and Inspection, I. in Dig. 1-52 N. S.

(November 28, 1916.)

A PPEAL by the defendant Bank from a decree of the Circuit Court for Upshur County overruling a demurrer to a bill seeking discovery, and a motion to dissolve an injunction restraining further prosecution by the bank of an action on a promissory note. Affirmed.

The facts are stated in the opinion.

Messrs. Young & McWhorter, for appellant:

It was error to overrule the demurrer to the bill.

Logan v. Ballard, 61 W. Va. 526, 57 S. E. 143; 1 Barton, Ch. Pr. § 168; Brown v. Swann, 10 Pet. 497, 9 L. ed. 508.

The note is merely "voidable" as to usury, and, therefore; not void in the hands of a holder in due course, for value.

Ewell v. Daggs, 108 U. S. 143, 27 L. ed. 682, 2 Sup. Ct. Rep. 408; Green v. Kemp, 13 Mass. 515, 7 Am. Dec. 169; Weeks v. Bridgman, 159 U. S. 547, 40 L. ed. 255, 16 Sup. Ct. Rep. 72; Anderson v. Roberts, 18 Johns. 515, 9 Am. Dec. 235; Dayton v. Nell, 43 Minn. 246, 45 N. W. 231; Breckenridge v. Ormsby, 1 J. J. Marsh. 236, 19 Am. Dec. 71; Cummings v. Powell, 8 Tex. 80; Callis v. Day, 38 Wis. 643; Slocum v. Hooker, 13 Barb. 536; Seylar v. Carson, 69 Pa. 81; Van Shaack v. Robbins, 30 Iowa, 201; Ammons v. Ammons, 50 W. Va. 403, 40 S. E. 490; Maupin v. Scottish Union & Nat. Ins. Co. 53 W. Va. 590, 45 S. E. 1003.

A plea of usury is personal to the debtor, and he may or may not interpose the same, at his election.

Chenoweth v. National Bldg. & L. Asso. 59 W. Va. 653, 53 S. E. 559.

Messrs. Higginbotham & Cutright for appellees.

Lynch, J., delivered the opinion of the court:

The plaintiffs made a negotiable note and several renewals of the same instrument payable to Wellington Thomas, who indorsed them in turn to the Traders' National Bank in due course. Neither the date of the transaction out of which the indebtedness originally arose, or of any of the renewals, is disclosed except the last one. On it the indorsee sued the makers and indorser. The former then filed their bill against the plaintiff in that action and the defendant Thomas to enjoin its further prosecution. They allege "usury in said note and the preceding notes and the transaction preceding the execution of the first note," and their lack of knowledge of the "amount of usury in said transaction," and "that it is material to them that said note be purged of the usury therein." Wherefore, "being remediless in the premises save by the aid of a court of equity," they pray L.R.A.1918C.

that defendants "be required to make full, true, and perfect answer to every of the" interrogatories propounded in the bill.

In this manner plaintiffs seek to ascertain from defendants "whether interest has been paid on said note, original note and renewals thereof, above 6 per cent, and, if so, to what extent," and, from Thomas, "whether in the first transaction, before the original note was executed," "there has been paid a greater amount of interest than 6 per cent, and, if so, to what extent."

Upon these allegations, the others being purely formal, the injunction prayed was awarded in vacation. To the bill Thomas has not appeared for any purpose; nor have any proceedings been instituted to compel his attendance. The bank demurred, and, the demurrer being overruled, filed its answer, and therein averred the negotiation of the several notes in due course before maturity, without notice of any defect in the instrument or infirmity in the title of the indorser. These averments, replied to generally, the bank proved by its cashier Graham. By counsel for the parties it was agreed that at the time the original note was discounted, and at the time of the renewals thereof, neither the bank nor any member of its board of directors "had any notice or knowledge of any claim of usury on the part of the plaintiffs as between them and the payee Wellington Thomas." At this stage of the proceeding, the bank moved to dissolve the writ restraining the prosecution of the action at law. This motion the court denied, but modified the vacation order so as to permit the bank to proceed to judgment against Thomas.

The appeal awarded to it can be entertained only by reason of the authority conferred by clause 7, § 1, chap. 135, Code, § 4981, as the order is interlocutory, not final. The demurrer and motion overruled raised precisely the same questions. To these our investigations necessarily are restricted. The facts are involved only incidentally.

It should be remembered that the sole purpose of this suit is to test the conscience of the defendants, that plaintiffs may from them personally extract knowledge or information of the transaction and its sequential results in which they were joint or separate actors. The bill, while praying for general relief, apparently is a pure bill for discovery. It does not contain sufficient averments or prayer to permit the adjudication of the whole subject-matter involved in the law action. The authorities generally hold that a bill making no relief other than discovery is limited to that object, and upon obtaining it by the answer of the defendant the suit is ended. This rule is sustained

alike upon authority and principle. 1 Pom. Eq. Jur. § 191; Story, Eq. Jur. § 1483; Mit. Eq. Pl. 16; Hurricane Teleph. Co. v. Mohler, 51 W. Va. 6, 41 S. E. 421. Nor does such a bill become one for relief because it seeks an injunction to stay the action at law until the discovery is obtained. Russell v. Dickeschied, 24 W. Va. 61. What plaintiffs assumed Thomas knew that they did not know, as an aid to their defense in the law action, was the real object prompting this proceeding, and not his admissions in pais. If any such admissions he made, they were available for use upon the trial stayed by the injunctive process.

Plaintiffs evidently were satisfied with the answer of the respondent bank, else they would not have signed the agreed statement of facts. That statement precludes a denial of its verity. It was accepted as true. But they did not by proper procedure require or attempt to require Thomas to answer. Nevertheless, their delay to inaugurate such proceeding did not alone warrant dissolution of the injunction. They could not, from the very nature of the bill, take proof to support its averments; wherefore they were not in default. While Shonk v. Knight, 12 W. Va. 667, says a plaintiff must be diligent in his effort to procure the answer of all the defendants upon whom rests the gravamen of the charges contained in the bill, it states the general rule to be that an injunction ought not to be dissolved until all the defendants implicated have answered. Russell v. Dickeschied, supra, applies this general rule to the dissolution of an injunction awarded upon a pure bill of discovery enjoining prosecution of a detinue action, and holds that until the defendant has answered, the injunction ought not to be dissolved. The record before us does not show lack of diligence on the part of the plaintiffs in not taking the necessary steps to coerce a response by Thomas to the interrogatories propounded to him. The injunction was granted March 10th; four days later the Traders' National Bank notified plaintiffs of its purpose to move a dissolution on March 15, 1916; the order refusing to dissolve was entered June 9th of the same year. At the same time, the court ruled upon the question of law raised by the demurrer. By its interposition the defendant challenged the legal sufficiency of the bill. For this delay plaintiffs were not in anywise responsible. They could not know what action the court would take on the demurrer or the motion to dissolve. Wherefore, the time intervening between the entry of the demurrer and the giving of the notice and the action of the court on both virtually operated in justification of plaintiffs' delay during that period. B.L.R.A.1918C.

sides, the defendant that answered was not wholly without a remedy for the default, if any, as by a motion for an order requiring plaintiffs to speed a hearing on penalty of a dismissal of the cause or dissolution of the injunction if thereafter they unduly delayed compliance with that requirement. We think, therefore, the court did not err in refusing to dissolve the injunction.

Although meager, the averments of the bill may be deemed and treated as formally sufficient. Section 26, chap. 96, Code (§ 4165), permits any defendant sued on a contract for the loan or forbearance of money at a greater rate of interest than 6 per cent to plead the usury in general terms, to which plea the plaintiff shall reply generally, and each party on the trial of that issue may introduce any available evidence that tends to sustain or traverse the existence of usury inhering in the contract in issue. Or the borrower may resort for aid in establishing the usurious character of the contract to § 7 (§ 4166), which gives him the right to exhibit his bill in equity against the lender, and coerce him to state upon oath the money or thing lent and all transactions referable to such loan, and the interest or consideration thereof. These provisions are quite liberal, and perhaps were intended to render unnecessary the usual formal averments required either at law or in equity.

But chiefly it is not the lack of such formality of which the Traders' National Bank complains. To defeat the discovery sought by the bill, it relies in its answer and demurrer upon the construction or interpretation of certain sections of the Negotiable Instruments Law. It is contended that, although § 5, chap. 96 (§ 4164), declares void all contracts for the loan or forbearance of money as to any excess of interest charged above the legal rate, yet, under §§ 52, 55, and 57 of the Negotiable Instruments Act, chapter 98a of the Code (§§ 4223, 4226, 4228), the defendant bank, as a holder in due course, took the instrument relieved of usury, if any, charged on the notes in the original transaction. Under § 52, it contends it was such a holder, because the instrument is complete and regular upon its face, was not overdue when negotiated, and the bank took it in good faith and for value, without notice that it had previously been dishonored, if such was the fact, or of any infirmity in the note or defect in the title of the indorser; that, under § 55, the title of Thomas was not defective, within the meaning of the act, unless he obtained the instrument or any signature thereto by fraud, duress, or other unlawful means, or for an illegal consideration, or in breach of faith or under such

circumstances as amount to fraud; and that, if he did so obtain it, respondent, as a holder in due course, took the instrument, by virtue of § 57, "free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

These sections do, it is true, attempt to afford ample protection to persons purchasing negotiable paper, and to give it such facility of circulation as the exigencies of commercial business may require; indeed, to obviate and avoid every impediment or obstruction that in any substantial degree tends to destroy confidence in instruments of that character. Business enterprises suffer inconvenience from anything that impedes the facile circulation of any medium of exchange with banking institutions or money lenders. Financial emergencies arrest their progress frequently, and require immediate resort for relief to the monetary centers of influence. Business and industrial activities of every character depend in large measure for success upon the readiness with which they can float their bills and notes, checks, and other like instruments common in commercial usage. To meet these trade requirements, to facilitate the movement of capital, and to inspire confidence and correct some defects or deficiencies in the circulation of commercial paper, manifestly were some of the purposes to be subserved by the enactment of the Negotiable Instruments Law.

But, conceding the wholesomeness, materiality, and benign purpose of this legislation, that concession cannot be permitted to violate or ignore other equally beneficent and essential statutory provisions. These the lawmaking branch of the government, not the court, must repeal or amend, if necessary, to suit public convenience. It is not within the power or province of judicial tribunals to say what the law ought to be. Courts exercise a limited authority. They can legitimately inquire only what the legislature intended when it enacted a statute. To them belongs the right of interpretation and construction, to ascertain what the principles governing a given state of facts are, and, when ascertained, to apply the principles to the facts, irrespective of the interests helped or hurt.

Unrepealed and unamended stands an enactment of an earlier date and of equal dignity with the Negotiable Instruments Law. Long ago competent authority declared: "All contracts and assurances made directly or indirectly for the loan or forbearance of money or other thing at a greater rate of interest than 6 per cent, L.R.A.1918C.

except where such greater rate is now allowed by law, shall be void as to any excess of interest agreed to be paid above that rate, and no further." Code, § 5, chap. 96.

This legislative declaration, taken from the Code of Virginia, materially altered and amended a yet earlier statute forfeiting both principal and interest where the rate charged exceeded that fixed by law, and a subsequent one forfeiting the interest only. Now the contract or assurance is void only as to the excess of interest above the legal rate.

To bring the note in controversy within the protection of the Negotiable Instruments Act, as contended by the bank, would in effect substitute "voidable" for "void" in § 5, chap. 96. Much competent authority tends to support this argument. *Ewell v. Daggs*, 108 U. S. 145, 27 L. ed. 683, 2 Sup. Ct. Rep. 408; *Weeks v. Bridgman*, 159 U. S. 547, 40 L. ed. 255, 16 Sup. Ct. Rep. 72; *Myers v. Kessler*, 74 C. C. A. 62, 142 Fed. 730; *Gordon v. Levine*, 197 Mass. 283, 15 L.R.A.(N.S.) 243, 125 Am. St. Rep. 361, 83 N. E. 861; *Union Trust Co. v. Preston Nat. Bank*, 136 Mich. 460, 112 Am. St. Rep. 370, 99 N. W. 399, 4 Ann. Cas. 347. The contrary proposition is upheld in numerous decisions of equally respectable courts. They declare unenforceable by an innocent holder any instrument by statute declared to be void because usurious, or because it arose out of gaming or other transactions in violation of a statute. These are collated in *Union Trust Co. v. Preston Nat. Bank*, supra. An act or contract so declared to be void has no legal force or effect. It is a nullity, and into it can be injected no vitality, although in some circumstances the conduct of the parties may be such as will, upon equitable principles, operate to estop them to deny they entered into or are bound by it, as where they accept the benefits thereof with knowledge of the infirmity. No currency in the market, and no degree of innocence or ignorance on the part of a holder for value, can impart validity to a negotiable instrument which is declared void by statute because based upon a gambling or usurious consideration. *Daniel & D. Neg. Inst.* § 221. Speaking of notes made void by statute, the Kentucky court said in *Lawson v. First Nat. Bank*, 31 Ky. L. Rep. 318, 102 S. W. 324: A statute that makes such notes void "is of a police nature, intended to prevent imposition and fraud. The Negotiable Instruments Act does not repeal this statute in terms nor does it by necessary implication. It has never been the policy of the courts to extend the doctrine of implied repeals further than the evident purpose of the last legislation required. The Negotiable Instruments Statute is a most com-

prehensive piece of legislation. It goes into minutest detail in dealing with the subjects embraced by it. The whole scope of it is shown to be the dealing with commercial paper, so as to protect innocent purchasers . . . against mere defenses available as between the original parties. It gives such paper currency, free from original defenses. But it applies to paper that might have been obligatory between the parties. But, where the parties were never bound because the law made the note void, as contrary to public policy as expressed in the statutes, the Negotiable Instruments Act does not apply, and ought not to. The prevention of crime is of more importance than the fostering of commerce. The later act should be read in view of its purpose, and not as intending to repeal other statutes passed in the exercise of the police power of the state to suppress crime and fraud."

That is in substance what this court said in *Twentieth Street Bank v. Jacobs*, 74 W. Va. 525, 82 S. E. 320, Ann. Cas. 1917D, 695, in which it was held that a paper negotiable in form for money lost in gaming is, under § 1, chap. 97, Code (§ 4168), void in the hands of the holder, even though he took it for value, without notice of the character of the consideration.

The obvious purpose and effect in enacting the Negotiable Instrument Law was the embodiment of the general law merchant as it had been previously applied by the courts. The presumption is that, when passing it, the legislature had in contemplation the existence of the usury statute and the de-

cisions of Virginia and this state construing it as invalidating all contracts comprehended within its scope. It knew, as we must assume, that, by a prior general rule, where a statute declares an instrument void, it gathers no vitality by circulation, although upon such instrument an indorser may be held liable to a bona fide holder without notice. *Dan. Neg. Inst.* § 673. The Virginia court had already declared that, as against an innocent holder, no defense can be made against a negotiable instrument declared by the usury statute to be void. "The original taint adheres to the paper, in whosoever hands it may come. It is void, and the defense may be set up, as well against the innocent holder as the usurer or gambler himself." *Taylor v. Beck*, 3 Rand. (Va.) 324. Where there is nothing in a statute indicating an intention to the contrary, the well-recognized doctrine is: "That the legislature did not intend to innovate upon, unsettle, alter, violate, repeal, or limit another general statute or statutory system, the entire subject-matter of which is not directly nor necessarily involved in the [subsequent] act." *Twentieth Street Bank v. Jacobs*, *supra*.

From these conclusions it follows that, as the rulings on the demurrer and motion to dissolve were not erroneous, our order will affirm the decree complained of, and remand the cause for further proceedings therein, agreeably with equitable principles governing courts of equity in cases of this nature.

Annotation—Usury as a defense against a bona fide purchaser of a bill or note.

The present note is confined to an investigation of the question how far usury between prior parties to a negotiable instrument is a defense as against one who thereafter takes the instrument for value, before maturity, and without knowledge of any defenses thereto; in other words, whether or not it is a defense against one who is a bona fide holder as that term is understood in the law relating to commercial paper. The purchase of paper at a discount as usury has been discussed in a previous note in this series of reports.¹ That note includes the question whether a purchase of paper which had no prior inception

by one who had no knowledge of that fact is usurious. The present note, as above indicated, is confined to cases in which there is no charge of usury against the plaintiff. The right of a bona fide indorsee against his indorser has not, in general, been considered.²

The note is confined to paper which is not usurious on its face.

It is well settled that the right to set up the defense of usury against a bona fide holder depends upon the character of a usurious contract as to being void or not. If the usurious contract is void, the courts are practically agreed that usury is a defense available against a

¹ Note to *People's Bank & T. Co. v. Fenwick Sanitarium*, 43 L.R.A.(N.S.) 211.

² In *McKnight v. Wheeler* (1844) 6 Hill (N. Y.) 492, the payee of a usurious note who had sold and indorsed the same was held to have no defense to an action by his L.R.A.1918C.

indorsee against him as indorser on the ground of the usury. The defendant is stated to have been estopped from setting up the usury. This case was followed in *Morford v. Davis* (1864) 28 N. Y. 481.

bona fide holder; but if the contract is not void, it is not a defense available against such a holder.

Rule under statutes declaring usurious contracts void.

The character of a usurious contract

³ *German Bank v. De Shon* (1883) 41 Ark. 331; *Early v. McCart* (1834) 2 Dana (Ky.) 414 (dictum); *Sauerwein v. Drunner* (1827) 1 Harr. & G. (Md.) 477; *Bridge v. Hubbard* (1818) 15 Mass. 96, 8 Am. Dec. 86; *Union Bank v. Gilbert* (1894) 83 Hun, 417, 31 N. Y. Supp. 945; *Sabine v. Paine* (1911) 148 App. Div. 730, 132 N. Y. Supp. 813; *Crusins v. Siegman* (1913) 81 Misc. 367, 142 N. Y. Supp. 348; *Collier v. Nevill* (1831) 14 N. C. (3 Dev. L.) 30 (see North Carolina cases under revised form of statute, *infra*, note 10); *Solomons v. Jones* (1812) 3 Brev. (S. C.) 54, 5 Am. Dec. 538; *Flemming v. Mulligan* (1822) 2 M'Cord, L. (S. C.) 173, 13 Am. Dec. 707; *Payne v. Trezevant* (1796) 2 Bay (S. C.) 23; *Andrews v. Hoxie* (1840) 5 Tex. 171; *Gilder v. Hearne* (1890) 79 Tex. 120, 14 S. W. 1031, approved in *First Nat. Bank v. Ledbetter* (1896) — Tex. Civ. App. —, 34 S. W. 1042; *Miles v. Kelley* (1897) 16 Tex. Civ. App. 147, 40 S. W. 599; *Rodecker v. Littauer* (1894) 8 C. C. A. 320, 19 U. S. App. 455, 59 Fed. 857 (dictum); *Lowe v. Waller* (1781) 2 Dougl. K. B. 736, 90 Eng. Reprint, 470; *Young v. Wright* (1807) 1 Campb. (Eng.) 140; *Ackland v. Pearce* (1810) 2 Campb. (Eng.) 599; and *Lowe v. Mazaredo* (1816) 1 Starkie (Eng.) 385 (the last three cases holding a bill which had been discounted at a usurious rate void in the hands of a bona fide holder to whom it afterwards came). See *Vallance v. Siddel* (1837) 6 Ad. & El. 932, 112 Eng. Reprint, 356, *infra*, note 20.

In *Owings v. Grimes* (1824) 5 Litt. (Ky.) 332, it is stated obiter that a note given for a usurious consideration, which was void under the statute then in force against usury, was void "in the hands of the assignee, as well as in the hands of the obligee or payee."

It is regarded as settled in *Wilkie v. Roosevelt* (1802) 3 Johns. Cas. (N. Y.) 206, 2 Am. Dec. 149, that usury is a defense against the bona fide holder. The statute is referred to, but not set out, so that its provisions cannot be ascertained.

It is stated in *Powell v. Waters* (1826) 8 Cow. (N. Y.) 669, that a note void in the hands of an indorsee, who had purchased it at a usurious consideration, would be void in the hands of a bona fide purchaser, to whom it might be transferred by such indorsee.

In *Claffin v. Boorum* (1890) 122 N. Y. 385, 25 N. E. 360, it is stated that "a note void in its inception for usury continues void forever, whatever its subsequent history may be. It is as void in the hands of an innocent holder for value as it was in the hands of those who made the usurious L.R.A.1918C.

as to being void or not is usually fixed by statute. Under statutes expressly declaring usurious contracts void, it is uniformly held that usury is a defense that may be set up against a bona fide holder.⁴ This has also been held under statutes making the usurious contract void

contract. No vitality can be given to it by sale or exchange, because that which the statute has declared void cannot be made valid by passing through the channels of trade."

The New York rule is applied to a mortgage in *Re Kellogg* (1902) 113 Fed. 120, affirmed without reference to the point in (1903) 57 C. C. A. 547, 121 Fed. 333.

It seems that the South Carolina statute expressly made the note void in the hands of an innocent holder, for, in *Gaillard v. Le Seigneur* (1840) 1 McMull. L. (S. C.) 225, the court states that the note upon which the action was brought in that case "was given entirely for usurious interest, and both by the Acts of 1777 and 1831 (a) was absolutely void, as well in the hands of an innocent holder as between the original parties to it."

But in *Foltz v. Mey* (1795) 1 Bay (S. C.) 486, it was held that a note executed by the drawer and given to an agent for the purpose of being discounted at a bank, but which was by the agent misappropriated and discounted on his own account at a usurious rate of interest, was valid in the hands of a bona fide holder to whom the note afterwards came in the usual course of trade, the court stating that the note appeared to be fair in its creation or making, made for a legal purpose in the course of trade, and came fairly into the hands of the plaintiff, and that "no intermediate contingencies or usurious transactions between other persons, through whose hands it may have passed, can affect it in the hands of an innocent indorsee."

A note given directly to creditors of the lender was held open to the defense of usury in an action by the payees, although such payees knew nothing of the usury in the original agreement between the borrower and lender. *Tait v. Hannum* (1830) 2 Yerg. (Tenn.) 349. The Tennessee statute was subsequently changed. See *Bradshaw v. Van Valkenburg* (1896) 97 Tenn. 316, 37 S. W. 88.

A mortgage given to secure the note was held good by virtue of a statute in *Coor v. Spicer* (1871) 65 N. C. 401. This case is disapproved in *Ward v. Sugg* (1893) 113 N. C. 480, 24 L.R.A. 280, 18 S. E. 717, and *Faison v. Grandy* (1901) 128 N. C. 438, 83 Am. St. Rep. 693, 38 S. E. 897.

That the New York statute relating to usury has been repealed so far as it affects state banks, and such banks put on a parity with national banks, is held in New York. Accordingly, when a state bank becomes a bona fide holder of a usurious bill or note, it is held to take free from the defense of usury, although the contract would

as to all but the principal sum or void as to the interest.⁴

It is held in some cases in which the form of the statute does not appear, that a usurious contract is void in the hands of an indorsee for a valuable consideration, without notice of the usury.⁵ In other cases it is merely stated that usury is a defense that may be made against an assignee, without stating whether or not the assignee is an innocent holder.⁶

The effect of the Negotiable Instruments Law upon the rights of a bona fide holder is discussed in a subsequent part of this note.

Rule under statutes not expressly declaring usurious contracts void.

Where the statute does not expressly declare the usurious contract void, the courts are not agreed as to the rights of a bona fide holder. It has been held under statutes which do not expressly make the contract void, but provide that no recovery shall be had thereon, or in

case of those statutes providing merely that the interest shall not be recoverable, that usury is a defense against a bona fide holder.⁷ The Iowa court, after stating that the Iowa statute did not expressly declare the contract void, continues: "But the same end is reached, and the same effect is given to its provisions, by declaring that in no case where unlawful interest shall be contracted for shall the plaintiff, in a suit brought upon the contract, have judgment for more than the principal sum loaned."⁸ So it has been held that usury is a defense against a bona fide holder under a statute limiting the rate of interest, providing for the recovery of costs by the defendant in an action on the usurious contract, and for forfeiture by the plaintiff of three times the interest unlawfully reserved or taken.⁹ So, under a statute providing that the taking of interest at more than the stipulated rate "shall be deemed a forfeiture" of the entire interest which has

be void in the hands of private parties. *Schlesinger v. Kelly* (1906) 114 App. Div. 546, 99 N. Y. Supp. 1083; *Vann, Gray, and Chase, JJ.*, in *Schlesinger v. Gilhooly* (1907) 189 N. Y. 1, 81 N. E. 619, 12 Ann. Cas. 1138. This statute receives a complete discussion both as it relates to banks that are bona fide holders and those that are not, in the note to *Schlesinger v. Lehmaier*, 16 L.R.A.(N.S.) 626, and reference should be had thereto.

It has been held in case of a note originally drawn to borrow money at illegal interest that if the holder did accordingly obtain money thereon at a usurious consideration, the note is void, and a bona fide holder cannot, under any circumstances, recover on it; but if, on the other hand, the note was bona fide in its origin, the bona fide holder might recover upon it, provided he had no knowledge of its being subsequently passed upon a usurious consideration. *Burt v. Gwinn* (1815) 4 Harr. & J. (Md.) 507. See *Ayer v. Tilden* (1860) 15 Gray (Mass.) 178, 77 Am. Dec. 355, *infra*, note 9, and *Freeman v. Brittin* (1839) 17 N. J. L. 191, *infra*, note 12.

⁴ *Saltmarsh v. Planters & M. Bank* (1848) 14 Ala. 668, on second appeal in (1850) 17 Ala. 761; *Pearson v. Bailey* (1853) 23 Ala. 537.

⁵ *Townsend v. Bush* (1814) 1 Conn. 250; *Bacon v. Norton* (1811) 5 Day (Conn.) 128.

⁶ *True v. Triplett* (1862) 4 Met. (Ky.) 57.

⁷ *Laramore v. Bank of Americus* (1882) 69 Ga. 722; *Angier v. Smith* (1897) 101 Ga. 844, 28 S. E. 167; *Atlanta Sav. Bank v. Spencer* (1899) 107 Ga. 629, 33 S. E. 878; *Bacon v. Lee* (1857) 4 Iowa, 490; *Burrows v. Cook* (1864) 17 Iowa, 426; *Perry Sav. Bank v. Fitzgerald* (1914) 167 L.R.A.1918C.

Iowa, 446, 149 N. W. 497; *Union Nat. Bank v. Fraser* (1885) 63 Miss. 231; *Armor v. Bank of Loudon* (1905) 86 Miss. 658, 39 So. 17.

In *Bailey v. Lumpkin* (1846) 1 Ga. 392, the court states that the contract is void as to the interest in the hands of the original payee "or an innocent holder, without notice." Apparently the term is used in the sense of a bona fide holder, and it is so interpreted in the subsequent case of *Miller v. Gould* (1868) 38 Ga. 465. The statute involved in this case declared that usurious contracts, bonds, etc., "shall not be void, but the principal due thereon shall be recoverable at law, and no more."

⁸ *Bacon v. Lee* (1857) 4 Iowa, 490. The court, after stating that such a provision as that set out in the text extends to the note, even in the hands of an innocent holder, continues: "We are strengthened in this conclusion by the language of the subsequent section, which provides that the proper bona fide assignee of any usurious contract may recover against the usurer the full amount of the consideration paid by him for such contract, deducting the amount of the judgment for the principal sum recovered against the makers."

⁹ *Kendall v. Robertson* (1853) 12 Cush. (Mass.) 156; *Knapp v. Briggs* (1861) 2 Allen (Mass.) 551; *North Bridgewater Bank v. Copeland* (1863) 7 Allen (Mass.) 129; *Whitten v. Hayden* (1865) 7 Allen (Mass.) 407.

But in *Ayer v. Tilden* (1860) 15 Gray (Mass.) 178, 77 Am. Dec. 355, where a note which had been negotiated so as to become a valid and binding contract upon a lawful consideration was subsequently transferred at a usurious consideration, the usury was held to be no defense to an ac-

been agreed to be paid, it has been held that usury is a defense against a bona fide holder; such a statute is regarded as making the contract, as to the interest, void.¹⁰ Usury is a defense to the maker against a bona fide holder of a note given as the last of a series of renewal notes, all of which were tainted with usury; and this is true although the note renewed by the note in suit had been discounted by the payee, who agreed upon the renewal while it was out of his hands, where the payee took it up upon the renewal.¹¹ The underlying theory of these cases is that, although the usurious contract is not expressly declared void by the statute, it is void, and therefore falls within the general rule that usury is a defense available against a bona fide holder where the usurious contract is void.

A majority of courts, however, do not regard a statute not expressly declaring usurious contracts void as render-

ing them void by construction, and therefore take the view that, under such a statute, usury is not a defense available against a bona fide holder.¹² This has been held under a statute merely prohibiting the taking of more than a stated rate of interest;¹³ also under a statute prohibiting the taking of more than a stated rate of interest, and imposing a penalty for so doing;¹⁴ and under a statute providing that a loan at a greater rate than that authorized "shall be deemed to be for an illegal consideration, as to the excess beyond the principal amount so loaned or forborne;"¹⁵ also under a statute making the contract voidable as to the usury, at the instance of the debtor;¹⁶ and under a statute providing that no person shall recover in any court more than a certain rate of interest, and that any payments made above this rate shall be deemed to be payments on the principal, and the court shall render judgment for any balance

tion of a bona fide holder thereof against the maker. See *Burt v. Gwinn* (1815) 4 Harr. & J. (Md.) 507, supra, note 3, and *Freeman v. Brittin* (1839) 17 N. J. L. 191, infra, note 12.

¹⁰ *Ward v. Sugg* (1893) 113 N. C. 489, 24 L.R.A. 280, 18 S. E. 117; *Faison v. Grandy* (1901) 128 N. C. 438, 83 Am. St. Rep. 693, 38 S. E. 897, opinion upon rehearing of (1900) 126 N. C. 827, 36 S. E. 276.

¹¹ *Knapp v. Briggs* (1861) 2 Allen (Mass.) 551.

¹² *Conkling v. Underhill* (1842) 4 Ill. 388; *Saylor v. Daniels* (1865) 37 Ill. 331, 87 Am. Dec. 250; *Hemmenway v. Cropsey* (1865) 37 Ill. 358; *Kleeman v. Frisbie* (1872) 63 Ill. 482; *Richter v. Burdock* (1913) 257 Ill. 410, 100 N. E. 1063; *Smith v. Mohr* (1895) 64 Mo. App. 39.

This rule is recognized in *Woodworth v. Huntoon* (1865) 40 Ill. 131, 89 Am. Dec. 340.

In *Gaul v. Willis* (1856) 26 Pa. 259, where an accommodation note was sold by the accommodation party, who was the payee, at a usurious rate of interest, and by the purchaser sold to the plaintiff at a usurious rate of interest, the defense of usury was made in an action by the plaintiff against the makers, but whether it was usury in the first or second purchase that was the basis of the defense is not disclosed. The court treated the plaintiff as a bona fide holder and entitled to recover.

It is assumed in *Haynes v. Gay* (1905) 37 Wash. 230, 79 Pac. 794, that a bona fide holder of a usurious note can recover thereon, but no statute is set out. This is assumed also in *Keene v. Behan* (1905) 40 Wash. 505, 82 Pac. 884, but the plaintiff in that case was denied recovery because he failed to prove that he was a bona fide holder. It seems the Washington statute did not make a usurious note void; at any rate, it is so stated in *American Sav. Bank L.R.A.1918C*.

& T. Co. v. Helgesen (1911) 64 Wash. 54, 116 Pac. 837, Ann. Cas. 1913A, 390, rehearing in (1912) 67 Wash. 572, 122 Pac. 26, Ann. Cas. 1913A, 390; it was accordingly held in the latter case that the defense of usury is not available to the maker against the holder acquiring the note in good faith, for value, before maturity.

Hornblower, Ch. J., in *Freeman v. Brittin* (1839) 17 N. J. L. 191, states that "if a note, whether for value received, or for accommodation only, is fairly negotiated by the payee, and a subsequent party indorses it upon a usurious discount, and it afterwards gets into the hands of a bona fide indorsee, without notice of the usury, he may strike out the names of the usurious parties, and make title through the payee, or any innocent indorser subsequent to him, and recover upon the note." And see *Ayer v. Tilden* (1860) 15 Gray (Mass.) 178, 77 Am. Dec. 355, supra, note 9; *Burt v. Gwinn* (1815) 4 Harr. & J. (Md.) 507, supra, note 3.

¹³ *Young v. Berkley* (1821) 2 N. H. 410; *Forbes v. Marsh* (1824) 3 N. H. 119. The rule of these cases is recognized in *Williams v. Little* (1840) 11 N. H. 66.

¹⁴ *Creed v. Stevens* (1838) 4 Whart. (Pa.) 223; *Bank v. Flanigan* (1882) 39 Phila. Leg. Int. (Pa.) 264.

¹⁵ *Lynchburg Nat. Bank v. Scott Bros.* (1895) 91 Va. 652, 29 L.R.A. 827, 50 Am. St. Rep. 860, 22 S. E. 287.

In the early Virginia case of *Whitworth v. Adams* (1827) 5 Rand. (Va.) 333, a bona fide indorsee of a note which had previously been transferred upon a usurious consideration was held entitled to recover thereon.

¹⁶ *Bradshaw v. Van Valkenburg* (1896) 97 (Tenn.) 316, 37 S. W. 88; *Hamilton v. Fowler* (1899) 40 C. C. A. 47, 99 Fed. 18, writ of certiorari denied in (1900) 176 U. S. 685, 44 L. ed. 639, 20 Sup. Ct. Rep. 1027.

after deducting such payments;¹⁷ and under a statute relating to banks, declaring that the discount and purchase of a bill at more than a stated rate "shall be deemed and held usurious and unlawful within the meaning of the act;"¹⁸ and under a statute expressly providing that a usurious contract shall not be void, but that in any action "the plaintiff shall only recover the principal without interest, and the defendant shall recover costs."¹⁹

Some statutes expressly relieve a bona

fide holder of the defense of usury.²⁰ The Minnesota statute to this effect has been interpreted to preserve in favor of negotiable paper in respect to the defense of usury the same privileges and immunities accorded to such paper at common law in respect to defenses generally; and it has been held that in an action upon such paper the defense of usury may be interposed only where any other defense, if it existed, might be interposed.²¹ Accordingly, the statute protects one who took after maturity

¹⁷ *Day v. Walker* (1876) 16 Kan. 326 (dictum); *Gross v. Funk* (1878) 20 Kan. 655.

A bona fide holder was held entitled to recover in *Holden v. Clark* (1876) 16 Kan. 348, as against a defense of an alleged partial failure of consideration and usury, but there is no discussion of the defense of usury.

¹⁸ *Pickaway County Bank v. Prather* (1861) 12 Ohio St. 497, approved in *Farmers & M. Bank v. Parker* (1867) 37 N. Y. 148, in dealing with an Ohio contract.

¹⁹ *Wortendyke v. Meehan* (1879) 9 Neb. 221, 2 N. W. 339 (allowing the defense against the plaintiff because he had not shown himself to be a bona fide holder); *State Sav. Bank v. Scott* (1880) 10 Neb. 83, 4 N. W. 314; *Cheney v. Cooper* (1883) 14 Neb. 415, 16 N. W. 471; *Evans v. De Roe* (1884) 15 Neb. 630, 20 N. W. 99; *Sedgwick v. Dixon* (1886) 18 Neb. 545, 26 N. W. 247; *Cheney v. Janssen* (1886) 20 Neb. 128, 29 N. W. 289; *Lincoln Nat. Bank v. Davis* (1889) 25 Neb. 376, 41 N. W. 281 (allowing the defense of usury because plaintiff was not shown to be a bona fide holder).

This rule is recognized in *Olmsted v. New England Mortg. Secur. Co.* (1881) 11 Neb. 487, 9 N. W. 650; *Darst v. Backus* (1885) 18 Neb. 231, 24 N. W. 681; *Knox v. Williams* (1888) 24 Neb. 630, 8 Am. St. Rep. 220, 39 N. W. 786; *Blackwell v. Wright* (1889) 27 Neb. 269, 20 Am. St. Rep. 662, 43 N. W. 116; *Richardson v. Stone* (1891) 32 Neb. 617, 49 N. W. 763; *Colby v. Parker* (1892) 34 Neb. 510, 52 N. W. 693; *Suiter v. Park Nat. Bank* (1892) 35 Neb. 372, 53 N. W. 205; *McDonald v. Aufdengarten* (1894) 41 Neb. 40, 59 N. W. 762; *Bovier v. McCarthy* (1903) 4 Neb. (Unof.) 490, 94 N. W. 965.

It has been held under the Nebraska statute that usury is a defense to an action in foreclosure of a mortgage securing a note, where the plaintiff took by transfer by a written assignment on the mortgage only, for value, before maturity, and without notice of any defects. *Doll v. Hollenbeck* (1886) 19 Neb. 639, 28 N. W. 286.

In *Cheney v. Campbell* (1889) 28 Neb. 376, 44 N. W. 451, where interest notes given wholly for usurious interest were assigned to a bona fide holder for one half their face value, the purchaser refusing to

pay more because of the fact that the notes were secured by a second mortgage, and there was danger that the security would be inadequate, the purchaser was permitted to recover the amount paid by him, with lawful interest thereon.

²⁰ Statute involved in *First Nat. Bank v. Bentley* (1880) 27 Minn. 87, 6 N. W. 422.

It is assumed in *Haas v. Camp* (1889) 40 Minn. 329, 42 N. W. 20, that a bona fide purchaser of usurious paper is entitled to recover thereon; no statute is mentioned, and it is not clear that the statute involved in *First Nat. Bank v. Bentley* was still in force.

The Minnesota statute was held not to protect a bona fide purchaser of a mortgage securing negotiable paper, in *Scott v. Austin* (1887) 36 Minn. 460, 32 N. W. 89, 864, and *Smith v. Parsons* (1893) 55 Minn. 520, 57 N. W. 311.

The Statute 58 Geo. III. chap. 93, provides that no bill of exchange or promissory note given for a usurious consideration or upon a usurious contract shall "be void in the hands of an indorsee for valuable consideration, unless such indorsee had at the time of discounting or paying such consideration for the same, actual notice that such bill of exchange or promissory note had been originally given for a usurious consideration, or upon a usurious contract." This statute was held not to relieve a bona fide holder of a usurious note who had taken the same for an antecedent debt, of the defense of usury, in *Vallance v. Siddel* (1837) 6 Ad. & El. 932, 112 Eng. Reprint, 356. This decision was followed in *Geddes v. Culver* (1845) 3 U. C. Q. B. 162, under the Statute of 7 Wm. IV. chap. 5.

The New York Revised Statutes of 1830, 1 Rev. Stat. 772, § 5, expressly relieved a bona fide holder of the defense of usury (*Hackley v. Sprague* (1833) 10 Wend. (N. Y.) 113); but this statute was subsequently repealed.

A statute enacted in Massachusetts, providing that usury between the payee and maker of a promissory note payable on time shall be no defense as against the bona fide indorsee of the note, taking it before maturity, was held in *North Bridgewater Bank v. Copeland* (1863) 7 Allen (Mass.) 139, not to apply to a contract in existence at the time of the enactment of the statute.

²¹ *First Nat. Bank v. Bentley* (Minn.)

from a bona fide holder who purchased for value, before maturity.²⁵ Such a statute, which relieves a bona fide holder of the defense of usury in any "action" brought on the paper, applies in equity as well as at law.²⁶

It has been held generally by cases that make no reference to the statute, that a note is valid in the hands of a bona fide holder regardless of usury in its inception.²⁴

Effect of Negotiable Instruments Act.

There is a difference of judicial opinion as to the effect of the provisions of the Negotiable Instruments Act with reference to bona fide holders, upon the availability of the defense of usury against such a holder. It is the view of some courts that that act does not relieve a bona fide holder of the defense of usury where a general statute makes usurious contracts void.²⁵ This has also been held where the statute relating to usury, while not expressly making the usurious contract void, has been construed by the court to have this effect.²⁶

The provision of the Negotiable Instruments Act which has been relied upon to relieve a bona fide holder of the defense of usury is that providing that the holder in due course holds the instrument "free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."²⁷

The reasoning by which the courts arrive at this conclusion is, in brief, that to thus relieve a bona fide holder of the defense would be in effect to repeal

the general statutory provisions relating to usury. Such statutory provisions not being directly repealed by the Negotiable Instruments Act, it is necessary to bring into operation the doctrine of repeal by implication, which is not favored.

The courts therefore conclude that the general statutory provisions must be given effect.²⁸

Entering into the provisions of the Negotiable Instruments Act more specifically, it has been stated that the clause of that act that a holder in due course takes "free from defenses available to prior parties among themselves" must be construed in connection with the law as it existed prior to the enactment thereof. In a state in which usury is treated as in the nature of a forfeiture, and properly urged against the contract, into whosoever hands it may pass, it is stated that usury is in the nature of a defense which is not "available to prior parties among themselves" alone, but is available as between the maker of the instrument and the world. A fair construction of this provision of the Negotiable Instruments Act is held to be that a holder in due course is protected against such defenses as are available between prior parties, but takes the instrument subject to any defense that the parties thereto may have, under the law then in force, urged against the instrument in the hands of third parties.²⁹

The provision of the Negotiable Instruments Act that a holder in due course may enforce payment of the instrument against all parties liable thereon has been stated to mean that payment of the instrument may be enforced in the

supra. Practically the same construction is put upon the New York statute of 1830 in *Hackley v. Sprague* (N. Y.) supra.

²² *Robinson v. Smith* (1895) 62 Minn. 62, 64 N. W. 90.

But such holder must prove his bona fide character when usury is shown. *Seymour v. Strong* (1841) 1 Hill (N. Y.) 563.

²³ *Coatsworth v. Barr* (1863) 11 Mich. 199.

²⁴ *Tucker v. Wilamowicz* (1847) 8 Ark. 157. Apparently this case was decided by virtue of a statute; at any rate, a statute is cited as authority for the proposition of the text above, although the statute is not set out. A statute making a bill of exchange or promissory note, void in its inception on account of usury, valid in the hands of a bona fide holder, was held unconstitutional in the subsequent case of *German Bank v. De Shon* (1883) 41 Ark. 331.

In *Chadbourne v. Watts* (1813) 10 Mass. L.R.A.1918C.

121, 6 Am. Dec. 100, the parties to a usurious loan had a settlement in which the amount found due, including usurious interest, was merged into a new note: subsequently another settlement was had on which the interest was calculated at the lawful rate and another note given for balance due. In an action by an indorsee of this note, the maker was not allowed to set up usury in the first loan. Compare with *Massachusetts cases* cited in note 9, supra.

²⁵ *ESKRIDGE v. THOMAS*, ante, 769; *Cruikshanks v. Siegman* (1913) 81 Misc. 367, 142 N. Y. Supp. 348. But see other New York cases contra, note 29, infra.

²⁶ *Perry Sav. Bank v. Fitzgerald* (1914) 167 Iowa, 446, 149 N. W. 497.

²⁷ *ESKRIDGE v. THOMAS*; *Perry Sav. Bank v. Fitzgerald* (Iowa) supra.

²⁸ *Perry Sav. Bank v. Fitzgerald* (Iowa) supra.

full amount thereof against parties claiming as a defense thereto that the title of the indorser was defective, or a defense which was only available between the prior parties thereto.²⁹

On the contrary, it is the view of some courts even in jurisdictions in which usurious contracts are declared void by statute that the Negotiable Instruments Law does relieve a bona fide holder of the defense of usury.³⁰

Estoppel, or waiver of defense.

While the general question of estoppel or waiver is beyond the scope of this note, it has seemed advisable to call attention to the fact that the maker of a usurious bill or note may preclude himself from taking advantage of the usury. No exhaustive citation of cases is attempted in this connection. The maker of a note may thus preclude himself by representations. The subject of estoppel by representations has already been covered in this series of reports and reference is made thereto.³⁰

A renewal of the note in the hands of the bona fide holder has been most frequently invoked to preclude the maker from setting up the defense of usury. A large number of cases support the rule that the maker of a usurious note who renews the note in the hands of a bona fide holder with no knowledge of the usury precludes himself from relying on the defense of usury.³¹ But if the renewal is made after the bona fide holder has acquired knowledge of the

usury, the new instrument is subject to the defense of usury as against him.³²

It has been held that the makers of a usurious note who renewed the same by agreement with the payee, but drew the note in favor of a third person to whom the payee subsequently transferred it, are entitled to make the defense of usury against such third person.³³ It was urged in this case that by making the promise directly to the plaintiff the makers of the note in fact represented to her that the transaction in which the note originated was a lawful one, and that they were estopped to deny the truth of that representation. In answer to this argument the court states that this would be so if the note had been made with the consent of the plaintiff, upon her agreement to take it from the makers in payment of the debt due from the original payee, but no such fact was found.

The fact that the note contains a stipulation that it is to be "without defalcation or discount, and waive all defense to the payment of this note in the hands of a bona fide purchaser or holder," does not preclude the makers from availing themselves of the defenses allowed by the usury statute as against the bona fide holder. The negotiability of promissory notes is stated to be regulated by the statute, and not by the contract of the parties, evidenced by the instrument; that to give such a stipulation the effect of precluding the defense

²⁹ Wood v. Babbitt (1907) 149 Fed. 818; Klar v. Kostuk (1909) 65 Misc. 199, 119 N. Y. Supp. 683; Ernst Oeser & Co. v. Behrend (1915) 89 Misc. 391, 151 N. Y. Supp. 873.

Laughlin, J., in Schlesinger v. Kelly (1906) 114 App. Div. 546, 99 N. Y. Supp. 1083, and Willard Bartlett, J., in Schlesinger v. Gilhooly (1907) 189 N. Y. 1, 81 N. E. 619, 12 Ann. Cas. 1138, are of this opinion.

Apparently the reason for the decision in Emanuel v. Misicki (1914) 149 N. Y. Supp. 905, to the effect that usury is not an available defense against a bona fide holder, is that the Negotiable Instruments Law precludes this defense.

Contra, Crusins v. Siegman (1913) 81 Misc. 367, 142 N. Y. Supp. 348, supra, note 25.

³⁰ See note to Holzbog v. Bakrow, 50 L.R.A.(N.S.) 1023, particularly on page 1031, as to estoppel to set up the defense of usury.

³¹ Masterson v. Grubbs (1881) 70 Ala. 406; Powell v. Waters (1826) 8 Cow. (N. Y.) 669; Brinkerhoff v. Foote (1839) Hoffm. Ch. (N. Y.) 291; Smedberg v. Whittlesey (1846) 3 Sandf. Ch. (N. Y.) 320; McWhirter v. Longstreet (1903) 33 Misc. 831, L.R.A.1918C.

81 N. Y. Supp. 334; Smalley v. Doughty (1860) 6 Bosw. (N. Y.) 66 (part of the obligation was paid and a new instrument given for the balance); Flemming v. Mulligan (1822) 2 McCord, L. (S. C.) 173, 13 Am. Dec. 707; Palmer v. Call (1881) 2 McCrary 522, 7 Fed. 737, affirmed in (1885) 116 U. S. 98, 29 L. ed. 559, 6 Sup. Ct. Rep. 301; Cuthbert v. Haley (1799) 8 T. R. 390, 101 Eng. Reprint, 1450.

Mitchell v. McCullough (1877) 59 Ala. 179. Upon a subsequent appeal of this case, reported in (1879) 64 Ala. 250, it was shown that the holder of the note had been informed of the usury at the time of taking it. Upon these facts the court held that to cut off the defense of usury against non-commercial paper there must be more than a transfer of the paper to one who receives it in good faith and without notice of the usury,—there must, in addition to this, be a renewal of the debt by giving a new security, payable to the transferee.

The rule is recognized in Glendenning v. Blood (1884) 12 Daly (N. Y.) 421; Smedberg v. Simpson (1848) 2 Sandf. (N. Y.) 85.

³² Theobald v. Crickmore (1819) 2 Barn. & Ald. 594, 106 Eng. Reprint, 483.

³³ Treadwell v. Archer (1879) 76 N. Y. 196.

of usury would be in effect to repeal the statute, and this it is not competent for the parties to do.⁸⁴

A different question is presented where the purchaser had notice of the usury before he took a transfer of the note; in such a case the purchaser is not an innocent holder, and although the maker

has stated that there was no defense to the note, the purchaser is not deceived in making the purchase; accordingly, it has been held that the maker has not waived the defense of usury as against a purchaser who took with notice of the usury.⁸⁵

⁸⁴ Union Nat. Bank v. Fraser (1885) 63 Miss. 231.

⁸⁵ Torrey v. Grant (1848) 10 Smedes & M. (Miss.) 89. The court here treats the

usury as an illegal consideration,—a consideration prohibited by law; and holds that no waiver of the defense is binding as to a party who has notice. W. A. E.

NORTH DAKOTA SUPREME COURT.

A. P. SIMONSON
v.

CARL F. WENZEL et al.
and

M. C. KRUPP et al., Appts.

(27 N. D. 638, 147 N. W. 804.)

Mortgage — of contract to purchase — record — effect — purchase of interest of vendor.

W., who held an unrecorded executory contract for the purchase from D. of certain real property, under which he was in possession, executed and delivered to plaintiff a mortgage thereon, which was recorded. Subsequently W. assigned his interest under such contract to K. for a valuable consideration, who in good faith paid the consideration, including the amount due to D., the vendor, under such executory contract, and procured a deed from such vendor without actual knowledge of the existence of such mortgage. In an action by plaintiff to foreclose his mortgage, held:

1. That W. had a mortgageable interest in the property.

For other cases, see Mortgage, I. a, in Dig. 1-52 N. S.

2. That the mortgage of his equitable interest to plaintiff constituted a "conveyance," within the meaning of our Recording Act.

For other cases, see Records and Recording Laws, III. a, in Dig. 1-52 N. S.

3. That the record of such mortgage operated as constructive notice to K., who, with actual knowledge of W.'s equities, purchased an assignment of his contract for deed.

For other cases, see Records and Recording Laws, III. d, in Dig. 1-52 N. S.

4. That to the extent of the amount paid by K. to D., with interest, he has an equity

Headnote by FISK, J.

Note. — For taking deed from stranger to record title as constructive notice of instruments of record to or by him, see annotation following Brannan v. Marshall, post, 787.

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superior to plaintiff's claim, which should be recognized and protected by the decree. *For other cases, see Mortgage, VI. e, in Dig. 1-52 N. S.*

(June 5, 1914.)

APPEAL by defendants Krupp et al. from a judgment of the District Court for McHenry County in plaintiff's favor in an action brought to foreclose a mortgage. Modified and affirmed.

The facts are stated in the opinion.

Messrs. Christianson & Weber and Engerud, Holt, & Frame, for appellants:

The interest of a vendee, under an unperformed executory contract, does not constitute real property of such vendee.

Miller v. Shelburn, 15 N. D. 182, 107 N. W. 51; Cummings v. Duncan, 22 N. D. 534, 134 N. W. 712, Ann. Cas. 1914B, 976.

This equitable fiction is based on the maxim that equity regards as done that which ought to be done, but even in equity such maxim will not be enforced to the injury of innocent third parties.

Casey v. Cavaroc, 96 U. S. 467, 24 L. ed. 779.

A mere contract or covenant to convey at a future time, on the purchaser performing certain acts, does not create an equitable title. It is but an agreement that may ripen into an equitable title.

Bispham, Eq. § 365; Chappell v. McKnight, 108 Ill. 570; Warvelle, Vend. & P. p. 187, § 2; Sutherland v. Parkins, 75 Ill. 338; Smith v. Jones, 21 Utah, 270, 60 Pac. 1104; Miller v. Shelburn, 15 N. D. 186, 107 N. W. 51; Cummings v. Duncan, 22 N. D. 534, 134 N. W. 712, Ann. Cas. 1914B, 976; Davis v. Williams, 130 Ala. 530, 54 L.R.A. 751, 89 Am. St. Rep. 55, 30 So. 488; Smith v. Forbes, 21 Utah, 270, 60 Pac. 1104; Bradwell v. Bank of Bainbridge, 103 Ga. 242, 29 S. E. 756.

The recording of an instrument not required or entitled to be recorded has no effect whatever.

Mesick v. Sunderland, 6 Cal. 297; Lewis v. Barnhart, 145 U. S. 56, 36 L. ed. 621,

12 Sup. Ct. Rep. 772; *Burck v. Taylor*, 152 U. S. 634, 38 L. ed. 578, 14 Sup. Ct. Rep. 696; *Lynch v. Murphy*, 161 U. S. 247, 40 L. ed. 688, 16 Sup. Ct. Rep. 523; *Ludlow v. Van Ness*, 8 Bosw. 178; *Lenoir v. Valley River Min. Co.* 113 N. C. 513, 18 S. E. 73; *Bassinger v. Spangler*, 9 Colo. 175, 10 Pac. 809.

Any instrument executed by anyone not having a record title would be out of the chain of title, and not binding either upon the Dakota Development Company or Krupp.

Garber v. Gianella, 98 Cal. 527, 33 Pac. 458; *Doran v. Dazey*, 5 N. D. 167, 57 Am. St. Rep. 550, 64 N. W. 1023.

When one searches till he finds the deed by which his grantor acquires the title, he is not bound to look for deeds made prior to that time. Such prior deeds are not "in the line of title" as that term is used by conveyances and searches.

Ford v. Unity Church Soc. 120 Mo. 498, 23 L.R.A. 561, 41 Am. St. Rep. 711, 25 S. W. 394; *Connecticut v. Bradish*, 14 Mass. 296; *Corbin v. Sullivan*, 47 Ind. 356; *Lozey v. Simpson*, 11 N. J. Eq. 246; *Odle v. Odle*, 73 Mo. 289; *Hibbs v. Union Cent. L. Ins. Co.* 40 Ohio St. 543; *Sands v. Beardsley*, 32 W. Va. 594, 9 S. E. 925.

Where one gives a mortgage on property to which he has not yet acquired title, the record of it is not constructive notice to a purchaser in good faith; since the mortgage will not appear in the chain of title, but will appear to have been given by a stranger, nor will it be notice to his vendor, who, on giving a deed, takes back a purchase-money mortgage.

Bingham v. Kirkland, 34 N. J. Eq. 229; *Farmers' Loan & T. Co. v. Maltby*, 8 Paige, 361; *Calder v. Chapman*, 52 Pa. 359, 91 Am. Dec. 163; *Bright v. Buckman*, 39 Fed. 243; *Donovan v. Twist*, 105 App. Div. 171, 93 N. Y. Supp. 990.

The registration of the mortgage, having occurred before the records disclosed title in the mortgagor, was not constructive notice to the second grantee, who purchased the property after the title had been transferred to his grantor.

2 Devlin, Deeds, 3d ed. pp. 1330, 1331, § 724; *Farmers' Loan & T. Co. v. Maltby*, 8 Paige, 361; *Lozey v. Simpson*, 11 N. J. Eq. 246; *Calder v. Chapman*, 52 Pa. 359, 91 Am. Dec. 163; *Page v. Waring*, 76 N. Y. 463; *Buckingham v. Hanna*, 2 Ohio St. 551; *Doswell v. Buchanan*, 3 Leigh, 365, 23 Am. Dec. 280; *Hetzel v. Barber*, 69 N. Y. 1; *Schoch v. Birdsall*, 48 Minn. 441, 51 N. W. 382; *Turman v. Sanford*, 69 Ark. 95, 61 S. W. 167.

So far as the Dakota Development Company is concerned, the recording of the L.R.A.1918C.

mortgage from Wenzel to Simonson in no manner constituted constructive notice.

Charles v. McGee, 1 N. D. 365, 26 Am. St. Rep. 633, 48 N. W. 231; *Union Nat. Bank v. Moline, M. & S. Co.* 7 N. D. 201, 73 N. W. 527.

The stipulation contained in the contract against the assignment or hypothecation of Wenzel's contract rights was a valid, integral part of the contract itself.

Mueller v. Northwestern University, 195 Ill. 236, 88 Am. St. Rep. 194, 63 N. E. 110; *Barringer v. Bes Line Constr. Co.* 23 Okla. 131, 21 L.R.A.(N.S.) 597, 99 Pac. 775; *Zetterlund v. Texas Land & Cattle Co.* 55 Neb. 355, 75 N. W. 860; *Grigg v. Landis*, 19 N. J. Eq. 350; *Schearff v. Dodge*, 33 Ark. 340; *Marvel v. Ortlip*, 3 Del. Ch. 9; *Bonds-Foster Lumber Co. v. Northern P. R. Co.* 53 Wash. 302, 101 Pac. 879; *Devlin, Deeds*, 3d ed. § 850a.

Plaintiff slept on any rights which he might have had, and cannot at this time be permitted to assert his alleged right against another who has not only acquired the equitable, but also the full legal, estate to the premises involved.

Jones v. Rush, 156 Mo. 364, 57 S. W. 118; *Hayden v. Huff*, 60 Neb. 625, 83 N. W. 920; *Peters v. Huff*, 63 Neb. 99, 88 N. W. 179; *Bruce v. Vogel*, 38 Mo. 105; *McNary v. Southworth*, 58 Ill. 473.

The holder of a junior equity, by acquiring the legal title before he has notice of a prior equity, obtains the superior right.

Carlisle v. Jumper, 81 Ky. 282; *Newton v. McLean*, 41 Barb. 285; *Rexford v. Rexford*, 7 Lans. 6; *Carroll v. Johnston*, 55 N. C. (2 Jones, Eq.) 120; *Hoult v. Donahue*, 21 W. Va. 294; *Fitzsimmons v. Ogden*, 7 Cranch, 2, 3 L. ed. 249; *Simmons v. Ogle*, 105 U. S. 271, 26 L. ed. 1087.

Messrs. C. W. Hookway and D. J. O'Connell for respondent.

Flisk, J., delivered the opinion of the court:

This is an appeal from a judgment of the district court of McHenry County, decreeing the foreclosure of a real estate mortgage in plaintiff's favor. The appeal is upon the judgment roll proper; appellants' contention being that the conclusions of the trial court are not warranted by the findings of fact. Such findings of fact are in substance as follows:

That on and prior to March 20, 1906, the defendant Dakota Development Company was the owner in fee of the real estate in controversy, as disclosed by the public records in the office of the register of deeds. On such date this company entered into an executory contract with defendant Carl F. Wenzel, in the usual form, whereby, for a

stated consideration of \$100, \$35 of which was paid in cash and the balance to be paid in equal instalments on March 20, 1907, and March 30, 1908, with interest, it promised and agreed to sell and convey such premises to the said Wenzel, such contract obligating the purchaser to pay all taxes and assessments levied, assessed, or imposed upon the premises in each year, and also contained a stipulation that "no assignment or transfer of any interest in and to this agreement or the lands described, less than the whole thereof, will be recognized by said vendor under any circumstances or in any event whatever, and no assignment shall be binding upon the vendor unless approved by its president." It also contained a stipulation "that time is to be the very essence of this agreement." Such contract also contained other stipulations relative to the vendor's right to declare a forfeiture in case the vendee failed in any respect to comply with his part of the contract, but we deem it unnecessary to set such provisions out in extenso.

Defendant Wenzel entered into the possession of the premises and constructed a dwelling house thereon, which he and his family occupied as their homestead until about January 20, 1908, when he sold and assigned such contract to defendant M. C. Krupp.

On April 17, 1907, Wenzel and wife, for a valuable consideration, executed and delivered to plaintiff their promissory note for the sum of \$914.70, payable on November 1st thereafter, with interest at the rate of 8 per cent per annum, and to secure the payment thereof they executed and delivered to plaintiff a mortgage on the land in controversy, which was filed in the office of the register of deeds of McHenry county on April 18, 1907, and recorded in book 31 of mortgages, at page 516.

That such note and mortgage have not been paid, and plaintiff is the present owner and holder thereof.

That Carl F. Wenzel paid to the Dakota Development Company the sum of \$35 at the time of the execution of the contract for deed, but made default in the payment due March 20, 1907, and the same was not paid until after the assignment of such contract to defendant Krupp, as hereinafter set forth. That such contract for deed was at no time recorded or filed for record in the office of the register of deeds of McHenry county, and the record title of the premises at all times up to January 29, 1908, remained in the Dakota Development Company.

On or about January 20, 1908, Wenzel, while in possession of said land as his homestead, entered into negotiations with L.R.A.1918C.

defendant Krupp for the sale to him of the contract for deed aforesaid, and the premises therein described, upon the terms that such contract was to be assigned to Krupp, who was to receive a warranty deed of the premises direct from the development company. Wenzel and wife thereupon assigned their interest in such contract to Krupp, and the latter paid to the development company the amount then remaining due upon said contract (\$65 and interest), and Krupp also paid to Wenzel the agreed consideration of \$1,000, less the payment aforesaid to the development company; and the development company did not, nor did its president or any one of its authorized officials, have any knowledge or actual notice of the execution or delivery of the mortgage to the plaintiff aforesaid.

That defendant Krupp purchased Wenzel's interest in such contract in good faith and without any actual notice or knowledge of the existence of plaintiff's mortgage, and he had no intent to cheat or defraud the plaintiff, but acted in absolute good faith in the making of said purchase, and purchased and paid for the same in utter ignorance of the plaintiff's mortgage, but he knew that Wenzel and family were living on and occupying said premises, but had no notice or knowledge of such mortgage other than that imparted by the record thereof.

On January 24, 1908, the development company duly executed and delivered to Krupp a warranty deed in the usual form, conveying the premises to him, which deed contained the usual covenants, and which was duly filed for record on January 29, 1908.

The trial court also found that the defendant Wenzel was on March 3, 1910, adjudged a bankrupt in the Federal court, and on June 22, 1910, that court, in due form, discharged him from all debts and provable claims; the notes held by plaintiff being scheduled in such bankruptcy court.

Upon such findings of fact the district court made conclusions of law favorable to plaintiff, adjudging a foreclosure of his mortgage.

Among other conclusions, the trial court found that, at the time of the execution of the mortgage by Wenzel, he had a mortgageable interest in and to the said premises by virtue of the contract for deed, and that the recording of such mortgage was due and legal notice to all the world of the rights of the plaintiff as mortgagee, and that defendant Krupp therefore had constructive notice of such mortgage at the time he purchased the assignment of the contract for deed to the said premises, and the conveyance of the premises to him by the

development company was subject to the lien of plaintiff's mortgage.

From the above it is apparent that the crucial question for decision is whether appellant Krupp, who, as the trial court found, in good faith and for value purchased an assignment of the Wenzel contract and a deed of the premises from its codefendant, the development company, without any actual knowledge of the plaintiff's mortgage, was nevertheless affected with constructive notice thereof so as to confer upon plaintiff a lien under his mortgage superior and paramount to the rights of such defendant. In answering this question we must bear in mind the fact, as found by the trial court, that the contract for deed executed and delivered by the development company to Wenzel was not entitled to record, nor was the same disclosed in any way by the public records, and, as far as such records disclosed, Wenzel had no interest whatever in the property in controversy, but the same stood in the name of and was owned exclusively by the development company. It is no doubt true that Wenzel, by such executory contract of purchase which gave him possession, acquired an equitable interest in such property which he might sell or mortgage (*Cummings v. Duncan*, 22 N. D. 534, 134 N. W. 712, Ann. Cas. 1914B, 976), and it is likewise no doubt true that his possession under the contract operated to convey notice to the world of his equities thereunder. But Wenzel's interest under such contract was cognizable merely in equity, not in law. *Miller v. Shelburn*, 15 N. D. 182, 107 N. W. 51; *Cummings v. Duncan*, supra. His possession under such executory contract operated, no doubt, as notice to the world of his equities thereunder. It is, however, quite a different proposition to say that such possession constituted notice of the rights of persons claiming to hold as assignees, vendees, or mortgagees of such equitable interest.

Was appellant Krupp, under the facts, charged with constructive notice of plaintiff's mortgage? As stated by appellant's counsel, this suggests two main inquiries: First, Was the mortgage a conveyance within the meaning of the recording laws? Second, Was it a conveyance in the chain of title?

Plaintiff's right to recover depends upon an affirmative answer to both of these questions. Counsel for appellant assert, with apparent confidence in the correctness of their position, that both of such questions must receive a negative answer, and they have presented a very able and ingenious argument in support of their contention. They apparently concede that under the L.R.A.1918C.

general statutory rule in other states, either in express terms or by judicial construction, the record of an instrument conveying or encumbering a mere equitable estate or interest, as well as a legal estate or interest, operates to give constructive notice thereof, but they seek to differentiate our recording act from the statutes of other states, and contend for a construction eliminating from its operation mere equitable interests or liens. As suggested by them, it is undoubtedly true that the doctrine of constructive notice by recording instruments is of purely statutory creation, and that the recording of an instrument not within the statute does not impart constructive notice thereof. This, of course, is elementary. 2 Devlin, Deeds, § 646, and cases cited.

The recording acts of this state are embraced in §§ 5038, 5039, and 5042, Rev. Codes, 1905, Comp. Laws, 1913, §§ 5594, 5595, 5598.

Section 5038 reads in part as follows: "Every conveyance by deed, mortgage or otherwise, of real estate within this state, shall be recorded in the office of the register of deeds of the county where such real estate is situated, and every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any part or portion thereof, whose conveyance, whether in the form of a warranty deed, or deed of bargain and sale, deed of quitclaim and release, of the form in common use, or otherwise, is first duly recorded. . . ."

Section 5039 defines the term "conveyance" as used in the last section as embracing "every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged or encumbered, or by which the title to any real property may be affected, except wills, and powers of attorney."

Section 5042 provides: "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof; but knowledge of the record of an instrument out of the chain of title does not constitute such notice."

The first clause of the section last quoted constituted the entire section as originally enacted, but in 1899 the legislature, by chapter 167, Laws of 1899, added thereto the latter clause which, no doubt, as counsel state, was for the purpose of changing the rule announced by this court in *Doran v. Dazey*, 5 N. D. 167, 57 Am. St. Rep. 550, 64 N. W. 1023. In that case it was held that *actual knowledge of the record* of an instrument out of the chain of title was constructive notice of the original instru-

ment and of the rights of the parties under it, and by such amendment the rule was changed so that now mere knowledge of the record of an instrument out of the chain of title does not constitute notice thereof.

Our first inquiry, therefore, is whether plaintiff's mortgage, which covered Wenzel's equitable interest under his executory contract to purchase the real property in question, is such an instrument as was entitled to be recorded. In other words, Was such mortgage a "conveyance," within the meaning of the recording laws aforesaid? The able counsel for appellant argue that it was not; their line of reasoning being that the executory contract for the purchase of the property by Wenzel, and under which he took possession of the property, gave him no *estate or interest* in the property, but merely a chose in action. They criticize and attempt to differentiate the holding of the Michigan court in *Balen v. Mercier*, 75 Mich. 42, 42 N. W. 866, wherein it was held that the vendee under such an executory contract acquired an interest in the land which could be sold, assigned, or mortgaged, and counsel assert that this court, in the cases of *Miller v. Shelburn*, 15 N. D. 182, 107 N. W. 51, and *Cummings v. Duncan*, supra, expressly held contrary to the Michigan holding in the above case. Counsel are in error in this respect. In *Miller v. Shelburn*, it is true, it was held that *at law* such an executory contract "produces no effect upon the respective estates and titles of the parties, and creates no interest in nor lien or charge upon the land itself. The vendor remains, to all intents, the owner of the land; he can convey it to a third person free from any legal claim or encumbrance. . . . In short, the vendee obtains at law no real property nor interest in real property." But the court expressly recognized the universal rule that in equity such contracts are regarded as transferring to the vendee in possession an equitable estate or interest which he may sell, assign, or mortgage, as stated by the Michigan court, and in *Cummings v. Duncan*, such equitable rule was also recognized. We there expressly held that the vendee's equitable interest in the real property under such a contract could be levied upon and sold under execution. Surely if this be true, and there can be no doubt upon this proposition, then such vendee had an estate or interest in the land which he could sell, assign, or mortgage, and such is, as we understand it, the universal holding of the courts.

In support of the correctness of our views, we will content ourselves by citing 27 Cyc. 1037, and cases cited, from which we quote: "The purchaser under an executory contract for the sale of land, or a bond

for title, being in possession and having partly performed his part of the contract, although the legal title remains in the vendor, has an interest in the premises which he may mortgage to a third person."

The fact that in the technical legal sense no estate or interest in the real property is conveyed to the vendee under such a contract is not controlling. Wenzel clearly had a mortgageable interest in the real property under all the authorities. 27 Cyc. 1037 and 1139, and cases cited. *Houghton v. Allen*, 2 Cal. Unrep. 780, 14 Pac. 641; *Jones v. Lapham*, 15 Kan. 540; *Laughlin v. Braley*, 25 Kan. 147; *Crane v. Turner*, 67 N. Y. 437; *Smith v. Patton*, 12 W. Va. 541; *Muehlberger v. Schilling* (Sup.) 19 N. Y. S. R. 1, 3 N. Y. Supp. 705; *Scott v. Farnam*, 55 Wash. 336, 104 Pac. 639; *Heard v. Heard*, 181 Ala. 230, 61 So. 343; 1 *Jones, Mortg.* § 136.

Do our recording laws include such a mortgage? We are entirely satisfied that this question must also receive an affirmative answer. The contention of appellant's counsel to the contrary is, we think, based upon an unwarranted and erroneous construction of our statute. We are unable to distinguish our law from the Michigan law and the corresponding statutes in most states. The fact that the Michigan statute, in defining the word "conveyance" as used in its Recording Law, in addition to the language in § 5039 of our Code, adds the words, "in law or equity," does not make their statute broader than ours. We think the statute would convey the same meaning without these words, and they were evidently inserted through a superabundance of precaution. Furthermore, the language in the first portion of the section, "the term conveyance . . . shall be construed to embrace every instrument . . . by which *any estate or interest* in real property is created, aliened, mortgaged or assigned," clearly was intended to cover a mortgage of an equitable title. In support of our views, see *Clark v. Lyster*, 84 C. C. A. 27, 155 Fed. 513, 27 Cyc. 1157, and cases cited in note 28 on page 1158; also 1 *Jones, Mortg.* § 476.

Having reached the conclusion that plaintiff's mortgage was entitled to record under our recording acts aforesaid, it only remains for us to determine whether the record thereof imparted constructive notice to defendant Krupp at the time he purchased an assignment of Wenzel's contract and procured the deed from Wenzel's grantor, the Dakota Development Company. In considering this question, it is important to bear in mind the fact that Krupp knew that Wenzel was in possession of the premises, asserting equitable ownership under the con-

tract of purchase, and that he expressly recognized Wenzel's contract rights by purchasing from him an assignment thereof.

In the light of these facts can Krupp successfully urge that Wenzel's mortgage to plaintiff was out of the chain of title, and hence, under § 5042, Rev. Codes, Comp. Laws 1913, § 5598, the record of such mortgage did not constitute notice thereof to him? We think not. The basic fallacy in appellant's argument, as we now view it, consists in the unwarranted assumption that such mortgage, as to him, was out of the chain of title. The reverse is true. He dealt with Wenzel and therefore was bound in law to know, and in fact did know, that he was the equitable owner of the premises and that his equitable title came from the Dakota Development Company through such contract. He was also bound in law to know, therefore, that Wenzel had a mortgageable interest in the premises, and that he might have sold, assigned, or mortgaged such interest, and the conveyance in either form would have been entitled to record. As to Krupp, therefore, the chain of title did not stop with the development company, but the last link in such chain was in Wenzel. He was therefore charged with constructive notice of plaintiff's mortgage and bought subject thereto. It would have been entirely different had he dealt alone with the development company, in ignorance of Wenzel's rights. In such event § 5042, supra, would have afforded him protection, but under the facts it can have no application.

As said in 1 Jones on Mortgages, § 476: "The registry of a conveyance of an equitable title is notice to a subsequent purchaser of the same interest or title from the same grantor. . . . The record of a mortgage or other conveyance which is entitled to be recorded operates as constructive notice to subsequent purchasers claiming under the same grantor, or through one who is the common source of title,"—citing *Edwards v. McKernan*, 55 Mich. 520, 526, 22 N. W. 20.

See also *Jones v. Lapham*, 15 Kan. 540, wherein Judge Brewer, while on the supreme bench of Kansas, in speaking to the point, said: "As to Maggie Murray, it appears that she had knowledge of the equitable interest, but not of the mortgage. Hull, however, was in possession of the lots, and had made valuable improvements on them. These improvements she bought. Now § 20 of the Conveyance Act (Gen. Stat. p. 187) provides that 'every such instrument in writing [and this, by prior description, includes mortgages, and mortgages upon equitable interests] shall from the time of filing the same with the register

of deeds for record impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed to purchase with notice.' While this general provision, as respects notice, may be limited, so far as relates to conveyances or mortgages of equitable interests, by the condition of the legal title, and the knowledge which the holders thereof have of the existence of the equity, as indicated in *Kirkwood v. Koester*, 11 Kan. 471, yet, aside from that limitation, it is of controlling force. Whoever buys a legal estate, having knowledge of an outstanding equitable interest, is chargeable with notice of any record of conveyance or encumbrance thereof. Whoever buys an equitable interest in land is also chargeable with like notice. In fact, knowledge of an equitable interest carries with it notice of the condition of such interest as is apparent from the public records."

We understand that the rule thus stated by Judge Brewer is generally recognized and well established, and we do not think that such rule is changed in this state by chapter 167, Laws of 1899, heretofore referred to.

We do not think there is any merit in appellant's last contention, to the effect that the contract under which Wenzel occupied the land in express terms prohibited any assignment thereof without the vendor's consent, and that such a stipulation is valid, and a violation thereof confers no rights on the assignee. The vendor, the Dakota Development Company, is not here urging any such question, and certainly Krupp, who dealt with Wenzel in recognition of his equitable interest, cannot be heard to raise such question.

We think it clear that Krupp purchased with constructive notice of plaintiff's mortgage, and that therefore the district court did not err in its conclusions and judgment in plaintiff's favor.

We think the judgment appealed from is correct except in one particular. Such judgment in effect decrees that plaintiff's mortgage covers not only the equities held by the mortgagor, Wenzel, but also the interests purchased by Krupp from the development company. Clearly this cannot be true. Wenzel, of course, could hypothecate nothing that he did not own. The interest of the development company consisted of the legal title held in trust as security for the payment of the remainder due it on the purchase price. To the extent of such interest, the development company manifestly had rights superior to those of the mortgagee; and Krupp, by his purchase from such company, succeeded to such

rights. Hence the decree should recognize and protect these rights in some proper manner. It seems to us that a proper method for so doing would be to adjudge that, out of the proceeds of the sale, defendant Krupp be first paid or reimbursed the amount paid by him to the development company as the

balance remaining due on the purchase price, with interest thereon from the date of such payment.

The District Court will modify its judgment accordingly, and, as thus modified, the judgment is affirmed. No costs shall be taxed to either party on the appeal.

ALABAMA SUPREME COURT.

L. I. BRANNAN, Appt.,

v.

JOHN B. MARSHALL.

(184 Ala. 375, 63 So. 1007.)

Record — notice — deed from stranger to title — registered encumbrance.

The rule that one who purchases from a stranger to the record title is charged with constructive notice of all registered conveyances executed by his grantor to other persons, which purport to affect his title, is applicable where a purchaser of an apparently perfect record title, who on that account would not have been chargeable with notice of conveyances outside the chain of title, took at the same time a quitclaim deed from his grantor's brother as a precaution against any claim arising from the relationship: since he is, in law, claiming and holding under each of his grantors.

For other cases, see Records and Recording Laws, III. d, in Dig. 1-52 N. S.

(November 27, 1913.)

A PPEAL by defendant from a decree of the Chancery Court for Mobile County in plaintiff's favor in a suit to establish priority of mortgage and for foreclosure. Affirmed.

Statement by Somerville, J.:

The agreed statement of facts shows the following: Eliza Kiernan was the owner of the land in suit. She conveyed it by warranty deed to Francis Kiernan on November 26, 1910, and he mortgaged it to complainant for value on December 29, 1910. This mortgage was filed for record on January 18, 1911; but the deed from Eliza Kiernan to the mortgagor was not filed for record until July 12, 1911. On July 11, 1911, Eliza Kiernan conveyed this land by warranty deed for value to the respondent Brannan, who in turn mortgaged it to respondent Cowan for value on February 6, 1912. After Brannan had contracted for the purchase of the land from Eliza Kiernan, and after his attorney had

examined the deed record, and found her title perfect thereto, and the deed had been drafted, Brannan's attorney requested said Francis Kiernan, who was the brother of Eliza, and also her agent and representative in the sale of the land to Brannan, that he make to Brannan a quitclaim deed to the land. To this he assented, and, at the same moment when he delivered to them Eliza's deed duly executed, he delivered to them also his own deed quitclaiming, releasing, and conveying the land to Brannan; the consideration being \$1, and the consideration paid to Eliza being \$300. Neither Brannan nor his attorneys had any actual knowledge or notice of the mortgage given by Francis Kiernan to complainant, nor that either of them owned or claimed any interest in the land. In his answer Brannan admits that, through his attorneys, he secured the quitclaim deed from Francis Kiernan, with the explanation that it was merely for the purpose of estopping him from subsequently claiming the land by virtue of his relationship to Eliza Kiernan. The chancellor decreed that the facts showed constructive notice to Brannan and Cowan of complainant's mortgage, and that they were not entitled to protection against it as innocent purchasers, and decreed the relief prayed for.

Messrs. Gordon & Edington for appellant.

Mr. D. B. Cobbs for appellee.

Somerville, J., delivered the opinion of the court:

It is well settled by numerous decisions in this state that the registration of a conveyance executed by one who is a stranger to the title as it is shown by the records—that is, by a grantor who does not appear in the chain of recorded conveyances or other title records as one who has acquired an interest in the land in question—is not constructive notice to a subsequent purchaser in the regular chain of title. *Fenno v. Sayre*, 3 Ala. 458; *Gimon v. Davis*, 36 Ala. 589; *Scotch Lumber Co. v. Sage*, 132 Ala. 598, 32 So. 607, 90 Am. St. Rep. 932; *Tennessee Coal, Iron & R. Co. v. Gardner*, 131 Ala. 599, 32 So. 622.

It is, however, also settled that one who

Note. — For taking deed from stranger to record title as constructive notice of instruments of record to or by him, see annotation following this case, post, 787. L.R.A.1918C.

purchases from a stranger to the record title is charged with constructive notice of all registered conveyances executed by his grantor to other persons, which purport to affect the title; and further, that the grantee's knowledge of such conveyances is sufficient to suggest title or claim of title in the grantor, and hence to demand a reasonable inquiry with respect thereto.

This doctrine has been applied where a purchaser under an unregistered deed afterwards procured his grantor to execute a new deed to a trustee in trust for his wife, which was registered, and the title of the plaintiff, claiming under an execution sale against the husband, was held superior to the title of one who subsequently purchased by a deed from the trustee in which the wife and husband joined as joint grantors. *Gimon v. Davis*, 36 Ala. 589. It was stated in that case that if the defendant had not held under the husband, and if the husband had been entirely outside of the plaintiff's chain of title, the result would have been different.

The rule of *Gimon v. Davis* was reaffirmed and applied in a later case where the same constructive notice was imputed to a remote grantee in the regular chain of record title—an apparent stranger to the title, though in fact the owner, having joined in one of the antecedent conveyances with the apparent record owner. *Creel v. Keith*, 148 Ala. 233, 41 So. 780.

In *Scotch Lumber Co. v. Sage*, 132 Ala. 598, 606, 90 Am. St. Rep. 932, 32 So. 607, the application of the doctrine was denied, on the ground that the claimant under the record title was not in privity with the unregistered owner, who was not a grantor in his chain of title, and that he was not claiming under the latter.

The question to be determined in the present case is whether the fact that Brannan—who purchased from Eliza Kiernan an apparently perfect record title, and simultaneously purchased also from Francis Kiernan by a quitclaim deed—took separate deeds, delivered at the same instant of time, differentiates this case in principle

from *Gimon v. Davis* and *Creel v. Keith*, where the stranger to the record title joined in the same deed with the apparent owner.

Appellant insists that it is thereby differentiated, and that the rule of those cases does not apply, because Brannan's purchase from Francis Kiernan was merely collateral and incidental to the real purchase from Eliza, and was but a precautionary afterthought; that Francis was not supposed to have any title to release or convey; that he is not in Brannan's chain of title; and that, on the face of the transaction, it is clear that Brannan never claimed title nor held under Francis, but entirely under Eliza, who alone appeared to have any title.

It is obviously not necessary that the stranger grantor should be one of an unbroken series of grantors and grantees, for this would deny the rule in all cases to which it could apply; and it is also obvious, we think, that one who contemporaneously procures whatever number of conveyances, from whatever number of grantors, and takes possession of the land conveyed, is, in law, "claiming and holding" under each and all of them—however he may differ in his estimation of the value and effect of his several deeds.

The use of the terms in this connection imports no more than the privity of estate that technically results from the relation of grantor and grantee in a deed of conveyance, prior to or contemporaneously with the acquisition of the title of the record owner, and this seems to be the essential basis for our decisions in the cases referred to.

Appellant's case, as presented by the record, is a hard one; but we are unable to distinguish it in principle from the *Gimon* and *Creel* Cases, *supra*, and by those cases our decision must be controlled.

It results that the decree must be affirmed.

Dowdell, Ch. J., and McClellan and Sayre, JJ., concur.

Annotation—Taking deed from stranger to record title as constructive notice of instruments of record to or by him.

For conveyance recorded before grantor obtained title as notice, see annotation following *Richardson v. Atlantic Coast Lumber Corp.* post, 792.

It will be observed that it is the doctrine of *BRANNAN v. MARSHALL*, ante, 786, that the purchaser from a stranger to the record title, prior to or contemporaneously with his acquisition of the L.R.A.1918C.

record title, takes constructive notice of prior instruments of record made by such stranger.

This doctrine is supported by the cases of *Gimon v. Davis* (1860) 36 Ala. 589, and *Creel v. Keith* (1906) 148 Ala. 233, 41 So. 780, which are sufficiently referred to in the opinion in *BRANNAN v. MARSHALL*.

In *Tarbell v. West* (1881) 86 N. Y. 280, it was held that the registry of a mortgage of his interest in a firm by one partner, where the title to the firm's real estate is in the other partner, is no notice to a purchaser of the legal title, the court stating that it would have been notice to a purchaser from the mortgagor of his interest.

But under a West Virginia statute the rule was held otherwise. There the holder of an equitable title executed a trust deed of the land to secure a debt to B, which was recorded; thereafter he contracted to sell the land to C, and later procured a deed from the owner of the legal title to C. It was held that the title of C was superior to the trust deed, as such title was not derived from the person who made the trust deed within the meaning of the statute providing that "a purchaser shall not, under this chapter, or chapter 75, be affected by the record of a deed or contract made by a person under whom his title is not derived, nor by the record of deed or contract made by any person before the date of a deed or contract made to or with such person, which is duly admitted to record, and from which the title of such person is derived." *Hoult v. Donahue* (1883) 21 W. Va. 294. Followed in *Sands v. Beardsley* (1889) 32 W. Va. 594, 9 S. E. 925.

It will be observed that in *Simonson v. Wenzel*, ante, 780, it is held that one buying an equitable title not of record from one in possession has constructive notice of recorded conveyances of such title by his grantor.

In *Eversole v. Virginia Iron, Coal, & Coke Co.* (1906) 122 Ky. 649, 92 S. W. 593, one taking a deed from a stranger to the legal title who had the equitable title, and was in possession, was held to take with constructive notice of an earlier recorded deed by such stranger.

SOUTH CAROLINA SUPREME COURT.

THOMAS MONROE RICHARDSON, Respt.,
v.
ATLANTIC COAST LUMBER CORPORATION, Appt.

(93 S. C. 254, 75 S. E. 371.)

Estoppel — after-acquired title — rights of stranger to deed.

1. One who conveys real estate and subsequently reacquires the title from his grantee, having remained in possession during the interim, is not estopped to deny the L.R.A.1918C.

So, in *Digman v. McCollum* (1871) 47 Mo. 372, where A made title bond to B who assigned it to C who, being in possession, assigned it to D who paid A the price and took deed from him, it was held that D had constructive notice of a recorded trust deed made by C before he assigned the title bond to D, although C had no title of record. In this case the purchaser at a sale by the trustee in the trust deed brought into court and tendered the amount D paid A.

In *Martin v. Brown* (1860) 4 Minn. 284, Gil. 201, A conveyed to B by a deed which was never recorded; B conveyed to C, the deed being recorded, and C, after being in possession twenty-two months under his deed, got a quitclaim from A and put it on record, and five months later conveyed to his brother D who had lived with him on the land since he received his first deed. It was held that D was chargeable with notice of the first deed to C and of the unrecorded deed from A to B, and consequently with notice of a recorded mortgage made by B when B took title. The court considered that the fact of C's possession for twenty-two months before he took the quitclaim deed, together with the character of that deed, were sufficient to have put D upon an inquiry which would have disclosed the facts.

Where the recording statute requires a numerical index, a recorded mortgage out of the chain of title is constructive notice. *Fullerton Lumber Co. v. Tinker* (1908) 22 S. D. 427, 118 N. W. 700, 18 Ann. Cas. 11. In that case a mortgage had been made by one in possession under a contract of purchase, who afterwards sold to another who took the title from the owner of the legal title. His remote grantee was held to take subject to the mortgage. B. B. B.

title of one who took a conveyance from the grantee before the latter acquired the title, although such conveyance was on record at the time he regained his title.

For other cases, see Records and Recording Laws, II. d, in Dig. 1-52 N. S.

Same — of first grantee.

2. One who takes a deed covering property not owned by the grantor is estopped, because of his failure to ascertain the state

Note. — For conveyance recorded before grantor obtained title as notice, see annotation following this case, post, 792; and references therein to annotations on collateral points.

of his grantor's title, to set up title against its owner, who subsequently conveys to the grantor and then takes back a deed from him, remaining in possession in the interim, without notice of the former conveyance. *For other cases, see Estoppel, III. i, in Dig. 1-52 N. S.*

(July 22, 1912.)

APPEAL by defendant from a judgment of the Common Pleas Circuit Court for Marion County in favor of plaintiff in an action brought to recover damages for cutting timber on a certain tract of land. Affirmed.

The facts are stated in the opinion.

Mr. M. C. Woods for appellant.

Messrs. L. M. Gasque and A. F. Woods, for respondent:

A purchaser of real estate is not charged with constructive notice of the record of a deed executed and recorded before the grantor had any title or was connected with the title in any way by possession or otherwise.

Wadsworthville Poor School v. Jennings, 40 S. C. 168, 42 Am. St. Rep. 854, 18 S. E. 257, 891; *Lake v. Shumate*, 20 S. C. 23; *Farmers Loan & T. Co. v. Maltby*, 8 Paige, 361; *Oliphant v. Burns*, 146 N. Y. 218, 40 N. E. 980; *Duchess of Kingston's Case*, 1 Leach, C. L. 146, 1 East, P. C. 468, 2 Smith, Lead. Cas. 8th ed. 734; *Connecticut v. Bradish*, 14 Mass. 296; *Doswell v. Buchanan*, 3 Leigh, 365, 23 Am. Dec. 280; *Blake v. Graham*, 6 Ohio St. 580, 67 Am. Dec. 362; *Woods v. Farmere*, 7 Watts, 382, 32 Am. Dec. 772; *Calder v. Chapman*, 52 Pa. 359, 91 Am. Dec. 163; *McLanahan v. Reeside*, 9 Watts, 508, 36 Am. Dec. 136; *Bingham v. Kirkland*, 34 N. J. Eq. 234; *Ford v. Unity Church Soc.* 23 L.R.A. 561, and note, 120 Mo. 498, 41 Am. St. Rep. 711, 25 S. W. 394; *Wheeler v. Young*, 76 Conn. 44, 55 Atl. 670.

Gary, Ch. J., delivered the opinion of the court:

This appeal raises the question whether the record of a deed conveying certain lands with the usual covenants of warranty, which includes a tract of which the grantor was not then owner, but which was subsequently conveyed to him by the owner, and afterwards reconveyed to the owner by him, affords such constructive notice as will prevent the owner from relying upon the plea of purchaser for valuable consideration without notice against the grantee of the recorded deed, when it appears that the owner was in the actual possession of his land, under a previously recorded deed, at the time it was wrongfully conveyed.

The facts are thus stated in the brief of L.R.A.1918C.

the appellant's attorney: "B. Talley Richardson and T. Monroe Richardson are father and son, and reside together in Button's Neck township, Marion county. On February 24, 1899, B. Talley Richardson conveyed to Tilghman Lumber Company, with general warranty, certain timber and easements on 168 acres, more or less. This conveyance was duly recorded. By successive conveyances, also all duly recorded, the timber and easements conveyed by Richardson to Tilghman Lumber Company became the property of Atlantic Coast Lumber Corporation. It subsequently transpired that Richardson did not own all of the land within the boundaries, on which he undertook to convey the timber and easements, but that the boundaries in his grant included about 15 acres that belonged to his son, T. Monroe Richardson. On October 22, 1904, while the grant to Tilghman Lumber Company was still of force, T. Monroe Richardson conveyed to B. Talley Richardson the 15 acres in question, and B. Talley Richardson became the owner in fee of all of the land embraced within the boundaries of the timber deed. B. Talley Richardson retained title to the 15 acres until November 8, 1907, a little over three years, when he conveyed the same back to T. Monroe Richardson. In 1908 the Atlantic Coast Lumber Corporation, claiming under the grant to Tilghman Lumber Company, which was still of force, entered upon the entire tract of land and cut the timber therefrom, including the 15 acres which originally belonged to T. Monroe Richardson, which T. Monroe Richardson had conveyed to his father, B. Talley Richardson, and which B. Talley Richardson had reconveyed to his son, T. Monroe Richardson. T. Monroe Richardson then sued for damages for the timber cut, and recovered a verdict for \$750 actual damages and \$150 punitive damages. The Atlantic Coast Lumber Corporation in due time appealed to this court, and the cause now comes to this court on the exceptions set forth in the record."

To which should be added the statement that the respondent, T. M. Richardson, went into possession of the 15 acres of land under a deed from J. T. and Martha Dimery, dated the 3d of May, 1892, which was recorded on the 21st of July, 1892, and he has continued in actual possession thereof without interruption, except by the alleged trespass of the defendant, until the commencement of this action.

In the language of the appellant's attorney, the ruling of his Honor, the presiding judge, was as follows: "Defendant claimed at the trial below, and still claims under this state of facts, that when B. Talley

Richardson acquired the title to the land on which his son's timber stood, under his general warranty, the title to the timber which stood on this land immediately inured to the benefit of the grantees of the Tilghman Lumber Company, and became vested in them. His Honor ruled and charged that, had B. Talley Richardson continued to hold title to the land which originally belonged to his son, he would be estopped from denying the title of Tilghman Lumber Company's grantees, but that his son would not be estopped from denying such title, unless the son had actual notice of the claim of the grantee of the Tilghman Lumber Company; and, further, that the fact that the deed of the Tilghman Lumber Company and its grantees was recorded was no notice with which the son was chargeable." We shall discuss this question at some length, as it is, perhaps, one of the most important affecting the title to real estate.

The principle is settled beyond controversy in this state that, if a grantor conveys land with the usual covenants of warranty, to which at that time he has no title, but afterwards acquires a title, he is estopped from claiming that he did not have title at the time of the sale; and the after-acquired title inures to the benefit of his grantee. *Reeder v. Craig*, 3 M'Cord, L. 411; *Robertson v. Sharpton*, 17 S. C. 592; *Gaffney v. Peeler*, 21 S. C. 55. But the question now under consideration has not heretofore been judicially determined in this state.

The principle is thus stated in Pom. Eq. Jur. vol. 2, § 658: "If the records show a good title vested in the vendor at a certain date, and nothing done by him after that time to impair or encumber the title, it would seem that the policy of the registry acts is thereby accomplished; the purchaser is protected; he is not bound to inquire further back, and to ascertain whether the vendor has done acts which may impair his title, prior to the time at which it was vested in him as indicated by the records. This view is supported by many decisions—it seems by the weight of authority—which hold that a purchaser need not prosecute a search for deeds or mortgages made by his own vendor, further back than the time at which the title is shown by the records to have been vested in such vendor; or in other words, a purchaser is not bound by the registry of deeds or mortgages from his vendor made prior to that time."

When B. T. Richardson reconveyed the land to T. M. Richardson on the 8th of November, 1907, there was nothing upon the record indicating that B. T. Richardson

had ever acquired any other title than that derived from T. M. Richardson on the 22d of October, 1904.

Section 214 of Wade on Notice is as follows: "The purchaser is not charged with notice from the record of conveyances from his grantor prior to such grantor's acquisition of title. In such cases the subsequent purchaser would not be estopped by the record of a mortgage from his grantor prior to the date of his grantor's deed. To hold otherwise would be to impose upon the purchaser the duty of examining the records indefinitely." And in § 216 the same author says: "Upon both principle and authority, it seems more consonant with the spirit of the recording acts to absolve purchasers from the duty of examining the records for conveyances from their grantors prior to the time when they had a title to convey."

In *Wheeler v. Young*, 76 Conn. 44, 55 Atl. 670, the rule is thus stated: "To carry this doctrine to the extent of giving priority to the title of one who, from his negligent failure to examine the records, has been induced to purchase land of a person having no title, over that of one who, without negligence, in good faith and for value, and without knowledge of such prior deed, has purchased after his grant, or has acquired title from one having both the legal and record title, is opposed to the principles of equity and to the spirit of our registry laws. . . . The doctrine of estoppel is one which, when properly applied, 'concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only when, in conscience and honesty, he should not be allowed to speak.' *Van Rensselaer v. Kearney*, 11 How. 297, 326, 13 L. ed. 703, 715."

In the case of *Doswell v. Buchanan*, 3 Leigh, 365, 23 Am. Dec. 280, the court uses this language: "The enrolment and registry acts of England and our recording acts are expressly declared to be made for the benefit of subsequent purchasers, to protect them from secret conveyances. These acts, then, ought not to be turned to the injury of those for whose benefit they were made, unless it be in obedience to some express provision contained in them. But there is none such. They declare that all deeds, etc., shall be void as to subsequent purchasers unless duly recorded; but they nowhere declare that such recording shall charge the subsequent purchaser with notice of the deed. If not recorded, the deed is void as to him: if recorded it is only so far valid that it passes to the bargainee the title it purports to convey, provided the bargainor had that title; if he had it not, the deed cannot pass

it though recorded, nor will the putting it on record affect the conscience of a subsequent purchaser of the legal title, nor, of course, charge that title with the equity which the deed raised between the bargainor and the bargainee. The laws had no such intention, nor will their words bear such construction. That this is settled doctrine in England, there are many cases to show,"—citing numerous cases.

The court, in the case of *Bingham v. Kirkland*, 34 N. J. Eq. 229, thus discusses the effect that would follow if the record in such cases should be construed to give constructive notice: "It would involve a search against every person whom the title in its transmission had ever touched, not merely for the period during which such person held the title, but for a period anterior thereto, during which any encumbrance might have been made and still exist. Such a construction of the scope of the constructive notice, imputed to a subsequent purchaser by our recording acts, is opposed to the sentiment of the bar of this state as it has existed from the earliest period of their enactment. The system of searching practised, so far as I know or have been informed, without any deviation, has been to trace the line of record title, and search against each owner during the period that he held the title. The titles to the real estate in this state rest upon searches made in conformity to this view. And it is a sensible view. No one is supposed to convey or encumber property which he does not own. *Non dat qui non habet.*"

In *Blake v. Graham*, 6 Ohio St. 581, 67 Am. Dec. 360, the rule is thus stated: "It is well settled that the record or registry of a deed is constructive notice only to those who claim through or under the grantor by whom such deed was executed. . . . In the last-named case (*Bates v. Norcross*, 14 Pick. 224), the court says: 'To hold the proprietors of land to take notice of the records of deeds, to determine whether some stranger has without right made conveyances of their lands, would be a most dangerous doctrine, and cannot be sustained with any color of reason or authority.' . . . These rules rest upon the obvious reason that a searcher can be fairly supposed to be made acquainted with the contents of such deeds only as, in the process of tracing link by link his chain of title on the record, necessarily pass under his inspection."

Judge Hare, in a note to the *Duchess of Kingston's Case*, 2 Smith, Lead. Cas. 8th ed. § 734, says: "It necessarily tends to give a vendee who has been careless enough to buy what the vendor has not to sell, a preference over subsequent purchasers

who have expended their money in good faith, and without being guilty of negligence." He was therefore opposed to a doctrine that was so unjust.

In the case of *Ford v. Unity Church Soc.* 120 Mo. 498, 23 L.R.A. 561, 41 Am. St. Rep. 711, 25 S. W. 394, to which there is a valuable and exhaustive note, the court quotes with approval the following language from Mr. Rawle's excellent work on Covenants for Title, as follows: "This rule, when applied to the case of a bona fide purchaser for value without notice, 'cannot harmonize with the spirit of the registry acts in force in this country, and leads to the position, which certainly cannot be considered as tenable, that a purchaser must search the registry of deeds not only from the time when his grantor acquired title, but also for a series of years before that time, in order to discover whether he had previously made any conveyance (though without title) to any other person; for, if he had, that person will, according to this doctrine, hold the estate as against this purchaser; and, if the property has passed through several hands, a similar search must be made' as to each." After making this quotation, the court uses this language: "He says nothing is more simple than what is termed 'the line of title.' It is that the first purchaser should search the registry for the deed to his vendor, and trace the title thence back to its source. If he finds no title in him, as would have been the case here, then it is his fault if he takes the deed. Now, as to the second purchaser, one who buys after the vendor acquires a title. He searches till he finds the deed to his vendor, and traces the title back to its source. He finds it regular, and that since his vendor acquired the title he has not conveyed to anyone else. He is not expected to look for conveyances from his vendor prior to the time the vendor acquired the title. 'Yet, as Mr. Rawle says, 'according to the practical effect of the doctrine now being considered, and apart from counter equities, the purchaser, having thus brought himself within all the provisions of the registry laws, is not protected at all, if his vendor had, before he acquired title, conveyed to another, with covenants, a title which was without existence or value.'"

The court announced the rule just stated, although the following statute was then of force: "If any person shall convey any real estate by conveyance purporting to convey the same in fee simple absolute, and shall not, at the time of such conveyance, have the legal estate in such real estate, but shall afterward acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such con-

veyance shall be valid, as if such legal estate had been in the grantor at the time of the conveyance."

The reasons which gave rise to the rule in such cases are (1) that the grantee is estopped by his conduct from relying upon the record as constructive notice to a subsequent purchaser for value, without notice, because he is guilty of an act of wrong by failing to exercise due diligence to ascertain whether his grantor has a good title, and thus by his negligence participates in casting a cloud upon the title of the owner; (2) a contrary doctrine would not only entail much inconvenience in searching the records, but would render titles to land, to a great extent, uncertain; such a result being against the spirit of the recording acts as well as against public policy.

The rule is especially applicable in the present case, for the reason that both the grantor and grantee had at least constructive notice of T. M. Richardson's title, not only from the fact that he was in possession, but from his recorded deed. The exceptions raising this question are overruled.

All other questions presented by the exceptions are either dependent upon the conclusions hereinbefore announced, or the appellant has failed to show that there was prejudicial error.

Judgment affirmed.

Woods, J., disqualified.

Petition for rehearing denied December 2, 1912.

Annotation—Conveyance recorded before grantor obtained title as notice.

This note is supplemental to the note to *Ford v. Unity Church Soc.* 23 L.R.A. 561.

For taking deed from stranger to record title as constructive notice of instruments of record to or by him, see annotation following *Brannan v. Marshall*, ante, 787.

For rights of assignee of mortgage as against subsequent bona fide purchasers or encumbrancers relying on apparent discharge of the mortgage by the mortgagee, see the notes to *Central Trust Co. v. Stepanek*, 15 L.R.A.(N.S.) 1025, and *Northrup v. Reese*, L.R.A.1915F, 554.

It will be observed that in *RICHARDSON v. ATLANTIC COAST LUMBER CORP.* ante, 788, where a father having 165 acres sold the timber on 83 acres to a lumber company with warranty, his son at that time owning 15 acres, which he later conveyed to his father, who afterwards reconveyed them to the son, it was held that the record of the deed to the lumber company was not constructive notice to the son.

Under the general spirit of the recording laws, a conveyance recorded before the grantor obtained title is not constructive notice. *Wheeler v. Young* (1903) 76 Conn. 44, 55 Atl. 670; *Breen v. Morehead* (1911) 104 Tex. 254, 136 S. W. 1047, Ann. Cas. 1914A, 1285.

The rule, however, requires a search back to the date of the deed to a person; it is not satisfied by searching back to the time of the record of such deed. *Higgins v. Dennis* (1898) 104 Iowa, 605, 74 N. W. 9.

In *Anderson v. Farmer* (1916) — Tex. L.R.A.1918C.

Civ. App. —, 189 S. W. 508, the court said: "It is the settled law that a purchaser of land is not required to examine the records for previous conveyances executed by his grantor prior to the time the title held by such grantor originated; nor is he charged with notice by the record of such prior deed or mortgage given by such grantor previous to the origin of the title."

In *Gallagher v. Stern* (1915) 250 Pa. 292, 95 Atl. 518, where the owner of one half of certain property mortgaged the whole and later acquired the other half, judgments entered against him after he became owner of the whole were held superior to the mortgage as to the half acquired since the mortgage, the court following *Calder v. Chapman* (1866) 52 Pa. 359, 91 Am. Dec. 163, referred to in the earlier note, page 567.

In *Breen v. Morehead* (Tex.) supra, the court considered the question as if the deed given before title was obtained had worked an estoppel as against the grantor, but such deed was merely of right, title, and interest with a covenant against future claim.

In *Wheeler v. Young* (1903) 76 Conn. 44, 55 Atl. 670, it was held that a mortgagee in good faith and his assignee were not chargeable with notice of a recorded warranty deed made by the mortgagor before he took title. The court points out that the contrary doctrine would give priority to one who purchased in negligent failure to examine the records over an honest purchaser who had examined them, and that it would be opposed to the principles of equity and to the spirit of the registry laws, and

quotes as follows: "To allow a title to pass by conveyance executed and recorded before it is acquired may therefore be a surprise on subsequent purchasers against which it is not in their power to guard, and is contrary to the equity which is the chief aim of the doctrine of estoppel as molded by the liberality of modern times." 2 Smith, Lead. Cas. 7th Am. ed. page 701, s. p. 634."

In this connection it may be noted that it was said in *Chew v. Barnet* (1824) 11 Serg. & R. (Pa.) 389, that a conveyance with warranty by one having only the equitable title is a mere contract to convey.

The opposing doctrine, of which *Tefft v. Munson* (1874) 57 N. Y. 97 (referred to in the earlier note), is a conspicuous example, was maintained in *Ayer v. Philadelphia & B. Face Brick Co.* (1893) 159 Mass. 84, 34 N. E. 177, where a mortgagor in a second mortgage covenanted against all claims, etc., except the first mortgage, a right of drainage, and an easement, and the first mortgage was afterwards foreclosed and the land reconveyed to the mortgagor. It was held that a subsequent grantee from him took subject to the second mortgage, although he had no notice of it and the mortgagor had been discharged in bankruptcy before he repurchased the land.

It may be noted that in *Oliphant v. Burns* (1895) 146 N. Y. 218, 40 N. E. 980, after land had been granted under a condition subsequent with a covenant to reconvey in a certain case, an agreement by the grantor as to such land, which was not a conveyance or mortgage, was held not to be constructive notice to one who took a mortgage from such grantor after the premises so granted under condition had been reconveyed by the grantee in such grant to the grantor, the court distinguishing *Tefft v. Munson* (N. Y.) supra, on the ground that there was here no estoppel. The agreement was one with a prior mortgagee of the aforesaid land and other property, who had released the aforesaid land, and was to the effect that all the mortgaged land except the part that might be retained by the grantee in the grant under condition should be sold by the mortgagor and a certain portion of the proceeds should be paid to the mortgagee.

In *Donovan v. Twist* (1903) 85 App. Div. 130, 83 N. Y. Supp. 76, it was held that a purchaser from an heir took title free from a mortgage by the ancestor, made and recorded three days be-

fore such ancestor took title, which had no covenant of seisin or warranty. The same rule was laid down on appeal after a later trial in (1905) 105 App. Div. 171, 93 N. Y. Supp. 990, where, however, a judgment against the mortgagee was reversed on another ground.

But a recorded mortgage without covenants of title, made by a vendee in possession under an unrecorded contract of purchase, was held, as to the amount paid on the contract, superior to a mortgage given by such vendee after he took title, but inferior to such later mortgage as to the balance over such amount so paid. *Gray v. Delpho* (1916) 97 Misc. 37, 162 N. Y. Supp. 194.

There are a number of cases holding that recorded instruments made by one who has entered lands under state or United States laws are notice to those who claim under him after he obtains the legal title.

So, where A entered under the United States Homestead Laws, and made a deed of trust to secure a note to B, and commuted his homestead entry into a cash entry, and after getting final receipt made another deed of trust to secure a debt to D, and later got a patent, it was held that D took with constructive notice of the first trust deed. *Dickerson v. Bridges* (1898) 147 Mo. 235, 48 S. W. 825.

In *Osceola Land Co. v. Chicago Mill & Lumber Co.* (1907) 84 Ark. 1, 103 S. W. 609, the court expressed the opinion that a purchaser of a state's certificate of entry from the widow and heirs of the enterer must take notice of the record of a warranty deed given by the enterer before the issuance of the certificate to him.

In *Bernardy v. Colonial & U. S. Mortg. Co.* (1904) 17 S. D. 637, 106 Am. St. Rep. 791, 98 N. W. 166, A, having made a timber culture entry on United States land, conveyed it to B by deed purporting to grant it in fee simple, dated 1890 and recorded in 1891, and in 1893, after making final proof, he mortgaged it to C. In 1895 A received a United States patent for the land. It was held that B's title was superior to one claiming under a foreclosure of the mortgage, the statute providing that, "where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee or his successors." The court quoted also from the recording statute, that "the record-

ing and deposit of an instrument . . . are constructive notice of the execution of such instrument to all purchasers and encumbrances [encumbrancers] subsequent to the recording," and stated: "It will be further observed that no exception is made in the Code of conveyances made prior to the acquiring of the legal title when such conveyances are duly recorded," and considered that one claiming under a grantor has constructive notice of conveyances made by him before he acquired the legal title. The court stated further that the view that it had taken of the registration laws was strengthened by the statute requiring "a numerical index to be kept of both city and farm property."

Bernardy v. Colonial & U. S. Mortg. Co. (S. D.) *supra*, was followed in *Tilton v. Flormann* (1908) 22 S. D. 324, 117 N. W. 377, holding that one claiming under a grantor who had a United States patent for the land took with constructive notice of a recorded deed with covenants made by his grantor before he received the patent.

In *Adam v. McClintock* (1911) 21 N. D. 483, 131 N. W. 394, it was held that the recording of a mortgage given by an unmarried woman containing covenants of title, etc., in the office of the register of deeds of the county, prior to final proof on the land, is constructive notice to the same effect as though the mortgage had been executed and recorded after the recording of the patent, and therefore is such notice to her husband, whom she married before completing her five years' residence under the Homestead Law, the statute providing that "title acquired by the mortgagor subsequent to the execution of the mortgage inures to the mortgagee as security for the debt in like manner as if acquired before the execution."

The recorded conveyance by a homesteader after making final proof, but before receiving his patent, is in the chain of title, and therefore constructive notice. *Peterson v. Sloss* (1905) 39 Wash. 207, 81 Pac. 744.

In *Balch v. Arnold* (1899) 9 Wyo. 17, 59 Pac. 434, it was held that a mortgagee whose mortgage was made by one who took title from the United States has constructive notice of a recorded mortgage made by the same mortgagor before he took such title, when the statute requires the register of deeds to enter an abstract of such instruments under the survey subdivisions.

U. P. 1918C.

Purchase money mortgages.

A purchase money mortgage is superior to a mortgage by the mortgagor made and recorded before he took title (*Hinton v. Hicks* (1911) 156 N. O. 24, 71 S. E. 1086), or recorded before he took title (*Daly v. New York & G. L. R. Co.* (1897) 55 N. J. Eq. 595, 38 Atl. 202, affirmed in (1898) 57 N. J. Eq. 347, 45 Atl. 1092).

So, where the mortgage to the third party, though dated after the other papers, was recorded with the deed and before the mortgage to the vendor. *Protection Bldg. & L. Asso. v. Knowles* (1896) 54 N. J. Eq. 529, 34 Atl. 1083, affirmed in (1896) 55 N. J. Eq. 822, 41 Atl. 115.

A grantor taking back a purchase money mortgage need not examine the records for encumbrances by the mortgagor. *Ely v. Pingry* (1895) 56 Kan. 17, 42 Pac. 330; *Continental Invest. & Loan Soc. v. Wood* (1897) 168 Ill. 421, 48 N. E. 221, where the grantee made a mortgage to a third party dated later than, but delivered before, the deed to her and the mortgage to her grantor, the third party knowing of the last-mentioned deed and mortgage.

In *Schoch v. Birdsall* (1892) 48 Minn. 441, 51 N. W. 382, it was held that a vendor's purchase money mortgage was superior to a mortgage of earlier date and record, made by the vendee to a third party, of which the vendor had no knowledge, although the third party supplied the vendee with money to make the cash payment to the vendor.

Where, after a remainderman had mortgaged the property as if he held the entire estate, the life tenant quitclaimed to the remainderman, who gave a trust deed to secure the purchase money, such trust deed is superior to the earlier mortgage, though that was of record before the quitclaim was given. *Wendler v. Lambeth* (1901) 163 Mo. 428, 63 S. W. 684.

Miscellaneous.

It may be noted that, under the Tennessee statute whereby a deed registered with a defective certificate of acknowledgment or probate becomes notice only after it has been registered for twenty years, A conveyed to B by deed dated and recorded in 1851, B reconveyed to A by deed dated 1851, recorded 1856, and B conveyed to C by deed containing a general warranty of title dated and recorded in 1859, all three deeds having defective certificates. It was held that a purchaser from B's

devisee in 1901 must take notice of C's deed. *Hitt v. Caney Fork Gulf Coal Co.* (1910) 124 Tenn. 334, 139 S. W. 693.

The existing record of a mortgage made by a stranger is not notice to the

owner of the land who later mortgages it to such stranger. *Turman v. Sanford* (1901) 69 Ark. 95, 61 S. W. 167.

B. B. B.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

THE KAISER WILHELM II.

(246 Fed. 786.)

Evidence — judicial notice — war.

1. The court will take judicial notice of the entry of the country into war and of an executive order taking over vessels of the enemy found in its ports.

For other cases, see Evidence, I. d., in Dig. 1-52 N. S.

Admiralty — suit between belligerents — dismissal.

2. The courts of a neutral nation should not dismiss a libel filed by a citizen of one belligerent against a vessel belonging to a citizen of another to enforce a lien for repairs which enabled the vessel to reach the neutral port, although a moratorium of the country where the vessel was owned forbade its citizens to pay debts owing citizens of the other nation pending the war; and this is especially true if, after the libel was filed, the neutral country declared war upon that where the vessel was owned, and took the vessel into its service.

For other cases, see War, in Dig. 1-52 N. S.

Same — retention of case until termination of war.

3. Upon refusing to dismiss a libel in admiralty for repairs to a vessel belonging to a citizen of one belligerent by a citizen of another belligerent, the court should hold the case to give the owner of the vessel an opportunity to present his proof, although a state of war exists between his nation and that where the court is sitting.

For other cases, see War, in Dig. 1-52 N. S.

(December 28, 1917.)

APPEAL by libellant from a decree of the District Court of the United States for the District of New Jersey. Thomas G. Haight, Judge, dismissing a libel filed to enforce a lien for repairs made on the libellee vessel. Reversed.

The facts are stated in the opinion.

Argued before Buffington, McPherson, and Woolley, Circuit Judges.

Note. — The rights of enemy aliens as litigants are discussed in the annotation following *Taylor v. Albion Lumber Co.* L.R.A.1918B, 189. L.R.A.1918C.

Messrs. Burlingham, Montgomery, & Beecher, Roscoe H. Hupper, and H. Alan Dawson for appellant.

Messrs. J. D. Bedle and Walter C. Noyes for appellee.

Buffington, Circuit Judge, delivered the opinion of the court:

In this case, Harland & Wolff, Limited, a British corporation, filed a libel against the steamship Kaiser Wilhelm II., owned by the North German Lloyd, a German corporation, for repairs made to that vessel in libellant's shipyard in England. By its answer, the North German Lloyd admitted the admiralty jurisdiction of the court below in the premises, but contended such jurisdiction should not be exercised in the present instance, because the countries of both litigants were at war with each other, and that prior to the filing of this libel the Imperial Government of Germany issued a moratorium whereby payment of all indebtedness by German to British subjects was forbidden during the war. It was therefore contended that the present enforcement of this claim would compel such German subject to violate the law of its country, and thereby subject itself to pains and penalties. To this answer the British libellant filed exceptions which, in substance, alleged that the facts set forth in the answer did not constitute a defense to the libel. On hearing, the court, in an opinion reported at 230 Fed. 717, sustained the contention of the North German Lloyd and subsequently entered a decree dismissing the libel. From such decree this appeal was taken. But pending such appeal, and at the hearing in this court, the whole situation was changed by two facts: First, the existence of war between the United States and the Imperial Government of Germany; and, second, the libeled ship, the Kaiser Wilhelm II., was taken over by the United States Government by the order in the margin.¹

¹ Executive Order.

Whereas the following Joint Resolution adopted by Congress was approved by the President May 12, 1917:

"Joint Resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of

This being an appeal in admiralty, this court has authority to consider the case *de novo*. *Irvine v. The Hesper*, 122 U. S. 250, 30 L. ed. 1175, 7 Sup. Ct. Rep. 1177. And, of course, it will also take judicial notice of the change of situation noted above. That the court below had jurisdiction of the subject-matter and of the parties, if it saw fit to exercise it, is assumed, and the question before that court was therefore as to the propriety of exercising such jurisdiction. Manifestly, the exercise of jurisdiction by the courts of a neutral nation between citizens of belligerent powers is a delicate one, and in this case whatever course was followed there would be reasonable complaint by the unsuccessful litigant. For, while the German citizen could assert the enforcement of the claim compelled it to pay a debt its government had forbidden it to pay, the British citizen could with equal weight complain that the German vessel had sought protection in an American port; it was enabled to do so through the very repairs the libellant made; the libellant had a lien for such helpful repairs on such vessel; that such lien might be lost if the cause were dismissed, and that it would be an unneutral act if it were turned out of court. Bearing in mind the further fact that the Kaiser Wilhelm II., even if this case were dismissed, could not have gone to sea for fear of capture, and that retention of jurisdiction in no way hindered, and dismissal of the libel in no

way furthered, the use of the vessel by its German owners, we are of opinion the court below should not have dismissed the libel, and that its decree should be reversed.

Moreover, the two facts which have come to pass meanwhile, viz., the war with Germany and the taking over of the vessel by the United States Government, give further support to this conclusion, for the action of the government, in taking over the libeled vessel, changed the practical effects of the decree prayed for when the libel was filed, in that such decree is not now enforced against a German citizen, or its property, but in substance and effect would be, if a decree were finally entered as hereafter noted, against a vessel held by the United States. This vessel, now taken by the government as noted, may hereafter be lost, burned, or destroyed, and if the lien be not finally enforced against her in this proceeding, or the hold of the court upon her be surrendered, it is manifest that the North German Lloyd might, after the war was ended, still remain liable to the libellant for the repairs on the ship, no matter what became of her. The practical effect, therefore, of our dismissing this libel, might eventually work a hardship to the North German Lloyd. So, also, the changed situation makes the British libellant's nation and our own allies in this war, and it might well be regarded as a well-nigh hostile act on the part of the United States district court to refuse to exercise its

any nation with which the United States may be at war, or was under register of any such nation, and for other purposes:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency of the government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances,

and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

And whereas the following vessels were, at the time of coming into the jurisdiction of the United States, owned in whole or in part by a corporation, citizen, or subject of the Empire of Germany, a nation with which the United States is now at war, or were flying the flag of or under the register of the Empire of Germany, or of a political subdivision or municipality thereof: The Kaiser Wilhelm II. [and eighty-seven other named vessels].

It is therefore ordered that through the United States Shipping Board there be taken over to the United States the possession and title of the aforementioned vessels. The United States Shipping Board is further hereby authorized to repair, equip, and man the said vessels; to operate, lease, or charter the same in any service of the United States, or in any commerce, foreign or coastwise; and to do and perform any and all things that may be necessary to accomplish the purposes of the Joint Resolution above set forth.

jurisdiction in behalf of a British citizen. It is manifest the ship cannot now be returned to the German subject, just as it could not have been really returned to such owner for use at any time since the libel was filed. Therefore there is no practical reason why jurisdiction should be declined on the ground that retention was an unneutral act when we were at peace with Germany, or is now an unjust act toward the citizen of a country with which we are at war. The fact that the ship has now been taken from the possession of the court by the government would not prevent the court from hereafter adjudicating the several rights of the parties litigant if possession of the ship should later be restored, or if the government saw fit hereafter and of its own accord to pay into court such amount as would satisfy this lien. It is apparent, therefore, that no harm can be done to the two litigants or to the government by the lower court retaining jurisdiction of the libel for the present. If, as is no doubt the case, the counsel for the German claimant cannot at this time properly procure proofs and present his client's case, the court can, and no doubt will, delay action until this can be done. On the other hand, retention of jurisdiction may afford a tribunal for hereafter deciding questions which might possibly arise growing out of the seizure of this and other vessels by the government, if the government should desire an adjudication by a court of last resort.

This case is exceptional in its situation, and calls for the exercise of that range of discretion which the broad powers of a court of admiralty enable it to exercise. Such broad powers and range of discretion are, in our judgment, fittingly exercised by an order which will make due provision for, first, giving the German citizen and belligerent an opportunity to litigate his rights if relations with his country are hereafter resumed; second, providing for ad-

judging, if the government hereafter so desires, its rights and liabilities, if any, in taking over libeled property of the German subject; third, adjudging hereafter what effect the taking of this ship by the government had on the claim of the British lienor, and the further obligation of the German vessel owner as between themselves.

In following this course, and protecting the unprotected rights of an absent German citizen while this country is at war with the Imperial Government of its country, we are impelled by three all-sufficient reasons: First, the innate sense of fairness, decency, and justice, which respects the rights of an enemy; second, the broad principles of international intercourse, which lead courts and nations that believe in international rights, to be the more careful to observe them toward belligerents; and lastly, because the awarding to this German citizen, with whom our country is at war, the careful preservation until times of peace of its rights, is in line with those high ideals of Anglo-Saxon justice which led the British courts years ago, in *Ex parte Bousmaker*, 13 Ves. Jr. 71, 33 Eng. Reprint, 221, 9 Revised Rep. 142, decided in 1806, to allow the claim of an alien enemy to be proved in time of war and the dividends held by the British court until peace. Indeed, the fact that our country is now at war with Germany is all the more reason why this court should most scrupulously award to this German citizen those international and equitable rights which no fair-minded people ever deny, even to their enemies in times of war.

We are therefore of opinion the decree of the court below should be reversed, the libel reinstated, with leave to the court and parties to take such further steps and proceedings in the case as are not at variance with the views above indicated, and that a certified copy of this opinion be furnished by the clerk to the State Department and the Department of Justice of the United States.

IOWA SUPREME COURT.

CUMMINGS SAND & GRAVEL COMPANY, Appt.,
v.
MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY.

(— Iowa, —, 166 N. W. 354.)

Carrier — switching — line haul charge.

1. A line haul charge in addition to the switching charge may be made for transferring a carload of gravel from a spur track at the pit to the spur track where it is to be used, where the transfer is for several miles over the lines of two railroad companies, although the initial and terminal points are within the limits of one municipality, and the transfer is made by a switching crew.

For other cases, see *Carriers*, IV. c, in *Dig.* 1-52 N. S.

Same — estoppel to enforce rates.

2. A carrier is not estopped from exacting its published tariff charge for a line haul service by the fact that it has construed similar service for other persons to

Note. — The question as to what constitutes switching service by carrier is considered in the annotation following J. B.

be subject merely to a switching charge, although the statute forbids discrimination in charges.

For other cases, see *Carriers*, IV. c. 4, in Dig. 1-52 N. S.

(February 13, 1918.)

A PPEAL by plaintiff from a judgment of the District Court for Cerro Gordo County in favor of defendant in an action brought to restrain it from discriminating against plaintiff, and from refusing to handle its shipments for rates and charges made to others for the same service. Affirmed.

Statement by Gaynor, J.:

Action in equity for a mandatory injunction requiring defendant to accept in payment for services rendered in handling freight for the plaintiff a sum less than the published tariff rate for long-distance haul, on the theory that the services were in the nature of switching service, or, if not, that defendant had so construed the service in that it hauled for others in a like situation and charged for so doing as for a switching service.

Messrs. Sennett, Bliss, Witwer, & Sennett, for appellant:

Switching service, as distinguished from train service, is the movement of cars by means (ordinarily) of switch engines and crews within railroad yard limits.

State v. Chicago, M. & St. P. R. Co. 88 Iowa. 445, 55 N. W. 331.

A railroad must deliver cars of freight to the consignee on the siding or spur serving his plant.

4 R. C. L. § 279, p. 824, note 7; Vincent v. Chicago & A. R. Co. 49 Ill. 33; Banner Grain Co. v. Great Northern R. Co. 119 Minn. 68, 41 L.R.A. (N.S.) 678, 137 N. W. 161; Coe v. Louisville & N. R. Co. 3 Fed. 775.

It is unlawful at common law for common carriers to unjustly discriminate between persons, in the matter of freight shipments; and where the various shipments are under circumstances that are substantially the same, it is unjust discrimination to charge different rates therefor.

Sullivan v. Minneapolis & R. River R. Co. 121 Minn. 488, 45 L.R.A. (N.S.) 612, 142 N. W. 3; Cook v. Chicago, R. I. & P. R. Co. 81 Iowa, 551, 9 L.R.A. 764, 3 Inters. Com. Rep. 383, 25 Am. St. Rep. 512, 46 N. W. 1080; Blair v. Sioux City & P. R. Co. 109

Iowa, 382, 80 N. W. 673; Louisville, E. & St. L. Consol. R. Co. v. Wilson, 32 Ind. 517, 18 L.R.A. 105, 32 N. E. 311; McDuffee v. Portland & R. R. Co. 52 N. H. 430, 13 Am. Rep. 72; Messenger v. Pennsylvania R. Co. 36 N. J. L. 407, 13 Am. Rep. 457; Fitzgerald v. Grand Trunk R. Co. 63 Vt. 169, 13 L.R.A. 70, 3 Inters. Com. Rep. 633, 22 Atl. 76; Scofield v. Lake Shore & M. S. R. Co. 43 Ohio St. 571, 54 Am. Rep. 846, 3 N. E. 907; Gates v. Detroit & M. R. Co. 151 Mich. 548, 115 N. W. 420; State ex rel. Atwater v. Delaware L. & W. R. Co. 48 N. J. L. 55, 57 Am. Rep. 543, 2 Atl. 803; Hays v. Pennsylvania Co. 12 Fed. 309.

Where a railroad moves, by switching service, freight originating on side tracks within its switching district, and delivers it to consignees on other sidings also within the district, upon a switching charge therefor, it must accord the same rate to all shippers requesting a like service.

Crescent Coal Co. v. Louisville & N. R. Co. (Higdon v. Louisville & N. R. Co.) 143 Ky. 73, 33 L.R.A. (N.S.) 442, 135 S. W. 768.

The use of a spur track whereon a shipper delivers freight to and receives freight from a railroad gives the road no right to charge such shipper a different rate from that charged to others not so situated.

Chicago & A. R. Co. v. United States, 26 L.R.A. (N.S.) 551, 84 C. C. A. 324, 156 Fed. 558.

Messrs. C. H. E. Boardman, F. M. Miner, and M. M. Joyce, for appellee:

A switching charge or transfer service is one which precedes or follows a transportation service, and applies only to a shipment on which legal freight charges have already been earned.

Dixon v. Central of Georgia R. Co. 110 Ga. 173, 35 S. E. 369; J. B. Doppes Sons Lumber Co. v. Cincinnati, N. O. & T. P. R. Co. 92 Ohio St. 206, L.R.A. 1916D, 452, 110 N. E. 640.

The fact that the origin and destination of a shipment are both within the terminal limits of a city is immaterial. The fact that the freight movement begins and ends within the limits of a city does not take from it its character of an actual transportation between two termini.

Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152; J. B. Doppes Sons Lumber Co. v. Cincinnati, N. O. & T. P. R. Co. supra.

The railroad company was not bound to switch cars from another line to its own team track for unloading by consignee.

Doppes Sons Lumber Co. v. Cincinnati, N. O. & T. P. R. Co. L.R.A. 1916D, 455.

As to right of carrier having line haul to make extra charge for switching or L.R.A. 1918C.

spotting cars at terminals or sidetracks, see annotation following State ex rel. Railroad Comrs. v. Florida East Coast R. Co. L.R.A. 1918A, 164.

Railroad Commission v. St. Louis & I. M.
& S. R. Co. 24 Inters. Com. Rep. 292.

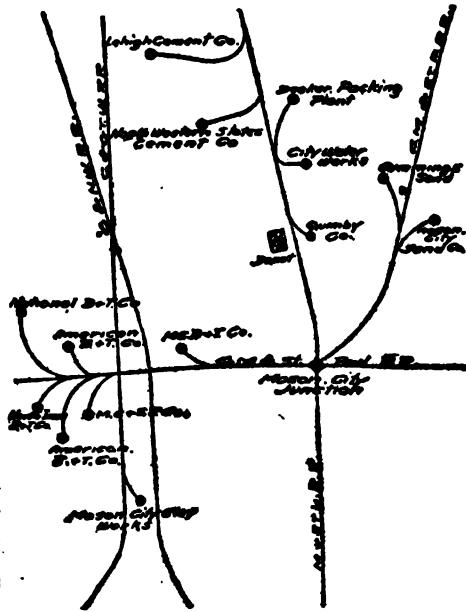
Mr. W. H. Bremner also for appellee.

Gaynor, J., delivered the opinion of the court:

The defendant is a railroad company operating a line of road north and south through Mason City. East of defendant's line and nearly parallel, runs a line of road owned and operated by the Chicago, Milwaukee, & St. Paul Railway Company, hereafter called the Milwaukee. On the line of the last-named company and connected with it by a spur track, plaintiff owned and is operating a gravel pit. The junction of the Milwaukee and the defendant company's line is at a point approximately 2 miles south of plaintiff's gravel pit. Prior to the time this complaint was lodged, plaintiff had ordered cars from the defendant company to be sent down its line to the junction, and up the Milwaukee line to the plaintiff's spur track. These cars, as we understand the record, were taken by the Milwaukee Company's switching crew to the gravel pit and there loaded with sand, and when loaded carried by it to its junction with the defendant road, and there switched onto defendant's road. The defendant's switching crew there received and carried the loaded cars to its depot. The tracks of both these companies and the junction are in Mason City. The gravel pit is slightly to the east of the city limits. For some time prior to the commencement of this action, cars loaded with sand had been carried by the plaintiff from this gravel pit south to the junction by the Milwaukee, and then north by defendant company to its depot, and there delivered to the plaintiff on what is known in this record as the Quimby track. After a number of cars had been delivered, defendant refused to receive and transport more unless the plaintiff would pay to the defendant company for the cars already delivered, and for the other cars tendered, a freight rate of \$8 per car, and \$4 additional switching charges. This the plaintiff refused to pay, claiming that the service rendered is a switching service, and claiming that defendant had served other industries along this line, under approximately similar circumstances, as for switching service at the rate of \$4 a car, \$2 for the Milwaukee and \$2 for itself. This action is brought to compel the defendant to receive and transport the cars tendered at the rate of \$4 a car, and to compel the defendant to accept payment for cars delivered at the same rate.

It is the claim of plaintiff that the services demanded and rendered are within the switching district, and therefore defendant is entitled only to charge and re-L.R.A.1918C.

ceive payment as for switching service; to wit, \$4 per car. It is conceded that if it is a line haul the amount demanded by the defendant is the published tariff rate. It is not claimed that the \$4 is not a proper switching charge. The claim of the defendant is that the services rendered were a transportation or line haul, and not a switching service, and that it cannot legally charge or receive less than the tariff rate for a line haul. We herewith submit a draft showing the relative location of the lines and roads and junction and the several industries with their spur tracks as the same appear in the record.



It appears from the record that the plaintiff is operating a sand pit east of the Milwaukee lines and outside the city limits; that this industry is connected by a spur track with the Milwaukee road; that the plaintiff ordered these cars from the defendant company, and upon such order they were shipped by defendant company to this junction with the Milwaukee, and there taken by the Milwaukee and carried to its sand and gravel pit, and there loaded. Thereupon the Milwaukee Company transferred the cars back to the junction, switched them onto defendant company's road at the junction, and they were there received by the switching crew of the defendant company and transported to and placed upon what is known as the Quimby spur track shown upon the plat. After they were loaded at plaintiff's gravel pit, they were carried by the Milwaukee main line to the junction and there switched on

defendant's line. Thereupon defendant's switching crew took the cars and hauled them north upon its main line until it reached the Quimby spur, and there switched them on the Quimby spur.

It appears that the plaintiff had a contract to erect a bridge just north of this Quimby spur over a creek, and this sand and gravel were shipped for the purpose of completing that contract. The gravel was shipped over these two roads from the gravel pit to the Quimby spur, or to the point where it was switched to the Quimby spur for the use of the plaintiff. It was received by the Milwaukee Company at a definite point on its road, and by both companies, each in its turn, carried to a definite point on defendant's road. The only switching that seems to have been done was shunting the cars from the spur track that led to the gravel pit onto the Milwaukee main line, and then further switching at the junction from the Milwaukee main line to the defendant's main line. They were there transported on defendant's main line from the junction to the point opposite the Quimby spur, and there shunted onto the Quimby spur for the use of the plaintiff. The services rendered by these companies, for which the charges were made, were the services from a definite initial point to a definite terminal point.

It is apparent that the only service rendered for which the charge is made is a service in transporting the gravel from the gravel pit, over the Milwaukee and defendant's roads, to the Quimby tract. No services were rendered by either company other than are involved in the act of transferring this sand from one definite point to another. A line haul has been defined to be the transportation of property from an initial point to a terminal point. In the line haul, switching may be, and sometimes is, an incident. It is an incident to the line haul. Switching is a part of the transportation. It is an incident to the transportation. It either precedes the initial shipment in the transferring of goods to a point for shipment, or it follows a shipment and is a transferring of goods from the terminal point of the shipment to the place of actual delivery on spurs or switch tracks. Here the services rendered constituted the carrying of goods from the initial point at which they were received to the point of delivery. The carriage was over both roads. The services charged are for the services of both roads. The switching at the junction was an incident to the transportation, and we think it is immaterial whether this was done by a switching crew or otherwise. It is the character of the service that determines whether it be a line haul or a switching serv-

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ice. Switching or transfer service is one which precedes or follows a transportation service, and applies only to a shipment on which legal freight charges have already been earned, or are to be earned. See *Dixon v. Central of Georgia R. Co.* 110 Ga. 173, 35 S. E. 369.

When goods are received at a definite point on one road for shipment to a definite point on another road, switching may precede as an incident to the preparation of the shipment, and switching may intervene in transferring from one road to the other, and switching may follow in transferring from the point at which it was received on the line of the receiving carrier to its team tracks or industrial sidings on its own line yet the character of the service remains the same. It is a definite service rendered between two definite points, an initial and a terminal, and the switching becomes merely an incident to the haul. Terminal facilities, switching tracks, team tracks, and spur tracks to industrial sidings are merely conveniences at the destination or initial point of the transportation, and are aids in the preparation at the beginning or in the completion at the end of a haul, and it would seem to be wholly immaterial that the initial point at which the goods are received for transportation and the point of delivery are within the industrial limits or switching district of the receiving company. The switching service is but an incident to a line haul. Switches, team tracks, industrial sidings, and spur tracks are necessary to prevent the congestion which would result from requiring all carload freight to be delivered at the freight depots of the respective roads, and, in a very proper sense, are shipping stations. The fact that the freight movement begins and ends within the limits of the city does not take from it its character of an actual transportation between two terminals. See also *J. B. Doppes Sons Lumber Co. v. Cincinnati, N. O. & T. P. R. Co.* 92 Ohio St. 206, L.R.A. 1916D, 452, 110 N. E. 640.

Our conclusion is that switching is an incident to a line haul, and that there is no such thing as "switching service" technically, independent of a line haul. We conclude on this first point that the services rendered were line haul services, and that the defendant is entitled to the tariff rate fixed for line haul services in the amount demanded by the company, unless defeated by the matters to which attention is herein-after called.

It is the claim of the plaintiff that, even if as a matter of fact it be a line haul, the defendant is not entitled to exact the sum demanded for these services, for the reason that by its conduct it has construed the services rendered to be a switching service.

and has exacted from other companies situated like this company is situated, and under practically the same conditions, payment as for a switching service, to wit, \$2 for the Milwaukee and \$2 for the defendant company, and that to allow defendant now to charge this company more than it charged other companies would be to permit it to discriminate unjustly between this company and the others, to its great prejudice.

It is conceded in the stipulation on which this case was submitted that during the year 1914 carload lots of clay products consigned from the Mason City Brick & Tile Company, American Brick & Tile Company, North Iowa Brick & Tile Company, to the Decker Packing Plant, city of Mason City, the Lehigh Portland Cement Company, and the Northwestern Portland States Cement Company, were delivered by the defendant company to said companies on a charge of \$4 per car, which charge consisted of the switching charge of the Milwaukee Company of \$2 and the switching charge of \$2 for the defendant company; that such carload lots were intended for the use of the consignees, and that each of the consignees had an industry located on a track of the defendant company, or a track connected therewith; that the delivery of said cars to said consignees was made by delivery upon the particular track of the consignee; that the movement of the cars was had by switching engines on both roads.

It was further conceded that the Mason City Sand & Gravel Company, a company connected by spur track with the Milwaukee, and just south of plaintiff's plant, consigned carloads of sand and gravel, under similar circumstances and under like conditions, to all or some of the above-named consignees, and that the sand and gravel were handled as in this case.

It is also conceded that the Mason City Sand & Gravel Company consigned certain carloads of sand and gravel to themselves, under like circumstances as attended the shipment in question, at the rate of \$4 per car.

It is further admitted that the rates and charges demanded by the defendant company on the carload shipments of sand and gravel involved in this action were and are in accordance with the published tariffs of the defendant company and the Milwaukee Company in force at the time the shipments were made for line hauls.

It is further admitted that the railroad commissioners, under the provisions of § 2125 of the Code, as amended, by the Thirty-fourth General Assembly, chap. 95, § 1, has never taken any action to define or establish a switching district or define an industrial vicinity in Mason City.

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It is further admitted that the yard limits of the Milwaukee road are within Mason City, and that the leads to the Quimby Company are within the Mason City yard limits of the defendant company, as are also the consignees to which the consignments have been made, as hereinbefore indicated.

It was further admitted that the published tariff rates of the defendant company in force at the time of the movements of the cars in question contained this provision: "Public team tracks or sidings, etc., of the defendant company, the M. S. N. Ry. Co. and S. I. T. for loading or unloading cars are exclusively for handling their track unless otherwise provided."

It is further conceded that if the plaintiff's theory is right the defendant is entitled to have judgment against the plaintiff at the rate of \$4 a car for the cars shipped, or \$156, and no more; that if the defendant's theory is correct the amount demanded by the defendant should be assessed against the plaintiff; to wit, \$511.81.

The court found for the defendant. Plaintiff appeals.

Out of the stipulation arises this question, Does the fact that the defendant charged and received from other companies a less rate for services like that rendered in this case than it is now demanding of the plaintiff prevent the defendant from recovering of the plaintiff its published tariff rate for line haul services? Or, in other words, has the defendant, by its conduct in dealing with these other companies, so construed the services rendered that it is not now in a position to assert against the plaintiff that it is entitled to a larger sum for the services rendered than exacted from others for like services? Or, in other words, does the statute against discrimination stand in the way of its recovering more than it charged and received from other companies for like services, under like conditions and situations?

We have found that the services rendered were line haul services. The stipulation is that for such services, under the published tariff rate, the defendant is entitled to the sum demanded. Defendant is not asking more of the plaintiff than under the published tariff rate it is entitled to. Is it estopped from insisting that plaintiff pay the published tariff rate for this service because it has rendered for other companies the same service at a less rate? We have a statute against unjust and unfair discrimination, for a violation of which the legislature has imposed a penalty. We have also a statute making it unlawful for a company to charge or receive more or less than its published tariff rates. The fact, if it be a fact, that the defendant has violated the statute against unjust discrimination, cannot, we

think, justify us in compelling the defendant, by decree or judgment, to violate the statute prohibiting it from charging or receiving more or less than the published tariff rate requires. It is no defense on the part of the plaintiff to say that the railroad company has violated this statute against unfair discrimination by charging others less than the tariff rate. To say this is to say, because you have once sinned, you must continue to sin. Moreover, is it a discrimination in the sense of the statute? Is the act of the defendant in insisting that this plaintiff pay no more and no less than the published tariff rate a discrimination against it, such as is contemplated by the statute? Was it the thought of the legislature that a violation of the published tariff rate in one or more instances would be a justification for a further violation? Would the fact that the company, in some instances, has violated the statute by charging a less rate for services rendered than was provided for in its published tariff rates, justify other parties in insisting that they too be served for a less rate than the published tariff rate fixed for the services rendered?

Is not the remedy, if there be any, found in the penal and other provisions of the statute lodged against unjust discrimination and a violation of the published tariff rate? Section 2125, Supplement Code 1913, provides: "It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or subject any particular person . . . or locality, or any description of traffic, to any prejudice or disadvantage in any respect whatsoever. . . . All common carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and switching of cars, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines, and to and from other lines and places connected therewith; and shall not discriminate in their accommodations, rates, and charges between such connecting lines. Any common carrier may be required to switch and transfer cars for another, for the purpose of being loaded or unloaded, upon such terms and conditions as may be prescribed by the Board of Railroad Commissioners. The switching service of common carriers is hereby defined to be the shifting of loaded or empty cars from one main line or siding to another main line

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or siding at an industry, or at a group of industries, or at a station, village, or city, and within its industrial vicinity, as may be defined by the Board of Railroad Commissioners, by means of switches and connecting tracks."

The theory of the law is that rates shall be uniform; that for like services a fixed rate shall be exacted and paid. The company has a right to fix the rates, but it must publish its tariff rates so that all may know the rate at which services may be demanded and received. These rates once fixed and published are binding upon the company while in force. For like services it can charge but the tariff rate to each shipper. If these rates are unfair or unjust, the railroad commissioners, upon application, may fix such rates as are reasonable. Section 2128 of the Code of 1897 provides: "Every common carrier . . . shall print and keep for public inspection schedules showing the rates, fares, and charges for the transportation of passengers and property which it has established, and which are in force at the time upon its railroad. . . . No advance shall be made in the rates, fares, and charges which have been established and published . . . except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedules then in force [etc.]. When any such common carrier shall have established and published its rates [etc.], it shall not charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith than is specified in such published schedule of rates . . . as may at the time be in force."

Section 2130 provides that for a violation of either of these statutes, or any of the statutes against which the statute is lodged, it shall be liable to the person or persons injured thereby for three times the amount of damages sustained in consequence, etc.

Section 2132 provides that for a wilful violation of any of these statutes the company shall be guilty of a misdemeanor, and shall, upon conviction thereof, be fined not more than \$5,000 or less than \$500 for each offense.

Section 2138 provides that the rates thus fixed, in all actions against the railroad corporations wherein there are involved the charges thereof for the transportation of any freight or cars, or any unjust discrimination in relation thereto, shall be taken as prima facie evidence in all courts that the rates fixed therein are reasonable and just maximum rates of charge, for which said schedules have been prepared. These rates, however, are subject to supervision by the Railroad Commission.

Section 2139 provides for complaints to the Board of Railroad Commissioners of the unreasonableness of the rates fixed by the railway company.

Section 2140 provides for a hearing before the railroad commissioners as to the reasonableness of the rates fixed.

Section 2141 provides for a determination by the railroad commissioners of the reasonableness of the rates fixed, with power to fix rates that are reasonable.

On the trial of the case the following stipulation was entered into: "It is further admitted that the rates and charges demanded by the defendant company on carload shipments of sand and gravel involved in this action were and are in accordance with the published tariffs of the defendant company and the Chicago, Milwaukee, & St. Paul Railway Company, in force at the time said shipments moved, the same being \$2 per car switching charge for movement on the Chicago, Milwaukee, & St. Paul Railway Company tracks, and \$.25 per ton for movement on the Minneapolis & St. Louis Railroad Company, except that, on those cars where the revenue collected by the Minneapolis & St. Louis Railroad Company under the said \$.25 per ton rate exceeds \$10, the defendant then assumed the payment of the said switching charge of the Chicago, Milwaukee, & St. Paul Railway Company, or so much of said switching charge as the amount collected by the defendant company under the \$.25 per ton rate exceeds \$10; that said \$.25 per ton rate, it is admitted, is the published tariff charge for a haul of 5 miles or less, under the Iowa distance tariff then in force, said distance tariff being a schedule established by the Railroad Commission of the state of Iowa, and which schedule had been adopted by the defendant company in its published tariffs at the time the said shipments moved. The said \$.25

per ton rate above mentioned is not a switching charge."

From this stipulation it appears that the amount demanded by the defendant was the published tariff rate for the services rendered. It therefore appears that defendant is demanding and exacting of the plaintiff only the rate fixed in its published tariff for the character of services which we find were actually rendered by the defendant. It follows, therefore, that the fact that the defendant company rendered like services for other industries at a less rate does not entitle the plaintiff in this case to insist that the defendant now further violate the law and its duty under the law, and charge the plaintiff a less sum than is so fixed in its tariff schedule.

When the defendant demands only what under the law it is entitled to, it is no defense to say that it has served other companies for a less rate than is demanded. Such contention makes no defense against the demand that the plaintiff pay for the services rendered the published tariff rate.

We have examined the Kentucky case reported in *Crescent Coal Co. v. Louisville & N. R. Co.* (Higdon v. Louisville & N. R. Co.) 143 Ky. 73, 33 L.R.A. (N.S.) 442, 135 S. W. 768, and are not persuaded by its reasoning to a different conclusion than we here reach. The rights demanded by the defendant were in accordance with the published tariff rates established by the Railroad Commission. To charge more or less than that rate for the services rendered is to violate the provisions of § 2128 hereinbefore referred to.

For the reasons hereinbefore set out, the judgment of the District Court is affirmed..

Preston, Ch. J., and Sallinger and Stevens, JJ., concur.

KENTUCKY COURT OF APPEALS.

DEMPSEY SHAVER, by Next Friend,
Appt.,
v.

STEWART SMITH et al.

(179 Ky. 26, 200 S. W. 8.)

Automobile — collision with overtaken wagon — negligence.

The driver of an automobile under control is negligent as matter of law in col-

liding with an overtaken wagon in broad daylight, on a road wide enough for him to pass in safety, merely because of miscalculation of distance, although the wagon was on the left of the center of the road.

For other cases, see *Automobiles*, II. a, in *Dig. 1-52 N. S.*

(January 29, 1918.)

APPEAL by plaintiff from a judgment of the Circuit Court for Shelby County in favor of defendants in an action brought to

VIII., on driving directly into horse-drawn vehicle.

As to rules of the road governing vehicles proceeding in the same direction, see note to *Hackett v. Alamito Sanitary Dairy Co.* 41 L.R.A. (N.S.) 337.

Note. — The question of duty and liability of operator of automobile with respect to horses encountered on the highway is covered in the note to *Messer v. Bruening*, 48 L.R.A. (N.S.) 946; see especially, in connection with *SHAVER v. SMITH*, subdivision L.R.A. 1918C.

recover damages for personal injuries alleged to have been caused by defendants' negligence. Reversed.

The facts are stated in the opinion.

Messrs. **Barrickman & Kaltenbacher** for appellant.

Mr. W. T. Beckham for appellees.

Clay, C., filed the following opinion:

Dempsey Shaver, suing by his father as next friend, Lloyd Shaver, brought this action against Stewart Smith and Clarence Smith to recover damages for personal injuries. From a verdict and judgment in favor of defendants, plaintiff appeals.

It is insisted for plaintiff that the trial court should have held that defendants were negligent as a matter of law, and have submitted to the jury only the question of damages.

According to the evidence of plaintiff, he was 14 years of age when the accident occurred under the following circumstances: He had been to Shelbyville, and was walking home over the state pike. He was overtaken by Mr. Jeff Money, who was driving a spring wagon. Mr. Money invited him to ride, and he sat down beside Mr. Money on the front seat. After riding about half a mile, an automobile belonging to Clarence Smith, and driven by Stewart Smith, and used by them in conducting their partnership business, approached the wagon from the rear. Upon the sounding of the horn plaintiff told Mr. Money that there was a machine behind them. At that time the wagon was nearer the right side of the pike than the left. The pike was 25 or 30 feet wide, and there was plenty of room for the automobile to pass. When the automobile reached the wagon, the fender struck the wagon in the rear, and plaintiff was thrown to the ground and injured. His injuries consisted of a cut which had to be sewed up and several bruises and abrasions. At the time of the accident the machine was going at the rate of 10 or 12 miles an hour.

According to the evidence of Stewart Smith, the driver of the machine, he saw the wagon some distance away and sounded his horn. He was then going 7 or 8 miles an hour, and was on the left side of the road. The wagon was nearer the left side of the road than the right. As they ap-

proached the second culvert, he knew that he could not pass Mr. Money on the culvert. He then slowed down and followed Mr. Money over the culvert. In describing how the accident occurred, he said: "Just after he went over the culvert, I aimed to pass him, aimed to go around him. Of course. I was watching where I was driving, and didn't make quite allowance enough. I saw I was going to hit the wagon, and I stopped the machine as quick as possible."

At that time he was moving very slowly, and had the machine under perfect control. He further stated that he struck the wagon because the wagon was in the way, and he could not stop the machine before it struck the wagon. Roy Smith, a brother of the defendants, testified that the road at the place of the accident was 25 or 30 feet wide, and that two or three automobiles could have passed in that distance. Messrs. Fullenwider and Ware testified that they went to the place of the accident shortly after the accident occurred, and the tracks indicated that the brakes had been applied, and that the left wheels had slipped off the metal for a distance of 4 feet. When the machine began to skid they could not say.

The record discloses that the defendants not only denied the allegations of the petition, but pleaded contributory negligence on the part of the driver of the wagon as agent of the plaintiff, who was an infant and guest of the driver. It further appears that a demurrer was sustained to this plea, and the plea dismissed.

Here, then, we have a case from which the question of contributory negligence has been eliminated. The automobile was approaching the wagon from the rear. It does not appear that the wagon suddenly pulled in front of the automobile. The driver had the machine under perfect control. It was broad daylight, and the position of the wagon was known to the driver of the machine. Under these circumstances the machine collided with the wagon, and the only excuse that the driver of the machine offered is that the wagon was in the way, and he miscalculated the distance between his machine and the wagon. Even if the wagon was on the wrong side of the road and in the way, this did not give to the driver of the machine the right to run against the

And with respect to rules of the road governing vehicles proceeding in opposite directions, see note to *Smith v. Barnard*, 41 L.R.A.(N.S.) 322.

Generally as to imputed negligence of driver of vehicle to passenger, see notes to *Schultz v. Old Colony Street R. Co.* 8 L.R.A.(N.S.) 597, and *Christopherson v. Minneapolis, St. P. & S. Ste. M. R. Co.* L.R.A. 1915A, 761. L.R.A.1918C.

As to imputed or contributory negligence of passenger riding in automobile driven by another precluding recovery against third person for injury, see note to *Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co.* L.R.A.1915B, 953.

As to reciprocal duty of operator of automobile and pedestrians to use care, see note to *Deputy v. Kimmell*, 51 L.R.A.(N.S.) 990, and earlier notes there referred to.

wagon. Under the circumstances he should have stopped his car and requested the driver of the wagon to turn out, rather than keep on driving and come in collision with him. *Savoy v. McLeod*, 111 Me. 234, 48 L.R.A.(N.S.) 971, 88 Atl. 721. On the other hand, if he ran into the wagon merely because he miscalculated the distance, there can be no question that the collision was due to his fault. Since the driver was un-

der the duty to use ordinary care to avoid coming into contact with the wagon, and since the uncontradicted evidence shows that he failed to use such care, we conclude that the trial court should have directed the jury to find for plaintiff, and have left to the jury only the question of damages under a proper instruction.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

KENTUCKY COURT OF APPEALS.

J. A. SCOTT, Appt.,

v.

S. M. RATLIFF.

(179 Ky. 267, 200 S. W. 462.)

Condition — devolution of title.

1. A condition in a deed that the title should at once go to the grantee's children if creditors of the grantee sought to subject the property to their claims is valid.

For other cases, see Covenants and Conditions, II. a, in Dig. 1-52 N. S.

Deed — grant to children — rights of after-born children.

2. After-born children share equally with those living when condition is broken, in the benefit of a condition in a deed providing that upon an attempt by the grantee's creditors to subject the property to their claims the title shall at once go to his children.

For other cases, see Deeds, II. b, in Dig. 1-52 N. S.

(February 12, 1918.)

APPEAL by defendant from a judgment of the Circuit Court for Franklin County in favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note executed by defendant to plaintiff as part consideration for land. Reversed.

The facts are stated in the opinion.

Messrs. Hager & Stewart, for appellant:

A deed granting a fee-simple title cannot be loaded with conditions which destroy the grant.

Note. — The unskilled hand which drew the deed under consideration in the case above reported appears unwittingly to have created that very rare thing in American law, a shifting use. The operation of such a limitation was the subject of consideration in *Simonds v. Simonds*, 199 Mass. 552, 19 L.R.A.(N.S.) 686, 85 N. E. 860, where it was held that a grant to one, his heirs and assigns, habendum to him during the term of his natural life, remainder to such of his children as should arrive at the age of twenty-one years, their heirs and as-

Land v. Land, 172 Ky. 145, 189 S. W. 1; *Ray v. Spears*, 23 Ky. L. Rep. 814, 64 S. W. 413; *Humphrey v. Potter*, 24 Ky. L. Rep. 1264, 70 S. W. 1062; *Hughes v. Hammond*, 136 Ky. 694, 26 L.R.A.(N.S.) 808, 125 S. W. 144.

A provision in a deed that it shall not go into effect during the life of the grantor simply reserves a life estate.

Reynolds v. McFarland, 10 Ky. L. Rep. 932, 11 S. W. 202; *Phillips v. Thomas Lumber Co.* 94 Ky. 445, 42 Am. St. Rep. 367, 22 S. W. 652.

A parent has a right, in creating an estate in a child, to impose conditions or limitations which would divest his title in the event he should get in debt, when coupled with a provision that the remainder in fee should vest in specified persons.

Bull v. Kentucky Nat. Bank, 90 Ky. 452, 12 L.R.A. 37, 14 S. W. 425; *Bottom v. Fultz*, 124 Ky. 307, 98 S. W. 1037.

A deed to the children of a named person vests an interest in all the children, including any that might be born thereafter, and none of them can have a perfect title until the possibility of issue is extinct.

Barker v. Barker, 143 Ky. 66, 135 S. W. 396; *McCoy v. Ferguson*, 164 Ky. 136, 175 S. W. 23; *Hall v. Wright*, 121 Ky. 16, 87 S. W. 1129, 138 Ky. 71, 127 S. W. 516, Ann. Cas. 1912A, 1255; *May v. Justice*, 148 Ky. 696, 147 S. W. 409; *Jones v. Thomasson*, 159 Ky. 196, 166 S. W. 1001.

Messrs. Willis & Davis, for appellees:

A deed by a parent conveying land to his son, with a final provision that it does not take effect until the death of the grant-

signs, created a fee in the first taker to hold for his use during life, and then for the use of such of his children as should attain majority, whether they did so before or after his death. In commenting upon this case, it was said in 19 L.R.A.(N.S.) 686, that in giving effect to a future estate created by a deed for the benefit of a class not definitely ascertained at the termination of the precedent estate, as a shifting use, the case seemed to be unique in the jurisprudence of this country.

or and his wife, conveys a remainder with a life estate reserved to grantors.

Phillips v. Thomas Lumber Co. 94 Ky. 445, 42 Am. St. Rep. 367, 22 S. W. 652; Reynolds v. McFarland, 10 Ky. L. Rep. 932, 11 S. W. 202.

A provision in the deed conveying a remainder interest on condition that the deed shall be void upon the happening of certain contingencies creates a defeasible fee.

Wills v. Wills, 85 Ky. 486, 3 S. W. 900.

It is lawful for a parent in a conveyance to his child, to provide that the deed shall be void if the child shall encumber the estate or contract any liability which would render it liable to be sold.

Bull v. Kentucky Nat. Bank, 90 Ky. 452, 12 L.R.A. 37, 14 S. W. 425; Bramhall v. Ferris, 14 N. Y. 41, 67 Am. Dec. 113; Bottom v. Fultz, 124 Ky. 307, 98 S. W. 1037.

Upon the violation of a condition in the deed, or upon the happening of contingencies provided for by the deed, the estate immediately vests; and when the parties taking the remainder in fee are heirs of the first grantee, it means only such heirs as were in existence at the time of the defeasance.

Turner v. Patterson, 5 Dana, 296; Foster v. Shreve, 6 Bush, 519; Barker v. Barker, 143 Ky. 66, 135 S. W. 396.

Courts will adopt the construction of a deed or will which prevents a title to real estate from remaining contingent, and will endeavor, if consistent with the intention, to vest the title in someone in existence.

Pearcy v. Greenwell, 80 Ky. 616; Blackwell v. Blackwell, 147 Ky. 264, 143 S. W. 1010; Robb v. Orm, 164 Ky. 752, 176 S. W. 221; Mullins v. Moberly, 145 Ky. 477, 140 S. W. 652.

It is the object of construction to effectuate the intention of the parties; and in gathering the intention of the maker from an instrument, the relation of the parties thereto should be considered and every word, phrase, and clause should be given effect, if possible.

Davis v. Hardin, 80 Ky. 672; American Nat. Bank v. Madison, 144 Ky. 156, 38 L.R.A.(N.S.) 597, 137 S. W. 1076; Louisville Presby. Theological Seminary v. Fidelity Trust & S. V. Co. 113 Ky. 336, 68 S. W. 427.

Carroll, J., delivered the opinion of the court:

The only question in this case is, Could the appellee, S. M. Ratliff, make a good title to a tract of land that she sold to the appellant, Scott? Whether she could or not depends on the proper construction of a deed made in 1878 by John H. Reynolds, and wife to their son Thomas Reynolds L.R.A.1918C.

the father of S. M. Ratliff. This deed recites: "That said party of the first part for and in consideration of the love and affection that we have for our (son) and for the further sum of one hundred dollars to be paid to Ann Sowards or her heirs in five years from this date do hereby sell and convey to the party of the second part his heirs and assigns the following described property, to wit: A certain part of the home farm that we now live on and bounded as follows: . . . To have and to hold the same, together with all the appurtenances thereunto belonging unto the party of the second part, his heirs and assigns forever. And the said party of the first part hereby covenant with the said party of the second part that they will warrant the title to the property hereby conveyed unto said party of the second part and his heirs and assigns forever. That is to say Thomas Reynolds is not to sell or convey said land to any person except to William Reynolds or C. Reynolds; and if said Thomas Reynolds should sell or convey to any other persons then in that event this deed shall be void and if said Thomas Reynolds should get in debt or any liability to sell said land then this deed shall be void and the land to go to his children and if he has no children then it shall go to his brothers and sisters and if Thomas Reynolds should die before his wife she is to live on said land her lifetime unless she should marry and in the event that she should marry then the land is to go to said Thomas Reynolds heirs at the date of said marriage. This deed is not to take effect until the death of myself and Cynthia Reynolds . . . my wife and at our death then this deed is to go into effect."

It stands admitted that in 1873 Thomas Reynolds, the grantee in the deed, became involved in debt, and as a result thereof judgment went against him, and the execution issued thereon was levied on the tract of land conveyed to him by his father. Thereafter the land was sold in satisfaction of the execution and purchased by the execution plaintiff, who had the sheriff make a deed to the land that he had bought to S. M. Ratliff, she having satisfied his execution debt. It is further admitted on the record that Thomas Reynolds, the grantee in the deed, is living and that S. M. Ratliff is his only child.

On behalf of S. M. Ratliff the argument is made that, as it was provided, in substance and effect, in the deed to Thomas Reynolds, that if he should get in debt and any creditor should undertake to subject the land to the payment of the debt then the deed to him should be void "and the land to go to his children, and if he has no

children, then to his brothers and sisters;" and that as Thomas Reynolds did get in debt and the land was sold to satisfy his indebtedness, this at once divested him of the title and at once vested the title in his children, and as she was at the time and is now the only living child, the full title vested in her by virtue of the sale of the land as well as by the deed made by the sheriff, subject to the life estate of John Reynolds and his wife. It may however, be here observed that there is no controversy between the parties respecting this life estate.

On behalf of Scott the argument is made:

(1) That as the deed to Thomas Reynolds conveyed to him, in the granting clause, the fee-simple title, this title would not be impaired or divested by subsequent conditions in the deed; (2) that as Thomas Reynolds, the grantee, is yet living, and upon the defeasance, assuming it to be valid, the deed provided that the land should go to his children, S. M. Ratliff, although the only child of Thomas Reynolds, did not and would not become invested with a good, vendible title until the possibility of further issue to Thomas Reynolds was extinguished, and this could not reasonably be determined until his death.

As to the first proposition, it is the settled law of this state, as declared by this court, that the condition the grantor attached to the conveyance, providing that in the event any creditors of the grantee sought to subject the land, the title should at once go to his children, is a valid and enforceable one. *Bull v. Kentucky Nat. Bank*, 90 Ky. 452, 12 L.R.A. 37, 14 S. W. 425; *Bottom v. Fultz*, 124 Ky. 302, 98 S. W. 1037. And so when this condition in the deed was broken by the grantee, he was at once divested of title to the land, and the title at once vested in his children, or rather in his daughter, now S. M. Ratliff, as she was at that time his only child.

The remaining question is Did S. M. Ratliff take a fee simple title to the whole of the land, or did she take a title part of which, at least, was subject to be defeated by the birth of other children to the grantee, Thomas Reynolds? It is plain that if Thomas Reynolds, at the time he forfeited his title to the land, had had other children than S. M. Ratliff, the title would have gone to all of the children in equal shares. But it is contended that as S. M. Ratliff was at that time the only living child, the whole title vested in her, and having once vested, no part of it was subject to be defeated or taken away from her by birth of other children.

We do not find ourselves able to agree with this contention. It will be observed L.R.A. 1918C.

that the grantor did not say that the title should vest in the children of the grantee, Thomas Reynolds, living at the time the condition was broken, or use any words that could be construed to mean that he intended that the estate should go to the then living children of Thomas Reynolds, or that after-born children should be deprived of their equal shares in the land with the children living at the time the title devolved from the grantee to his children. On the contrary, he used without limitation the broad word "children," thereby manifesting a purpose that all the children of the grantee should participate equally in the ownership of the land.

According to the construction placed on this provision by counsel for the appellee, if a child of the grantee had been born six months after the condition was broken, he would be denied the right to share in the land as much so as a child that might be born twenty years afterwards, because the whole argument rests on the proposition that when the condition was broken, the title immediately became vested irrevocably in the then living children of the grantee, as much so indeed as if the deed had been made to them in the first instance, or the children who should take when the condition was broken had been named in the deed to Thomas Reynolds.

It would further follow from this construction that if the grantee had no children when the condition was broken, the land would go under the deed to his brothers and sisters, who would likewise take the fee-simple title, of which they could not be divested, in whole or in part, by children subsequently born. The result of this would be that although the children of Thomas Reynolds, if he had any, were to be the first takers, and his brothers and sisters the second, his children if born subsequent to the devolution in the title would be deprived of all interest in the estate. This construction would certainly do violence to the expressed intention of the grantor, which was, as we think, that all the children of Thomas Reynolds, no matter when born, would take an equal share in the land. In other words, if only one child was living when the condition was broken, the title would go to that child, subject, however, to be opened up for the benefit of subsequently born children, who, as each was born, would take his equal share.

Accordingly we think that S. M. Ratliff never had and will not have until the death of Thomas Reynolds without further issue the fee-simple title to the whole of this land. The construction we have adopted is in harmony with many opinions of this court construing the meaning of the word "children" in deeds and

wills in cases presenting questions whether children living at the time the title vested in the children under some condition in the deed or will took the whole estate to the exclusion of after-born children. Thus in *Barker v. Barker*, 143 Ky. 66, 135 S. W. 396, the devise was to Mrs. Caroline M. Stites, and in the event of her death before the will took effect, the property devised was directed to be "divided between the children of Richard N. Barker and Maxwell S. Barker, share and share alike." Mrs. Stites died before the testatrix, and the question in the case was whether the testatrix meant to give this property to the children of the Barker brothers referred to in the will who might be living at her death, or to them and such others as might be born thereafter to the Barker brothers. In that case upon a construction of the whole will the court held that it was the intention of the testatrix that only those living at her death should participate in the estate, but said: "At common law a bequest to a class was held to embrace all in the class at the time the bequest was to take effect, but where there was a postponement of the payment of the legacy until a period subsequent to the death of the testator, every person answering the description at the time fixed for the division was held entitled to participate as one of the class. . . . In this state, however, the common-law rule has not been followed, and in the cases of *Lynn v. Hall*, 101 Ky. 738, 72 Am. St. Rep. 439, 43 S. W. 402; *Goodridge v. Schafer*, 24 Ky. L. Rep. 219, 68 S. W. 411; *Caywood v. Jones*, 32 Ky. L. Rep.

1302, 108 S. W. 888; *Gray v. Pash*, 24 Ky. L. Rep. 963, 66 S. W. 1026; and *United States Fidelity & G. Co. v. Douglas*, 134 Ky. 374, 120 S. W. 328, 20 Ann. Cas. 993, it is held that a bequest to the children of A would, in the absence of a contrary intent expressed in the will, include not only the children of A living at the death of the testator, but all such as might thereafter be born to him. It may be said that this rule of construction is now the well-settled law of this state; and in the absence of some expression in the will indicating a contrary intention on the part of the testatrix, the same principle would govern in the case at bar."

The rule announced in this case was also approved in *Lamar v. Crosby*, 162 Ky. 320, 172 S. W. 693, Ann. Cas. 1916E, 1033, in which a number of cases affirming it are cited. Another case in point is *McCoy v. Ferguson*, 164 Ky. 136, 175 S. W. 23. The cases of *Mullins v. Moberly*, 145 Ky. 477, 140 S. W. 652, *Foster v. Shreve*, 6 Bush, 519, and *Turner v. Patterson*, 5 Dana, 292, are relied on by counsel for appellee, but we find nothing in any of these opinions in conflict with the rule taken from *Barker v. Barker*.

It results from what we have said that the court committed error in sustaining a demurrer to the answer and counterclaim of Scott, and in effect holding that S. M. Ratliff conveyed to Scott a good title.

Wherefore the judgment is reversed, with directions to overrule the demurrer, and for proceedings consistent with this opinion.

KENTUCKY COURT OF APPEALS.

FIDELITY & CASUALTY COMPANY OF
NEW YORK, Appt.,

v.

PALMER HOTEL COMPANY.

(179 Ky. 518, 200 S. W. 923.)

Insurance — indemnity — exceptions — injury on elevator.

A provision in a policy insuring against liability for injury on an elevator, that the policy does not cover loss from liability to any person in or about an elevator while operated by or in charge of a person under the age fixed by law for elevator attendants, includes a loss arising while the elevator is in charge of such person, although the

Note. — As to elevator insurance, see annotation following this case, post, 812, and references therein to annotations on related questions.
L.R.A.1918C.

injury is due to a structural defect in the elevator.

For other cases, see *Insurance*, VIII. in *Dig.* 1-52 N. S.

(February 26, 1918.)

APPEAL by defendant from a judgment of the Circuit Court for McCracken County in favor of plaintiff in an action brought to recover the amount alleged to be due under a policy of indemnity insurance. Reversed.

The facts are stated in the opinion.

Messrs. Mocquot & Berry, for appellant:

Policies of insurance, if devoid of ambiguity, will be construed as other simple contracts.

1 Cooley, Briefs on Ins. p. 627; *Etna Ins. Co. v. Johnson*, 11 Bush, 587, 21 Am. Rep. 223; 14 R. C. L. p. 928.

Language will be given its plain and customary meaning:

1 Cooley, Briefs on Ins. pp. 629, 637; Fidelity & C. Co. v. Hart, 142 Ky. 25, 133 S. W. 996.

Breach of contract will avoid an insurance policy even though the breach is not the proximate cause of the loss.

Speagle v. Dwelling House Ins. Co. 97 Ky. 646, 31 S. W. 282; Robinson v. Aetna Ins. Co. 18 Ky. L. Rep. 865, 38 S. W. 693; Thomas v. Hartford F. Ins. Co. 21 Ky. L. Rep. 914, 53 S. W. 297; Goodwillie v. London Guarantee & Acci. Co. 108 Wis. 207, 84 N. W. 165; Tozer v. Ocean Acci. & Guarantee Corp. 94 Minn. 478, 103 N. W. 509; Montgomery v. Firemen's Ins. Co. 16 B. Mon. 439.

Messrs. Wheeler & Hughes, for appellee:

If there is ambiguity in the language employed, or if the words or sentences of the contract have two meanings, all doubt will be resolved against the insurer.

Farmers Mut. Equity Ins. Soc. v. Smith, 158 Ky. 459, L.R.A. 1915B, 844, 165 S. W. 675; Pacific Mut. L. Ins. Co. v. McCabe, 157 Ky. 270, 162 S. W. 1136; Spring Garden Ins. Co. v. Imperial Tobacco Co. 132 Ky. 7, 20 L.R.A. (N.S.) 277, 136 Am. St. Rep. 164, 116 S. W. 234; Hurst Home Ins. Co. v. Deatley, 175 Ky. 728, L.R.A. 1917E, 750, 194 S. W. 910.

Although there may be a technical breach of an indemnity insurance contract, a forfeiture based thereon will not be allowed unless such breach proximately contributed to the injury sued about.

Germania Ins. Co. v. Rudwig, 80 Ky. 223; Cooley, Briefs on Ins. 3149; Bridal Veil Lumbering Co. v. Pacific Coast Casualty Co. 75 Or. 57, 145 Pac. 671.

Where a contract of insurance undertakes to indemnify against loss from liability imposed by law for damages on account of bodily injury or death in broad terms, the insurer will be held to the terms of the contract, although language may be found in a subsequent section which may be construed so as to defeat the insured's claim.

Carroll, J., delivered the opinion of the court:

The appellee, Palmer Hotel Company, operated a hotel in Paducah, and there was issued to it by the appellant company a contract of insurance by which it obligated itself to indemnify the hotel company against loss occasioned by damages it might sustain on account of injury or death suffered by any person while a passenger in its elevator, subject to conditions that will be later noticed. While the contract was in force a passenger in the

elevator sustained personal injuries which were caused by structural defects in the elevator, and not by the negligence of the operator, and brought suit against the hotel company to and did recover damages. Thereafter the hotel company brought this suit against the Fidelity & Casualty Company on its contract of insurance to recover the amount it had paid to the injured passenger. The Fidelity & Casualty Company defended the suit upon the ground that at the time the passenger was injured the elevator was being operated by an employee of the hotel company who was under sixteen years of age, and consequently it was exempt from liability by the stipulations in the contract of insurance, which, in the insuring clause, provided that "the Fidelity & Casualty Company of New York [hereinafter called the company] does hereby agree (1) to indemnify the person, firm, or corporation, named in statement 1 of the schedule of statements; and herein called the assured, against loss from the liability imposed by law upon the assured, for damages on account of bodily injuries or death suffered within the premises designated in statement 4 of the said schedule, as the result of an accident occurring while this policy is in force, by any person or persons while in the car of any elevator described in the statement, . . . subject to the following conditions: . . .

(B) This policy does not cover loss from liability for, or any suit based on, injuries or death suffered or caused by (1) any minor hired by the assured contrary to law, or any minor while performing any work contrary to law; (2) any child under fourteen years of age employed by the assured in any state in which there is no law restricting the age of employment in the assured's trade or business; (3) any person who is in charge of or is operating an elevator and is under the age fixed by law for elevator attendants, or any person in or about any elevator while operated by or in charge of any person under the age fixed by law for elevator attendants; (4) any person who is under eighteen years of age and is in charge of or is operating an elevator in any state in which there is no law restricting the age of elevator attendants, or any person in or about any elevator while operated by or in charge of a person under eighteen years of age in any such state."

On a trial of the case in the lower court there was a judgment for the full amount claimed in favor of the hotel company, and the Fidelity & Casualty Company appeals.

It is admitted that the employee of the hotel company who attended the elevator and was operating it at the time the ac-

cident to the passenger occurred was under the age fixed by law in this state for elevator attendants, and so it will be seen that the question presented on this record is purely one of law, depending on the proper construction of paragraph B in the contract heretofore quoted, and especially clause 3 thereof.

Referring again to the contract, it will be noticed that the Fidelity & Casualty Company obligated itself to indemnify the hotel company against any loss suffered by it as a result of an accident to any person while in the car of its elevator, but provided that "this policy does not cover loss from liability for, or any suit based on, injuries or death suffered or caused by . . . (3) any person who is in charge of or is operating an elevator and is under the age fixed by law for elevator attendants, or any person in or about any elevator while operated by or in charge of any person under the age fixed by law for elevator attendants."

For the hotel company the argument is made that paragraph B should be construed to exonerate the insurance company from liability only in a suit brought to recover damages for injuries or death suffered (1) by a minor hired by the assured contrary to law or while performing any work contrary to law; or (2) by any child under fourteen years of age employed by the assured in any state in which there was no law restricting the age of employment; or (3) by any person under the age fixed by the law for elevator attendants; or (4) by any person in charge of or operating an elevator who was under the age of eighteen in a state in which there was no law restricting the age of elevator attendants.

In other words, the contention is that the purpose of the insurance company in this paragraph was to relieve itself from liability in a suit to recover damages for injuries or death sustained by any infant of the class described in the paragraph who was injured or killed while operating an elevator or employed by the hotel company, and should be so construed. The further argument is made that to construe this paragraph so as to exempt the company from liability for injuries or death suffered by an adult passenger on the elevator, solely because at the time of the accident it was being operated by or in charge of one of the prohibited class, would be putting into the paragraph a meaning that it is not fairly susceptible of, although it is conceded that by interpolating or omitting certain words in the paragraph it might reasonably be construed to exempt the insurance company from liability for damages on account of injuries

suffered by a passenger in the elevator while it was in charge of or being operated by one of the prohibited class.

On the other hand, counsel for the insurance company say paragraph B in connection with clause 3 should be construed as if it read: "This policy does not cover loss from liability for, or any suit based on, injuries or death suffered by . . . (3) any person in or about any elevator while operated by or in charge of any person under the age fixed by law for elevator attendants,"—and that accordingly the insurance company was not liable on its contract to indemnify the hotel company for the damages it was required to pay to the passenger who was injured in the elevator.

The contract could perhaps have been simplified and made plainer if the exemption from liability, on account of an accident to any person riding on the elevator when it was in charge of or being operated by any person under the age fixed by law for elevator attendants had been put in a separate clause; but we think this exemption feature as written in paragraph B was sufficiently clear to advise the insured that the policy did not cover accidents to passengers while the elevator was being operated by or in charge of any person under the age fixed by law for elevator attendants. To give to the contract the construction contended for by counsel for the hotel company would necessarily result in striking from paragraph B the words "or any person in or about any elevator while operated by or in charge of any person under the age fixed by law for elevator attendants," and this we do not feel authorized by any rule of construction to do.

Paragraph B, which contains only four short clauses, could not very well be read by any person of ordinary intelligence without understanding and appreciating the meaning of the sentence here in question. Evidently it was the intention of the draftsman of this paragraph to exempt the insurance company from liability not only for all accidents that might happen to any minor within the prohibited age while in charge of or operating the elevator, but to exempt it from liability for all accidents that might happen to any person riding on the elevator while operated by or in charge of such minor; and the reason doubtless for the insertion of this exemption clause was that minors within the prohibited age are not likely to be as prudent or as careful as older persons, or as apt to discover or call attention to or correct defects in the elevator or parts of it that might get out of repair. But whatever the reason for its insertion, it is in the contract, and the insurance company had the unquestioned right to in-

sert as many exemption clauses as it thought proper to do.

A further argument is made by counsel for the hotel company that, as the accident and resulting injury suffered by the passenger who recovered damages from the hotel company was due to a structural defect in the elevator, and not to any fault or negligence on the part of the operator, the insurance company should not be allowed to escape liability under the contract. But if we should attempt to adopt this construction, we would be at once confronted by the words of the contract exempting the insurance company from liability for "injuries to any person in or about the elevator while operated by or in charge of any person under the age fixed by law for elevator attendants." So that, giving to these exempting words their ordinary meaning and such meaning as they would have in common, everyday usage, it makes no difference what cause brought about the accident or injury, or how it happened. The exemption clause is sweeping in its terms, and the only fact necessary for the insurance company to establish to make the exemption from liability effective is to show that the elevator at the time the injury complained of happened was operated by or in charge of a person under the age fixed by law for elevator attendants. The exemption of the company from liability does not depend on the fact that the injury was caused or brought about by some act of omission or commission on the part of the elevator attendant, but on the fact that a prohibited elevator attendant was operating or in charge of the elevator. When the elevator is being operated by a prohibited attendant it is wholly immaterial what cause produced or brought about the accident or injury or death to the passenger.

We have laid down in a number of cases certain generally accepted rules applicable in the construction of insurance contracts, which are thus stated in *Spring Garden Ins. Co. v. Imperial Tobacco Co.* 132 Ky. 7, 116 S. W. 234, 20 L.R.A. (N.S.) 277, 136 Am. St. Rep. 164, where the court said: "The companies had the unquestioned right to insert as many reasonable provisions in the policy exempting them from liability as they thought proper or necessary. We know of no rule of law that denies to insurance companies this privilege. They may limit the amount of insurance they will offer, may limit the species of property they will insure, may provide reasonable conditions that the insured must observe, as well as conditions that will in certain states of case operate as a forfeiture of the policies or L.R.A.1918C.

waiver of the right of the insured to recover upon them, and may protect themselves from loss resulting from causes that they do not desire to offer indemnity against. Why then, should these words by which the companies undertook to limit their liability be stricken from the policies or ignored in their construction? They are not obnoxious to any principle of law or public policy. They are not surplusage. They are not in conflict with any other provisions in or words of the policies. They may be read harmoniously in connection with other and subsequent clauses, and when so read, become a material, intelligible part of the contract. They were inserted for a purpose, intended to have a meaning, are not of doubtful or uncertain import, and, when fairly and reasonably applied, they exempt the companies from loss by fire when the fire is caused by riot. In the construction of policies the same rule obtains as in the construction of other contracts, with the exception that a policy will be construed in favor of the insured so as not to defeat, without plain necessity, his claim to the indemnity which in taking the insurance it was his object to secure; and when the words are fairly susceptible of two interpretations, that which will sustain his claim and cover the loss must by preference be adopted. It may also be said that ambiguities, and words, sentences, or clauses of doubtful meaning, will be construed against the insurer; and this for the reason so often declared that the companies themselves prepare the policies with great care and deliberation, and, as the insured has no election except to accept them as prepared and presented to him, it is fair that they should be construed most strongly against the insurer and most liberally in favor of the insured, so that the purpose for which the insurance was obtained may be effectuated, if this can be done without doing violence to the contract. It is also a familiar principle, everywhere recognized in the construction of contracts, including contracts of insurance, that the intention of the parties is to be gathered from an inspection of the entire instrument; and that all parts of it, and all words employed, should be given meaning and effect, if this can be done."

Adopting this view of the manner in which an insurance contract should be looked at by the court, we see no escape from the conclusion that the clause in question exempted the insurance company from liability, and therefore the judgment is reversed, with directions to dismiss the petition.

Annotation—Elevator insurance.

The principles applicable to insurance indemnifying against liability for personal injuries have been treated in their various aspects in notes cited in the L.R.A. Indexes under the title, "Insurance," subtitle, "Guaranty policies."

This note deals with the question of the liability under policies insuring against loss or damage sustained on account of injuries resulting from the operation of passenger or freight elevators.

Generally, as to liability for injury to elevator passenger, see notes to *Edwards v. Manufacturers' Bldg. Co.* 2 L.R.A. (N.S.) 744, and *Tippecanoe Loan & T. Co. v. Jester*, L.R.A. 1915E, 722.

There is at present little direct authority on the question under annotation.

With respect to the power of companies to issue policies of this kind, it has been held that "elevator policies" insuring against claims for compensation for accidental personal injuries caused to persons by the insured's elevator are a variety of accident insurance, it being an accidental personal injury which causes the right to the insurance money to spring up, and that companies formed or operating within a state which are authorized to insure against injuries by accident have power to issue such policies. *Employers' Liability Assur. Corp. v. Merrill* (1892) 155 Mass. 404, 29 N. E. 529.

It has been held that the parties to a contract of elevator insurance may lawfully include in the policy an agreement that the insurer shall not be liable if the insured's building and elevator are not completed ready for occupancy. *Scarritt Estate Co. v. Casualty Co.* (1912) 166 Mo. App. 567, 149 S. W. 1049.

But in this case, where the insurer's agent knew that the building and elevators were not fully completed, and accepted the elevators covered by the policy as completed ready for occupancy, and delivered the policy and collected and retained the premium, the company was held estopped from denying liability on account of an injury on the ground that the building and elevators were not completed.

In *Western Warehouse Co. v. New Amsterdam Casualty Co.* (1917) 85 Or. 597, 167 Pac. 572, a policy undertook to indemnify "against loss from the liability imposed by law upon the as-

sured for damages on account of bodily injuries accidentally suffered . . . by any person or persons while in the car of any of the elevators described in the schedule, or in the elevator well or hoistway thereof, or while entering upon or alighting from such car, subject to the following conditions: . . . This policy does not cover . . . loss from liability from injuries or death suffered by or caused by . . . any person during the making of additions to or structural alterations in or extraordinary repairs of any elevator plant, unless a written permit is granted by the company specifically describing the works; but no elevator shall be used for any service while additions, alterations, or repairs of any kind are being made in or about such elevator." It was held that, considering both the positive and the negative terms of the policy, there could be no recovery where an employee was injured by being struck by the descending counterweights of an elevator while he was engaged in boarding up the sides of the elevator shaft, since he was not in the car, the well, or hoistway, or entering upon or alighting from the car, and since no permit had been obtained for the work which he was engaged in, and since the elevator was being used while the work was in progress in violation of the conditions of the policy.

It will be noticed that in *Fidelity & C. Co. v. PALMER HOTEL CO.* ante, 808, an exception in a policy insuring against liability for injuries on an elevator, that it did not cover loss from liability for, or any suit based on, injuries or death suffered or caused by any person in or about any elevator while operated by or in charge of a person under the age fixed by law for elevator attendants, was held to include a loss which resulted on account of an injury which occurred while the elevator was in charge of one under the age specified, although the injury was due to a structural defect in the elevator, and not to any fault or negligence of the operator.

It has been held that an insurer which issues a policy insuring against loss on account of bodily injuries accidentally suffered by persons using an elevator, and providing that the insurer shall at its own cost defend all suits, commits a breach of its contract where it has notice of a suit against the insured by one injured on his elevator

and prepares to defend it, but a short time before the trial notifies the insured that he seems to be in sympathy with the person injured and advises him to have his own counsel present at the trial as the insurer's attorney may be compelled to withdraw from the suit; and the insurer is liable to reimburse the insured for the expense incurred in the employment of counsel to defend the suit, in the absence of evidence of any acts on the part of the insured with respect to the defense of the case which are prejudicial to the insurer. *Ander-son & I. Co. v. Maryland Casualty Co.* (1914) 123 Md. 67, 90 Atl. 780.

It was further held in this case that a provision that the insurer would not be responsible for any expenses incurred

by the insured unless they were first specifically authorized by the insurer in writing applied only where both parties were proceeding in accordance with the terms of the contract, and that the insurer's letter contemplated a possible rescission and not a performance of the agreement, and that the letter could not therefore be held to constitute an authorization of expenditures within the meaning of the clause of the policy.

Cases like *Depue v. Travelers' Ins. Co.* (1909) 166 Fed. 183, and *Ætna L. Ins. Co. v. Davis* (1911) 112 C. C. A. 87, 191 Fed. 343, passing upon the question as to when one is a passenger in an elevator within the provisions of an accident insurance policy, are not within the scope of the note. J. T. W.

MASSACHUSETTS SUPREME JUDICIAL COURT.

HAVERHILL STRAND THEATER

v.

A. L. GILLEN et al.

(— Mass. —, 118 N. E. 671.)

Injunction — against enforcement of rules by labor union.

1. Injunction lies on behalf of an employer against the enforcement of an illegal rule by a labor union which will deprive him of his employees, although no boycott or strike has been put in force or threats made against him.

For other cases, see *Injunction, I. d.* in *Dig.* 1-52 N. S.

Labor organization — minimum employee rule — validity.

2. A rule of a labor union that to secure union labor an employer must employ not less than a specified minimum number, although a less number would be more advantageous to his business, and the employment of the number specified will result in pecuniary loss, is illegal.

For other cases, see *Labor Organizations, in Dig.* 1-52 N. S.

(February 28, 1918.)

RESERVATION by the Superior Court for Suffolk County for determination by the Supreme Judicial Court, after confirmation of the Master's Report, of a question arising in a suit to enjoin enforcement of an alleged illegal rule of a labor union of which defendants were members. Injunction ordered.

The facts are stated in the opinion.

Note. — For right of labor union to enforce rules as to the minimum number of employees, see annotation following this case, post, 817. L.R.A.1918C.

Messrs. Dunbar, Nutter, & McClennen, Jacob A. Kaplan, and A. A. Berle, Jr., for plaintiff:

A combination by a group of individuals to prevent a single individual from obtaining labor is a legal wrong unless affirmatively justified.

Walker v. Cronin, 107 Mass. 555; *Berry v. Donovan*, 188 Mass. 353, 5 L.R.A.(N.S.); 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; *Pickett v. Walsh*, 102 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; *L. D. Willcutt & Sons Co. v. Driscoll*, 200 Mass. 110, 23 L.R.A.(N.S.) 1236, 85 N. E. 897; *Folsom v. Lewis*, 208 Mass. 336, 35 L.R.A.(N.S.) 787, 94 N. E. 316; *Allen v. Flood* [1898] A. C. 1; 62 J. P. 595, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 14 Times L. R. 125, 46 Week. Rep. 258, 17 Eng. Rul. Cas. 285; *Reynolds v. Davis*, 198 Mass. 204, 17 L.R.A.(N.S.) 162, 84 N. E. 457; *Plant v. Woods*, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *De Minico v. Craig*, 207 Mass. 593, 42 L.R.A.(N.S.) 1048, 94 N. E. 317; *Farrer v. Close*, L. R. 4 Q. B. 602, 10 Best & S. 533, 38 L. J. Mag. Cas. N. S. 132, 20 L. T. N. S. 802, 17 Week. Rep. 1129.

Such a combination is not justified because it is instituted for the purpose of forcing upon the individual an unnecessary number of laborers.

Jeremiah Smith, "Crucial Issues in Labor Litigation," 20 Harvard L. Rev. 361; *Oxley Stave Co. v. Coopers' International Union*, 72 Fed. 695; *Hopkins v. Oxley Stave Co.* 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912; *Burnham v. Dowd*, 217 Mass. 351, 51 L.R.A.(N.S.) 778, 104 N. E. 841; *South Wales Miners' Federation v. Glamorgan Coal Co.* [1905] A. C. 239; 1 B. R. C. 1, 74

L. J. K. B. N. S. 525, 53 Week. Rep. 593, 92 L. T. N. S. 710, 21 Times L. R. 441, 2 Ann. Cas. 436; Barnes v. Chicago Typographical Union, 232 Ill. 424, 14 L.R.A. (N.S.) 1018, 83 N. E. 940, 13 Ann. Cas. 54; George Jonas Glass Co. v. Glass Bottle Blowers' Asso. 72 N. J. Eq. 653, 66 Atl. 953; Newton Co. v. Erickson, 70 Misc. 291, 126 N. Y. Supp. 949; Purvis v. Local No. 500, U. B. C. J. 214 Pa. 348, 12 L.R.A. (N.S.) 642, 112 Am. St. Rep. 757, 63 Atl. 585, 6 Ann. Cas. 275; Minasian v. Osborne, 210 Mass. 250, 37 L.R.A. (N.S.) 179, 96 N. E. 1036, Ann. Cas. 1912C, 1299; Aberthaw Constr. Co. v. Cameron, 194 Mass. 208, 120 Am. St. Rep. 542, 80 N. E. 478.

Even if the combination is for a legal object, compulsion by the combination, exerted upon its members through fines and penalties, is an unlawful means to secure the object, and should be enjoined.

L. D. Willcutt & Sons Co. v. Driscoll, 200 Mass. 110, 23 L.R.A. (N.S.) 1236, 85 N. E. 897; Walker v. Cronin, 107 Mass. 555; Vegelahn v. Guntner, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 120 Am. St. Rep. 341, 69 N. E. 1085; Allis-Chalmers Co. v. Iron Molders' Union, 150 Fed. 155; Boutwell v. Marr, 71 Vt. 1, 43 L.R.A. 803, 76 Am. St. Rep. 746, 42 Atl. 607; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287.

The damages to the plaintiff, apparent on the record, are such as to justify injunctive relief. Statutory interference with such relief would be unconstitutional.

Opinion of Justices, 220 Mass. 627, L.R.A. 1917B, 1119, 108 N. E. 807, 208 Mass. 619, 34 L.R.A. (N.S.) 771, 94 N. E. 1044; Coppage v. Kansas, 236 U. S. 1, 14, 59 L. ed. 441, 446, L.R.A. 1915C, 960, 35 Sup. Ct. Rep. 240; Adair v. United States, 208 U. S. 161, 172, 52 L. ed. 436, 441, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Goldfield Consol. Mines Co. v. Goldfield Miners' Union, 159 Fed. 500; Bogni v. Perotti, 224 Mass. 152, L.R.A. 1916F, 831, 112 N. E. 853.

Messrs. W. Scott Peters, Harry J. Cole, Frederick H. Magison, and Wilbert F. Barrett, for defendants:

Defendants have violated no rights whatever of plaintiff, and the adoption and enforcement of the so-called minimum rule was proper.

Com. v. Hunt, 4 Met. 111, 38 Am. Dec. 346; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Vegelahn v. Guntner, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; L. D. Willcutt & Sons Co. v. Driscoll, 200 Mass. 130, 23 L.R.A. (N.S.) 1236, 85 N. E. 897; Hoban v. Dempsey, 217 Mass. 166, L.R.A. 1915A, 1217, 104 N. E. 717, Ann. Cas. 1915C, 810; Rhodes L.R.A. 1918C.

Bros. Co. v. Musicians' Protective Union, 37 R. I. 281, L.R.A. 1915E, 1037, 92 Atl. 641; Scott-Stafford Opera House Co. v. Minneapolis Musicians Asso. 118 Minn. 410, 136 N. W. 1092.

Loring, J., delivered the opinion of the court:

The plaintiff corporation is a "moving picture and vaudeville house" in Haverhill. The defendants are officers and members of a labor union of musicians. They are also joined as representing the other members of it who are too numerous to be made parties defendant. For convenience we shall speak of the union as the party defendant. In the summer of 1916 the plaintiff had in its employ an organist, one Coburn by name, who was a member of the defendant union. He played an organ (part of the plaintiff's building) at all performances given by it, and the music of the organ was the only music furnished at these performances. Before 1916 the defendant had adopted a minimum rule fixing the number of musicians who should be employed in the different theaters in Haverhill. By this rule the plaintiff was required to employ an orchestra of five musicians if it wished to employ any member of the defendant union. The minimum rule had been suspended during the summer of 1916. At some time shortly before the filing of this bill the defendant notified the plaintiff that it was about to enforce the minimum rule so far as the plaintiff was concerned. "From motives of economy" the plaintiff wished to continue to employ Coburn and Coburn alone. Upon being informed of the defendant's intention to enforce the rule, the plaintiff brought this bill on September 9th, alleging that the rule was illegal, and asking that the defendant be enjoined from putting it in force. After playing at the performance on September 10th, Coburn left the plaintiff's employ "because of the existence of said rule and penalties incident to its violation," to quote the terms of one of the findings made by the master. It would seem that Coburn's wages were \$27 a week, with one night off. Some time after Coburn left the plaintiff succeeded in hiring a nonunion organist, and it had to pay him \$60 a week. The master's report ends in these words: "Upon the pleadings and the foregoing findings, general and special, the parties agree, without waiving their right to raise other questions, that the following question of law may be posited for the court: In the absence of boycott, strike, intimidation, or interference with existing contractual relations, does an unincorporated labor organization have a legal right to enact with penalty of fine or ex-

pulsion a rule which prevents its members from working for any employer unless said employer employs a given number of union men, and where, as a matter of fact, the operation of said rule narrows the labor market and restricts the field of competitive employment for the employer?"

The first contention of the defendant is that on the findings of the master the "plaintiff had acquiesced in the enforcement of the rule" here complained of, and that a decree dismissing the bill on that ground "would be well warranted on the findings." After making this suggestion counsel for the defendant seems to have waived it. But if the suggestion is not to be taken to have been waived, it is enough to say that on the findings of the master what was said by the plaintiff to the defendant was not sufficiently definite to amount to an agreement not to maintain this bill if it was entitled to do so.

The defendant's next contention is based upon the master's finding that "neither a boycott or strike [had been] put in force or threatened to be put in force" by the defendant before the bill now before us was brought; that the defendant had "in no wise disturbed or interfered with any existing contractual relations to which the plaintiff is a party," and that the defendant "in no wise threatened the plaintiff or its business" before the bringing of the bill. The three special findings here relied on, together with the finding already referred to and one other finding, are set forth in full below.¹

The defendant's contention based upon these findings is that, in the absence of a strike or of threats on the part of the defendant, the present bill cannot be maintained. It is this contention without doubt which is referred to in the opening words of the question of law which the master says the parties agreed should be "posed for the court." This contention is without foundation. On the findings made by him

it must be taken that the master has found that the defendant did notify the plaintiff that it would enforce its minimum rule, but that the defendant made no threats to the plaintiff other than the notice that the rule would be enforced. The bill was brought (first) on the ground that the rule was an illegal one, and (second) on the ground that defendant had notified the plaintiff that they would enforce it. For the purpose of the question under discussion, it must be assumed that the rule was an illegal one. If a union notifies a plaintiff that they will enforce an illegal rule which operates to his prejudice he has a right to bring a bill to have the union enjoined from enforcing it. In the case at bar the master finds that the defendant union did notify the plaintiff that it would enforce the minimum rule, and the plaintiff proved the fact that the defendant did intend to enforce it when it proved that Coburn left "because of the existence of the rule and penalties incident to its violation." The contention that a plaintiff cannot bring a bill upon being notified that a combination of individuals will enforce an illegal rule which operates to his prejudice in the absence of a strike or threats of a strike or intimidation is founded on a misconception. Where a combination is a legal one, a plaintiff has a right to complain if the parties to the combination undertake to enforce it by illegal means. A boycott and threats of intimidation by using physical violence are illegal means of enforcing a legal combination. But a strike is one of the legal means which parties have a right to resort to to enforce a legal combination. On the other hand, when a combination is an illegal one the plaintiff has a right to have it enjoined in case it operates to his prejudice on proving the fact that the defendants intend to enforce it. He has no need to go further and prove that the defendants have threatened to enforce it by means which are illegal.

With this explanation the question propounded to the court by the agreement of parties is this: Is a combination between musicians a legal one by which a plaintiff is compelled to employ a number of musicians specified by the members of the combination if he wishes to employ any member of the combination, even though it be the fact that in the plaintiff's opinion the employment of a single musician is the most advantageous way of conducting his (the plaintiff's) business, and that the employment of more than one musician will cause him pecuniary loss? It is manifest that such a rule is an interference with a plaintiff's right to that free flow of labor to which every member of the community is entitled for the purpose of

12. This rule is enforced against the members of the union by either fine or expulsion.

4. There has been neither a boycott or strike put in force or threatened to be put in force by the defendants or any of them against the plaintiff.

5. The defendants or any of them have in no wise disturbed or interfered with any existing contractual relation to which the plaintiff is a party.

6. The defendants or any of them have in no wise threatened the plaintiff or its business.

8. Coburn, the organist, refrained from working in the plaintiff's employ after September 10, 1916, because of the existence of said rule and penalties incident to its violation.

carrying on the business in which he or it has chosen to embark. The right to the free flow of labor is not an absolute right; it is limited by the right of employees to combine for purposes which, in the eye of the law, justify interference with the plaintiff's right to a free flow of labor. A combination which interferes with a plaintiff's right to a free flow of labor is legal if the purpose for which it is made justifies the interference with that right. On the other hand, it is illegal if that purpose does not justify the interference (which ensues from the making and enforcing of the combination in question) with the plaintiff's right to a free flow of labor. So much is settled in this commonwealth. See, for example, *Plant v. Woods*, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Reynolds v. Davis*, 198 Mass. 294, 17 L.R.A. (N.S.) 162, 84 N. E. 457; *De Minico v. Craig*, 207 Mass. 593, 598, 42 L.R.A. (N.S.) 1048, 94 N. E. 317; *Minasian v. Osborne*, 210 Mass. 250, 37 L.R.A. (N.S.) 179, 96 N. E. 1036, Ann. Cas. 1912C, 1299; *Burnham v. Dowd*, 217 Mass. 351, 51 L.R.A. (N. S.) 778, 104 N. E. 841; *Cornellier v. Haverhill Shoe Mfrs. Asso.* 221 Mass. 554, L.R.A. 1916C, 218, 109 N. E. 643. It is also settled in this commonwealth that the question whether the purpose for which the combination is made does or does not justify interference with the plaintiff's right to a free flow of labor is a question of law for the court. *De Minico v. Craig*, 207 Mass. 593, 598, 42 L.R.A. (N.S.) 1048, 94 N. E. 317; *Minasian v. Osborne*, 210 Mass. 250, 37 L.R.A. (N.S.) 179, 96 N. E. 1036, Ann. Cas. 1912C, 1299; *Cornellier v. Haverhill Shoe Mfrs. Asso.* 221 Mass. 554, L.R.A. 1916C, 218, 109 N. E. 643.

There is no decided case in this commonwealth which has gone as far as we are asked to go in the case at bar, and with the exception of the case of *Scott-Stafford Opera House Co. v. Minneapolis Musicians Asso.* 118 Minn. 410, 136 N. W. 1092 (which is not law in this jurisdiction, as we shall point out later on), there is no decided case outside of this commonwealth which has gone so far.

No case has gone further toward supporting the defendant's contention than *Pickett v. Walsh*, 192 Mass. 572, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638. But that case does not go so far as to support that contention.

The question we have to decide in the case at bar is whether the doctrine of *Pickett v. Walsh* is to be extended. In *Pickett v. Walsh* a union of masons struck; that is to say, combined to refuse to lay bricks to get the work of pointing the mortar after the bricks were laid. The contract.

tor wished to give the work of pointing to men known as pointiers, who had that and that alone as their trade. In that case the complaint was made by the pointiers. But that is not material. It was held that the purpose for which the combination was made, namely, to get work for members of the union, was a justification for the interference with the pointiers' right to be employed to do the work, and, as a consequence, that the combination was a legal one. But in that case the contractor wanted the pointing done. The peculiarity of the case at bar is that the work which the defendants have combined to force the plaintiff to give them is work which the plaintiff does not want done; not only that, but it is work which, if done at the plaintiff's expense, will cause him pecuniary loss. The difference between *Pickett v. Walsh* and the case at bar is that in *Pickett v. Walsh* the defendants combined for the purpose of getting work which the employer wanted done, while in the case at bar the purpose of the defendants' combination is to force the plaintiff to make work for them when he does not wish to have that work done and when that work will result in a pecuniary loss for him. The question is whether a combination by a union for the purpose of getting work for the members of it in this indirect way is a justifiable interference with the plaintiff's right to a free flow of labor.

The consequences of holding a combination for such a purpose to be a legal one are far reaching. If it is legal for a union of musicians to combine for the purpose of forcing a plaintiff (who wants an organist only) to employ an orchestra of several pieces,—that is to say, if that indirect purpose of enabling the union musicians to earn more money justifies the adoption of the minimum rule,—it is hard to see why it is not legal for a union of carpenters (for example) to refuse to work on a building belonging to the plaintiff unless he uses in the construction of it hand-made doors, window frames and window sashes, in place of doors, window frames, and window sashes made by machine. Heretofore it seems to have been assumed that a rule forbidding union members to work on machine-made material in order to get the work of doing it by hand was not a legal combination. See in this connection *Oxley Stave Co. v. Coopers' International Union (C. C.)* 72 Fed. 695; *Hopkins v. Oxley Stave Co.* 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912; *Minasian v. Osborne*, 210 Mass. 250, 253, 37 L.R.A. (N.S.) 179, 96 N. E. 1036, Ann. Cas. 1912C, 1299. There is more money for masons, carpenters, and plumbers in building a ten-story store than there is in building a store of two stor-

ies. If it is legal for musicians to adopt a minimum rule fixing the number of musicians who shall be employed in all the theaters within its jurisdiction, it is hard to see why a minimum rule may not be adopted by the allied trade unions of masons, carpenters, and plumbers, fixing the number of stories of which every store to be erected in the business district is to consist.

That is to say, masons, carpenters, and plumbers may combine to refuse to work on any store less than ten stories in height, even though the owner of the land wishes to erect a store of two stories only, and even though the owner, in his judgment, cannot, without pecuniary loss, erect one having more than two stories. It is no answer to point out that the right of an owner of land to erect a two-story building upon it is an absolute one and what we are concerned with in the case at bar is the plaintiff's limited right to a free flow of labor. But in the case of a minimum rule adopted by a union or combination of unions fixing the number of stories for every store erected in the business district, the absolute right of the owner to erect a store having fewer stories is not interfered with. The minimum rule does not forbid the owner erecting such a store with his own hands or by employing nonunion labor. What such a minimum rule interferes with is not the owner's right to erect the store with fewer stories, but the owner's right to a free flow of labor to erect a store with fewer stories. If such a minimum rule can

be legally adopted by a union or a combination of unions it is hard to see why unions or a combination of unions cannot adopt a minimum rule fixing the number of stories in case of any and every building to be erected upon any and every foot of land within the commonwealth. Other illustrations might be put showing the far-reaching consequences of a decision upholding the legality of this minimum rule.

A majority of the court are of opinion that a minimum rule fixing the number of musicians to be employed in the several theaters specified in it is an interference with the right of the owners of those theaters to a free flow of labor which is not justified by the purpose for which it is made.

The defendants have relied upon *Scott-Stafford Opera House Co. v. Minneapolis Musicians' Assn.* supra, where the court reached a conclusion contrary to that reached by us. But that case was decided upon the ground that what one man may do singly any number of men may agree to do jointly. That is not the law of this commonwealth. *Burnham v. Dowd*, 217 Mass. 351, 51 L.R.A.(N.S.) 778, 104 N. E. 841; *Pickett v. Walsh*, 192 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638, and cases there collected.

From what has been said it follows that the combination complained of by the plaintiff is an illegal combination, and that injunction should issue as prayed for.

So ordered.

Annotation—Right of labor union to enforce rules as to the minimum number of employees.

For a general reference to notes of interest on the question of the extent to which a labor organization may enforce rules interfering with the rights of an employer of labor, see note to *Hitchman Coal & Coke Co. v. Mitchell*, ante, 497.

In *Scott-Stafford Opera House Co. v. Minneapolis Musicians' Assn.* (1912) 118 Minn. 410, 136 N. W. 1092 (referred to in the opinion in *HAVERHILL STRAND THEATER v. GILLEN*, ante, 813), the court affirmed an order sustaining a demurrer to a complaint in a suit by the theater proprietors to enjoin the enforcement of a rule, adopted by a musicians' association to which practically all musicians available for employment by plaintiffs were members, which prohibited its members from accepting employment or playing in the orchestra of any of the plaintiffs' theaters unless at least a certain number of persons, all members of L.R.A.1918C.

the association, were included in such orchestra. It was further alleged that the number of persons required to make up the orchestra for the different entertainments given by plaintiffs varied with the nature of the entertainment, and that in many entertainments an orchestra made up of less than the number of persons required by such rule would be entirely satisfactory and sufficient, and that a compliance with the rule would be and is a useless and needless burden and expense upon plaintiffs. The holding was based upon the rule that "any man, unless under contract obligation, or unless his employment charges him with some public duty, has a right to refuse to work for or deal with any class of men, as he sees fit, and this right, which one man may exercise singly, any number may agree to exercise jointly." It was pointed out that there was no allegation by the employer of

any contractual relation between himself and any of the defendants, or any members of the defendant union. Neither was there any allegation of conspiracy, malice, or ulterior motive, and no question of strike, violence, wage, boycott, or violation of contractual relations or public duty was involved; and no allegation was made that the rule complained of was not beneficial to the members of the defendant corporation. The court said: "The plaintiffs' argument is largely based upon the assumption of lack of benefit to such members; but, in the absence of any allegation of such lack of benefit, we think it may fairly be inferred from the facts and circumstances alleged, and from the very nature of the rule recited, that the rule was designed to benefit the members of the defendant corporation. Certainly the rule does not appear to be so manifestly nonadapted to produce benefit as to raise an inference of malice or evil motive."

The court in the HAVERHILL CASE regards the Minnesota decision as resting upon the ground that what one man may do singly any number of men may agree

to do,—a proposition from which the Massachusetts court dissents. The conflict of views upon this fundamental question is reflected in the various notes dealing with industrial disputes which are cited in L.R.A. Indexes under the titles "Conspiracy" and "Labor Organization."

In *Grassi Contracting Co. v. Bennett* (1916) 174 App. Div. 244, 160 N. Y. Supp. 279, a labor organization was restrained from ordering a strike or otherwise attempting to enforce a rule requiring an employer of members of the union to permit a union foreman to work on each of its jobs. The court said that this threatened action was unlawful, and, in view of other material facts presumably known to officers and members of the union, it constituted prima facie evidence of a conspiracy to injure the plaintiff by preventing it from exercising its constitutional right to continue its business and to hire such employees as it required to perform its contracts, and to have the work performed under its own direction or under the direction and supervision of those selected by it.

MASSACHUSETTS SUPREME JUDICIAL COURT.

GEORGE M. HEATHCOTE, Admr., etc., of
Edna G. Heathcote. Deceased.
v.

CURTIS PUBLISHING COMPANY.

(— Mass. —, 118 N. E. 909.)

Guaranty — editorial guaranty of advertisers.

An editorial publication in a magazine that it guaranteed every advertisement in its columns to be honest and trustworthy, and guaranteed the integrity of its advertising, does not render the publishers liable to a subscriber who, on the faith of the statement, patronizes an advertiser who fails to fill an order according to agreement, in the absence of knowledge of unreliability on the part of such advertiser. *For other cases, see Guaranty, I. in Dig. 1-52 N. S.*

(March 4, 1918.)

REPORT by the Superior Court for Suffolk County for determination by the Supreme Judicial Court of an action brought to recover damages for alleged breach of a contract by defendant guaran-

Note. — As to responsibility of publisher to patrons of advertiser, see annotation following this case, post, 820.
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teeing the integrity of its advertising. Judgment for defendant.

The facts are stated in the opinion.

Messrs. Thibodeau & Ellsworth and George M. Heathcote for plaintiff.

Mr. William D. Turner for defendant.

Carroll, J., delivered the opinion of the court:

Since her marriage to the plaintiff in December, 1909, the plaintiff's intestate was a subscriber to the "Saturday Evening Post." In April, 1912, an editorial published by the defendant in that paper, entitled "Concerning the Three of Us," stated in substance that the defendant has for years guaranteed every advertisement in its columns to be honest and trustworthy, and the "publishers guarantee the integrity of its advertising." This publication was read by the intestate, who was then thinking of building a house. Prior to February, 1913, she saw in the "Saturday Evening Post" an advertisement of the North American Construction Company concerning the "Aladdin House and Aladdin System" of partly made houses, and also an advertisement by the construction company entitled "How to Beat the Building Game." Mrs. Heathcote wrote to the construction company, which replied to her letter, and on May 29, 1913, ordered from it "a Marsden Aladdin House" for the sum of \$1,464.90.

The parts of the house arrived at West Newton soon after July 20, 1913, and were taken to the land of the deceased. There was evidence that no plan was received indicating where the parts could be found, or instructions showing how the work was to be carried on; and that it required a skilled carpenter to construct the house. There was also evidence of deficiency in material; that some of the parts did not fit; that the building material was not as represented; and that in other respects the North American Construction Company failed to carry out its contract. When the construction company learned that some of the flooring was missing, it authorized the plaintiff to purchase it at the expense of the company. In December, 1913, the plaintiff wrote to the company "stating the items that were short," and later, in settlement of the claim, received from it a check for \$69, which he refused to accept.

The declaration is in four counts: The first alleges a breach of the contract of the defendant in guaranteeing the "honesty, integrity, and trustworthiness" of its advertisers, to the loss and damage of the plaintiff; the second and third are based upon the implied contract in holding out the defendant's advertisers as trustworthy, and its duty to use proper care "to investigate the truth of said recommendation;" the fourth sets out the defendant's fraud. At the close of the evidence the judge directed a verdict for the defendant and reported the case to this court.

While there was evidence that the North American Construction Company failed to perform its contract with the plaintiff's intestate, there was no evidence that this company was engaged in a fraudulent business, was financially irresponsible, or was in the habit of intentionally deceiving people. The editorial was not strictly a guaranty to answer for the debt or default of another, and it contained no words indicating such an intention; it was in effect merely a recommendation of its advertisers. "The integrity of its advertising and the honesty and trustworthiness of its advertisements," indicates no more than this, that its advertisers can be depended upon as reliable and honest. A statement that a manufacturer is trustworthy is an assurance that he is so reputed,—that nothing to the contrary is known; and while an action may lie upon such a promise in case of fraud, it is not a statement which gives a right of action against the publisher if the party recommended does not do as he agrees under any particular contract. The defendant assured the readers of its publication that its advertisements were honest and trustworthy. It did not guarantee the faithful performance of contracts made by

its advertisers, or agree to answer for their debt or default; nor did it promise that in supplying materials for the construction of the house the North American Construction Company would fully and exactly carry out the terms of its agreement with the plaintiff's intestate. See *Eaton v. Mayo*, 118 Mass. 141.

We find nothing in the evidence to show a breach of the defendant's promise. On the contrary, the defendant, according to its practice, before receiving the advertisement, made a thorough investigation of the North American Construction Company and "the personnel of the company," "their standing. . . . their business and financial ability, and their general reputation," and the results were entirely satisfactory. There is nothing to show that this investigation was not careful and complete, or that it revealed or ought to have revealed anything not in harmony with the statements of its editorial.

There is nothing in the answer of the defendant's president that shows a failure to examine thoroughly the affairs of the construction company. It appears from his answers that the North American Construction Company advertised in the "Saturday Evening Post" during the years 1910, 1911, and 1913, and that the defendant had no knowledge that this company was unreliable or had ever failed to fulfil its contracts. Two or three complaints about the construction company had been made to the defendant, but, with one exception, it did not appear what the reasons were, if any, for these complaints, or on what basis they were settled, if settlements were made. In one case the complaint was from a purchaser of a house who said the siding and flooring were imperfect. He wrote to the North American Construction Company about it several times, but no adjustment was made; he then wrote to the defendant, and although he did not make the purchase because of an advertisement "seen especially in the paper of the defendant," but after a visit to the construction company's factory, the construction company settled the loss and the matter was ended. These complaints did not show that the construction company was dishonest, unreliable, or lacking in integrity, and they are far from showing any neglect on the part of the defendant to investigate properly the North American Construction Company and the standing and reputation of its officers.

There is no evidence that the representations made by the defendant were false. It follows that the verdict was properly directed, and judgment is to be entered for the defendant.

Petition for rehearing denied.

Annotation—Responsibility of publisher to patrons of advertiser.

A novel question, which apparently has not before been passed upon, was involved in *HEATHCOTE v. CURTIS PUB. Co.* ante, 818, where the court held that an editorial published in a magazine stating that the publishers guaranteed every advertisement in their columns to be honest and trustworthy, and guaranteed the integrity of their advertising, did not render the publishers liable to a subscriber who, on the strength of the statement, patronized an advertiser who failed to fill an order according to agreement, at least in the absence of knowledge by the publishers of unreliability on the part of the advertiser. It will be noted that recovery was sought on a count alleging a breach of the publishers' contract in guaranteeing the honesty and trustworthiness of their advertisers, and also on counts based upon the publishers' implied contract in holding out the advertisers as trustworthy, and their duty to use proper care to investigate the truth of their recommendation, and on another count setting out the defendant's fraud. It appears in this case that the publishers made a thorough investigation of the advertiser and that it was found to be a reputable concern. The conclusion reached is, upon the facts, apparently sound. A state of facts, however, can be conceived of which might warrant a recovery. For example, if it appeared that publishers of a magazine or a newspaper had inserted advertisements of concerns which they knew practised fraud on those dealing with them, and had nevertheless inserted a recommendation of their advertisers, a recovery could doubtless be had against the publishers by defrauded patrons of the advertiser who were in-

duced to deal with the latter by the advertisement and the publishers' recommendation. A closer question as to the publishers' liability would arise in a case where it merely appeared that they inserted advertisements of concerns with knowledge that they were unreliable, but made no special recommendation as to the advertisers' reputation or responsibility.

While not directly in point, the case of *De la Bere v. Pearson* [1908] 1 K. B. (Eng.) 280, 1 B. R. C. 21, 77 L. J. K. B. N. S. 380, 98 L. T. N. S. 71, 24 Times L. R. 120, is of interest in this connection. In that case, the proprietors of a newspaper having advertised in their paper that their city editor would answer inquiries from readers desiring financial advice, a reader of the paper wrote asking for a safe investment for a stated sum, and for the name of a "good stockbroker." It was held that there was a contract between the proprietors of the paper and the reader by which the former undertook to use reasonable care that a person recommended as a broker should answer the description of a "good broker," and that the act of the defendant's editor in recommending, without making inquiries, a broker who was not a member of the stock exchange and who was an undischarged bankrupt, constituted a breach of the contract, and that a recovery might be had against the proprietors of the paper, the person recommended having misappropriated money sent to him for investment by the reader of the paper. In this case, of course, the advertisement was that of the proprietors, and not that of a third person.

J. T. W.

MISSOURI SUPREME COURT.
(In Banc.)

STATE OF MISSOURI EX REL. BUFFUM
TELEPHONE COMPANY, Resp.,
v.

PUBLIC SERVICE COMMISSION, Appt.

(— Mo. —, P.U.R.1918C, 158, 199 S. W.
962.)

Telephone — jurisdiction of Public
Service Commission — mutual com-
pany.

1. A mutual telephone company the mem-

Note. — For mutual telephone companies as public utilities, see annotation following this case, post, 827.
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bers of which own their instruments and maintain their lines to the central station, and contribute a quarterly amount to maintain such station, cannot require connection with an incorporated company for long-distance service through the Public Service Commission, under a statute defining the corporations within the jurisdiction of the commission as those maintaining telephone communications for hire, although a fee is exacted in case a nonsubscriber talks on a telephone on the company's switchboard to one on a connecting line.

For other cases, see *Telephones*, in *Dig.* 1-52 N. S.

Public Service Commission — review — new issues.

2. New issues cannot be presented in a

court proceeding to review the action of the Public Utilities Commission in requiring a physical connection of two telephone lines, when the statute provides that they shall not be so presented.

For other cases, see Public Service Commissions, in Dig. 1-52 N. S.

(Blair, J., dissents.)

(December 22, 1917.)

APPEAL by the Public Service Commission from a judgment of the Circuit Court for Cole County setting aside its order requiring that a physical connection be made between two certain telephone companies. **Affirmed.**

The facts are stated in the opinion.

Messrs. A. Z. Patterson and James D. Lindsay, for appellant:

The order of the Public Service Commission requiring the respondent telephone company, at the expense of the mutual telephone company, to construct and maintain a physical connection with the latter company, and to receive and transmit messages or conversations for long-distance transmission originating on its lines, is valid as a reasonable regulation of the business of respondent and its use of its property, is a requirement of service, and is not a "taking" or appropriation of its property.

Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 468, 58 L. ed. 310, 317, 34 Sup. Ct. Rep. 152; Michigan C. R. Co. v. Michigan R. Commission, 236 U. S. 615, 59 L. ed. 750, P.U.R.1915C, 263, 35 Sup. Ct. Rep. 422; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Chicago, M. & St. P. R. Co. v. Iowa, 233 U. S. 334, 58 L. ed. 988, 34 Sup. Ct. Rep. 592; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 385, 11 Ann. Cas. 398; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Pacific Teleph. & Teleg. Co. v. Wright-Dickinson Hotel Co. 214 Fed. 666; Wisconsin Teleph. Co. v. Railroad Commission, L.R.A.1916E, 748, and note, 162 Wis. 383, P.U.R.1916D, 212, 156 N. W. 614; Michigan State Teleph. Co. v. Michigan R. Commission, 193 Mich. 515, P.U.R. 1917C, 355, 161 N. W. 240; Hooper Teleph. Co. v. Nebraska Teleph. Co. 96 Neb. 245, 147 N. W. 674; Pioneer Teleph. & Teleg. Co. v. State, 38 Okla. 554, 134 Pac. 398; State ex rel. Public Service Commission v. Skagit River Teleph. & Teleg. Co. 85 Wash. 29, P.U.R.1915C, 902, 147 Pac. 885.

The Buffum Telephone Company is a common carrier of spoken messages, and its L.R.A.1918C.

duties in that regard must be tested by the rules which the courts have laid down as appropriate and necessary in determining the obligations assumed by common carriers.

Home Teleph. Co. v. Sarcoux Light & Teleph. Co. 236 Mo. 114, 36 L.R.A.(N.S.) 124, 139 S. W. 108; Postal Cable Teleg. Co. v. Cumberland Teleph. & Teleg. Co. 177 Fed. 726; Commercial U. Teleg. Co. v. New England Teleph. & Teleg. Co. 61 Vt. 241, 5 L.R.A. 161, 15 Am. St. Rep. 893, 17 Atl. 1071; State ex rel. Webster v. Nebraska Teleph. Co. 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237.

The mutual telephone company is a public utility and is subject to the jurisdiction of the Public Service Commission, because it is engaged "in the conduct of the business of affording telephonic communication for hire."

Pioneer Teleph. & Teleg. Co. v. State, 45 Okla. 31, 144 Pac. 1060; 21 Cyc. 437; Carter v. Arnold, 134 Mo. 208, 35 S. W. 584; South Highland Land & Improv. Co. v. Kansas City, 172 Mo. 533, 72 S. W. 944.

It is not the amount, but the character, of the business done which constitutes a public utility. It need not be unrestrictedly offered or open to all the public.

Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 60 L. ed. 984, P.U.R.1916D, 972, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916D, 765; State Public Utilities Commission ex rel. Pike County Teleph. Co. v. Noble, 275 Ill. 121, P.U.R.1917A, 520, 113 N. E. 910; State Public Utilities Commission ex rel. Noble Teleph. Co. v. Noble Mut. Teleph. Co. 268 Ill. 411, P.U.R.1915D, 770, 109 N. E. 298, Ann. Cas. 1916D, 897; Public Service Commission v. Fox, 96 Misc. 283, 160 N. Y. Supp. 59; Van Dyke v. Geary, 244 U. S. 39, 61 L. ed. 973, 37 Sup. Ct. Rep. 483; Del Mar Water, Light & P. Co. v. Eshleman, 167 Cal. 681, 140 Pac. 591, 948; Pacific Teleph. & Teleg. Co. v. Wright-Dickinson Hotel Co. 214 Fed. 666.

The power of the Public Service Commission to require the Buffum Company to provide instrumentalities and facilities adequate and in all respects just and reasonable with respect to its business of affording long-distance telephone service is plenary, and power does not depend for its existence or exercise upon the complainant or applicant for the service being technically and unrestrictedly a public service company.

Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 60 L. ed. 984, P.U.R.1916D, 972, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916D, 765; Public Service Commission v. Fox, 96 Misc. 283, 160 N. Y. Supp. 59; Pacific Teleph. & Teleg. Co. v. Wright-Dickinson Hotel Co.

214 Fed. 686; *Van Dyke v. Geary*, 244 U. S. 39, 61 L. ed. 973, 37 Sup. Ct. Rep. 483; *Del Mar Water, Light & P. Co. v. Eshleman*, 167 Cal. 681, 140 Pac. 591, 948; *State Public Utilities Commission ex rel. Noble Teleph. Co. v. Noble Mut. Teleph. Co.* 268 Ill. 411, P.U.R.1915D, 770, 109 N. E. 298, Ann. Cas. 1916D, 897; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; *Ratcliff v. Wichita Union Stock-Yards Co.* 74 Kan. 1, 6 L.R.A.(N.S.) 834, 118 Am. St. Rep. 298, 86 Pac. 150, 10 Ann. Cas. 1016; *Peck v. Tribune Co.* 214 U. S. 185, 190, 53 L. ed. 960, 29 Sup. Ct. Rep. 554, 16 Ann. Cas. 1075.

Messrs. Jeffries & Corum, E. H. Painter, and D. A. Frank, for respondent:

The commission did not have jurisdiction or authority to order a physical connection between the two telephone lines.

Home Teleph. Co. v. Sarcoxie Light & Teleph. Co. 236 Mo. 114, 36 L.R.A.(N.S.) 124, 139 S. W. 108; *State Public Utilities Commission ex rel. Macon County Teleph. Co. v. Bethany Mut. Teleph. Asso.* 270 Ill. 183, P.U.R.1916A, 997, 110 N. E. 334, Ann. Cas. 1917B, 495; *State ex rel. United R. Co. v. Public Service Commission*, 270 Mo. 429, P.U.R.1917D, 752, 192 S. W. 958, 198 S. W. 872; *State v. Missouri Tie & Timber Co.* 181 Mo. 558, 65 L.R.A. 588, 103 Am. St. Rep. 614, 80 S. W. 933, 2 Ann. Cas. 119.

The physical connection ordered is unauthorized under the statute, and confiscatory.

Atchison, T. & S. F. R. Co. v. Public Service Commission, — Mo. —, P.U.R.1917C, 1005, 192 S. W. 460; *Farmers' Teleph. Co. v. Southern Bell Teleph. & Teleg. Co.* 37 A. T. & T. Co. Com. L. 443; *Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; *People ex rel. Oneida Teleph. Co. v. Central New York Teleph. & Teleg. Co.* 41 App. Div. 17, 58 N. Y. Supp. 221; *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; *Philadelphia, M. & S. Street R. Co.'s Petition*, 203 Pa. 354, 53 Atl. 191; *Pacific Teleph. & Teleg. Co. v. Eshleman*, 166 Cal. 640, 50 L.R.A.(N.S.) 652, 137 Pac. 1119, Ann. Cas. 1915C, 822.

The physical connection prayed for would operate as the taking of the property of the Buffum Company without a judicial determination that the taking is for a public use, and without due process of law, in violation of the state and United States Constitutions.

State ex rel. Rhodes v. Public Service Commission, 270 Mo. 547, P.U.R.1917C, 315, 194 S. W. 287; *American Teleph. & Teleg. Co. v. St. Louis, I. M. & S. R. Co.* 202 Mo. 656, L.R.A.1918C.

101 S. W. 576; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *State ex rel. Star Pub. Co. v. Associated Press*, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91; *Home Teleph. Co. v. Sarcoxie Light & Teleph. Co.* 236 Mo. 114, 36 L.R.A.(N.S.) 124, 139 S. W. 108; *Pacific Teleph. & Teleg. Co. v. Eshleman*, supra; *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; *Cape Girardeau v. Houck*, 129 Mo. 607, 31 S. W. 933; *Shoemaker v. United States*, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361.

The Public Service Commission of Missouri is not a judicial body, and has no authority to pass upon constitutional questions, and no legislative enactment can give it such authority.

Atchison, T. & S. F. R. Co. v. Public Service Commission, — Mo. —, P.U.R.1917C, 1005, 192 S. W. 460; *State ex rel. United R. Co. v. Public Service Commission*, 270 Mo. 429, P.U.R.1917D, 752, 192 S. W. 958, 198 S. W. 872; *State ex rel. York v. Locker*, 266 Mo. 384, 181 S. W. 1001; *State ex rel. School Dist. v. Andrae*, 216 Mo. 617, 116 S. W. 561; *Kansas & T. Coal R. Co. v. Northwestern Coal & Min. Co.* 161 Mo. 288, 51 L.R.A. 936, 84 Am. St. Rep. 717, 61 S. W. 684; *Aldridge v. Spears*, 101 Mo. 400, 14 S. W. 118; *Kansas City v. Baird*, 98 Mo. 215, 11 S. W. 243, 562.

Walker, J., delivered the opinion of the court:

This is an appeal by the Public Service Commission from a judgment of the circuit court of Cole county setting aside an order of the commission which required that a physical connection be made at the town of Auxvasse, in Callaway county, between the Auxvasse Mutual Telephone Company and the Buffum Telephone Company.

The proceedings before the commission were upon the complaint of the Auxvasse Company asking that the Buffum Company be required to receive and transmit long-distance messages over its lines from the members and subscribers of the Auxvasse Company, that they might thereby have long-distance connection over the lines of the Buffum Company.

The Auxvasse Company is not incorporated, but is a mutual telephone company formed by the union at the town of Auxvasse of various neighborhood lines extending into the town and united in a local exchange. It was organized in 1911, to afford cheap telephone service to its shareholders and subscribers. It consists of about 140 members, owning twelve or more lines running into and connected at a central office and switchboard in the town of Auxvasse. The

members on the various lines composing the system furnish and own their respective lines and instruments and keep the same in repair, and the members on each line maintain an organization of their own. The union of the various lines under a constitution and by-laws constitutes the central organization known as the Auxvasse Mutual Telephone Company. The organization owns the poles, wires, and equipment in the town of Auxvasse, and the central office and switchboard whereby all the various lines are united and a local exchange maintained. The maintenance of the central office, and of the upkeep of the property belonging thereto, is borne by receipts for service rendered to certain subscribers at flat rates, who are nonmembers, and from toll charges received from nonmembers talking from phones on the lines of the company to a person on the line of another mutual local company with which the Auxvasse Company maintains free exchange service arrangements. Any deficit is made up by assessment upon the members. There are eight subscribers not members who pay a flat rate or fee of \$5 each per annum for service on the exchange and for communications over the various local lines of the company. Any white person may talk free from the phone of a member to a person at a phone on any of the lines of the company, and may talk with a person on the line of any of the other like mutual local companies with which the Auxvasse Company has exchange service arrangements upon payment of a toll charge of 10 cents. The members and subscribers on the various lines receive free service over the lines of the company and over the lines of other like mutual companies with which exchange service arrangements have been made. There are about twenty-five of the latter.

The members and subscribers of the Auxvasse Company also have service over a mutual line owned by the company to Mexico, Missouri, but do not have general long-distance service. The service of the members and subscribers is confined to the lines of the company, the connecting line owned by the members to Mexico, and the lines of other like mutual companies with which free service arrangements have been established.

The Buffum Company is an incorporated company, and has a local exchange in the town of Auxvasse, and, through its own lines and connecting lines of other companies with which it is affiliated, has long-distance service over the country in general. The central offices of the Buffum Company and of the Auxvasse Company are located in the same block near each other.

This action is prompted by a desire of the members of the Auxvasse Company to have

from their own phones long-distance connection through the Buffum exchange with the various lines and points reached by the Buffum Company. Connection with Fulton, the county seat of Callaway county, is especially desired.

The commission found that the cost of the physical connection between the two exchanges would not exceed \$25, and that the connection desired was not for an interchange of messages between the local exchanges of the two companies, but that messages transmitted by the subscribers of the Auxvasse Company over its lines should be received and transmitted by the Buffum Company over its lines. The commission further found that the matter was within the provisions of the Public Service Act; that the physical connection desired could reasonably be made, and that there would thereby be formed a continuous line of communication between the two companies for the transfer of messages or conversations by persons entitled to use the lines of the Auxvasse Company; that public convenience and necessity would thereby be subserved; whereupon the commission ordered the connection to be made, and that the service asked be furnished by the Buffum Company.

The commission also found that, irrespective of whether the property of the Auxvasse Company was impressed with a public use or not, the nature of its business and the number of persons served by it were such as to create a necessity for the physical connection demanded, and therefore the making of same and the rendering of the service was a duty which could lawfully be required of the Buffum Company.

It was ordered that the expense of making the connection be borne by the Auxvasse Company, and that said company, or its subscribers, or any person using its line for the purpose of long-distance connection with the lines of the Buffum Company, pay to the latter company for such service the full amount of the tolls and charges of the Buffum Company therefor, in accordance with its schedule filed with the commission.

The Buffum Company filed its application for a rehearing, but failed to allege as grounds for same the violations by the commission through its order of provisions of the Constitution of Missouri and of the United States, as subsequently set forth in its petition for review. Upon the overruling of the application for a rehearing the Buffum Company filed its petition for a review in the Cole county circuit court of the action of the commission, setting up the constitutional questions above noted. In the circuit court the respondent herein asked that a jury be called, and that it be permitted to introduce additional testimony. These requests were refused.

Respondent then filed its motion for a judgment reversing the order of the commission, and, among other things, set up that the order was made without due process of law, and was a taking of respondent's property without just compensation, and was a violation of §§ 10, 20, 21, and 30 of article 2 of the Constitution of Missouri, and of § 1 of the 14th Amendment of the Constitution of the United States, and that the alleged taking of its property was an unauthorized exercise of the right of eminent domain.

The appellant, Public Service Commission, filed its motion to strike out respondent's motion for a judgment, for the reason that same was based upon grounds not urged or relied upon by respondent in its motion for rehearing, and was a violation of the method of procedure provided for by the Public Service Act, under the law of its creation which motion was overruled. The court thereupon sustained respondent's motion, and entered judgment annulling and setting aside the order of the commission.

The judgment of the circuit court sustaining the respondent's motion involves a finding that upon the record the Auxvasse Company was not a public utility operating for hire, and therefore not subject to the jurisdiction of the commission; that public convenience and necessity would not be subserved by the making of the connection, and that no authority existed for the order, and that enforcement of same constituted a taking of respondent's property in the sense and manner forbidden by the Constitution.

A synopsis of the relevant sections of the Public Service Act (Laws 1913, pp. 556-551) will assist in determining the matter at issue. By a "telephone corporation," as the term is employed in the act, is meant: "Every corporation, company, association, joint stock company or association, partnership and person, . . . owning, operating, controlling or managing any telephone line or part of telephone line used in the conduct of the business of affording telephonic communication for hire." Subd. 17, § 2.

The term "telephone line" is defined to include every sort of property "used, operated, controlled or owned by any telephone corporation to facilitate the business of affording telephonic communication." Subd. 18, § 2.

The jurisdiction, supervision, powers, and duties of the commission are declared to extend "to all telephone lines, as above defined, . . . and to every telephone company, . . . so far as said telephone . . . lines are and lie, and so far as said telephone companies . . . conduct . . . line or lines, respectively, within this state." Subd. 6, § 16.

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to the supervision of the commission in respect of facilities and service it shall afford is stated thus: "Every . . . telephone corporation shall furnish and provide with respect to its business such instrumentalities and facilities as shall be adequate and in all respects just and reasonable." § 87.

The duty of each telephone corporation to transmit messages is thus prescribed: "Every . . . telephone corporation operating in this state shall receive, transmit and deliver without discrimination or delay, the conversations and messages of every other . . . telephone corporation with whose line a physical connection may have been made." Subd. 5, § 87.

The provision for requiring physical connections between lines of telephone companies is as follows: "Whenever the commission . . . shall find that a physical connection can reasonably be made between the lines of two or more telephone corporations . . . whose lines can be made to form a continuous line of communication by the construction and maintenance of suitable connections for the transfer of . . . conversations, and that public convenience and necessity will be subserved thereby, or shall find that two or more . . . telephone corporations have failed to establish joint rates, tolls or charges for service by or over their said lines, and that joint rates, tolls or charges ought to be established, the commission may, by its order, require that such connection be made, except where the purpose of such connection is primarily to secure the transmission of local : . . . conversations between points within the same city or town, and the conversations be transmitted . . . over such connection under such rules and regulations as the commission may establish, and prescribe through lines and joint rates, tolls and charges to be made, and to be used, observed and in force in the future. If such . . . telephone corporations do not agree upon the division between them of the cost of such physical connection or connections or the division of the joint rates, tolls or charges established by the commission over such through lines, the commission shall have authority, after further hearing, to establish such division by supplemental order." Subd. 3, § 93.

The powers of the commission, in requiring improvements, changes in, or additions to telephone facilities, are thus further amplified and emphasized: "Whenever the commission shall be of the opinion . . . that repairs or improvements to or changes in any . . . telephone line ought reasonably to be made, or that any additions should reasonably be made thereto, in order to promote the convenience of the public or

employees, or in order to secure adequate service or facilities for . . . telephonic communications, the commission shall make and serve an order, directing that such repairs, improvements, changes or additions be made within a reasonable time and in a manner to be specified therein, and every . . . telephone corporation is hereby required and directed to make all repairs, improvements, changes and additions required of it by any order of the commission served upon it." § 95.

All of these provisions are to be liberally construed as required by the act, to wit: "The provisions of this act shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities," § 127.

I. If the companies here involved are public utilities within the meaning of the Public Service Act, and a physical connection between them will add to their efficiency as such, then the judgment of the circuit court should be reversed, and the order of the commission affirmed; otherwise not. If it were not conceded by the Buffum Company that it is a public utility, and as such subject to the supervision of the commission, the nature of its organization and the character of its activities would justify no other conclusion. It remains, therefore, to be determined whether the Auxvasse Company is subject to a like classification. To render it so it is not necessary that it be incorporated. Under the inclusive provisions of subdivision 17 of § 2, *supra*, any association, joint stock company, partnership, or person dependent primarily upon the character of the telephone business it conducts may be so classified.

The Auxvasse Company is a voluntary association. The right to the use of the facilities it affords is limited to white persons who are the owners of certificates of shares therein, for which they are required to pay a fixed sum. In addition an assessment is made upon such shareholders of \$1.50 each per quarter to maintain and operate a central office or switchboard. Maintenance charges required of each shareholder may be fixed quarterly. Shareholders are not required to pay more than is actually necessary for the upkeep and operating expenses for the quarter ensuing the fixing of same. Nonsubscribers are not charged for talking from any telephone on the Auxvasse switchboard to any other telephone on the same switchboard; but when talking from a telephone on the Auxvasse switchboard to one on a connecting switchboard, they are required to pay a fee of 10 cents to the owner of the telephone where the call is made. Fees thus collected are required to be paid into the company's treasury during the J. R. A. 1918C.

quarter when they are collected. This constitutes the extent of the business and income of the Auxvasse Company, except \$5 per year paid by each of eight flat rate subscribers, who are thus entitled to the facilities afforded without further charge. An abstract of the testimony of a number of the shareholders of this company given at the hearing before the commission will give a definite idea as to the character of the business of the company, from which its nature and purpose may be determined. These are literal excerpts from different witnesses' testimony in response to inquiries propounded to them on the stand:

"To maintain and operate the central office each party contributes \$1.50 per quarter."—E. W. Martin.

"The lines are kept up by the members who own them. This keeping up of the lines applies to residents in the town of Auxvasse and the surrounding country."—S. W. Turner.

"It was never the intention of the company to go into the telephone business for profit. No; I don't think they calculated on more than enough to make expenses. It was not the intention to go into what is known as a commercial business. The lines were built for convenience. That's what a telephone is for."—J. F. Buckner.

"The company is not in the telephone business to make money out of it. It was simply for the accommodation of the shareholders. The Mexico toll line is kept up out of the treasury of the company. I use it three or four times a day, I reckon, but I pay no toll charges for this use. The toll line is used a whole lot. Country people, when they come in, use it more than we do in town. We keep it up for the benefit of those who want to use it."—W. F. Woodson.

"On the Auxvasse line each individual owns the box he uses, and the association owns the telephone line reaching to the switchboard. The association does not build lines to anybody. It is simply a collection of individuals divided further into lines and each line is a separate organization in that it owns its own line. The Auxvasse Company is not a corporation; it is simply a voluntary association composed of individuals. Its purpose is to provide telephone service to its stockholders at actual cost. No service is furnished in town to anybody except stockholders."—S. M. Turner.

The constitution and by-laws and the oral testimony all point to the conclusion that the Auxvasse Company is primarily a private organization not operated for hire. Operation for hire is a prerequisite to supervision by the commission. The reason is plain. The commission was created, as is evident from the entire statute defining its

powers, not to interfere with individual action except where same assumes a public nature, but to provide regulations and give plenary power, as defined by the statute, to the commission to control such utilities as from their nature and operations may affect the interests of the general public. All such organizations are commercial in their nature in that they are not conducted for favors, but for fees. Recognizing this fact, the framers of the Public Service Act made this a condition precedent to commission control. That a fee may be exacted from nonsubscribers for talking from a telephone on the company's switchboard to one on a connecting line does not militate against the correctness of the conclusion that this company does not afford telephonic communications for hire. If thus conducted, the right of nonsubscribers to demand service would be absolute upon the tender of the fee. Such a right cannot exist, however, because the telephones are individually owned by those in whose premises they are located, and, no limitation as to such ownership having been made by the company, if such could be made under the circumstances, the right of use to nonsubscribers is at best permissive, and, being so, does not authorize the conclusion that the company is conducted for hire. The fee thus authorized to be charged is but an incident in the general conduct of the business of the company, and is not indicative of its character, which is to serve those who sustain it, and not the general public. Nor is the claim that the eight subscribers, in the absence of any authority therefor in the company's constitution and by-laws, are permitted upon the payment of a flat rate, free from assessments, to enjoy its facilities, an argument in favor of the contention that the company is conducting its business for hire. Each of these subscribers owns the phone used by him. Except, therefore, for the difference between the payments made by them and others, they sustain no different relation to the company. If their relation be construed to give color to the contention that these transactions are of a commercial nature, and hence the company is conducting its business for hire, it will be sufficient to say that the constitution and by-laws based thereon confer no such authority upon the company as is thus exercised. The elementary axiom is therefore applicable that the company cannot enlarge its character by exceeding its powers.

The settlement of a controverted question is often rendered easier by a resort to elements. To that end, what is meant by such companies as "conduct telephonic communications for hire?" Simply those which engage in business as a commercial transaction, or for profit. Summarizing what we

have heretofore said, is this company of that class? It lets nothing; it hires nothing; but for the maintenance of its own property, and for that alone, it exacts a like sum quarterly from all of its members. The accessories, to wit, the telephone boxes necessary to render the lines available for the transmission of conversations, do not belong to the company, but to the individual members. Hence the property owned by the company is but inconsiderable, and there is in existence no such organization as is contemplated by the statute.

The Public Service Act is further illuminative of the character of telephone companies subject to its provisions, in defining the requirements that may be made of them. The commission may require them to furnish and provide such instrumentalities as shall be adequate in all respects for the transacting of their business (§ 87); to transmit and deliver without discrimination or delay conversations sent over other lines with which they have physical connection (subd. 5, § 87); to make physical connections with other like companies (subd. 3, § 93); to order repairs, improvements, and changes in companies for the betterment of the service (§ 95). In addition they may be required to file schedules of their rates of charges with the commission and subject themselves to its supervision by complying with its rules and regulations for the operation of telephone companies. There is no pretense that in any of these particulars this company has complied with these statutes. On the contrary, it is not contended that it could be required so to do. Unless there is other evidence than is disclosed by the record, we are inclined to the opinion that it could not be so required. Rulings upon kindred questions in other jurisdictions are but a little more than persuasive in the determination of the matter here at issue on account of differences in the statutes construed. Rightly reasoned, this well-marked line runs through them all, that to authorize supervision the character of the utility must be of such a nature that the exercise of its powers will affect public rather than private rights. Any other classification would destroy the ruling purpose underlying the creation of Public Service Commissions, and necessarily, sooner or later, run afoul of constitutional provisions, the violation of which would be inimical to individual liberty of action.

II. The same facts adduced to show that the Auxvasse Company is not a public utility will sustain the conclusion that its connection with the Buffum Company is not such a matter of public necessity and convenience as to authorize the issuance of an order in regard thereto. Recapitulated,

these are the nature of its business, existing as it does, not for public use, but private convenience; its requiring no pay for profit, but fees only for the purpose of existence. Need arguments be piled up like Pelion on Ossa to establish the fact that facilities added by the commissioner's order to an association of this type will not enable it to pass beyond its own tether and add even incidentally to the convenience of others than its own membership? We think not.

The constitutional question injected into this controversy for the first time in the petition for review was not timely. How, without a contradiction in terms, can a matter be reviewed which has not been viewed? The purpose of the petition filed in the circuit court, in cases of this character, would be defeated if new issues were permitted to be incorporated therein. Forms of procedure are for the purpose of facilitating business, whether it be of a court or a commission; and there is no more reason why, when required by law, they should not be observed in one case than in the other. By the express language of § 110 of the Public Service Act (Laws 1913, p. 641), it is provided that "no corporation or person or public utility shall in any court urge or rely on any ground not so set forth in said application," referring to that of rehearing. We ruled in *State ex rel. Missouri P. R. Co. v. Atkinson*, 280 Mo. 634, L.R.A.1918A, 46, P.U.R.1917C, 971, 192 S. W. 86, Ann. Cas. 1917E, 987, that the observance of this rule was obligatory. There is no reason for a variance from this conclusion. Neither within the letter or spirit of the Public Service Act is the character of the Auxvasse Company such as to render it subject to the commission, and hence the latter is not authorized to comply with the demand herein made.

The contention is vaguely made by appellant that the individual members of this company have collectively the right to demand the connection here under consideration. This contention is evidently based upon the assumption that numbers alone will establish the claim of public necessity. This is not true. Their mere numbers give them no more rights in the premises than a single individual would have under like circumstances. If A should demand that his private phone be connected with the Buffum Company, we may look in vain for authority in reason or the law for the exercise of such power by the commission as will effect a compliance with this request. Granted to A, the right must, as a necessary consequence, be conceded to every other individual owning a private telephone line. The result would be the improper invasion of the rights granted by law to the Buffum Company, or, in other words, the taking of its property without due process of law. A, therefore, is entitled to the same service as others, but not more, and he will only be heard to complain when such service is denied. This subject was discussed incidentally with much clearness in *Home Teleph. Co. v. Sarcoxie Light & Teleph. Co.* 236 Mo. loc. cit. 133, 36 L.R.A.(N.S.) 124, 139 S. W. 108, in which the conclusion we have indicated was reached.

There is, in our opinion, no sufficient ground for the order of the commission requiring a connection to be made between the Buffum and the Auxvasse Companies, and the judgment of the Circuit Court is therefore affirmed.

All concur, except Blair, J., who dissents.

Annotation—Mutual telephone companies as public utilities.

Whether or not a mutual telephone company constitutes a public utility so as to be subject to the jurisdiction of the Public Service Commission is a question upon which there is an apparent conflict of decision. It should be observed, however, that the statutes differ in respect to the definitions of "public utilities." In some of the cases the point for decision upon which the case turned was whether the company was operating for "public use" or furnishing service "for the public;" whether the company was "doing a telephone business;" or whether the company was operating "for profit," "for compensation," or "for hire." The decision upon this L.R.A.1918C.

question also depends largely upon the particular facts and circumstances in each case.

Operating for "public use" or furnishing service for "the public."

Generally, it is held that a company furnishing telephone service for the use of its members only is not a public utility, under a statute prescribing as the test of the operation of its property "for public use."

Thus, a mutual telephone company furnishing telephone service for use of its members only, for communication between themselves, and without pecuniary profit, does not operate its property "for public use," so as to become a pub-

lic utility within the Illinois Public Utilities Act, necessitating the securing of a certificate of convenience and necessity from the commission before constructing a plant in territory served by another public utility. *State Public Utilities Commission ex rel. Macon County Teleph. Co. v. Bethany Mut. Teleph. Asso.* (1915) 270 Ill. 183, P.U.R.1916A, 997, 110 N. E. 334, Ann. Cas. 1917B, 495. The court said: "To constitute a public use, all persons must have an equal right to the use, and it must be in common, upon the same terms, however few the number who avail themselves of it. It is not essential to a public use that its benefits should be received by the whole public, or even a large part of it, but they must not be confined to specified, privileged persons. *People ex rel. Scott v. Ricketts* (1911) 248 Ill. 428, 94 N. E. 71. The words, "public use" mean of or belonging to the people at large, open to all the people to the extent that its capacity may admit of the public use. *State Public Utilities Commission v. Monarch Refrigerating Co.* (1915) 267 Ill. 528, P.U.R.1915D, 119, 108 N. E. 716, Ann. Cas. 1916A, 528. The use must concern the public as distinguished from an individual, or any particular number of individuals, but the use and enjoyment of the utility need not extend to the whole public or any political subdivision. It may be confined to a particular district and still be public. *State Public Utilities Commission ex rel. Noble Teleph. Co. v. Noble Mut. Teleph. Co.* (1915) 268 Ill. 411, P.U.R.1915D, 770, 109 N. E. 298, Ann. Cas. 1916D, 897. . . . By the charter the use of the telephone system is limited strictly and solely to the members of the corporation, and it has no authority, under its charter, to erect or maintain any telephone line for the service of the public. It can only exercise such powers as are within the scope of its charter, and none others. . . . It is argued that the appellant's property is used or to be used for a public use, because the appellant has obtained a license from the village of Bethany to construct, maintain, and operate telephone poles, wires, and fixtures in the streets of the village, and has purchased a great quantity of poles which it intends to erect on the public highways and to string wires on them. These matters neither concern the petitioner nor the State Public Utilities Commission, and do not fix the character of the corporation. If poles or wires should be placed on streets and highways, it would no more tend to prove L.R.A.1918C.

that the use is public than the fact of farmers driving upon the public highways with their own products would tend to prove they are common carriers. If constructing a telephone system in streets or highways for private use is a diversion of the streets or highways from their legitimate use, the commission would not thereby acquire jurisdiction over the appellant."

So an association chartered to maintain a telephone system for the private use of its members is not a public utility, and does not become one, so as to necessitate the securing of a certificate of convenience and necessity from the Public Utilities Commission before operating in territory served by a public utility, under a statute confining the jurisdiction of the commission to the control and supervision of owners and operators of property devoted to "public use," by the acceptance of a municipal franchise authorizing it to use the public streets, or by the violation of its charter in rendering service to the public. *State Public Utilities Commission ex rel. Evansville Teleph. Co. v. Okaw Valley Mut. Teleph. Asso.* (1918) 282 Ill. 336, P.U.R.1918C, 583, 118 N. E. 760. The court pointed out that the telephone association could only exercise the rights and powers granted by its charter, and would be subject to a penalty and to a forfeiture of its franchise if it should assume to act or to serve the public generally as a telephone company organized and chartered to serve the public for hire; that the Public Utilities Commission is given no right or power to extend the charter rights and powers of the association to enable it to obtain a certificate of convenience and necessity, or to give it the right and power to do a telephone business as a public utility; and that violations of its charter could not have the effect to make it a public utility.

And a mutual telephone company which furnishes service to its members only does not operate a telephone system or plant for "public use," so as to be a public utility within the meaning of the New Jersey act, Laws of 1911, chap. 195. *Re Farmers' Mut. Teleph. Co.* (1913) 1 Ann. Rep. N. J. P. U. C. 74, P.U.R.1915C, 344 (abstract).

Likewise, farm telephone lines built and maintained by the owners for the purpose of securing service through connections with a city system, whose owners do not own or operate an exchange, or rent telephones to the public, or hold themselves out as conducting or operat-

ing a public system, are not public utilities under Illinois Public Utilities Act, and therefore may disconnect from the city system without the consent of the commission. *Thompson v. Kleckner* (1915; Ill.) P.U.R.1916A, 153.

But where the service is open to all who desire to become members of the company, or the system is so operated through connections or otherwise as to afford communication by and with persons not members, it has been held that the company is a public utility.

Thus, a mutual telephone company, the service of which is open to anyone within its territory willing to become a shareholder, such shareholders having the means of communicating over the company's lines with one another, and also via commercial lines with various cities and villages of the state, operates its property "for public use," and is a public utility within the meaning of § 10 of the Illinois Public Utilities Act, and therefore required to have a certificate of convenience and necessity. *State Public Utilities Commission ex rel. Pike County Teleph. Co. v. Noble* (1916) 275 Ill. 121, P.U.R.1917A, 520, 113 N. E. 910, affirming order of Public Utilities Commission. For opinion of the commission, see (1915) P.U.R.1915C, 336. The Illinois supreme court said: "The question whether a person or persons, association, copartnership, or company is owning, operating, or controlling a public utility is one that necessarily depends upon the special facts connected with the management, operation, or control of such business. A mutual telephone company may or may not be operating and managing a public utility, but when it is operating its line in connection with the exchange of a commercial telephone company, and serving the public in the manner that, as shown here, appellants' lines are serving the public, there can be no escape from the conclusion that the business is a public utility, and is subject to the control of the Public Utilities Commission of this state."

And a mutual telephone company rendering service to its members at cost, and having connection with other telephone companies upon the basis of a mutual exchange of free service, operates and manages its plant "for a public use," so as to make it a public utility within § 10 of the Illinois Public Utilities Act, and to necessitate the securing of a certificate of convenience and necessity from the commission under § 55 of the act before beginning operations in territory served by another com-

pany, where its franchise to use the streets of the village in which it is located is given upon express condition that no person, firm, or corporation except commercial telephone companies shall be barred from membership and from the service to be rendered by the company; and it is immaterial that the company does not furnish as complete service as is supplied by most commercial companies. *State Public Utilities Commission ex rel. Noble Teleph. Co. v. Noble Mut. Teleph. Co.* (1915) 268 Ill. 411, P.U.R.1915D, 770, 109 N. E. 298, Ann. Cas. 1916D, 897.

Likewise, a mutual telephone copartnership serving thirty-seven subscribers by rural lines connected with the exchange of another company, by virtue of which its subscribers are able to communicate not only among themselves, but with all subscribers connected with the exchange, and have access to the long-distance service of the company, is a "telephone company" "furnishing telephone service to the public," subject to the jurisdiction of the commission, and as such may be required to re-establish telephone service to a subscriber that has been discontinued. *Sullwold v. Four Lakes Rural Teleph. Co.* (1917; Minn.) P.U.R.1918B, 147.

And under a statute defining a public utility as embracing every corporation, association, or individual operating any plant for the conveyance of telephone messages, either directly or indirectly, "to or for the public," the Wisconsin Commission held in *Re Five Mile Creek Teleph. Co.* (1917; Wis.) P.U.R. 1918B, 520 (abstract), that a farmer telephone line occupying the public highway and connecting with the exchange of a telephone company is a public telephone utility, and should not arbitrarily discontinue service on account of a dispute between the owners of the line. The commission said: "It may well be that the occupancy of the highways alone makes the use a public one, since our statutes nowhere permit the public highways to be occupied for any but public uses. Being engaged in furnishing local service in that territory, the company would doubtless be entitled to notice under chap. 610 of the Laws of 1913 before a paralleling line could be constructed there. To the extent indicated, then, the respondent is a public telephone utility and so bound to furnish service to all who apply, within reasonable territorial limits and in accordance with approved rules. Since the company is, in contemplation of law, a partner-

ship, it may be doubtful if this commission can dictate who the members of the firm shall be. But as a utility the co-partnership can be required to render service on a commercial basis to any person who desires it, within its territorial limits."

"Doing a telephone business."

It has been held that the furnishing of telephone service by a mutual company is "doing a telephone business."

Thus, in *Reading Cent. Teleph. Co. v. Fayette Rural Teleph. Co.* (1915; Mich.) P.U.R.1915A, 56, the Michigan Railroad Commission decided that a mutual telephone company was "doing a telephone business" within the meaning of the statute conferring jurisdiction over all persons, corporations, and associations operating telephone lines or exchanges doing a telephone business, and required the company to furnish an interchange of telephone communication and service by means of lines and circuits already forming a physical connection between the exchange and that of another company. The commission pointed out that the phrase "doing a telephone business" excludes only such facilities as are entirely private in character, and that an association having its poles and wires upon the public highways, and furnishing communication between its immediate patrons and with those of distant organizations, cannot be said to be a private facility not doing a telephone business, merely because the cost of its maintenance was apportioned in the form of an assessment.

And in *Canterbury & B. Teleph. Co.* (1912) 2 Ann. Rep. N. H. P. S. C. 76, P.U.R.1915C, 345 (abstract), the New Hampshire Commission held that a telephone company was doing a telephone business in a certain city so as not to require the consent of the commission to extend its service, where it was engaged in transmitting messages for compensation in the territory in question, although it held no franchise from the city.

Operating "for profit."

By the Ohio statute utilities "not operating for profit" are expressly excluded from control and supervision by the commission.

Accordingly, in *Wehr v. Seneca Valley Teleph. Co.* (1916; Ohio) P.U.R.1916E, 479, the Ohio Public Utilities Commission held that it had no jurisdiction of a complaint against a mutual telephone company "not operated for profit," requesting an order requiring res-

toration of service which had been withdrawn, and alleging discriminatory practices and excessive rates.

The provision of the same statute, however, to the effect that "no telephone company" shall furnish service in territory adequately served by an existing company without consent of the commission, has been held applicable to mutual telephone companies "not operated for profit," by the Ohio supreme court in *Ashley Tri-County Mut. Teleph. Co. v. New Ashley Teleph. Co.* (1915) 92 Ohio St. 336, P.U.R.1916B, 401, 110 N. E. 959, although the court remarked that a mutual telephone company not operated for profit is not a public utility within the statutory definition of public utilities, which expressly excludes utilities not "operating for profit." The court, in referring to this provision (§ 614-52, General Code), said: "The legislature specifically treated telephone companies as public utilities requiring special legislation. Telephone companies were thereby taken from the general scheme of public utility regulation, and there was added and applied to this particular utility a statutory mandate not applicable to others. Having in view the public convenience primarily, and the adequacy of telephone service secondarily, it protected the public convenience, and incidentally the established plant, by a special provision that no telephone company should invade a municipality or locality furnishing adequate service without a certificate from the commission; and this the statute provides irrespective of whether the company operates for profit or not. The legislature, no doubt, considered that public policy required special legislation in that particular field when it sought to supervise competition in the interest of public convenience. The language of the section is plain, and we are unable to apply to telephone companies the added words, 'operating their utilities for profit.'"

We do not hold that private telephone lines, or that even all mutual lines, shall in all cases require the certificate named. Public convenience is the polestar of the act, and an established and adequate service in a municipality or locality is the chief factor in its determination, and where, as here, these factors may be disturbed by a new and competitive telephone company substantially affecting established service, it is necessary that a certificate be obtained to the effect that the right or franchise is necessary for the public convenience, before such second company

can exercise its rights and franchises in such occupied locality."

Operating "for compensation."

It has been held that a mutual company furnishing telephone service to its members without profit is engaged in a public service "for compensation" so as to be a public utility.

Thus, in *Mountain States Teleph. & Teleg. Co. v. Project Mut. Teleph. & Electric Co.* (1916; Idaho) P.U.R.1916F, 370, it was held that a mutual telephone company having a large number of subscribers, who paid an amount sufficient to cover the cost of operation and maintenance, was engaged in a public service "for compensation" so as to be a public utility, which cannot operate in territory served by another public utility without securing a certificate of convenience and necessity from the commission, although the service was furnished to stockholders exclusively and without profit. The commission said: "The defendant admits that the complainant has a right to the exclusive privilege of operating a public telephone for compensation within the village of Rupert until such time as this commission shall issue its certificate of necessity and convenience to another company to operate a public telephone line for compensation within the said village, but contends that the defendant is not doing business for compensation. The Century Dictionary defines compensation as 'that which is given or received as an equivalent, as for services, debt, work, loss, or suffering.' It is admitted that the defendant contemplates the operation of a telephone line in the village of Rupert at cost and on a nonprofit-sharing basis. The subscribers of the defendant company pay to the defendant in exchange or as an equivalent for telephone service an amount sufficient to cover the cost of operating and maintaining the plant; and, as we view the situation, the defendant is clearly rendering services for compensation. This construction of the statute we believe to be in the light of the public good or welfare, so as to give effect to the statute as a whole, and to carry out the general policy laid down by the statute and the evident intent of the legislature in enacting the statute."

... It being the prime purpose of the Public Utilities Act to substitute regulation for competition, and to protect the public on the one hand, and the investor on the other, it appears to this commission that the object and whole policy of the statute would be defeated

by permitting competition to the extent contemplated by the defendant under the guise of a mutual organization."

Operating "for hire."

It has been held that a mutual company furnishing telephone service without profit is not operating its system "for hire" so as to be a public utility subject to the jurisdiction of the commission.

Thus, a voluntary association furnishing telephone service to its members on the basis of the actual cost of upkeep and operating expense, and as a private convenience to a few nonmembers, the members owning their own instruments, and paying a flat rate, and the non-subscribers paying a toll charge when service is given over connecting lines, is not operated "for hire" so as to make it a public utility within the meaning of the Missouri Public Service Act, and cannot require connection with an incorporated company for long-distance service through the Public Service Commission, which has jurisdiction of telephone companies furnishing service for hire, where the collection of fees from nonmembers is merely an incident in the general conduct of the business. *STATE EX REL. BUFFUM TELEPH. CO. v. PUBLIC SERVICE COMMISSION*, ante, 820, which affirmed a judgment setting aside the order of the commission requiring a physical connection. For opinion of commission, see (1916) 3 Mo. P. S. C. 559, P.U.R.1916E, 296.

And a mutual telephone company is not engaged in "the conduct of the business of affording telephonic communication for hire," so as to be subject to the jurisdiction of the commission and required to secure authority for extending its lines, merely because nonsubscribers, who are permitted to use the line without charge as a benefit to subscribers, occasionally "tip" the operators, no portion of such "tip" or of any other payment by nonsubscribers going to the company. *Farmers' Teleph. Co. v. Saline Mut. Teleph. Co.* (1917; Mo.) P.U.R.1917C, 881.

In referring to a constitutional provision conferring upon the Oklahoma Corporation Commission jurisdiction over telephone lines "operated for hire," in the case of *Twin Valley Teleph. Co. v. Mitchell* (1910) 27 Okla. 388, 38 L.R.A. (N.S.) 235, 113 Pac. 914, Ann. Cas. 1912C, 582, the Oklahoma supreme court said: "Only telephone lines 'operated for hire' are placed by article 9 of the Constitution under the jurisdiction of

the Corporation Commission. Rural or farmers' lines operated on the mutual plan, without any charges or toll for use of the line, are not subject to regulation by the commission."

"Telephone corporation" or "company."

In *Farmers' Mut. Teleph. Co. v. Kinloch Long Distance Teleph. Co.* (1916; Mo.) P.U.R.1917A, 245, the Missouri Public Service Commission decided that a mutual telephone company not operating its line "for hire" was not a "telephone corporation" as defined in § 2, subsec. 17, of the Public Service Commission Law, and could not require physical connection with a telephone corporation for long-distance service through the commission under § 93, sub-

sec. 3, of the same statute, authorizing the commission to require physical connection between telephone corporations.

A mutual telephone association operated on an assessment plan is a "telephone company" within the meaning of the South Dakota statute defining the term "telephone company" as embracing all corporations (except municipal), associations, and individuals owning or operating any telephone line or exchange in the state, and requiring telephone companies to establish and file with the Board of Railroad Commissioners a schedule of rates for service before transacting any business. Re *Indian Creek Teleph. Co.* (1917; S. D.) P.U.R.1917E, 533. A. L. R.

WEST VIRGINIA SUPREME COURT OF APPEALS.

H. E. LOVE

v.

H. L. MCCOY et al.

(— W. Va. —, 94 S. E. 954.)

Bond — validity — unconstitutional statute.

1. A bond executed according to the requirements of a statute afterwards declared unconstitutional is not necessarily void. The test of the enforceability of such an instrument, if it has the essentials of a common-law obligation, is whether it is based upon a consideration independent of the statute, or some profit or advantage has accrued to the obligors from its execution which otherwise they would not have received.

For other cases, see Bonds, II. a, in Dig. 1-52 N. 8.

Same — action for breach.

2. But where there was no such consideration, and no such profit or advantage has accrued, the obligation, though in proper form, will not support an action to recover for a breach of its conditions.

For other cases, see Bonds, II. a, in Dig. 1-52 N. 8.

(January 15, 1918.)

CERTIFICATION by the Circuit Court for Cabell County for determination by the Supreme Court of Appeals of questions arising upon the filing of a demurrer

Headnotes by LYNCH, J.

Note.—As to validity and effect of indemnity bond executed under unconstitutional statute, see annotation following this case, post, 834, and references therein to annotation on related questions. L.R.A.1918C.

and special plea in an action on a statutory bond executed in a proceeding to contest title to office. Case remanded.

The facts are stated in the opinion.

Mr. George J. McComas for plaintiff.
Messrs. Strickling & Strickling and J. W. Perry for defendants.

Lynch, J., delivered the opinion of the court:

As a candidate for the office of sheriff of Cabell county in the general election held November 7, 1916, for the term beginning January 1, 1917, H. E. Love, on the face of the returns as canvassed by the proper body, was declared elected and entered upon the discharge of his official duties. H. L. McCoy and others, voters and taxpayers of the county, filed their petition in the manner and for the purposes apparently authorized by § 8b (15), chap. 5, Code 1916, charging that by corrupt practices, in violation of the provisions of that act, Love so far influenced the result of the election as to secure title to the office, and entered into the bond upon the conditions required by that section. After the decision of this court in *Sutherland v. Miller*, — W. Va. —, L.R.A.1917D, 1040, 91 S. E. 993, holding the section invalid as an unlawful delegation of legislative power and for other reasons stated in the opinion, McCoy and others voluntarily dismissed the petition; and this action on the bond ensued to recover the costs and expenses incurred by Love in his defense against the assault so made upon his title to the office he was elected to administer.

Two questions are certified to this court, pursuant to the provisions of the last paragraph of § 1, chap. 135, Code,—the sufficiency of the declaration challenged by demurrer, and of a special plea tendered by

defendants and filed by the court over the protest and objection of the plaintiff. As the demurrer and objection in effect raise the same issue, the determination of either one will dispose of the case finally here as now presented.

There is no necessity for reviewing or restating and applying the principles enunciated in *Sutherland v. Miller*, as no question is raised as to them. On the contrary, they are recognized as controlling upon the questions presented by the petition charging corrupt practices. The controversy requires the determination of a single inquiry, namely, whether a bond voluntarily executed, in conformity with the requirement of a statute subsequently adjusted to be invalid as in contravention of the fundamental or organic law, can serve as the basis of an action to recover damages for the breach of the obligation. As a further limitation upon the scope and extent of the inquiry, it may be said that its solution depends not wholly upon the constitutional incompetency of the act, for, though it thereafter be declared void, the discharge of the obligors from liability does not necessarily follow as a matter of course. While the failure of an act to stand the test of constitutionality does frequently render invalid a bond given pursuant to its requirements, and relieve the obligors from the liability it would impose if the statute were not void, yet if there be some consideration underlying it independent of the statute, or there accrues to them some benefit, advantage, or profit by its execution, they will be required to respond to the undertaking expressed in the instrument. It is not the policy of the law to permit escape from the legal consequences of the execution of such an instrument, if some one or more of the persons who bind themselves to perform its conditions receive and enjoy its fruits or the protection it affords, or derive some material or financial benefit from it. They will not, in either such event, when summoned to account for a breach of the conditions, be permitted to plead the voidness of the statute necessitating the execution of the undertaking.

The decision cited on behalf of plaintiff recognize this distinction. For in *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187, it was held: The obligors in a bond given under an unconstitutional law of the Confederate government, which authorizes an execution debtor to give such bond to suspend the sale of property until the operation of the law ceased, were estopped from asserting the unconstitutionality of the law. They availed themselves of its benefits and must not be permitted to escape its responsibilities.

L.R.A.1918C.

The benefits which in that case effected an estoppel resulted from the deferred enforcement of the judgment, in consequence of the bond sanctioned by an act declared to be void because violative of the constitutional provision against the impairment of contracts. The same qualification appears in *Baltimore & O. R. Co. v. Vanderwarker*, 19 W. Va. 265, a proceeding upon a motion to quash an execution upon a decree against the railroad, where the contention was that, as the bond to supersede the decree pending an appeal was executed only in the name of the appellant's attorney, without surety and without the consent of the company, the instrument did not operate as a supersedeas, wherefore the appellees could have sued out execution on the decree at any time within the period fixed by statute and, having failed to do so, the decree was barred. This court answered that proposition by saying: "If a party has enjoyed the benefit of a supersedeas bond, though it was executed by his attorney . . . alone, when the law required it to be executed with security, in a proceeding to enforce the debt, after the appeal had been dismissed, he is estopped from alleging that the supersedeas bond was invalid."

Most of the cases cited by counsel and examined upon this investigation point out this demarcation between liability and exemption, where the bonds were given under the authority of void legislative enactments, and none of them more clearly and logically than *Stevenson v. Morgan*, 67 Neb. 207, 108 Am. St. Rep. 629, 93 N. W. 180. It matters not that some of these cases declined to relieve the obligors from liability, because, as found therein, they had derived some substantial benefit, advantage, or protection from the instruments. In *Stevenson v. Morgan*, the principal obligor had continued temporarily in the possession and enjoyment of the premises from which plaintiff sought to oust him. While emphasizing the qualification of the rule of liability, other cases deny the right to a recovery upon bonds where no such emoluments or benefits accrued. 9 C. J. 28; 4 R. C. L. 55.

It is this point of divergence between the two classes of authority which should be kept constantly in mind in determining the results of the conflicting contentions of the parties to this controversy. For if none of the defendants has received any substantial aid, profit, or advantage by or through the instrument it cannot serve as the foundation of an action to recover the penalty. Wherein such beneficial results inured to them is not pointed out by counsel, and none is perceived. McCoy and his co-obligors have not profited by the obligation they assumed. It did not in the least im-

prove their condition or situation. The proceeding instigated by them proved wholly abortive; and, when the act whose provisions they invoked broke down, the bond fell with it. The law will inject into it substance and entity, so as to charge the obligors, only where some consideration independent of the statute entered into the purposes for which it was executed, or they have reaped some advantage from it for which they should be compelled to respond to the obligee.

There is no real merit in the objection urged against the right claimed by defendants to rely upon legislative incompetency to enact the section under which the petition was filed and the bond executed. This question, so far as anything appears to the contrary, may have been raised by the demurrer to the declaration,—a method of procedure approved in *Hoxie v. New York*,

N. H. & H. R. Co. 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324, 21 Am. Neg. Rep. 42, and *Adkins v. Richmond*, 98 Va. 91, 47 L.R.A. 583, 81 Am. St. Rep. 705, 34 S. E. 967, whether the obnoxious character of the act is pointed out specifically or not. Besides, the recitals of the bond itself and the averments of the special plea bring the case within the scope and purview of the act. *Turpin v. Lemon*, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20; *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 56 L. ed. 1197, 32 Sup. Ct. Rep. 784. Furthermore, it is evident the proceeding upon the petition terminated upon the theory that the act is void,—a theory to which counsel address their arguments.

As the Circuit Court did not err in permitting the special plea to be filed, we approve its action, and remand the case.

Annotation—Validity and effect of indemnity bond executed under unconstitutional statute.

A bond executed under an unconstitutional statute may be enforced if it was voluntarily given, is based upon an independent consideration, and contravenes no principle of public policy. In such a case the obligor will be estopped to question the validity of the statute. The leading case on the subject is *Daniels v. Tearney* (1880) 102 U. S. 415, 26 L. ed. 187, which is sufficiently referred to in *Love v. McCoy*, ante, 832.

Thus, the obligors in an attachment bond given in a proceeding taken under an unconstitutional statute, who, by means of the bond, obtained possession of the defendant's property, cannot escape responsibility on the bond on account of the unconstitutionality of the statute. *State ex rel. Cantwell v. Stark* (1882) 75 Mo. 566.

Recovery is permissible on a bond given on an appeal from a justice of the peace in a forcible entry and detention proceeding, though the statute authorizing such bond is afterward declared unconstitutional, provided the obligor has been thereby enabled to retain possession of the premises. *Stevenson v. Morgan* (1903) 67 Neb. 207, 108 Am. St. Rep. 629, 93 N. W. 180; *McVey v. Peddie* (1903) 69 Neb. 525, 96 N. W. 166; *United States Fidelity & G. Co. v. Ettenheimer* (1904) 70 Neb. 144, 113 Am. St. Rep. 783, 93 N. W. 227, 99 N. W. 652. In the *Stevenson* Case the court said: "The basis of distinction between these two lines of cases is the consideration. If it exists, the instru-

ment may be enforced like any other contract, and the annulment of, or departure from, a statute providing for it, is not fatal. If, on the other hand, the consideration is absent, the instrument, like any other nudum pactum, affords no basis for recovery."

In *Shaughnessy v. American Surety Co.* (1903) 138 Cal. 543, 69 Pac. 250, it was held that a bond was void which stated on its face that it was given in compliance with a statute afterwards found to be unconstitutional, which directed that the owner of property in certain cases should file a bond, and that any laborer or materialman should have an action to recover upon it for the value of labor and materials, etc. The court said: "This bond was given to secure a statutory privilege upon conditions to its enjoyment imposed by the statute, but the privilege was a constitutional privilege, which could not be interfered with by statute. The undertaking was therefore wholly without consideration and void." The court stated further that it was contended that the bond might be considered as a voluntary common-law bond, given without any reference to the statute, but that whether in any case it could be supposed that a sane man, not fearing the compulsion of the statute, would voluntarily give such bond, was a question not presented, as it was expressly stated on the face of the bond that it was given in compliance with the statute.

The same was held in *Martin v. McCabe* (1913) 21 Cal. App. 658, 132 Pac. 606; and the *Shaughnessy Case* seems also to have been followed in *Hampton v. Christensen* (1906) 148 Cal. 729, 84 Pac. 200.

The same was held although the bond did not refer to this statute in terms, where it was apparent that the bond was executed because of it. *San Francisco Lumber Co. v. Bibb* (1903) 139 Cal. 192, 72 Pac. 964; *San Francisco Lumber Co. v. Bibb* (1903) 139 Cal. 325, 72 Pac. 864; *Montague v. Furness* (1904) 145 Cal. 205, 78 Pac. 640.

These California decisions seem to be contrary to the earlier cases of *People's Lumber Co. v. Gillard* (1902) 136 Cal. 55, 68 Pac. 576, *infra*, and *Union Sheet Metal Works v. Dodge* (1900) 129 Cal. 390, 62 Pac. 41, in both of which bonds under the same statute, given in connection with contracts to build schoolhouses, were sustained.

In *People's Lumber Co. v. Gillard* (Cal.) *supra*, where a contractor contracted with a high school district and gave a bond under the same statute, it was held that the unconstitutionality of the statute was immaterial. The court said: "The bond no doubt was made pursuant to the statute; but it was voluntarily made, and may be enforced as a common-law bond, as it is substantially in form. . . . It was competent for the parties to enter into such an obligation, whether the statute authorized it or not; and it is none the less binding because the statute requires it. No statutory authority is required to give validity to bonds of this character, and if there were no statute on the subject it would be quite within the ordinary and prudential administration of the affairs of the school district for the board to require some guaranty, by bond or otherwise, for the faithful per-

formance of the work. The bond derives force from its provisions, and not from any statute." The above decision was held to be the law of the case on a further appeal in (1907) 5 Cal. App. 435, 90 Pac. 556.

But if a bond executed under an unconstitutional statute is involuntary, and based upon no independent consideration, it will fall with such unconstitutional statute. *Love v. McCoy*, *ante*, 832.

Thus, no action will lie upon a bond given to discharge a vessel from an attachment, when the attachment was issued in pursuance of an unconstitutional statute. *Brookman v. Hamill* (1871) 43 N. Y. 554, 3 Am. Rep. 731; *Poole v. Kermit* (1875) 59 N. Y. 554.

In *Cassel v. Scott* (1861) 17 Ind. 514, it was said that bonds given under an unconstitutional act to regulate the retailing of spirituous liquors, etc., were unsupported by any valid consideration.

It would seem, however, that the principle of estoppel might well have applied in *Coburn v. Townsend* (1894) 103 Cal. 233, 37 Pac. 202, where it was held, though not necessary to the result, that a bond given in pursuance of an order of court in condemnation proceedings, permitting the plaintiff in such proceedings to take possession on giving such bond, was void, the statutes under which such order was made being unconstitutional.

For the question whether a bond of a public official, intended as a statutory bond, but not binding as such, can be enforced as a common-law bond, see the note in 21 L.R.A.(N.S.) 766. And see, in this connection, the note in L.R.A. 1917B, 990, 1017, as to enforceability as a common-law bond of a statutory bond which contains provisions unauthorized by the statute. B. B. B.

WEST VIRGINIA SUPREME COURT OF APPEALS.

NELSON C. HUBBARD, Appt.,
v.

LUCY M. GEORGE et al.

(— W. Va. —, 94 S. E. 974.)

Specific performance — sale of stock.

1. A court of equity has jurisdiction to specifically enforce a contract for the sale of corporate stock where the value of such

stock is not easily ascertainable, or the stock is not to be obtained readily elsewhere, or there is some particular and reasonable cause for the vendee's requiring the stock itself to be delivered.

For other cases, see *Specific Performance*, I. c, in Dig. 1-52 N. S.

Attorney and client — contract for compensation.

2. An attorney may contract with his client for the rendition of professional services, and in such contract may fix the

Note. — The right to specific performance of a contract for the sale of stock in a corporation is discussed in the notes to *Ryan v.*

amount of the compensation to be paid for such services.

For other cases, see Attorneys, II. c, 1, in Dig. 1-52 N. 8.

Corporation — sale of stock — right to dividends.

3. Where the owner of corporate stock sells the same to another to be paid for by services to be performed in the future, the purchaser is entitled to receive all of the dividends declared on such stock after the date of such sale, although the stock certificates are not transferred and delivered to the purchaser until after full performance of the services agreed to be performed by him.

For other cases, see Corporations, V. c, 4, in Dig. 1-52 N. 8.

(January 29, 1918.)

APPEAL by plaintiff from a decree of the Circuit Court for Ohio County in his favor in part only in a suit to compel specific performance of a contract of employment. Modified and affirmed.

The facts are stated in the opinion.

Mr. Frank W. Nesbitt, for appellant:

Plaintiff is entitled to both stock dividends and cash dividends which have been declared and paid since December, 1910, upon the ten shares of stock which the defendant by her contract agreed to give to the plaintiff in consideration for services to be rendered by him.

7 R. C. L. § 268, p. 293; Currie v. White, 45 N. Y. 822; Harris v. Stevens, 7 N. H. 454; Phinizy v. Murray, 83 Ga. 747, 6 L.R.A. 426, 20 Am. St. Rep. 342, 10 S. E. 358; Rose v. Barclay, 45 L.R.A. 395, note; Black v. Homersham, L. R. 4 Exch. Div. 24, 39 L. T. N. S. 671, 48 L. J. Exch. N. S. 79, 27 Week. Rep. 171.

And he is entitled to the stock dividend of January 8, 1914, for the reason that a stock dividend is in reality no dividend at all, but is simply an arrangement under which the stockholders are given new evidences of the interests which they already hold.

Kaufman v. Charlottesville Woolen Mills Co. 93 Va. 673, 25 S. E. 1003; Gibbons v. Mahon, 136 U. S. 549, 34 L. ed. 525, 10 Sup. Ct. Rep. 1057; 2 Cook, Corp. 6th ed. § 539; 5 Thomp. Corp. 2d ed. §§ 5274, 5330.

The court below had full jurisdiction to decree for specific performance, and was clearly justified in doing so.

Applegate v. Wellsburg Bkg. & T. Co. 68 W. Va. 477, 60 S. E. 902; Hogg v. McGuffin,

McLane, 50 L.R.A. 501; Hogg v. McGuffin, 31 L.R.A.(N.S.) 491; and Morgan v. Bartlett, L.R.A.1915D, 300.

The right to a dividend declared between the making of a contract for the sale of stock and the delivery of the stock is L.R.A.1918C.

67 W. Va. 456, 31 L.R.A.(N.S.) 491, 68 S. E. 41; 2 Cook, Corp. §§ 337, 338.

Mr. J. F. Cree for appellees.

Ritz, J., delivered the opinion of the court:

The plaintiff claims that he was employed by the defendant Lucy M. George in the month of December, 1910, to recover for her 160 shares of stock of the S. George Company, of which she claimed she had been deprived by fraudulent practices of other parties. At the time of the employment, according to the contention of the plaintiff, Mrs. George proposed to give him for his services, and he accepted the offer, 10 shares of stock of the S. George Company, of which stock Mrs. George owned a large number of shares in addition to the 160 shares involved in the litigation. After the agreement was made the plaintiff instituted and prosecuted the suit to a successful conclusion, recovering the 160 shares of stock for Mrs. George. This result was reached in June, 1914. The plaintiff states that shortly after he accepted the employment from Mrs. George on the terms above mentioned, he asked her to transfer to him the 10 shares of stock; that she then raised no question about his right to have the 10 shares of stock, but suggested that it would be better not to transfer them to him until after the litigation was concluded, inasmuch as it might embarrass him to attend meetings of the corporation stockholders while the litigation was in progress, the litigation being with the other stockholders of the corporation, and it might embarrass the corporation's affairs unless all of the stock was represented at such stockholders' meetings. For this reason he made no further demand upon her to transfer the stock to him until after the litigation was determined, and her stock recovered for her. After the contract was entered into there was a stock dividend of 20 per cent declared on this stock, and a number of cash dividends, which are set out in the record. Mrs. George admits that she employed Mr. Hubbard for the purpose of instituting and prosecuting the suit for the recovery of her 160 shares of stock, but she denies that she agreed to give him 10 shares of the S. George Company stock for his services, and says that there was no agreement as to what compensation he should receive. The court below found as a matter of fact that the contract had been entered into as alleged

treated in the annotation following La Fountain & W. Co. v. Brown, L.R.A.1917F, 553. Generally, as to right to dividends on transfer of stock, see the annotation following Wallin v. Johnson City Lumber & Mfg. Co. L.R.A.1917B, 323.

by the plaintiff, and entered a decree requiring the defendant Lucy M. George to transfer to the plaintiff 10 shares of the stock of the S. George Company standing in her name on the books of said company, and enjoining her from transferring such stock to anyone else, and directed the defendant the S. George Company to pay the dividends on 10 shares of said stock to the plaintiff until such time as such transfer was effected, and decreed in favor of the plaintiff for the dividends declared on said 10 shares since June, 1914, the date of the termination of the litigation. From this decree plaintiff appealed, and contends that, in addition to the 10 shares of stock which the court awarded him, he is entitled to have a decree for the 20 per cent stock dividend, or have 12 shares of stock as it stands at the present time, as well as have the cash dividends, which, however, are not in dispute, the court having decreed in his favor for the cash dividends from June, 1914, and he not insisting on the cash dividends prior to that time. The sole question presented by the plaintiff is: Does the stock dividend declared early in the year 1914 go to him, or is he only entitled to the 10 shares of stock and the dividends declared thereon after he completed the contract of service?

The defendant Lucy M. George assigns cross error. She contends that plaintiff ought not to be allowed to maintain the suit at all, for the reason that he has failed to prove his contract by a preponderance of the testimony, and the court should have for that reason dismissed his bill; for the further reason that equity has no jurisdiction to entertain a suit to specifically enforce a contract of this character, the remedy at law being adequate to cover either the value of the stock or the value of his services; and, further, that the contract, even as claimed by the plaintiff, is void for the reason that it provided for the payment of compensation to an attorney at law out of the subject-matter of the litigation.

It may be said that the evidence in this case upon the question as to Mr. Hubbard's employment for the prosecution of the suit is undisputed; the dispute arises upon the agreement he asserts for his compensation. Upon this the parties are sharply in conflict. The learned chancellor in the circuit court, after carefully weighing all of the evidence, found that Mr. Hubbard had proved his contract, and that it existed as contended for by him. It has been so frequently held by this court that the findings of fact of a circuit judge upon conflicting evidence will not be disturbed on appeal, unless the preponderance is clearly against such finding, that we need not cite authority to sustain the proposition. That is the L.R.A.1918C.

case here. The evidence upon this question is sharply in conflict, and we will not disturb the findings of fact of the chancellor thereon.

Mrs. George next contends that the suit cannot be maintained, because the remedy at law is adequate; that the plaintiff could sue at law and recover the value of the 10 shares of stock, or, if he failed to prove that he had a contract for any specific compensation, recover the value of his services. Of course, plaintiff's right to recover in this case depends entirely upon establishing the contract as asserted by him. He could not maintain a suit in equity to recover compensation for his services as attorney for the defendant. It may further be said that, even though the defendant Mrs. George had agreed to pay him for his services certain shares of stock, he could not maintain a suit in equity to compel the transfer of such shares of stock, unless it is made to appear that the shares of stock so agreed to be delivered to him are of peculiar value, or the value thereof not easily ascertainable. *Hogg v. McGuffin*, 67 W. Va. 456, 31 L.R.A.(N.S.) 491, 68 S. E. 41; *Cook, Corp.* §§ 337, 338. The rationale of this doctrine is that the purchaser may desire the particular stock for the purpose of securing to himself control of the corporation, or of preventing the control of the same by antagonistic interests; or, where the stock has no such peculiar value to him, still if it has no well-recognized value in the market, or the value is not easily ascertainable, a judgment at law may be adequate to compensate him for the stock, or it may not be; because of the difficulty in proving the real value of it, he may receive more than he is entitled to, or he may receive less. In this case witnesses who are conversant with this corporation fix the value of its stock over a wide range, some saying that it is about \$104 a share, and others fixing it much higher. Undoubtedly from the evidence the jury would be warranted in finding that the value of the stock was \$104 a share, and we have no doubt that such a finding would be to the prejudice of the plaintiff; or the jury might find that the value of it was the highest price mentioned, and we have no doubt that such a finding would be to the prejudice of the defendant Mrs. George, so that courts of equity entertain jurisdiction, and it is a well-recognized ground of such jurisdiction to specifically enforce contracts for the delivery of corporate shares where those shares have peculiar value to the purchaser, or where, because of the difficulty in ascertaining the market value thereof, a court of law cannot adequately compensate the complaining party. Such, we think, is the case here.

Mrs. George further contends that, conceding that she made such a contract as that relied upon by Mr. Hubbard, it cannot be enforced for the reason that it is void as against public policy. We are a little at a loss to understand the basis for this contention. Both parties were competent to contract. Mr. Hubbard was an attorney at law, his services were desired by Mrs. George, he was willing to render her the services, and she was willing to give him 10 shares of stock therefor, and the parties contracted upon this basis. There can be no doubt but that it is perfectly proper and right for an attorney to enter into a contract with one desiring his services fixing the compensation which he is to receive. Thornton, Attorneys at Law, pp. 723 et seq. The case of Keenan v. Scott, 84 W. Va. 137, 61 S. E. 806, is relied upon for the contention that the contract set up here is void as against public policy. That case has no application. It was held there that after the employment of an attorney under a contract by which his compensation is fixed, and the relation of attorney and client is established, any change that is made in it increasing the amount of the compensation agreed on in the beginning will be held to be voidable as against public policy. There are other authorities cited sustaining this proposition, and it is good law. Certainly, after an attorney is employed and his compensation agreed upon, he cannot secure any other agreement from his client while this confidential relation is existing materially altering the first one, without subjecting it to the liability of being overthrown at the election of his client. But no such principle is involved here. The contract that is relied upon by the plaintiff was made at the time he accepted the employment, and no reason is perceived, nor is any authority cited, that would indicate that it is not entirely competent for an attorney to agree with the party proposing the employment to him upon the amount of his compensation at the time of such employment as a part of the contract of employment. If such were not the case, the compensation of attorneys would always be uncertain and indefinite, and left to be determined, when the parties could not agree after the conclusion of the litigation, by a suit in court. Such a holding would have a tendency to promote litigation, while the policy of the law is exactly the contrary.

The plaintiff contends that the decree of the court below is wrong and to his prejudice, in that the 20 per cent stock dividend declared in 1914 was not decreed to him, as well as the 10 shares of stock. He contends that, instead of decreeing to him 10

shares of stock with the dividends paid thereon from June, 1914, the court below should have decreed to him 12 shares of stock with these dividends, and it was to correct this alleged error that he prosecuted this appeal. Dividends declared on corporate stocks are the property of the real owner of the stock at the time of the declaration of the dividend. *Rose v. Barclay*, 191 Pa. 594, 45 L.R.A. 392, 43 Atl. 385; 10 Cyc. 556. The only question here is, Who was the real owner of this stock at the time of the declaration of this dividend? The stock certificate was not delivered to Mr. Hubbard, nor was any transfer thereof made upon the books of the company, and it is contended that because of this failure to transfer to him the stock certificate, or transfer the shares on the books, there was no title in him. It may be true that the legal title had not passed, but was not the full equitable interest vested in the plaintiff from and after the making of the contract of employment? It occurs to us that the action of the court in holding that the contract existed, and that the plaintiff was entitled to have the stock transferred, must necessarily carry with it the finding that the full equitable interest was transferred to the plaintiff by the contract of employment set up and relied upon by him. If it were not transferred to him by this contract, he never got it at all. Even though we were to treat the contract as a sale of this stock to the plaintiff, to be delivered when he had performed the services, still under the authorities he would be entitled to take the stock with everything that accrued therefrom after the making of the contract between him and Mrs. George. It must be borne in mind that the certificates are not the property; they are but evidence of the stockholder's interest in the corporation. The stock is the interest in the corporation itself, and when a purchaser agrees to pay a certain sum of money for 10 shares of the stock of a particular corporation, the agreement is to pay the sum of money agreed upon for a certain proportion of the assets of that corporation; and should the corporation subsequently declare a stock dividend, or any other sort of dividend, and thereby make each of its shares a less interest in the corporation than it formerly was, surely the purchaser would be entitled to the dividend thus declared in order to give him what he contracted for. 7 R. C. L. § 267. In the case of *Black v. Homersham*, L. R. 4 Exch. Div. 24, 48 L. J. Exch. N. S. 79, 39 L. T. N. S. 671, 27 Week. Rep. 171, it was held that, where shares of stock were sold on the 1st of August to be paid for on the 29th day of August, and a dividend was declared between the day of sale and

the day provided for payment, such dividend belonged to the purchaser. So we must say here these shares of stock were sold in December, 1910, to be paid for by Mr. Hubbard with services to be rendered as long as was necessary in the prosecution of that particular litigation, and any dividends declared upon this stock after the date of the purchase or contract with him belonged to him. In *Harris v. Stevens*, 7 N. H. 454, it was held that, where one offered to sell another certain shares of stock on a certain day with the privilege to such other to accept the offer within a certain time, the offer being accepted within the time, the purchaser was entitled to a dividend declared upon the shares between the time the offer was made and the date of the acceptance thereof, upon the theory that what the party was buying was what was offered to him, and if he did not get the dividend, he was getting less than that, because it cannot be doubted that every declaration of a dividend to that extent reduces the value of the property of the corporation. After a dividend is declared the amount thereof becomes a debt of the corporation to its stockholders. Before it is declared it is the property of the corporation, and so it

is easy to be seen that by the declaration of a dividend the value of the corporate assets is decreased to the extent that it is necessary to take them to pay such dividend. What Mr. Hubbard undertook to do in this case in December, 1910, was to perform certain services agreed upon between him and the defendant for 10 shares of the stock of the S. George Company. He was entitled to have the interest in that corporation represented by these 10 shares unimpaired by the subsequent declaration of dividends, and the only way that he could get the interest he actually contracted for was to give him the dividends declared on the stock subsequent to the making of his contract. A like holding was made in the case of *Currie v. White*, 45 N. Y. 822.

We are of opinion that the decree entered in the court below will have to be modified so as to require Mrs. George to transfer to the plaintiff 12 shares of the stock of the S. George Company instead of 10 shares, and to require her to pay him the cash dividends provided in the decree of the lower court upon 12 shares of stock instead of 10 shares thereof, as therein provided. With this modification the decree will be affirmed, with costs to the appellant.

ALABAMA SUPREME COURT.

KINZEA STONE, Appt.,

v.

A. E. WALKER, Superintendent of Banks,
et al.

(— Ala. —, 77 So. 554.)

Corporation — subscription to stock — fraud — rescission.

1. One induced by the fraudulent representations of promoters of a bank who become its officers on organization, as to its assets, to subscribe to its stock, may rescind the contract and recover the amount paid, although the bank has ceased to be a going concern and has passed into the hands of a receiver for liquidation.

For other cases, see Corporations, V. b, 1, in Dig. 1-52 N. S.

Same — rights of creditors.

2. Pre-existing creditors of a corporation cannot object to a rescission of a stock subscription and recovery of the money

paid thereon because it was induced by fraudulent representations.

For other cases, see Corporations, V. b, 1, in Dig. 1-52 N. S.

Pleading — action to rescind subscription.

3. A bill to rescind a subscription to corporate stock need not allege that there are funds available for return of the money paid, or show that there are no creditors with superior rights.

For other cases, see Pleading, II. p, in Dig. 1-52 N. S.

(Anderson, Ch. J., and McClellan, J., dissent.)

(May 10, 1917.)

APPEAL by complainant from a decree of the City Court of Birmingham sustaining demurrers to a bill filed to rescind a subscription to corporate stock and to recover the money paid thereon. Reversed.

Statement by Mayfield, J.:

Appellant, as a stockholder in the appellee bank, filed this his bill against the bank and the state superintendent of banks, who had taken over the bank to the end of its liquidation under the statute of this state. The purpose of the bill is to rescind the contract of subscription by which complainant purchased his stock, and have refunded

Note.— For fraud as a ground for release from subscription to stock after insolvency of corporation, see the notes to *Gress v. Knight*, 31 L.R.A.(N.S.) 900, and *Morrissey v. Williams*, L.R.A.1915D, 792; and see later cases. *Smith v. Jones*, L.R.A. 1917C, 890, and *La Salle Street Trust & Sav. Bank v. Topeka Mill. Co.* L.R.A.1918A, 574. L.R.A.1918C.

to him the amount paid therefor; viz., \$10,000.

The alleged ground for rescission is that fraudulent representations were made to complainant by the promoters and incorporators of the bank, touching the financial condition of the bank when organized, its assets and liabilities. These representations were in writing, in the form of a letter written by one of the promoters of the corporation, who, it is alleged, had been agreed on as the president to be elected of the corporation and who was shortly thereafter elected to the place, and was acting as such official.

It is also alleged that it was agreed among the several promoters and incorporators that the letter in question should be written, and that it was so written, in response to a letter written by appellant's attorney, requesting that the incorporators give a signed statement as to the financial condition and status of the proposed banking corporation, in the way of assets, liabilities, encumbrances, etc. The representations alleged to be false were as follows:

"(1) There will be approximately \$250,000 in cash to be turned over by the state superintendent of banks.

"(2) The issue of \$400,000 of 6 per cent third mortgage bonds has been placed on a par basis, which will be, in fact, more than sufficient to pay all the indebtedness of the old bank and the floating indebted-

ness of the building company, should we find that we need the money.

"(3) Approximately \$1,150,000 in cash will be on hand when the new bank opens August 2, 1915."

It is also alleged that the representations were made with the intent to deceive appellant, that he relied upon them and acted upon them and that they did deceive him. It is also alleged in the bill that before the letter was written containing the false statements, it had been agreed among the incorporators of the bank that they would send one of their number, viz., one Malone, together with appellant's attorney, who resided in Birmingham, to the home of appellant, in Georgetown, [Kentucky], to induce appellant to subscribe for stock in the new corporation to be formed.

The letter* was written and was written for the purpose of obtaining data to present to appellant, for his information in determining whether or not he would take stock in the proposed corporation. The information was presented to him, as was intended to be done, and he acted on it.

It is also alleged that appellant was a nonresident of the state at the time he was induced to subscribe for the stock, and did subscribe and pay his money therefor: that he was at his home in Georgetown, Kentucky, ill and confined to his room.

It is alleged that appellant subscribed for his stock on or about the 25th day of July.

*The letters referred to in the statement are as follows:

W. N. Malone, City.

Dear Sir:—

I think it would be a good idea to get a short statement signed by Mr. Jackson and Mr. Hutton, too, if here, as trustees for the incorporators, showing the following facts, so that we can exhibit it to Colonel Stone: (1) Approximately the amount of cash that will be received by the new bank from the state superintendent of banks; (2) show whether or not the third mortgage bond on the building has been placed so as to enable the building company to pay off its indebtedness to the old bank, and the total amount of cash that will be received by the new bank from this source; (3) the total amount of cash assets on hand when the bank opens for business; (4) the total amount of liabilities of the old bank assumed by the new bank; (5) the appraised value of the real estate, less encumbrances of the old bank, to be acquired by the new bank; (6) the face value of all other assets of the old bank, and the probable amount of same that can be collected; (7) in the last above item please keep the interest in the building company separate from other assets.

Yours very truly,
James A. Mitchell.

L.R.A.1918C.

In reply to this letter is the following:

In reply to your favor of recent date, addressed to W. N. Malone, beg to say that we had a committee of prominent bankers pass upon the commercial loan of the Jefferson County Savings Bank, and this committee of bankers suggested a real estate committee to pass upon the real estate and real estate loans. From the reports and other information which we have received, the following are the facts as we see them: [Here follow the first, second, and third representations as set out by Judge Mayfield in his statement of fact] (4) the total liabilities of the old bank to be assumed by the new bank is approximately \$1,287,000, which is composed of savings and checking accounts; (5) the appraised value of the real estate, including old bank building, is \$179,000, which is carried on the books of the old bank at \$140,000; (6) the face value of all the assets of the old bank acquired by the new bank is about \$1,800,000, and we feel that there can be collected a salvage of from \$300,000 to \$400,000.

Trusting this information is what you want, I am yours very truly,

A. E. Jackson.

1915, and that the bank was organized on the 29th day of July, 1915, commencing the banking business on or about the 2d day of August, 1915, and continued to do business in Birmingham, Alabama, until the 28th day of January, 1916, when it was taken over by the state bank superintendent for the purpose of its liquidation in accordance with the state laws.

It is also alleged that appellant did not know of the falsity of the statements made to him, and upon which he relied and acted, until the 21st day of February, 1916, after the bank had been taken over by the state superintendent of banks; that on account of his nonresidence and absence from the state, and of his ill health, he had had no opportunity to learn the true financial condition of the bank, or of the falsity of the statements, until after the bank was so taken over.

The bill also alleges that the appellee bank was organized, with the knowledge and consent of the state superintendent of banks, for the purpose of taking over the assets and assuming the liabilities of the Jefferson County Savings Bank, which was then in process of liquidation under the control of the state bank superintendent; that it was therefore the object, in forming this new bank, that it acquire all the assets and business of the old corporation, and carry on its business in the building formerly occupied and owned and controlled by the old corporation; and that this purpose or intention was carried out, the new corporation continuing the business of the old, until it was in turn taken over by the state bank superintendent for the purposes of liquidation. The letters will show that the statements related largely to assets acquired from the bank absorbed, and to its liabilities assumed. It is also alleged that appellant was a stockholder in the old bank afterwards absorbed by the new one.

It therefore appears that the object and purpose of the letters in question was to inform appellant as to the assets which would be acquired from the old bank absorbed, as to the liabilities assumed in consequence thereof, and as to the encumbrances upon the property acquired by the absorption of the old bank.

It is therefore made to clearly appear that appellant had a right to rely upon these representations, and that he did rely upon them: and if they were false and resulted to his damage, he ought to have a remedy of some kind, against some person or firm.

Mr. James A. Mitchell, for appellant:

A court of equity has jurisdiction to affirm. L.R.A. 1918C.

ford relief to one who has been induced through fraud of the promoters of a corporation to become a subscriber to its stock, and may rescind the contract though fully executed, and compel restitution.

Barcus v. Gates, 32 C. C. A. 327, 61 U. S. App. 596, 89 Fed. 783; *Virginia Land Co. v. Haupt*, 90 Va. 533, 44 Am. St. Rep. 939, 19 S. E. 168; *Hunter v. French League Safety Cure Co.* 96 Iowa, 573, 65 N. W. 828; *Bosher v. Richmond & H. Land Co.* 89 Va. 455, 37 Am. St. Rep. 879, 16 S. E. 360; *McDermott v. Harrison*, 9 N. Y. Supp. 184; *Rives v. Montgomery South Pl. Road Co.* 30 Ala. 92; *Montgomery Southern R. Co. v. Matthews*, 77 Ala. 357, 54 Am. Rep. 60; *Owen v. Boyd Land Co.* 95 Va. 560, 28 S. E. 950.

A party has a right to rely upon representations of an agent or a person authorized to receive subscriptions.

1 *Thomp. Corp. § 716*; *Alabama Foundry & Mach. Works v. Dallas*, 127 Ala. 513, 29 So. 459.

A bill to rescind a fraudulent sale of stock applies even against the receiver of the corporation.

1 *Cook, Corp. § 356*.

A subscriber to the capital stock of a corporation may rescind his subscription even after the insolvency of the corporation, but, of course, it must appear that he acted promptly after discovering the fraud, and that he was not guilty of negligence in failing to discover it sooner.

1 *Thomp. Corp. § 735*; *Newton Nat. Bank v. Newbegin*, 33 L.R.A. 727, 20 C. C. A. 339, 40 U. S. App. 1, 74 Fed. 135; *Kentucky Mut. Invest. Co. v. Schaefer*, 120 Ky. 227, 85 S. W. 1098; *Savage v. Bartlett*, 78 Md. 561, 28 Atl. 414; *Chamberlain v. Trogden*, 148 N. C. 139, 61 S. E. 628, 16 Ann. Cas. 177; *Ramsey v. Thompson Mfg. Co.* 116 Mo. 313, 22 S. W. 719; *Farrar v. Walker*, 3 Dill. 506, Fed. Cas. No. 4,679; *Upton v. Englehart*, 3 Dill. 496, Fed. Cas. No. 16,800; *Robinson v. Dickey*, 14 Tex. Civ. App. 70, 36 S. W. 499; *Park v. Kribs*, 24 Tex. Civ. App. 650, 60 S. W. 905; *Stufflebeam v. De Lashmutter*, 83 Fed. 449; *Florida Land & Improv. Co. v. Merrill*, 2 C. C. A. 629, 2 U. S. App. 434, 52 Fed. 77; *Merrill v. Florida Land & Improv. Co.* 8 C. C. A. 444, 13 U. S. App. 649, 60 Fed. 17.

Messrs. Coleman & Coleman, for appellees:

Subscriptions procured on false and fraudulent representations of promoters cannot be avoided after the corporation is organized.

1 *Thomp. Corp. § 727*; *Cook, Corp. § 140*; *Shick v. Citizens' Enterprise Co.* 57 Am. St. Rep. 230 and note, 15 Ind. App. 329, 44 N. E. 48; *St. Johns Mfg. Co. v. Munger*,

106 Mich. 90, 29 L.R.A. 63, 58 Am. St. Rep. 469; *Oldham v. Mt. Sterling Improv. Co.* 103 Ky. 529, 45 S. W. 779.

Even in those cases where parties who have been induced, through fraudulent representations, to subscribe for stock, would be otherwise entitled to relief, it becomes necessary for them to show not only that they acted immediately upon the discovery of the fraud, but they must go further and show a valid and sufficient excuse for not having discovered it sooner.

Bartol v. Walton & W. Co. 92 Fed. 13; *Olson v. State Bank*, 67 Minn. 267, 69 N. W. 904; *Upton v. Tribilecock*, 91 U. S. 45, 23 L. ed. 203.

Where relief is granted on the ground of fraud which induced the subscriber to become such, the subscription is voidable but not void, and if the subscriber fails to assert his rights before the rights of innocent third parties have intervened, their equities to treat it as valid may be superior to his right to set it aside.

Upton v. Englehart, 3 Dill. 496, Fed. Cas. No. 16,800; *Thompson v. Reno Sav. Bank*, 19 Nev. 103, 3 Am. St. Rep. 797, 7 Pac. 68; *Chubb v. Upton*, 95 U. S. 665, 24 L. ed. 523; *Upton v. Tribilecock*, 91 U. S. 45, 23 L. ed. 203; *Webster v. Upton*, 91 U. S. 65, 23 L. ed. 384; *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220; *Ogilvie v. Knox Ins. Co.* 22 How. 380, 16 L. ed. 349; *Bosher v. Richmond & H. Land Co.* 89 Va. 455, 37 Am. St. Rep. 879, 16 S. E. 360; *Montgomery Southern R. Co. v. Matthews*, 77 Ala. 357, 54 Am. Rep. 60; *Russell v. Broadus Cotton Mills*, — Ala. —, 39 So. 712; 1 *Thomp. Corp.* §§ 737, 738; *Shick v. Citizens Enterprise Co.* 15 Ind. App. 329, 57 Am. St. Rep. 230, 44 N. E. 48; *St. Johns Mfg. Co. v. Munger*, 106 Mich. 90, 29 L.R.A. 63, 58 Am. St. Rep. 469, 64 N. W. 3; *Morawetz, Priv. Corp.* § 547; *Cook, Stock & Stockholders*, §§ 102-141; 10 Cyc. 262.

Mayfield, J., delivered the opinion of the court:

If this were a suit between man and man, or between two individuals, under the facts averred, all would concede that the bill contains equity, and that it was not subject to the demurrer interposed.

The following principles are well settled by the authorities, or are patently correct:

A material false statement, relied upon by the other party in ignorance of its falsity, and which materially influences him to enter into the contract, constitutes a fraud which will authorize a rescission. *Sledge v. Scott*, 56 Ala. 202; *Perry v. Johnston*, 59 Ala. 648; *Davis v. Betz*, 66 Ala. 206; *Rice v. Gilbreath*, 119 Ala. 424, 24 So. 421; *Brewer v. Arantz*, 124 Ala. 127, 26 So. L.R.A. 1918C.

922; *Moore v. Barber Asphalt Paving Co.* 118 Ala. 563, 23 So. 798; *Mayfield's Dig.* 182.

As a condition precedent to the exercise of the right of rescission, the party complaining must, if practicable, restore, or offer to restore, to the other party, what he had received from him by virtue of the contract. *Cozzins v. Whitaker*, 3 Stew. & P. 322; *Jemison v. Woodruff*, 34 Ala. 143; *Young v. Arntze*, 86 Ala. 116, 5 So. 253; *Rice v. Gilbreath*, 119 Ala. 424, 24 So. 421. This obviously has no application, however, where it has become impossible for such party to make such restoration by reason of the conduct or default of such other party. *Johnson v. Oehmig*, 95 Ala. 189, 36 Am. St. Rep. 204, 10 So. 430.

The right to a rescission on account of fraud does not depend upon the insolvency of the other party, nor upon the inadequacy of an action at law for damages. *Baker v. Maxwell*, 99 Ala. 558, 14 So. 468.

Courts of equity do not take jurisdiction merely for the purpose of declaring a rescission, but only for the purpose of administering some form of equitable relief or protection not available in other forums, or where, by reason of the insolvency of the offending party, a judgment at law might fail to compensate the injured party, or to place him in statu quo. *Merritt v. Ehrman*, 116 Ala. 278, 22 So. 514; *Hafer v. Cole*, 176 Ala. 248, 57 So. 757; 7 *Mayfield's Dig.* 182.

The bill in this case as last amended clearly and explicitly brings the case within the above rules of law.

Is the result different, or are rules of law different, where one of the parties, the defendant, is a corporation which has received the benefit of the contract induced by fraud and sought to be rescinded, but which ceased to be a going concern before rescission sought, with its property lodged in the hands of a receiver or of a representative in law, to the end of the administration or liquidation of its affairs, as is shown to be the case at bar? Or are the effect and result different when the false representations were not made by the officers of the corporation, or, if made by the officers, were made at a time when they were not in fact or in law such, though they became such soon after, and when the representations were made about, and for and on behalf of, the corporation, and not of the persons making them, and when the corporation received the benefit or result of the representations? These questions are not so easy of answer. And if the answer is that they make different cases, wherein are they different, and what are the rules applicable to each?

We have not been referred to any decision

of this court in a case in all respects similar to this; hence we must look to the text-books and to the adjudicated cases of other courts, or for authority in like cases. We have decisions of this court in cases somewhat similar; that is, in which actions at law, or defenses to actions, on subscriptions for stock in corporations, rested on the ground of the right of the stockholder to rescind and recover back what he has paid, or to avoid liability as for the consideration not paid, because of the fraud of the corporation or of its agents in procuring the subscription. It was once held that an action for fraud or deceit would not lie against a corporation, because the gist of the action was fraudulent intent, and intent was not imputable to an artificial body; but in more recent times it is almost universally held that such actions will lie against corporations.

There are at present many courts, and extant many decisions, holding that a corporation cannot have an agent before it has an existence, just as a deceased person or an unborn child or even an infant cannot have or appoint an agent; and for this reason it is said that corporations are not liable for the fraud of their promoters (as in the making of false representations or the circulating of deceptive prospectuses, or otherwise) committed before the corporation comes into existence. This is on the theory that, as neither the corporation itself nor its agents committed the fraud, the corporation is not responsible therefor.

There are, however, other decisions and authorities holding that, while the corporation could not act itself nor have an agent before it had existence, yet, if the contract of subscription to the capital stock of the corporation to be formed was induced by the fraud of the promoters, the subscriber, in certain cases, might have relief against the corporation: (1) If he has paid his money to the corporation for his shares under conditions which will authorize an action for deceit, he may surrender or tender his stock to the corporation in an action for money had and received; (2) if he be sued by the corporation on his subscription contract, he may set up the fraud of the promoters in procuring his subscription as a defense; (3) he may go into equity and rescind the contract, and have the money paid by him on the fraudulent contract refunded. This last remedy, says Mr. Cook, is the fairest, safest, and most convenient remedy for all parties. It is notice to all parties interested in the matter not to further rely upon the contract of subscription, and avoids the risk of the future insolvency of the corporation, which might defeat all relief by the stockholder L.R.A.1918C.

against the corporation. Cook, Stock & Stockholders, § 155. In order, however, for the corporation to be bound by the acts of its promoters, it must, after it comes into existence, do some act which makes the contract binding on it; it is sometimes said that it must ratify the contract, but, strictly speaking, it cannot and does not ratify. As pointed out by the textwriters and judges, contracts made by promoters for the corporation to be organized cannot in law or in equity be ratified by the corporation when it comes into existence, because ratification implies at least the existence of a person or thing in whose behalf the contract might have been made at the time it was made. Being incapable of binding the corporation when they were made, for the all-sufficient reason that the corporation then had no existence, such contracts cannot afterwards be ratified by the body.

It is held, nevertheless, by many courts, that, while there can be no ratification of the contract "qua" contract, yet there may be created an equitable liability on equitable grounds, or as it is sometimes stated, while it cannot ratify contracts made in its behalf before it had an existence, yet after the corporation comes into existence it can exercise its powers to contract, and may do so by accepting the contracts so made for it, and thereafter adopting them as its own. This last doctrine rests upon the ground that the promoters' contract was in the nature only of a proposal, which the corporation could accept or reject after it came into existence.

It does seem to us to be in keeping with the rules of justice and of law that, where the parties who made the contract intended that the prospective corporation, when formed, should become a party to the undertaking, and intended that the contract should be for the use and benefit of the corporation, and the corporation does accept the benefit, it thereby adopts the proposed contract as fully as if it had been an original party thereto.

In the case at bar the corporation bank availed itself of a subscription made for shares before it was formed, and received the price paid therefor, and issued to the subscriber certificates of stock, thereby treating him as a shareholder. This, as all the authorities hold, was sufficient to bind the subscriber, and we think it ought to bind also the corporation. Its obligations and its benefits ought to be mutual, and to be as binding as if it had made the original contract of subscription by its legally authorized agents. This has been held by this court. *Davis Bros. v. Montgomery Furnace & Chemical Co.* 101 Ala.

127, 8 So. 496; *Moore & H. Hardware Co. v. Towers Hardware Co.* 87 Ala. 206, 13 Am. St. Rep. 23, 6 So. 41; *Cook, Stock & Stockholders*, § 707.

We have examined a number of cases in which subscriptions to capital stock have been canceled by courts of equity, where the subscription was procured by the fraud of agents after the corporation was formed; and it seems to us that the same rules should apply to other cases, except where their application would prejudice the interests of other subscribers. As to these cases, see *Southern States Fire & Casualty Ins. Co. v. Whatley*, 173 Ala. 101, 55 So. 620; *Southern States Fire & Casualty Ins. Co. v. Tanner*, 180 Ala. 30, 60 So. 81; *Southern States Fire & Casualty Ins. Co. v. Brannon*, 178 Ala. 115, 59 So. 60; *Alabama Foundry & Mach. Works v. Dallas*, 127 Ala. 513, 29 So. 459; *Southern States Fire & Casualty Ins. Co. v. Cromartie*, 181 Ala. 295, 61 So. 907; *Southern States Fire & Casualty Ins. Co. v. Wilmer Store Co.* 180 Ala. 1, 60 So. 98; *Garner v. Hall*, 114 Ala. 166, 21 So. 835.

In the case of *Planters' & M. Independent Packet Co. v. Webb*, 144 Ala. 666, 39 So. 562, the subscriber was held liable, though no formal subscription was entered and there was then no corporation, and in that case it was said:

"That 'a subscription for stock implies a promise to pay for it, even though the subscription was before incorporation, is the rule sustained by the great weight of authority.' 1 *Cook, Corp.* §§ 71, 75; 26 Am. & Eng. Enc. Law. 902; 1 *Morawetz, Priv. Corp.* 47, 54. A subscriber may be bound by an actual subscription made before incorporation or organization, although he makes no cash payment, and the proceedings after incorporation are without notice to him. 26 Am. & Eng. Enc. Law, 902.

" 'A direct subscription to take stock may be enforced by the corporation, even though such subscription was made prior to the incorporation. An agreement reading, 'The undersigned hereby subscribe for the number of shares set opposite our names,' may be enforced by the corporation when it is formed.' Id. §§ 73, 75.

" 'When an action is brought to collect a subscription, either directly or indirectly, for the benefit of the corporate creditors, it is well established that the subscribers cannot defeat such action by the defense that the corporation was not an incorporation, by reason of its not having fully complied with the terms of the statute providing for such an incorporation. Not only is the subscriber estopped by the act of subscribing from setting up this defense, L.R.A.1918C.

but he is bound also by the rule that the existence of a corporation cannot be inquired into except by a direct proceeding in behalf of the state.' Id. § 184."

If the subscriber should be so held to the agreement with the promoters, it does seem that, so far as the corporation itself is concerned, it ought to be so held.

The case of *Broadus v. Russell*, 160 Ala. 353, 49 So. 327, id., on former appeal, — Ala. —, 39 So. 712, dealt with the liability of promoters and of the corporation, and with the rights and liabilities of subscribers, under guaranties or warranties made by the promoters to the subscriber as to acts to be done in the future by the corporation, but is not decisive of the question here involved.

This case, so far as this particular phase of it is concerned, in our opinion falls within the rule that, when contracts are made for the benefit of another, but without his agency or even his consent, they may be either rejected or accepted and affirmed by him, and that, if he accepts, he adopts the bad as well as the good, the burden as well as the benefit. And if he seeks to enforce such a contract, it may be impeached or rescinded on account of the fraud or wrong of the party making the same for him, just as if he or his agent had made it; and where he has accepted the benefits of it, he may be by the other party required to bear the burden thereof.

The New Hampshire court thus states the rule: "Fortunately the justice of this case is the law of it. I take it to be clear law that the defendant cannot affirm the trade made on his behalf by Hutchinson, and so treat him as his agent in the matter to that extent, without, at the same time, adopting the ill-omened means whereby it was brought about. He takes it cum onere, and, unless he can sustain it as a whole, he must be content to see it fall as a whole, and his gains, of course, go with it." *Presby v. Parker*, 56 N. H. 409.

The New Jersey court, speaking through *Beasley, Ch. J.*, states the rule thus: "The action was against the bank for deceit, which was alleged to consist in certain fraudulent representations charged to have been made on a sale of stock to the plaintiff by the directors of such corporation as its agents. Lord Chelmsford, in giving his views, said: 'The distinction to be drawn from the authorities, and which is sanctioned by sound principle, appears to be this: Where a person has been drawn into a contract to purchase shares belonging to a company, by fraudulent misrepresentations of the directors, and suit is brought in the name of the company to seek to enforce that contract, or the person

who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because the company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action of damages for the deceit, such an action cannot be sustained against the company, but only against the directors personally.' Lord Cranworth, in his opinion, puts himself on the same ground, and says: 'A person defrauded by the directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally.'" *Kennedy v. McKay*, 43 N. J. L. 288, 291, 39 Am. Rep. 581.

See also *Thomp. Corp.* §§ 727, 739; *Cook, Corp.* § 140.

In our case nearest in point this court has thus spoken: "The general doctrine is well established, and obtains both at law and in equity, that a corporation is a distinct entity, to be considered separate and apart from the individuals who compose it, and is not to be affected by the personal rights, obligations, and transactions of its stockholders; and this whether said rights accrued, or obligations were incurred, before or subsequent to incorporation. *Morawetz, Priv. Corp.* 227-234, 547-549; *Morrison v. Gold Mountain Gold Min. Co.* 52 Cal. 309, 13 Mor. Min. Rep. 578; *Hawkins v. Mansfield Gold Min. Co.* 52 Cal. 515, 13 Mor. Min. Rep. 581; *Gent v. Manufacturers' & Mut. Ins. Co.* 107 Ill. 658; *Caledonian R. Co. v. Helensburgh*, 2 Macq. H. L. Cas. 391, 2 Jur. N. S. 695, 4 Week. Rep. 671; *Penn. Match Co. v. Hapgood*, 141 Mass. 147, 7 N. E. 22. There is a class of contracts, however, which are entered into between the promoters or prospectors of a contemplated corporation and third persons, on the faith of the corporation, intended to inure to its benefit, and which in point of fact do inure to its benefit, on which the corporation will be charged, even in the absence of an express promise to perform, or ratification on the part of the company after it is in esse, on 'the familiar principle that one who accepts the benefit of a contract, which another volunteers to perform in his name and on his behalf, is bound to take the burden with the benefit.' *Redf. Railways*, 5th ed. 18; *Edwards v. Grand Junction R. Co.* 1 Myl. & C. 650, 40 Eng. Reprint, 525, 1 Eng. Ry. & C. Cas. 173, 6 L. J. Ch. N. S. L.R.A.1918C.

47, 7 Sim. 337, 58 Eng. Reprint, 967; *Stanley v. Chester & D. R. Co.* 9 Sim. 264, 59 Eng. Reprint, 359, 1 Eng. Ry. & C. Cas. 58; *Little Rock & Ft. S. R. Co. v. Perry*, 37 Ark. 164; *Perry v. Little Rock & Ft. S. R. Co.* 44 Ark. 383; *Bommer v. American Spiral Spring Butt Hinge Mfg. Co.* 81 N. Y. 468." *Moore & H. Hardware Co. v. Towers Hardware Co.* 87 Ala. 210, 13 Am. St. Rep. 23, 6 So. 43.

The above case is reported in 13 Am. St. Rep. 23, with an extensive note thereto.

Is the complainant a "third party" within the meaning of the expression used above or entitled to the protection of such party? If he is, is he entitled to relief in equity as well as at law?

The next cases nearest in point are *Rives v. Montgomery South Pl. Road Co.* 30 Ala. 92, and *Montgomery Southern R. Co. v. Matthews*, 77 Ala. 357, 364, 365, 54 Am. Rep. 60. In the latter case the former is construed and its holding readopted, and therein it is said: "In *Rives v. Montgomery South Pl. Road Co.* supra, the suit was on a subscription to the capital stock of the Plank Road Company. The defense was fraud in procuring the subscription. On the trial 'the defendant offered to prove that, before he subscribed for any stock in said company, and before its organization under its charter, two of its subscribers for stock, one of whom was afterwards elected president and the other secretary of the corporation, represented to him that the road would be so located as to pass through his plantation, thereby greatly enhancing the value of his land; that these representations were repeated by them after their election to their respective offices, and thereupon defendant subscribed for five shares of the capital stock of said company, and that said road, as afterwards located, did not pass within 5 miles of defendant's plantation.' This testimony was rejected by the court, on plaintiff's motion; and the propriety of that ruling was the sole question presented in this court. In passing on that question, the majority of this court said: 'We cannot doubt that the declarations of those officers, as offered by the defendant, were relevant and admissible. Those declarations certainly throw some light upon one of the material questions in the case; and to exclude them is to deny, practically, to the defendant, the right to prove the very basis on which he rests his defense. Until these declarations are proved, it is impossible to show that they were false, or that they formed an inducement to the defendant to subscribe.' It will be observed that in the case above we did not decide that the representation, even if not kept and conformed to as a promise,

was in itself sufficient to avoid the subscription. That question was not before us. We simply held that it was legal evidence—a predicate for further testimony.” *Montgomery Southern R. Co. v. Matthews*, 77 Ala. 364, 54 Am. Rep. 60. “There can be no question that, if the stock subscription in this case was procured by the fraud of Kirkpatrick, the soliciting agent, the railroad corporation, claiming the benefit of the subscription, must take it tainted with Kirkpatrick’s fraud. *Story, Agency*, § 253; *Corning v. Southland*, 3 Hill, 552; *Mead v. Bunn*, 32 N. Y. 275; *Harris v. Delamar*, 38 N. C. (3 Ired. Eq.) 219; *Meadows v. Smith*, 42 N. C. (7 Ired. Eq.) 7.” 77 Ala. 365.

In a later case it is said: “In *Montgomery Southern R. Co. v. Matthews*, supra, it was said by this court, speaking through Stone, Ch. J.: ‘An opinion expressed, even if not realized, cannot, without more, become a fraudulent representation. If however, such opinion is falsely expressed, with intent to deceive, and does deceive, this constitutes such opinion or representation a false statement of fact, and vitiates a contract thereby procured, unless the representation relates to a matter equally open to both parties. This could not deceive.’ *Lake v. Security Loan Asso.* 72 Ala. 209; *Bradfield v. Elyton Land Co.* 93 Ala. 527, 8 So. 383; *Birmingham Warehouse & E. Co. v. Elyton Land Co.* 93 Ala. 549, 9 So. 235; *Thompson, Bldg. & L. Asso.*, p. 178, note.” *Johnson v. National Bldg. & L. Asso.* 125 Ala. 465, 482, 82 Am. St. Rep. 257, 28 So. 2.

There can be no doubt that the fraudulent representations as averred in this bill belonged to a class authorizing the rescission of a contract made on the faith of them.

The Michigan courts, while announcing the same general rules as recognized by our court, denied relief solely on the ground that the promoters or organizers of the corporation were not its agents, and that the corporation was not bound by their frauds or representations. The court spoke thus on the subject: “This is an attempted application of the rule that, by accepting the benefits of a contract made by an agent, the principal is bound by the undertakings and promises of the agent. A number of cases are cited to sustain this contention, which manifestly must rest upon the proposition that the citizens’ committee was an agent of the company which its efforts created. Among the cases cited are many which support the general rule above stated, viz., that a principal must assume the obligations, if he wishes the benefits, of an unauthorized contract made by an agent. As stated by Paley: ‘Contracts made for the

benefit of another, but without his privity or direction, may be rejected or affirmed at his election. But by making the election to affirm it, he adopts the agency altogether, as well that which is detrimental as that which is for his benefit. But in seeking to enforce contracts entered into by agents, the principal is subject to have them impeached by any conduct of his agent which would have had that effect if proceeding from himself. Every species of fraud, misrepresentation, or concealment, therefore, in the agent, affects the principal’s right to recover.’ *Paley, Agency*, 324; *Hitchcock v. Griffin & S. Co.* 99 Mich. 451, 41 Am. St. Rep. 624, 58 N. W. 373.” *St. Johns Mfg. Co. v. Munger*, 106 Mich. 90, 29 L.R.A. 63, 58 Am. St. Rep. 471, 64 N. W. 3.

“The promoters were persons who represented the meeting, or possibly themselves or some prospective stockholder, who for purposes of his own, desired to see the corporation organized. They cannot be said to be agents of the corporation in any sense. These subscribers contracted with each other to form a corporation, which they did. If one was guilty of fraud upon the others in procuring their subscriptions, a remedy should exist against such person. Doubtless a subscriber who is induced by fraud to agree to join in the organization of a corporation may refuse to do so on discovering fraud; but by carrying out his agreement and uniting with others, he has assumed new relations with them and the public, after which his remedy is restricted to action against the wrongdoers. See 4 Am. & Eng. Enc. Law, 201, and notes; *Carmody v. Powers*, 60 Mich. 28, 26 N. W. 801.” 106 Mich. 95.

The Indiana court seems to have held with the Michigan court. See *Shick v. Citizens Enterprise Co.* 57 Am. St. Rep. 230, and note (15 Ind. App. 329, 44 N. E. 48). We do not mean to say that these are the only courts so holding.

The Virginia court seems to hold to the contrary, and in line with what this court has said, see 44 Am. St. Rep. 942, where the court says: “The authorities are abundant in the support of the general rule that a person fraudulently induced by an agent of a corporation—and a promoter is an agent—to subscribe to its capital stock may, at his option, repudiate the contract; and a fraud may consist as well in the suppression of what is true as in the representation of what is false. Indeed, the law is that where the person solicited to subscribe has no other information on the subject than that which the agent chooses to convey, the statements of the agent ought to be characterized by the utmost candor and honesty.” 1 Cook, Stock & Stockholders, 3d ed. § 147;

Crump v. United States Min. Co. 7 Gratt. 352, 56 Am. Dec. 116, 3 Mor. Min. Rep. 454; *Bosher v. Richmond & H. Land Co.* 89 Va. 455, 37 Am. St. Rep. 879, 16 S. E. 360; *Central R. Co. v. Kisch*, L. R. 2 H. L. 99, 36 L. J. Ch. N. S. 849, 16 L. T. N. S. 500, 15 Week. Rep. 821." *Virginia Land Co. v. Haupt*, 90 Va. 533, 44 Am. St. Rep. 939, 19 S. E. 168.

It seems to us that there is no sound reason why a subscriber should not be allowed to rescind a contract which was induced by the fraud of the promoters, even before the corporation was formed, if the contract was made for the use and benefit of the corporation, and it did so use it and receive the benefits of it. If the promoters are not, strictly speaking, agents of the corporation, they were agencies which wrought the fraud; and the corporation was the recipient of the fruits of the fraud, and it ought to bear the burdens thereof. The justice of the case ought to be the law of it; and an innocent subscriber who has been so defrauded, if he be diligent, ought to have relief. And so far as this record shows, appellant is both innocent and diligent; and there is no doubt that he has been defrauded without fault on his part.

While it is made to appear that the learned trial judge sustained the demurrer on the ground that the promoters were not agents of the corporation, and that no ratification or acceptance of the contract was shown (as to which ground we have reached a different conclusion), yet, before we reverse the decree sustaining the demurrer, we must see whether or not the decree should be sustained on other grounds.

The question next in importance raised by the demurrer is that, the bill showing that the corporation had gone into the hands of the state bank superintendent for liquidation before the filing of the bill, the bill contained no equity, whatever of equity it might have contained had the bank been a going concern. This seems to be, or at least once was, the law of England. This strict English rule seems not to prevail in America to its full extent. The American rule is thus stated by Mr. Cook and Mr. Thompson in their valuable works on Corporations, and the text is borne out by many decisions, state and Federal, cited in notes: "It seems to be the rule in this country, at least, that a defrauded subscriber may rescind such subscription after insolvency if he had not had a reasonable time to examine into the affairs of the corporation before such insolvency, or before the appointment of a receiver. This rule was expressly recognized by the United States Circuit Court." 1 *Thomp. Corp.* 2d ed. § 735. "A bill in equity to rescind a L.R.A.1918C.

fraudulent sale of stock by a corporation lies even against the receiver of the corporation." 1 *Cook, Corp.* 6th ed. § 356.

It appears that in America such a bill lies even against the receiver of a corporation or an assignee under a general assignment, and that the fact of insolvency does not ipso facto prevent equity from awarding all relief under such bill; hence, if the bill should allege insolvency (which this bill does not do), it might, with other averments such as are contained in this bill, contain equity. Such a bill must, of course, show that the complainant acted promptly after the discovery of the fraud, that he was not guilty of laches, and that he was guilty of no negligence in discovering the fraud, and that he had not ratified the contract or waived the fraud after discovery, and had received no benefits thereafter, as a stockholder, in any dividends or profits, all of which this bill does, in the fullest and most specific terms. The bill certainly acquits the complainant of any neglect, wrong, or delay in the filing of his bill, or in the discovery of the fraud sought to be relieved against.

It may be true that in cases where the rights of creditors intervene, their rights may be superior to the rights of some or all of such stockholders, or it may be shown that the complainant is estopped as against some or all of such creditors; but these matters do not now appear on the face of the bill, and it is not required that the bill should negative such facts.

It is true the bill alleges the bank to be in a failing condition, and is being liquidated by the state bank superintendent, and the bill is against that officer. This averment was only necessary to give the bill equity as against such officer, not as against the bank. It is not at all necessary that the bank be insolvent before it can be taken over by such officer.

The only creditors of the bank shown by the bill are those whose debts were taken over by the new corporation when formed, and which were agreed to be taken over before it was formed. They are shown to be creditors of the old bank, and to have been such before the alleged fraud was committed on appellant. It is not shown that there are any creditors subsequent to the issuance of certificates or shares to appellant. There may or may not be such creditors; it is not necessary that the bill negative their existence, or show that they have been or can be paid in full, and yet allow the relief prayed in the bill. It may also be true that the claims of creditors of the old corporation are superior to the claims of complainant, or there may or may not be funds sufficient to pay all creditors,

including the complainant if his relation be transformed from that of stockholder to that of creditor, as prayed in his bill; but it is not necessary that the bill should show these facts affirmatively, or negative prior rights of creditors of either class. These are matters that lie peculiarly within the knowledge of the bank and of the state superintendent of banks, and should be set up in the answer, and, of course, will depend upon the proof.

If it is made to appear that the corporation is wholly insolvent, then under our statute making the assets of such corporation a trust fund for the benefit of creditors it may be that no relief can or should be awarded to complainant.

If the contract is rescinded, then the complainant becomes one of the creditors; yet his rights by such change of relation may or may not be secondary to those of all other creditors. This, of course, can be determined only on final hearing on bill, answer, and proof, unless the facts are agreed on or admitted.

There can be no doubt as to the sufficiency of the averments to show fraud; the bill's averments in this respect could scarcely be made more specific or stronger, and no laches is shown. If the appellant is not entitled to the relief prayed, it must be made to appear by answer and proof. So far as now appears, he is entitled to some relief. The mere fact, if it be a fact, that the corporation has now no funds which would be availing to repay all or part of the money paid by complainant thereto, ought not to prevent his obtaining all relief, or the changing of his status from that of a stockholder to that of a creditor. There may be creditors as against whom he would not be allowed to thus change his status; yet as against the corporation and the promoters it does seem that he should be allowed to effect that change of relation.

Mr. Freeman, in a valuable note to the report of the case of *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 797, has collected and reviewed most of the authorities up to that time on the subject; and the following principles deduced therefrom are stated by him: "The rule that a contract obtained by fraud is voidable at the election of the defrauded party applies to the contract of a shareholder in a corporation. Therefore, if one is induced to subscribe for or purchase shares of stock of a corporation through the fraud of its agents, he may have all the remedies, affirmative and defensive, against the corporation which he might have had against a principal in any other similar case. See *Cook, Stock & Stockholders*, §§ 136 et seq.; *Thompson Liability of Stockholders*, §§ 142 et seq.; note to *Parker v. L.R.A.1918C*.

Thomas, 81 Am. Dec. 392. But the contract entered into through fraud is voidable merely, and not absolutely void. It is valid and binding until the defrauded party elects to treat it as void. And if he fails to repudiate it before the rights of innocent third parties have intervened, their equities to treat it as valid may be superior to his claim to avoid it." 3 Am. St. Rep. 824.

"Some of the authorities seem to favor the view that in no case can fraud in obtaining the subscription be set up by the subscriber after the insolvency or bankruptcy of the corporation. This may be true under the *English Companies' Act* of 1862, by which it appears a creditor is entitled to hold every shareholder whose name is on the register of the company at the time proceedings are instituted to wind up the company for insolvency; but in America there seems to be no reason for the universality of the rule. Thus in *Upton v. Englehart*, 3 Dill. 496, 505, Fed. Cas. No. 16,800; *Dillon*, C. J. remarks: 'I am inclined to the opinion that if a company has fraudulently misrepresented or concealed material facts, and thus drawn an innocent person into the purchase of stock, he at the time being guilty of no want of reasonable caution and judgment, and afterwards guilty of no laches in discovering the fraud, and he thereupon without delay notifies the company that he repudiates the contract and offers to rescind the purchase, these facts concurring, I am inclined to the opinion that the bankruptcy of the company subsequently appearing will not enable the assignee to insist that the purchase of stock is binding upon him.' " 3 Am. St. Rep. 825.

The more recent cases are collected in a note to a West Virginia case reported in *L.R.A.1915D*, 792.

We are of the opinion that the trial court erred in sustaining the demurrer to the bill as last amended.

Reversed, rendered, and remanded.

All the Justices concur.

A petition for rehearing having been filed, the following *Per Curiam* response was handed down December 20, 1917:

Application for rehearing overruled.

Sayre, Somerville, Gardner, and Thomas, JJ., concur.

Anderson, Ch. J., and McClellan, J., dissent.

CALIFORNIA SUPREME COURT.
(In Banc.)

ASSOCIATED PIPE LINE COMPANY
v.

RAILROAD COMMISSION OF THE
STATE OF CALIFORNIA et al.

ASSOCIATED OIL COMPANY
v.
SAME.

(— Cal. —, P.U.R.—, —, 169 Pac. 62.)

Carriers — pipe line — regulation — private carrier.

1. Owners of a pipe line who have never exercised their right of eminent domain, and who use their line solely for the transportation of oil produced or purchased by them, are not engaged in transporting the oil to or for the public for hire, so as to become subject to regulation by the Public Service Commission; at least they are not so subject if the oil transported by them is only a small portion of that produced in the section in which they operate.

For other cases, see Public Service Corporations, in Dig. 1-52 N. S.

Same — subjecting to public use — necessity of compensation.

2. Pipe lines belonging to private individuals who use them solely to transport oil produced or purchased by them cannot be subjected to public use without compensation, although, by reason of the fact that there is no pipe line reaching the field served by the lines in question, their owners have an advantage over independent producers in transporting their product.

For other cases, see Eminent Domain, III. a, 1, in Dig. 1-52 N. S.

Public service corporation — effect of legislative declaration.

3. The legislature cannot, by its mere declaration, make something a public utility which is not in fact such.

For other cases, see Public Service Corporations, in Dig. 1-52 N. S.

Constitutional law — due process — subjecting pipe line to public use.

4. A pipe line constructed without the exercise of the right of eminent domain, and utilized by its owners solely to transport oil produced or purchased by them, cannot, under the provisions of the Federal Constitution as to taking property for public use without due process of law, be declared a public utility and subjected to the use of the public unless compensation is made to the owners for it.

For other cases, see Constitutional Law, II. b, 2, b, in Dig. 1-52 N. S.

(November 20, 1917.)

Note. — For pipe line companies as public utilities, see annotation following this case, post, 855.
L.R.A.1918C.

PETITIONS for writs of certiorari to review and annul an order of the Railroad Commission requiring petitioners to file schedules of rates and charges with the Commission for the transportation of oil products. Order annulled.

The facts are stated in the opinion.

Messrs. Edmund Tausky, Henley C. Booth, and Stanley Moore, for petitioners:

The Associated Pipe Line Company has never been a common carrier of oil.

Ingate v. Christie, 3 Car. & K. 61; *Gisbourn v. Huret*, 1 Salk. 249, 91 Eng. Reprint, 220; *Nugent v. Smith*, L. R. 1 C. P. Div. 19; *Jackson Architectural Iron Works v. Hurlbut*, 158 N. Y. 34, 70 Am. St. Rep. 432, 52 N. E. 665; *Allen v. Sackrider*, 37 N. Y. 342; *Moore, Carr. p. 20*; *United States v. Sioux City Stock Yards*, 162 Fed. 558.

To now turn the Associated Pipe Line Company into a common carrier destroys the right of exclusive enjoyment of private property, and amounts to a taking of private property for public use without compensation first being made.

Forster v. Scott, 136 N. Y. 577, 18 L.R.A. 543, 32 N. E. 976; *Weems S. B. Co. v. People's S. B. Co.* 214 U. S. 345, 53 L. ed. 1024, 29 Sup. Ct. Rep. 661, 16 Ann. Cas. 1222; *Monongahela Nav. Co. v. United States*, 148 U. S. 336, 37 L. ed. 471, 13 Sup. Ct. Rep. 622; *Adair v. United States*, 208 U. S. 180, 52 L. ed. 445, 28 Sup. Ct. Rep. 283, 13 Ann. Cas. 764; *Del Mar Water, Light & P. Co. v. Eshleman*, 167 Cal. 666, 140 Pac. 591, 948.

The three Pipe Line Statutes are to be read together, and considered as comprising a single act; for all of them relate to the same subject, were enacted at the same session, and approved on the same day.

Primm v. Superior Ct. 3 Cal. App. 208, 84 Pac. 786; *United States v. Freeman*, 3 How. 557, 11 L. ed. 724; *State v. Gerhardt*, 145 Ind. 439, 33 L.R.A. 313, 44 N. E. 469; *Blackwell v. First Nat. Bank*, 10 N. M. 555, 63 Pac. 47; *Brown v. Barry*, 3 Dall. 365, 1 L. ed. 638.

The order is in excess of the authority of the Railroad Commission, and will be annulled by the supreme court on writ of review sued out in pursuance of the Public Utilities Act.

Title Guarantee & T. Co. v. Railroad Commission, 168 Cal. 295, 142 Pac. 878, Ann. Cas. 1916A, 738.

The power of the Railroad Commission is limited to powers of regulation over public utilities, and the Commission is without power to determine the judicial question as to whether or not the petitioner is a public service corporation within the meaning and

construction of subdivision D of chapter 327.

People ex rel. New York, N. H. & H. R. Co. v. Wilcox, 200 N. Y. 432, 94 N. E. 212; *St. Louis, I. M. & S. R. Co. v. State*, 31 Okla. 509, 122 Pac. 217; *Del Mar Water, Light & P. Co. v. Eshleman*, 187 Cal. 666, 140 Pac. 591, 948; *Pacific Teleph. & Teleg. Co. v. Eshleman*, 166 Cal. 640, 50 L.R.A. (N.S.) 652, 137 Pac. 1119, Ann. Cas. 1915C, 822; *Western Asso. v. Hackett*, 8 Cal. R. C. 220, P.U.R.1915F, 997.

The mere carrying of some purchased oil for the Associated Oil Company does not constitute a dedication of any portion of these lines to public use; but, if it did, their admittedly private use could not be done away with.

Pipe Line Cases (*United States v. Ohio Oil Co.*) 234 U. S. 561, 58 L. ed. 1471, 34 Sup. Ct. Rep. 956; *Wade v. Litcher & M. Cypress Lumber Co.* 33 L.R.A. 255, 20 C. C. A. 515, 41 U. S. App. 45, 74 Fed. 517; *Del Mar Water, Light & P. Co. v. Eshleman*, 167 Cal. 666, 140 Pac. 591, 948.

Chapters 285 and 286 of the Pipe Line Statutes are both unconstitutional because of their exorbitant tolls and enormously cumulative penalties.

Kansas Natural Gas Co. v. Haskell, 172 Fed. 545; *United States v. Harris*, 1 Sumn. 21, Fed. Cas. No. 15,315; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Ritchie v. People*, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 415, 40 N. E. 454; *American Fertilizing Co. v. Board of Agriculture*, 11 L.R.A. 179, 3 Inters. Com. Rep. 532, 43 Fed. 609; *Philadelphia v. Western U. Teleg. Co.* 2 Inters. Com. Rep. 728, 40 Fed. 615; *Lawton v. Steele*, 152 U. S. 137, 38 L. ed. 388, 14 Sup. St. Rep. 499; *Dobbins v. Los Angeles*, 195 U. S. 236, 49 L. ed. 175, 25 Sup. Ct. Rep. 18; *Barclay v. Howell*, 6 Pet. 498, 8 L. ed. 477; *Perley v. Chandler*, 6 Mass. 454, 4 Am. Dec. 159; *Woodring v. Forks Twp.* 28 Pa. 361, 70 Am. Dec. 134; *Starr v. Camden & A. R. Co.* 24 N. J. L. 597; *Papworth v. Milwaukee*, 64 Wis. 389, 25 N. W. 431; *Shawnee County v. Beckwith*, 10 Kan. 607; *Overman v. May*, 35 Iowa, 89; *Woodruff v. Neal*, 28 Conn. 167; *Ex parte Young*, 209 U. S. 123, 32 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; *Cotting v. Kansas City Stock Yards Co.* (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Portland R. Light & P. Co. v. Portland*, 201 Fed. 119; *Consolidated Gas Co. v. Mayer*, 146 Fed. 150; *Central of Georgia R. Co. v. Railroad Commission*, 161 Fed. 925; *Kern Trading & Oil Co. v. Associated Pipe Line Co.* 217 Fed. 278. L.R.A.1918C.

Mr. Douglas Brookman, for respondents:

The orders of the Commission are in strict accord with the Constitution of California.

Pipe Line Cases (*United States v. Ohio Oil Co.*) 234 U. S. 548, 58 L. ed. 1459, 34 Sup. Ct. Rep. 956.

A state has the right to declare a business theretofore private to be of public interest and subject to regulation.

German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 407, 58 L. ed. 1011, 1020, L.R.A. 1915C, 1189, 34 Sup. Ct. Rep. 612; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Brass v. North Dakota*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; *Clark v. Nash*, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 678, 4 Ann. Cas. 1171; *Strickley v. Highland Boy Gold Min. Co.* 200 U. S. 527, 50 L. ed. 591, 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174; *Giffin v. South West Pennsylvania Pipe Lines*, 172 Pa. 580, 33 Atl. 578; *Boyle v. Smithman*, 146 Pa. 255, 23 Atl. 397; *Columbia Conduit Co. v. Com.* 90 Pa. 307, 14 Mor. Min. Rep. 197; *Charleston Natural Gas Co. v. Lowe*, 52 W. Va. 664, 41 S. E. 410.

Chapter 327 contemplates that the Commission shall determine what oil pipe lines are subject to the provisions of the statute.

Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35, 9 N. C. C. A. 466; *Pacific Teleph. & Teleg. Co. v. Eshleman*, 166 Cal. 640, 50 L.R.A. (N.S.) 652, 137 Pac. 1119, Ann. Cas. 1915C, 822.

Shaw, Judge pro tem, delivered the opinion of the court:

These are proceedings in certiorari whereby each of the petitioners seeks the review and annulment of an order made by the Railroad Commission, requiring them to file with said Commission schedules of their rates and charges for the transportation of crude oil, petroleum, and the products thereof, by means of pipe lines from the San Joaquin valley oil fields, in the state of California, and their rules and regulations in connection with such transportation.

The proceeding initiated of its own motion by the Commission, under and by virtue of chapter 327 of the laws of California found in Statutes of 1913, p. 657, is entitled: "In the Matter of the Compliance by Oil Pipe Lines with Provisions of Chapter 327 of the Laws of 1913, Declaring Certain Corporations, Associations, and Individuals to be Common Carriers and Public Utilities, and Subject to the Provisions of the Public Utilities Act."

Its declared purpose was an investigation to determine what corporations and associations were subject to the provisions of said act of the legislature. Pursuant to an order therein made, petitioners and a number of other corporations engaged in the transportation of crude oil and its products by means of pipe lines appeared before the Commission at a stated time and place to show cause why each of them should not file with the Commission the data and information therein specified, and otherwise comply with the law.

At the hearing had evidence was adduced touching the subject of inquiry, upon which the Commission made its findings and order which it is sought herein to have annulled.

Section 23, art. 12, of the Constitution of California, as amended in October, 1911, pursuant to which the act in question was adopted, is as follows: "Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any commercial railroad, interurban railroad, street railroad, canal, pipe line, plant, or equipment, or any part of such railroad, canal, pipe line, plant or equipment within this state, for the transportation or conveyance of passengers, or express matter, or freight of any kind, including crude oil, or for the transmission of telephone or telegraph messages, or for the production, generation, transmission, delivery or furnishing of heat, light, water or power, or for the furnishing of storage or wharfage facilities, either directly or indirectly, to or for the public, and every common carrier, is hereby declared to be a public utility, subject to such control and regulation by the Railroad Commission as may be provided by the legislature, and every class of private corporations, individuals, or associations of individuals hereafter declared by the legislature to be public utilities shall likewise be subject to such control and regulation. The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the state of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

By this provision of the Constitution the people of the state, however novel, if not startling, the proposition may be, have in clear and unmistakable language declared that "every class of private corporations, individuals, or associations of individuals

hereafter declared by the legislature to be public utilities, shall . . . be subject to . . . control and regulation" by the Railroad Commission, as provided by the legislature, and this without reference to the character of the business, whether it be a bootblack stand, grocery store, or agricultural pursuit conducted in a purely private capacity; and, further, that "the right of the legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

Acting in pursuance of the power so conferred, the legislature adopted the act referred to as chapter 327, § 3 of which provides that "any pipe line constructed, acquired, owned, operated, maintained, managed or controlled by any private corporation or individual or association of individuals for any of the purposes or under any of the conditions specified in § 1 or § 2 of this act, is hereby declared to be a public utility and subject to the provisions of the 'Public Utilities Act.'"

Referring to § 1, divided into four subdivisions, we find that by subdivisions designated (a), (b), and (c) the legislature declares to be common carriers and subject to the provisions of the Public Utilities Act every private corporation, individual, or association of individuals (a) engaged in transporting crude oil, petroleum or the products thereof through a pipe line, "directly or indirectly, to or for the public, for hire, compensation or consideration of any kind, paid, given, extended or received, directly or indirectly, for such transportation;" (b) any like person or body "in favor of whom the right of eminent domain exists," engaged in such transportation to or for the public for hire, through a pipe line "constructed or maintained upon, along, over or under any public highway;" (c) any corporation, individual or association of individuals transporting crude oil, petroleum or the products thereof, to or for the public, for hire "or otherwise," by means of a pipe line "constructed, operated or maintained across, upon, along, over or under the right of way of any railroad corporation or other common carrier required by law to transport crude oil, petroleum or products thereof as a common carrier."

Restated, subdivision (a) of § 1 embraces only those engaged in the business of transporting oil as common carriers. Subdivision (b) is the same as subdivision (a), except that the act in its operation is restricted to those in whom the power of eminent domain exists (though not exercised), and whose pipe lines are constructed over public highways. Subdivision (c), re-

taining the provision that the transportation be for the public for hire, adds after the word "hire" the words "or otherwise," and restricts the operation of the provision to pipe lines constructed along the rights of way of common carriers required to transport oil. It thus appears that subdivisions (a), (b), and (c) of § 1 apply solely and alone to those who, by means of pipe lines, are engaged in the transportation of crude oil and its products to or for the public.

As bringing the petitioners within the provisions of these subdivisions, the Commission found as a fact that in the transportation of crude oil and its products by means of pipe lines from the San Joaquin valley petitioners were common carriers thereof, or, in the language of the statute, they were engaged in transporting such articles "to or for the public for hire." In our opinion, there is no evidence to support this finding as to either of the petitioners.

In his work on Carriers, Mr. Moore, at page 22, vol. 1, defines a common carrier as one who "holds himself out as such to the world; that he undertakes generally and for all persons indifferently to carry goods and deliver them for hire; and that his public profession of his employment be such that, if he refuse, without some just ground, to carry goods for anyone, in the course of his employment and for a reasonable and customary price, he will be liable to an action."

It is one who offers to carry goods for any person between certain termini, and who is bound to carry for all who tender their goods and the price of carriage.

Whether the business conducted by petitioners was that of a common carrier as thus defined was a question of fact, since it may not be said that the intention of the legislature in enacting subdivisions (a), (b), and (c) of § 1 of the act was to subject to public use pipe lines engaged in the business of transporting oil other than for the public. Indeed, such a legislation, if attempted, would have been futile, since, under the 14th Amendment of the Federal Constitution, no state shall deprive any person of property without due process of law, and to take or devote private property to public use without compensation is such deprivation. The record discloses no action on the part of either petitioner which constitutes an irrevocable dedication of its property to a public use such as the exercise of the sovereign power of the state in eminent domain. *Wyman, Pub. Serv. Corp. § 214; State, Trenton & N. B. Turnp. Co., Prosecutors, v. American & E. Commercial News Co.* 43 N. J. L. 381. Hence, in order to bring petitioners within the purview of L.R.A.1918C.

the provisions under consideration, it must have been made to appear that they had voluntarily devoted their transportation facilities to the indiscriminate use of the public for hire, thus constituting them common carriers.

As to the Associated Pipe Line Company, the evidence shows that it was incorporated in August, 1907, "for the acquisition, construction, leasing, owning, maintenance, and operation, but not as a common carrier, of pipe lines for transportation of oil within the state of California, together with necessary pumping stations thereunder." At the time in question the Southern Pacific Company was, through a subsidiary company known as the Kern Oil and Trading Company, having charge of its oil bureau, engaged in developing oil lands owned by it in Kern county, the production from which was intended for its own use, and, as a means of delivering the oil so produced to points along its line of railroad, it joined with the Associated Oil Company in the construction of two pipe lines, the aggregate daily carrying capacity of which, in 1913, was 38,000 barrels. The cost of construction represented by the capital stock of the Associated Pipe Line Company was equally divided between the Associated Oil Company and the Kern Oil & Trading Company, and under their agreement, no charge being made for the transportation of oil other than the actual cost of operation and maintenance of the pipe line, each was entitled to one half the carrying capacity of said lines, one of which was known as the Rifle line, being 281 miles in length, and the other, known as the Hot line, 138 miles in length. At all the times since the construction of these pipe lines the Kern Oil & Trading Company has devoted its one half of the carrying capacity of said lines solely and alone to the transportation of oil produced by it and delivered to its proprietary company, the Southern Pacific Company, for the sole use of the latter. In 1913 such use amounted to 19,000 barrels per day, which was one half of the full carrying capacity. The other interest in the capacity of said pipe lines so owned by the Associated Oil Company has never at any time since the construction thereof been devoted to the carrying of oil or products other than those either produced by the Associated Oil Company or purchased in the oil field by it in its business of producing, buying, and selling oil, both in crude and refined forms. In 1913 its daily production of oil amounted to 16,500 barrels, and at the same time it was purchasing about 30,000 barrels per day, which, as found by the Commission, amounted to about 22 per cent of the entire production of the state. It thus appears

that one half of all the oil transported through these pipe lines was produced by the Kern Oil & Trading Company, so owned by the Southern Pacific Company, for the use of the latter, and the other half so transported was either produced or bought by the Associated Oil Company, by whom it was transported and delivered to itself at the termini of said pipe lines.

With reference to the other petitioner, Associated Oil Company: As stated, it had a daily production of 16,500 barrels and acquired by purchase 30,000 barrels per day, making a total of 46,500 barrels; hence, its one half the capacity of the Associated Pipe Line Company being only 19,000 barrels per day, left an amount for transportation by other means of \$27,500 barrels, for the purpose of such transportation, it, in addition to ownership in the associated Pipe Line Company, owns a pipe line running from the oil fields to Gaviota, and one from the Coalinga field to Monterey, the capacity of each of which is some 15,000 barrels per day. At no time since the construction thereof has the Associated Oil Company transported any oil through either of these pipe lines, save and except such as it produced, together with that so purchased in the field and transported for delivery to itself at the termini of said pipe lines, where it was sold to consumers in its crude or refined form, or reshipped to other points for sale to consumers. The only efficient means of transporting oil from the San Joaquin valley oil fields, which in July, 1913, as found by the Commission, amounted to some 6,500,000 barrels, was by means of pipe lines of the petitioners and those of a number of other companies engaged in the transportation of oil, all of which product, except that produced by the Kern Oil & Trading Company and Associated Oil Company, together with the 30,000 barrels per day purchased by said last-named company, was transported through and by means of such other independent pipe lines in which petitioners had no interest.

We are unable to perceive anything in the facts established which does not compel the conclusion that petitioners were engaged in a purely private business of transporting oil through these pipe lines. Respondent lays great stress upon a decision of the United States Supreme Court entitled *United States Pipe Line Cases v. Ohio Oil Co.* 234 U. S. 548, 58 L. ed. 1459, 34 Sup. Ct. Rep. 956. To our minds, there are many features of this case which clearly distinguish it from that at bar. In the *Ohio Oil Co. Case* it appears that the Standard Oil Company had acquired control of all pipe lines to which the oil fields east of California were tributary, thus giving it a L.R.A.1918C.

monopoly of the means of transportation; that a part of the pipe lines constituting the system were in fact common carriers. Having thus made itself master of the fields without the necessity of owning them or producing any oil itself, it, through its subordinates, refused to carry oil unless the same was sold to it, or to its subsidiaries and through them to it, on terms dictated by itself. It was there held that since, subject to such condition of sale to it, the company carried everybody's oil to market, the act of Congress declaring the pipe lines so operated to be common carriers was not a taking of the property for the use of the public, since, upon the facts found, such pipe lines had been by the owners thereof devoted to public use. In the case at bar a large part of the oil transported through the pipe lines by the Associated Oil Company is produced by it. The amount of 30,000 barrels per day purchased bears a comparatively small proportion to that produced in the oil fields tributary to its lines. The fact of such limited purchase, in competition with a number of other oil pipe line companies to which said oil field is tributary, cannot, under the opinion in the *Ohio Oil Company Case*, however interpreted, be deemed to constitute it a common carrier, or engaged in transporting oil for the public. Indeed, the opinion of the Supreme Court in the case of *United States v. Uncle Sam Oil Co.*, found in the same book (page 561), is authority for holding the contrary view. The fact that "the business is such that the public needs the use in the same, and that the conduct of the same is a matter of consequence," as found by the Commission, is immaterial to the question. In one of the so-called elevator cases, that of *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, it is said: "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

But so long as he uses his property for private use, and in the absence of devoting it to public use, the public has no interest therein which entitles it to a voice in its control. Other cases to the same effect are: *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Weems S. B. Co. v. Peoples' S. B. Co.* 214 U. S. 345, 53 L. ed. 1024, 29 Sup. Ct. Rep. 661, 16 Ann. Cas. 1222; *Monongahela Nav. Co. v. United States*, 148 U. S. 336, 37 L. ed. 471, 13 Sup. Ct. Rep. 622; and *Del Mar Water, Light & P. Co. v. Eshleman*, 167 Cal. 666, 140 Pac. 591, 948. Indeed, our attention is directed to no au-

thority in this state or elsewhere holding otherwise.

Subdivision (d) of § 1 embraces everyone "owning, using, operating, managing or controlling, directly or indirectly, or participating in the ownership, use, operation, management or control, directly or indirectly, under lease, contract of purchase, agreement to buy and sell, or other contractual or tacit agreement or arrangement of any kind or character whatsoever, of any pipe line, or pipe lines, or any part of any pipe line, or pipe lines, plant or equipment, or pipe line system, or any part of any pipe line system, for the transportation of crude oil, petroleum or the products thereof, of and from, or of, or from any oil field or place of production within the state of California, to any distributing, refining, or marketing center or reshipping point therefor within said state, whereby, or under, or through which, directly or indirectly, such corporation, or any corporation or association of corporations, or individual or association of individuals secures, or is enabled to secure, or attempts to secure, or tends to secure, the control of, or monopoly of the purchasing of, or the control of, or monopoly of the transportation of such crude oil, petroleum or the products thereof."

As bringing petitioners within this provision of the act, the Commission found that "the purpose of chapter 327 of the Laws of 1913 is to terminate and prevent a monopoly in the oil pipe line business," and found as a fact that the Associated Oil Company and Associated Pipe Line Company, together with three other companies named as engaged in like business, "have secured the control and monopoly of the transportation of crude oil, petroleum, and the products thereof from the San Joaquin valley oil fields," and that, while § 5 of the act excepts from the provisions thereof companies, individuals, and associations the nature and extent of whose business is not of public interest or consequence, "the five companies (among which were petitioners) serving the San Joaquin valley fields cannot be regarded as coming within the exception," and further found as a fact that the nature and extent of the business of said five companies, including petitioners, "is such that the public needs no use in the same, and the conduct of the same is not a matter of public consequence."

The finding as to the control and monopoly secured by petitioners is attacked upon the ground of insufficiency of evidence to support the same. The evidence touching the subject is most meager and unsatisfactory. In effect it shows that five companies, including petitioners, operating pipe lines

in transporting oil, a part of which was produced by each of them, were also buyers of crude oil in the fields from the independent producers thereof, who, since none of said companies transported oil other than that produced by themselves or such as they acquired by purchase, had no efficient means of shipping their oil to market, and hence contracted to sell the same to some one of those companies at prices agreed upon; that there was no agreement, tacit or otherwise, shown to exist between the companies as to the price which they should pay in contracting for the purchase of oil; that during most of the time the production of oil was largely in excess of the demand therefor, and little, if any, difference was paid by the companies in contracting for the purchase of oil; hence convenience and economy in delivery of the oil both as to the purchaser and buyer might well be deemed a controlling factor in making such contracts. While the position of petitioners and owners of the other pipe lines gave them, as found by the Commission, an advantage over the independent producers in transporting their product, thus affording an opportunity enabling them to enter into an unlawful combination in restraint of trade, our attention is directed to no evidence which in the slightest degree tends to establish such fact.

However this may be, and conceding the evidence ample to support the finding, such fact cannot warrant the taking of private property for public use without compensation, for which no provision is made or contemplated. True, the exaction of tolls for actual service will be allowed, but there are elements of damage due to the subjection of the property to the public service not covered by charges for service performed for which no compensation is made. That subjecting petitioners' property to the use of the public as common carriers constitutes a taking of the same, admits of no controversy. "Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment that materially affect its value, without legal process or compensation, it deprives him of his property within the meaning of the Constitution. . . . It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner." *Forster v. Scott*, 136 N. Y. 677, 18 L.R.A. 543, 32 N. E. 976; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622.

Under the Public Utilities Act the Rail-

road Commission, as an instrumentality of the state, is authorized to supervise and regulate every public utility in the state, with power to fix tolls and charges exacted for the service performed; but it has not power to declare what shall constitute a public utility. But this, argues respondent, is a function of the legislature. Not so. The legislature possesses no such power. It cannot by its edict make that a public utility which in fact is not, and take private property for public use by its fiat that the property is being devoted to a public use. If, under the broad language used in § 23, art. 12, of the Constitution, that "every class of private corporations, individuals or associations of individuals hereafter declared by the legislature to be public utilities shall . . . be subject to . . . control and regulation" of the Railroad Commission, the legislature can by its mere fiat, without notice or opportunity to be heard, and in the absence of any provision for compensating the owner thereof for damage, subject petitioners' pipe lines to the demands of the public because the private use thereof tends to create a monopoly or enables the owner thereof to secure a monopoly, it can with equal propriety declare a grocer or dry goods store employing more than a specified number of clerks to be a public utility, or, without such or any qualifications, declare that all pipe lines used in transporting oil shall be common carriers of oil. Indeed, as to corporations, this is precisely what it has attempted to do by § 2 of the act, which provides that every corporation owning a pipe line through and by means of which it transports oil is declared to be a common carrier and subject to the provisions of the Public

Utilities Act; the only limitation therein being, as provided in § 5, that it shall not apply where the nature and extent of the business is such that the public needs no use in the same. That such provisions constitute a taking of private property by the state for public use, without due process of law, which is prohibited by the 14th Amendment to the Federal Constitution, must be conceded. Mr. Lewis, in his work on Eminent Domain, 3d ed. § 11, says: "A law which authorizes the taking of private property without compensation . . . cannot be considered as due process of law in a free government." *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

1. The evidence is insufficient to justify the finding that petitioners, in operating their pipe lines in transporting oil, came within the provisions of subdivisions (a), (b), and (c) of § 1 of the act.

2. Subdivision (d) of § 1 and § 2 of the act are, except, perhaps, as to corporations acquiring such pipe lines after the passage thereof, unconstitutional and in violation of the 14th Amendment to the Federal Constitution, in that they contemplate the taking of private property in the absence of any provision made for compensating the owners, and without due process of law.

Our conclusion renders it unnecessary to consider other grounds upon which petitioners attack the action of the Railroad Commission.

The orders, in so far as they affect petitioners, are annulled.

We concur: Sloss, J.; Melvin, J.; Henshaw, J.; Shaw, J.

Annotation—Pipe line companies as public utilities.

A search has disclosed but two cases on this question in addition to ASSOCIATED PIPE LINE CO. v. RAILROAD COMMISSION, ante, 849.

Whether or not a pipe line is a public utility or common carrier subject to regulation by the Public Service Commission or the Interstate Commerce Commission seems to depend upon the method of operation; that is, whether it is operated for the benefit of the public, for hire, or whether it is operated for purely private purposes.

Thus, in *Pipe Line Cases* (*United States v. Ohio Oil Co.*) (1914) 234 U. S. 548, 58 L. ed. 1459, 34 Sup. Ct. Rep. 956, it was held that oil companies controlling interstate pipe lines in which is carried all oil offered between the oil

fields east of California and the Atlantic seaboard upon condition that the offerer shall first sell the oil to them on practically their own terms are carriers, subject to the jurisdiction of the Interstate Commerce Commission, within the meaning of the statute (Act. of June 29, 1906, 34 Stat. at L. 584, chap. 3591, Comp. Stat. 1916, § 8563) extending the operation of the Interstate Commerce Act to persons or corporations engaged in the transportation of oil by means of pipe lines, "who shall be considered and held to be common carriers within the meaning and purpose of this act." The court said: "The provisions of the act are to apply to any person engaged in the transportation of oil by means of pipe lines. The words 'who

the will is precisely like that in the instant case. But, as we have said before, decisions construing other wills are not always helpful, because the language used is not the same.

Plaintiffs' contention is that by the use of the words "fee simple" the will gave an absolute title, and that the subsequent provision is repugnant. Appellees say that the use of the words "fee simple" was ill advised, but contend that this cannot have the effect of extending the term providing for a life estate. Cases are cited by the parties as to general rules of construction, about which there seems to be no dispute. Cases are cited to the effect that, if there is irreconcilable repugnancy between two clauses, the last expression controls, and that mere ambiguity will not convert into a fee-simple estate what would otherwise be plainly a life estate, and that the failure of the will to devise the remainder cannot control the provision of the will giving only a life estate; also, that the fact that the widow may never marry will not enlarge the estate to a fee; and it is conceded by both that the intent of the testator controls, and that all parts of the will must be given force if possible.

Referring first to plaintiffs' contention. They say that the words following the words "fee simple" in paragraph 2 are merely precatory and an expression of desire on the part of the testator,—that he does not desire his wife's remarriage,—and that said last clause is repugnant. They cite to sustain their contention, among other cases, *Re Burbank*, 69 Iowa, 381, 28 N. W. 648; *Rona v. Meier*, 47 Iowa, 609, 29 Am. Rep. 493; *Alden v. Johnson*, 63 Iowa, 125, 18 N. W. 696; *Killmer v. Wuchner*, 74 Iowa, 359, 37 N. W. 778; *Pelizzarro v. Reppert*, 83 Iowa, 498, 50 N. W. 19; *Halliday v. Stickler*, 78 Iowa, 388, 43 N. W. 228; *Law v. Douglass*, 107 Iowa, 608, 78 N. W. 212; *Re Barrett*, 111 Iowa, 570, 82 N. W. 998; *Williams v. Allison*, 33 Iowa, 278; *Podaril v. Clark*, 118 Iowa, 264, 91 N. W. 1091; *Channell v. Aldinger*, 121 Iowa, 297, 96 N. W. 781; *Meyer v. Weiler*, 121 Iowa, 51, 95 N. W. 254; *Reichauer v. Born*, 151 Iowa, 456, 131 N. W. 705. They also refer to *Simpkins v. Bales*, 123 Iowa, 62, 98 N. W. 580, and say of it that there, by the express terms of the will, the widow took a life estate in the property of her deceased husband, with power of disposal during her life or widowhood, and that, having conveyed by deed within that period, title passed to the grantee named in the deed. And appellants say that that case differs from the one now before us in this respect: That *Simpkins* provided in his will that the remainder of his property left at the L.R.A.1918C.

time of his wife's death, or the termination of her widowhood, should descend to his children and heirs at law, which is not true in the instant case. This may have some bearing, but we think it is not controlling for the reason that, in the instant case, if the widow takes but a life estate, the heirs would take the remainder upon her death or remarriage.

We shall not attempt to again review the cases cited and relied upon by appellants. They are cases where there was an absolute grant and an attempt thereafter to place limitations thereon and which were repugnant thereto, or where there was power of disposition, and the like.

For appellees it is said that it has been held in another jurisdiction that a devise to one "while she remains the widow of John McGuire, deceased, in fee simple," gave only a life estate, citing *McGuire's Appeal*, 8 Sadler (Pa.) 177, 11 Atl. 72. An examination of that case shows that it was an action to compel specific performance of a contract to convey certain land in fee simple, and the purchaser refused to take the deed, contending that plaintiff was not the owner in fee. The trial court held that the widow took but a life estate, and the supreme court of Pennsylvania said that it was inclined to think that, under the will, she took but a life estate; but the court said further that her estate was no more than a conditional fee, hence liable to expire on breach of the condition, and that such was not the kind of a fee that was contracted for, and that the court rightly refused to compel the payment of the purchase money. Appellees cite also *Price v. Elwell*, 169 Iowa, 206, 151 N. W. 79, and *Smith v. Runnels*, 97 Iowa, 55, 65 N. W. 1002, and say of them that the language used in the wills there construed was as comprehensive as the term "fee simple," and the court held the devise to be only a life estate. But we think the language of the wills in the cases cited is not as broad as in the instant case. In the *Smith Case*, the will gave plaintiff all the estate of the testator for her sole use and benefit "during her natural life," afterwards to be divided. In the *Price Case*, the will provided, substantially, that the wife of testator was to have and to hold in her exclusive right so long as she remained unmarried, and in case of her marriage she was to have one third, and the remainder to be divided equally among his children, and on her death before a division the estate should be divided equally among the children; it was held that this gave the wife a life estate only. But we think the language there used was not as broad as in the instant case. That case reviews many of the

cases relied upon by appellees which will be referred to in a moment.

It is quite generally held that a devise to the widow so long as she remains the widow devises but a life estate. Appellees cite, to sustain this proposition, *Brunk v. Brunk*, 157 Iowa, 51, 137 N. W. 1065; *Archer v. Barnes*, 149 Iowa, 658, 128 N. W. 989; *Mohn v. Mohn*, 148 Iowa, 288, 126 N. W. 1127; *Koonz v. Hempy*, 142 Iowa, 337, 120 N. W. 976; *Shaw v. Shaw*, 115 Iowa, 193, 88 N. W. 327. But in none of these cases was the language as broad as in the instant case. Doubtless the last clause, standing alone, would give a life estate only, but it must be construed in connection with the words preceding "fee simple." Of course, if the last clause gives a life estate only, and the preceding words a fee simple, that would devise a fee-simple life estate, which is impossible.

Under the will being now reviewed, giving effect to all the language used, we think it is not subject to serious doubt that testator wished his wife to remain unmarried, and that he gave her a fee title if she did not remarry, and that the devise was subject to be defeated in case she did.

Definitions for a qualified or defeasible fee are found at 16 Cyc. 602, and notes. It is there said, in substance, that it is a fee which has a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. The estate is a fee, because by a possibility it may endure forever in a man and his heirs; yet, as that duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee. During its continuance such a fee has all the incidents of a fee simple. The owner of such a fee cannot alone convey a perfect title to the property, and if he conveys in fee the determinable quality of the estate follows the transfer.

It is said in *Hall v. Turner*, 110 N. C. 292, 14 S. E. 791, that the terms "determinable fee," "base fee," and "qualified fee" are now used indiscriminately, although some authorities have made distinctions in their application.

Appellant cites *Busby v. Busby*, 137 Iowa, 57, 114 N. W. 559, in addition to the cases before referred to. We refer to this case at this point because it may be thought to be in some respects similar to the case being now reviewed, and it was there held that the widow took a fee title. In the first paragraph of the *Busby* will, the homestead is devised by the testator to his wife, and in that paragraph there are no words of limitation. The determination of that case was not placed upon the ground, as we

understand it, that the first paragraph devised an absolute fee and that subsequent provisions of the will were repugnant and for that reason inoperative. There were numerous other provisions of the will, and, taking it all together, for the reasons given in the opinion and referred to again in the case of *Price v. Ewell*, supra, the widow took a fee title. But the question as to whether she took an absolute or fee-simple title, or a qualified title, was not discussed or determined. It is said by Mr. Justice Bishop, who wrote the opinion, at page 61 of 137 Iowa: "Now it is well settled in the authorities that a devise by a testator to his widow, conditioned only against remarriage, carries title—in fee if real estate, and absolute if personal property—which is descendible to her heirs on her death; the condition having been faithfully observed."

It may be thought that this statement is not strictly accurate, in view of our other holdings, in the cases before cited, that it is generally held that such a devise is only a life estate. We think it is true, where, as in the instant case, the will devises a fee-simple title to the widow provided she remains unmarried, it does devise a fee. And such we think was the meaning by Mr. Justice Bishop in his statement just quoted, for he cites, to sustain his proposition, *Becker v. Becker*, 206 Ill. 53, 69 N. E. 49; *Redding v. Rice*, 171 Pa. 301, 33 Atl. 330; *Squier v. Harvey*, 16 R. I. 226, 14 Atl. 862; 1 Underhill, Wills, §§ 506, 507. An examination of these cases shows that in every one of them, while it was held that a fee was created, it was a qualified or defeasible fee, and not a fee-simple title. Thus, in the *Becker* Case the provisions of the will were, substantially, that testator devised all of his realty to his wife, and, with the exception of certain specific bequests, bequeathed to her all his personalty, declaring that she was to have full charge of the estate, without any restriction of any nature, and further provides that she was never to marry again, and that if she did his estate was to be divided equally between her and his brothers, did not reduce the fee theretofore given to a life estate. The court said: "The estate taken by the appellee widow is a fee, because, in the absence of remarriage, it will endure forever in her and her heirs. The restriction against her remarriage qualifies her estate, and it is therefore a qualified or base fee. Until determined by her remarriage, she has the same rights and privileges over the estate as if it were a fee simple absolute, save that the determinable quality of the estate will follow any conveyance thereof by her. [Citing cases.] It did not appear from the

bill that the appellant had any present interest in the real estate. The contingency upon which he may succeed to an interest in the real estate has not happened and may never happen."

In the Redding Case testator gave his property to his widow "for her own proper use and behoof, as long as she shall remain my widow, and if she should get married then she shall be only entitled to the one third in said property, the balance, being two thirds to my youngest daughter, K., and if the said K. should die, then I will and bequeath the two thirds to my son, W., and if both should die then the residue remaining shall be equally divided among my remaining children." Held, that the whole estate was given to the widow in fee, subject to the condition that she should not marry again, and defeasible as to two thirds upon the breach of that condition.

In the Squier Case testator gave to his wife all his estate, real and personal, with certain exceptions, forever, as long as she should remain his widow, but in case she should marry again he gave all his real estate to J. Held, that the widow took the entire estate, after the payment of debts and legacies, subject to defeasance by her marriage.

In Underhill on Wills, cited by Judge Bishop (§ 506), it is said, among other things: "The limitation by the testator of an estate in lands to his widow during widowhood, or, in express terms, 'while she remains a widow,' 'as long as she remains unmarried,' 'until her marriage,' or in any similar language, is unquestionably valid. Such a limitation is not regarded as in restraint of marriage. The testator has an interest in providing that his widow shall not remarry. Nor is it at all inconsistent with public policy to restrain second marriages under all circumstances, however much it may be advisable to promote marriage in general. In many cases the testator leaves young children who must be cared for by someone; and what person can be more competent to attend to their moral culture, rearing, and education than their mother? . . . Hence, whether we regard the estate during widowhood as an estate upon limitation, or as an estate upon condition subsequent restraining remarriage, it is unquestionably valid in either case. Nor is it material that there is no gift over upon the remarriage of the widow."

And it is said in § 507 of the same work: "If the testator gives his widow an estate during widowhood, or if he gives her in express terms an estate during her life, which is to cease on her remarriage, and she takes under his will, she has no cause to complain that on her remarriage she loses L.R.A.1918C.

the estate which was given her conditionally. On her remarriage the estate absolutely ceases and goes to the devisee over or to the heirs or next of kin of the testator.

. . . No rule of law prevents the testator from giving her a fee simple in lieu of dower which shall be defeasible and shall go to others on her remarriage. . . . If she conveys the fee, her grantee takes it also subject to being defeated by her remarriage; but, if she dies without having remarried, the fee descends to her heirs and the devise over is defeated."

In *Cummings v. Lohr*, 246 Ill. 577, 92 N. E. 970, the will devised and bequeathed to testator's wife all the realty and personality of which he might die seised, "provided she remains my widow, but should she marry, then all the property shall go to my children that are alive," except a life estate in one third of the land. It was held that the widow took a conditional or base fee, subject to be terminated by her marriage. That case was made to turn, in part at least, upon a statute of Illinois, which provides that "every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed in a fee-simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law."

We have a statute somewhat similar as to conveyances. Code, § 2914.

In the *Cummings* Case the court said: "The words of the devise are sufficient to pass the fee to the widow, and the proviso merely annexes a condition which converts the fee simple into a conditional or base fee, subject to be terminated by her marriage.

. . . The will gave to the widow a qualified fee in all the land of which the testator died seised, subject to be terminated by her marriage. The plaintiff in error has no present estate in any of the land, but only an expectancy. No estate will vest in her except in the event of the marriage of Louisa Lohr. . . . There can be no partition of an expectancy, and the appeal should therefore have been dismissed."

In *McFarland v. McFarland*, 177 Ill. 208, 52 N. E. 281, it was held that a will devising testator's estate, without words of limitation, and subject to a personal charge, to be held and enjoyed by the devisees indefinitely, unless they desired to terminate their interest, which they could do by a written instrument signed by at least two of them, passes an estate in fee and determinable only in the manner prescribed.

We are of opinion that under these authorities and the *Becker*, *Redding*, and

Squier Cases, *supra*, the widow, under the will in question, took a fee, but that it is a defeasible fee. Without taking the time or space to review further cases so holding, the following cases may be cited: *Fidelity Trust Co. v. Bobloski*, 28 L.R.A. (N.S.) 1093, and note (228 Pa. 52, 76 Atl. 720), 40 Cyc. 1593,—where it is said a devise to a woman which is absolute, except for a provision against marriage, creates a qualified or defeasible fee, subject to be divested only by her marriage, citing a large number of cases. See also *Re Biles*, 88 Misc. 452, 151 N. Y. Supp. 1097.

In the case of *Cummings v. Lohr*, *supra*, the court distinguished between the words "provided" and "while," saying that "while" is merely an adverb expressing duration, and that "provided" is an apt word to express a condition. The will in the instant case uses the words, "'so long' as she will be my widow and not marie again." But in the *McFarland Case*, *supra*, devisees were to hold the property "so long as they shall carry on and conduct the business for which the real estate above mentioned is peculiarly and particularly adapted, viz., the care and treatment of the insane." And, as before stated, it was there held that the estate taken was a defeasible fee. The words are the same as in the instant case. See also, on this point, 1 *Underhill on Wills*, § 506, from which we have before

quoted, where the words "while," "as long," "until," etc., are used.

We are of opinion that the trial court correctly construed the will as giving to the widow a defeasible fee, and that such holding ought to be and it is affirmed. But, though the point is not made, under the circumstances, we think the judgment should be without prejudice to the right of defendants to relitigate their claim to their share in the remainder in case the widow should remarry. The judgment should likewise be without prejudice to plaintiffs to relitigate their claim to the property as grantees of the widow should she die without remarrying, should their title be questioned. It may not be necessary for us to preserve such rights, because only questions presented are adjudicated, and we do not in this case determine the rights of plaintiffs under their deeds in case the widow dies without a remarriage, or the rights of defendants should she remarry. Under the authorities, some of which have been quoted, the parties have no present interest in the real estate. Whether they ever will depends on the question as to whether the widow does or does not remarry.

Affirmed.

Gaynor, Ch. J., and Evans and Weaver, JJ., concur.

Petition for rehearing denied.

Annotation—Effect of testamentary provision restricting widow to enjoyment during widowhood, upon quantum of estate taken by her.

The question above stated forms the subject of a note in 28 L.R.A. (N.S.) 1093, to which the present annotation is supplementary.

As stated in the earlier note, the fundamental inquiry upon the result of which the quantum of estate taken under any particular devise or bequest must depend, is whether the event of not marrying is interwoven into the gift itself so as to create an estate during widowhood only, or whether it is a condition annexed to the gift upon the breach of which the estate given is to be divested and determined. In as much as the intent of the testator, gathered from his general scheme of disposition as well as from accompanying circumstances, rather than the language employed by him, controls, no general rule can be laid down by which the quantum of the estate devised in any given case may be ascertained.

Like the earlier note, the present note does not include cases in which a

limitation over in event of subsequent marriage has been held void as repugnant to the estate primarily devised; nor does it include cases in which, although the testamentary provision under construction restricts the widow to enjoyment during widowhood, the extent of her estate is determined by the power of disposition annexed to the gift.

Qualified or determinable fee.

In *Cummings v. Lohr* (1910) 246 Ill. 577, 92 N. E. 970, it was held that under a will devising the testator's real estate to his wife "provided she remains my widow, but should she marry, then all the property shall go to my children that are alive, except one third of the land which she is to have during her lifetime," the widow took a conditional or base fee subject to be terminated by her marriage.

In *Lehfart v. Scharre* (1911) 143 Ky. 849, 137 S. W. 775, testator gave his

residuary estate to his wife, "with full power to sell and convey the same or any part thereof . . . and she may dispose of my property by will. If my wife should marry again then in that event her right to sell and convey my real or personal estate or dispose of the same by will shall cease and she shall only have a life estate," and further appointed her as executrix with full power to sell and convey any and all of the property for reinvestment or otherwise. It was held that, reading the above provisions together and gathering from them the intention of the testator, his purpose was to invest her with the fee in the event she did not marry.

In *Hinkle v. Hinkle* (1916) 168 Ky. 286, 181 S. W. 1116, where testator gave all his residuary estate, both real and personal, to his wife, "to be hers to hold, use and control and to be responsible to no one for her management as long as she shall remain my widow. Should she desire to marry again, before such marriage I want my estate as it shall then be found to be regularly administered under the laws of Kentucky by a competent appointee of the court," it was held that, in view of the language employed and of the fact that there was no limitation over unless the wife should marry again, she took a defeasible fee, subject to be defeated by her marriage, and converted into a life estate in one third of the real property.

In *Gaven v. Allen* (1889) 100 Mo. 293, 13 S. W. 501, where testator devised to his wife certain real estate and personal property, adding: "And my will is and I desire that if my said wife, Ellen Gaven, should happen to get married at any time after my death, the above-mentioned property or any money or property hereafter mentioned shall be divided share and share alike between all or any of my children then living," it was held that the wife took a base or qualified fee.

In *Weiss v. Mt. Vernon* (1913) 157 App. Div. 383, 142 N. Y. Supp. 250, affirmed without opinion in 215 N. Y. 657, 109 N. E. 1095, where testator gave all his property to his widow, with "authority to sell, convey, and mortgage," adding: "She shall have and enjoy the same and the proceeds and profits thereof as long as she shall remain my widow. But in case she should marry again, then she shall only have and be entitled to such a share as is now provided by the statute,"—it was held that L.R.A.1918C.

the wife took a fee determinable upon her marriage.

In *Hults v. Holzbach* (1911) 233 Pa. 367, 82 Atl. 469, where testator bequeathed to his wife all his real and personal estate so long as she should remain his widow, providing that in case she should marry again she should have certain property and the balance should go to the testator's six sisters, it was held that there was nothing in the will to justify an inference that the testator intended his wife to have merely a life estate, but that the estate granted was a fee, determinable upon remarriage; the court further supporting its conclusion by the argument that, as there was no suggestion of a devise over of the whole estate after the death of the widow in case she did not remarry, the result of holding that the fee was not in her would be an intestacy.

In *Weymouth's Will* (1917) 165 Wis. 455, 161 N. W. 373, where testator provided: "It is my wish that all of my property go to my wife, Elizabeth Weymouth, so long as she shall remain single. In case of her marriage she shall have the homestead [describing it] and one third of all other property after all debts and accounts are paid, and the balance to go to my brothers and sisters," it was held that, in view of the provisions of a statute that every devise of land shall be construed to convey all the estate unless it clearly appears that the testator intended to convey a lesser estate, the wife took, not a life estate, but a fee absolute, subject to be divested by remarriage.

Estate during widowhood.

In *Hawks v. Smith* (1914) 141 Ga. 422, 81 S. E. 200, it was held that under a will by which testator declared that all of his property should remain in the care of his wife for her use and support, and for the use and support of his children during the life or widowhood of the wife, and that at the death or marriage of his wife all the testator's property should be divided among his lawful heirs, the wife took an estate for life or during widowhood.

In *Belt v. Gay* (1914) 142 Ga. 366, 82 S. E. 1071, it was held that under a will by which testator devised to his wife the whole of his estate, real and personal, "during her widowhood, to be as absolutely under her control and management as it now is under my own, being perfectly willing to trust my children to her care and bounty. In the event of the marriage of

my said wife after my death, then I wish my property to be divided equally among her and my children who may then be in life, share and share alike, including the natural increase of the slaves but not the income of the property during her widowhood, it being my express intention that she shall not be held to account for any income or for any alleged waste or mismanagement. Should my said wife remain in widowhood during the term of her natural life, she is to have the same control, management and interest in the property as above specified until her death at which time I will and direct that it be divided equally share and share alike, among my then surviving children and the children (if any) of such as may have died before her, the latter to take per stirpes to them and their heirs forever,"—the widow of the testator took no greater estate than one for life, subject to be terminated by her marriage.

In *Cowman v. Glos* (1912) 255 Ill. 377, 99 N. E. 586, it was held that a devise to testator's widow so long as she remains unmarried, and in case she should remarry, one third to go to her and the remainder to testator's children, gave the widow a life estate only, subject to be terminated by her marriage.

In *Rumsey v. Durham* (1854) 5 Ind. 71, it was held that under a will by which testator gave his wife "as long as she remains my widow, the use and benefit of all my real and personal property for the support of herself and family," further providing that after her death or remarriage the property should be sold and equally divided among testator's children, the widow evidently took a life estate.

In *Hibbits v. Jack* (1884) 97 Ind. 570, 49 Am. Rep. 478, it was held that under a devise to testator's wife "so long as she shall remain my widow," of all testator's property, the widow took at most an estate for life.

In *Brunk v. Brunk* (1912) 157 Iowa, 51, 137 N. W. 1065, where a will provided: "I will all my real estate and personal property to my wife, Elizabeth Brunk, while she remains my widow.

If she should fail to be my widow during her lifetime, she is to have one third of all my real estate and personal property, and the balance is to be divided equally between my children," it was held that the widow took only a life estate, subject to the condition with reference to marriage, the court saying: "The language of the first para-

graph is not broader in its effect than a devise to the widow for life or during widowhood. She could not remain his widow after her death, and the devise therefore conferred upon her no estate which could pass by inheritance."

In *Price v. Ewell* (1915) 169 Iowa, 206, 151 N. W. 79, it was held that under a devise to testator's wife of certain realty and of his residuary estate, "to have and to hold in her exclusive right so long as she shall remain unmarried," and disposing of the estate in case of her marriage or decease, the widow took only a life estate, subject to be terminated by her remarriage.

In *Best v. Best* (1889) 88 Ky. 569, 11 S. W. 600, testator gave all his property to his wife, adding: "I desire that all the property, real and personal and mixed, be under the control and desire of my said wife, and to be managed by her as she may wish. Should my wife intermarry, then I desire that she may give security for all property remaining on hand for the purpose of protecting my children, and, should she remain unmarried, at her death I desire that all the property remaining be divided equally with my children [naming them] share and share alike," and appointed her as executrix, to act without giving security. It was held that the provision quoted so far qualified what would otherwise have been regarded as an absolute estate as to make it, according to the evident intention of the testator, an estate for life or during widowhood, though with a power of disposal for the support of the widow and children.

In *Morgan v. Christian* (1911) 142 Ky. 14, 133 S. W. 982, testator by an artificially drawn will provided: "I will my wife, Sarah B. Tanner," certain real and personal property, concluding: "She also can hold this entire property or depts or depts this is my will so long as she remains my widow, and if she marries, the lower tract of land will be equal divided between the boys and Lizzie Tanner home farm." It was held that it was clearly testator's intention that the widow should take, not a fee, but a life estate, subject to be terminated or defeated by her marrying again.

In *Mason v. Tuell* (1914) 161 Ky. 392, 170 S. W. 950, where testator gave all his property, both real and personal, to his wife, "to use and manage as she thinks best as long as she shall remain unmarried and my widow. I hereby give to her the full power and authority to sell any or all of my real estate at private or public sale and invest the

proceeds as she may deem best for the interest of my family; but on her decease or marriage, any property remaining I give and devise to my children and their heirs respectively," it was held that as the power of disposition given to the wife was not general, but limited, she did not take a fee, but only a life estate in the property devised.

In *Nash v. Simpson* (1886) 78 Me. 142, 3 Atl. 53, where testator devised to his wife all his real estate, "to remain hers so long as she shall remain unmarried after my decease, but if she shall marry again, then from that time she shall be entitled to and receive only one third part of all that remains," it was held that the widow took a life estate only, and not a fee, although there was no devise over.

In *Tapley v. Douglass* (1915) 113 Me. 392, 94 Atl. 486, where testator made the following bequest: "I will and bequeath to Hattie R. Douglass \$2,000 in money" and certain personal property, "to have and use so long as she shall remain the widow of Jeremiah Douglass," it was held that the legatee had only a life estate in the money and other property mentioned in the bequest to her, determinable upon her marrying again.

In *Hale v. Neilson* (1916) 112 Miss. 291, 72 So. 1011 (suggestion of error denied in (1916) 113 Miss. 29, 73 So. 865), where testator provided:

"Item 2. I devise and bequeath all of my estate, both real and personal to my beloved wife, to have, to hold and enjoy the same as long as she continues my widow.

"Item 3. It is my will and I so direct that in the event of the marriage of my widow, that she retain to her own separate use, benefit and behoof, one half of my said estate, both real and personal, during her natural life, and upon her death, should she leave surviving her any child, or children or descendants of them, I devise and bequeath to such child or children or descendants of them the said half so to be retained by my wife during her natural life, but should she die not leaving any child or children or descendants of them I bequeath and devise said last mentioned half to the persons herein-after mentioned in the 4th item of this will, to be divided among them in the proportion therein provided for the division of said half to be given up by my wife upon marriage as aforesaid.

"Item 4. In the event of the marriage of my widow, I devise and bequeath one

half of my estate, both real and personal, to the following persons, in the following proportions, to wit, one fifth of said half each to my sisters, Annie F. Symons and Catherine C. Hopkins, my niece, Annie Little, my nephew, Walker Neilson; and one tenth of said half each to my nephews, William Covington and Benjamin Covington, to have and to hold unto themselves and their respective heirs in fee simple.

"Item 5. It is the full meaning and intent of this my last will and testament that my beloved wife shall hold and enjoy all of my estate during her widowhood, in case she marries, that one half of my estate be divided and disposed of among my said sisters, niece, and nephews as specified and directed in item 4 of this will; that my wife retain during her natural life the other half of my estate, and that in case my wife die leaving a child or children or their descendants surviving her the last mentioned half of my estate shall be divided between my said sisters, niece, and nephews in the same manner and proportions as directed in said item 4 of this will for the division of said half so to be given up by my wife in case of her marriage," it was held that the will, taken as a whole, showed that it was testator's intention to give his widow not a conditional fee, but at best a mere life estate.

In *Worley v. Wimberly* (1915) 99 Neb. 20, 154 N. W. 849, where a testator who, when his will was drawn and at his death had a wife and three children, the objects of his bounty, made the following disposition: "Second 2. I give and bequeath to my beloved wife, Eliza Jane Worley, all of my real estate (describing it). Third 3. And all the personal property of every description whatsoever moneys notes bankable paper of every description belonging to me at my death. Fourth 4th. And the said Eliza Jane Worley my beloved wife is to have the use of all lands and personal property so long as she lives or remains my widow but if she should marry then all property both real and personal shall be divided up equally between the children and at any time the property is divided and each child shall choose one man each and they shall divide the property equally and if the said Eliza Jane Worley wants to help any one of the children she can do so and it be charged up to their estate and taken out at final settlement,"—it was held that the widow did not take a fee, but only a life estate.

In *Schminke v. Sinclair* (1916) 100 Neb. 101, 158 N. W. 458, where testator provided: "I devise and bequeath all the estate and effects, whatsoever and wheresoever, both real and personal, to which I may be entitled or which I may have power to dispose of at my decease, unto my dear and beloved wife Anna Schminke so long as she shall continue my widow and unmarried; and in the event of her marriage or death I devise and bequeath the same to my children to be divided between them as nearly as may be possible in equal shares," it was held that the general and equivocal words in the first part of the will, which, standing alone, might have given the fee to the wife, were to be considered as limited by the subsequent clauses evidencing an intent to devise only a life estate.

In *Fenster v. Bierman* (1916) — N. J. Eq. —, 99 Atl. 529, where testator gave and devised to his wife, Flora, all his residuary estate, "to have, hold, manage, control, lease, sell, mortgage, exchange, convey and convert the same in her discretion, and to have full charge and control of same (this third provision of my will shall be in full force and effect so long as Flora does not remarry). Upon the remarriage of my wife after my death I request and direct my wife Flora to divide the rest, residue and remainder of my estate, real and personal wheresoever and whatsoever into four equal shares and to pay, make over and convey one of said shares to each of my sons here named," giving a share to each of his three children, and the fourth to the widow herself, it was held that as, by the parenthetical statement which included the third clause of his will, the testator had in express terms limited the

devise to his widow to her widowhood, she took only a life interest, subject to be terminated by her remarriage.

In *Pettis v. Smith* (1873) 69 N. C. 3, it was held that under a will by which testator gave his wife certain real and personal property, "all of which property to be hers during her widowhood; in the event of her marriage the one third of the above property to be hers forever, and the balance to be divided among my children,"—the wife took an estate for life.

In *Kemerer's Estate* (1916) 251 Pa. 282, 96 Atl. 654, where testator bequeathed all his estate, real and personal, "to my beloved wife so long as she remains my widow," further providing: "After her death I direct that my property be sold, and the proceeds of my estate be divided equally, share and share alike among my children," it was held that the widow took only an estate for life or so long as she should remain unmarried, any other construction being precluded by the language employed by the testator.

In *Hendricks v. Temple* (1915) 101 S. C. 418, 85 S. E. 961, where testator devised certain lands to his wife "to have and to hold, to use and possess during her natural life or widowhood, but in the event she should marry or if she lives single until she dies, in either case it is my will that the above named land be sold by my executors . . . and proceeds of the sale of land be divided in the following manner: one third to her or her heirs, one third to the children of my son . . . one third to my daughter," it was held that the widow took no more than a life estate, liable to be divested upon her marriage. E. S. O.

IOWA SUPREME COURT.

MARY McNABB, Appt.,
v.

HOOVER McNABB.

(— Iowa, —, 166 N. W. 457.)

Divorce — habitual drunkenness — marriage under promise of reform.
One who remarries a man from whom she

has been divorced on his promise to drink no more intoxicating liquor cannot secure a divorce because of his failure to keep his promise, where, by statute, habitual drunkenness is a ground for divorce only in case the habit is formed after marriage.

For other cases, see Divorce and Separation. Ill. c, in Dig. 1-52 N. S.

(February 16, 1918.)

Note. — For effect of fact that habit relied upon as ground of divorce was contracted before the marriage, see annotation following this case, post, 867, and references therein to annotations on related questions.

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APPEAL by plaintiff from a judgment of the District Court for Mahaska County dismissing her petition on the merits in an action for a divorce and alimony. **Affirmed.**
The facts are stated in the opinion.

Mr. Dan Davis, for appellant:

Plaintiff is entitled to a divorce on any and all the grounds alleged in the petition.

Pierce v. Pierce, 33 Iowa, 238; Douglass v. Douglass, 31 Iowa, 421; Owen v. Owen, 90 Iowa, 365, 57 N. W. 887; Day v. Day, 84 Iowa, 221, 50 N. W. 979; Taylor v. Taylor, 80 Iowa, 29, 20 Am. St. Rep. 394, 45 N. W. 307; Rivers v. Rivers, 65 Iowa, 568, 22 N. W. 679; Wheeler v. Wheeler, 53 Iowa, 511, 36 Am. Rep. 240, 5 N. W. 689; Lewis v. Lewis, 75 Iowa, 200, 39 N. W. 271; Lane v. Lane, 67 Iowa, 76, 24 N. W. 601; Sackrider v. Sackrider, 60 Iowa, 397, 14 N. W. 736; Cole v. Cole, 23 Iowa, 433; Caruthers v. Caruthers, 13 Iowa, 266; Vanduzer v. Vanduzer, 70 Iowa, 614, 31 N. W. 956; Platner v. Platner, 66 Iowa, 378, 23 N. W. 764; Hart v. Hart, 74 Iowa, 487, 38 N. W. 375.

No appearance for appellee.

Preston, Ch. J., delivered the opinion of the court:

In her petition plaintiff asked for a divorce on three grounds: Desertion, cruel and inhuman treatment, and that he has become an habitual drunkard since the marriage.

There was no appearance in the district court for defendant, either in person or counsel, and a default was entered against him. The plaintiff's evidence was taken down by the reporter. Plaintiff was examined as a witness in her own behalf, as was her mother and another witness. There was cross-examination by the court, but very little of the cross-examination is set out in the abstract. Under the circumstances, we have thought it proper to order a transcript of the evidence in order that we may have the case as nearly as may be as it was presented to the trial court.

It appears that plaintiff had been married to another man, by whom she had five children. She has no children by the defendant. The first husband obtained a divorce from her, but the grounds are not shown in the abstract. Plaintiff had obtained a divorce from the defendant, but had remarried him. Plaintiff testifies to her husband's habits of intoxication, and there is some corroboration by other witnesses at this point, but it appears that defendant was an habitual drunkard before she married him the last time. She testified that before she married him the last time he promised her he would take the cure for the liquor habit, and that he would not drink any more, but that he was not cured, and began his drinking habits again a few days after the last marriage. Under such circumstances we think the requirements of the statute have not been met, that to entitle her to a divorce on that ground he

must have become an habitual drunkard after the marriage.

Plaintiff testifies as to acts of cruelty which, if corroborated, would perhaps justify the court in granting a divorce. Some of her testimony is in the nature of conclusions, and is such that she could have no personal knowledge, such as that he hunted her with a revolver. The only evidence that could be claimed as corroboration as to the alleged cruelty is given by plaintiff's mother. The mother does not testify to having seen any acts of cruelty on the part of the defendant towards plaintiff. She says he came over to her house, as we understand it after plaintiff had gone, and that defendant had a gun, but does not testify that defendant made any attempt to use it, or what he did with it, or that any threats were made, or that plaintiff was present. So that the testimony as to this is that of the plaintiff alone, and her evidence is not entirely satisfactory. Code, § 3173, provides that no divorce shall be granted on the testimony of the plaintiff alone.

Such is the situation, too, in regard to the charge of desertion. She testifies that she left the defendant two years before the bringing of the action because of his mistreatment of her. The mother testifies in regard to the separation at about that time, but does not show that they have not lived together since. Another witness on this branch of the case testifies that plaintiff worked for her two or three months of the alleged two years' desertion, and that she had never lived with defendant since then to her knowledge. But the witness lived in the town of Washington, Iowa, and the plaintiff and defendant in another town, except the time that plaintiff worked for witness. It is not shown that the witness was so situated as to have any knowledge on the subject, except for the short time plaintiff worked for her.

Without any appearance for the defendant in the district court, or in this court, makes it an unsatisfactory way to present the case to us. The trial court had the advantage of seeing the witnesses. It is our conclusion that the showing is not sufficient to justify a divorce. We have examined the transcript, which shows some other matters than those referred to, and which strengthens our conclusion that the record does not present a case for reversal. Indeed, taking the entire record, it is clearly manifest that plaintiff did not show herself entitled to a divorce.

Though it does not appear in the abstract, the transcript shows that after plaintiff obtained a divorce from her first husband she married one Arnold. She was indicted with Arnold for a crime, but was acquitted. Ar-

nold was convicted, and she obtained a divorce from him, and she then married again. It is not quite clear, but, as we gather from the record and from the cross-examination of plaintiff by the court, plaintiff also obtained a divorce from one Rishmiller on the ground of desertion. At any rate, plaintiff testifies that she has been married four times, but to only three men. It appears, too, that in December, 1916, she attempted to get a divorce from the defendant in the Keokuk county district court on the same grounds now alleged, except desertion. That case was tried before Judge Talbott, and her petition dismissed on the merits April 3, 1917. Plaintiff's mother testified on the examination by the court

that for the last fifteen or sixteen years the defendant has been in the habit of getting drunk. She also testifies that defendant would come down and visit witness, and that he came when plaintiff did a part of the time, and part of the time he did not, but the date when plaintiff and defendant visited together is uncertain. Witness Bickford, who testifies in regard to the alleged desertion, testifies on examination by the court that all she knew about it was what plaintiff told her, except while plaintiff was at the home of witness in Washington.

The judgment is affirmed.

Gaynor, Stevens, and Ladd, JJ., concur.

Annotation—Divorce: effect of fact that habit relied upon as ground of divorce was contracted before the marriage.

There seems to be very little in the books on this subject.

The decision in *McNABB v. McNABB*, ante, 865, is under a statute allowing a divorce from the husband when after marriage he becomes addicted to habitual drunkenness.

It may be observed that in *Wheeler v. Wheeler* (1880) 53 Iowa, 511, 36 Am. Rep. 240, 5 N. W. 689, where it was claimed by the defendant that "he was addicted to an excessive use of intoxicating liquors before his marriage, that on one or two occasions he was drunk, and that the plaintiff so knew," it was found, as matter of fact, that he was not an habitual drunkard at the time of his marriage; that in *Bill v. Bill* (1916) —, Iowa, —, 157 N. W. 158, it was held that the defendant was not in the habit of drinking to excess before marriage; and that in *Lewis v. Lewis* (1888) 75 Iowa, 200, 39 N. W. 271, there was sufficient evidence outside that of the plaintiff to show that the habit did not become habitual until after the marriage, the statute providing that "no divorce shall be granted on the testimony of the plaintiff alone."

It may be noted, for example, that in *McMahon v. McMahon* (1910) 170 Ala. 338, 54 So. 165, the statutory ground for divorce was "becoming addicted after marriage to habitual drunkenness;" and that in *McBee v. McBee* (1892) 22 Or. 329, 29 Am. St. Rep. 613, 29 Pac. 887, the statutory ground was "habitual gross drunkenness contracted since marriage and continuing for one year prior to the commencement of the suit."

Where the statutory ground was gross and confirmed habits of intoxication L.R.A.1918C.

contracted after marriage, the court said: "To make out a cause of divorce upon the ground of habits of intoxication, such habits must not only have been gross and confirmed, but they must have been contracted since the marriage; if they were contracted before the marriage, although not known to the other party until afterwards, they would not be a cause of divorce." *Lyster v. Lyster* (1873) 111 Mass. 327.

And where the statutory ground was habitual drunkenness when the party has contracted the habit of drunkenness after the marriage, the court, in dismissing the wife's bill, said inter alia: "The whisky or drinking habit of the defendant existed before the marriage. This is not disputed. That the complainant was cognizant of it before the marriage is not seriously disputed or disputable under the evidence." *Hickerson v. Hickerson* (1899) —, Tenn. —, 52 S. W. 1019.

Under a statute providing that the court may grant a divorce when the defendant "shall have become an habitual drunkard," the defendant must have become an habitual drunkard after the marriage. *Porritt v. Porritt* (1867) 16 Mich. 140, where the court said: "Unless, perhaps, when his habits have been concealed from the complainant's knowledge until after the marriage, a point upon which we express no opinion, as it is not before us."

In *Tilton v. Tilton* (1895) 16 Ky. L. Rep. 538, 29 S. W. 290, the wife had sued for divorce on various grounds, including a confirmed habit of drunkenness, and the chancellor had refused any relief to her, but granted a divorce to

the husband. Although reversing this decree the court said: "The distress of mind on her part, and the cruelty of the husband, consisted in his persistent purpose to lead a life of dissipation, and this the unfortunate woman was appraised of, and assumed to risk, when taking him as her husband; and upon this state of facts the chancellor would have been justified in dismissing her petition, and certainly denying to her such relief as an absolute divorce." In this case the statutory ground was "confirmed habit of drunkenness on the part of the husband, of not less than one year's duration, accompanied with a wasting of his estate, and without any

suitable provision for the maintenance of his wife or children."

For the general subject of drunkenness as effecting divorce, see the note in 34 L.R.A. 449. For morphinism as a ground for divorce, see the note in 39 L.R.A. 264. As to who is an habitual drunkard within the meaning of the divorce laws, see the notes in 6 L.R.A. (N.S.) 914, and 40 L.R.A. (N.S.) 655. For reformation as effecting right of divorce on ground of drunkenness or use of drugs, see the note in L.R.A. 1917D, 361. For effect of complainant's knowledge of spouse's antenuptial unchastity as a bar to divorce for subsequent adultery, see the note in 23 L.R.A. (N.S.) 240. B. B. B.

MINNESOTA SUPREME COURT.

JOSEPH LEBENS, Appt.,

v.

PETER WOLF, Respt.

(— Minn. —, 165 N. W. 276.)

Evidence — negligence of bailee — burden of proof.

1. In this action to recover damages for injury to a stallion while in the care and custody of defendant as bailee, the burden of proof is upon plaintiff, the bailor, to establish that the injury resulted from defendant's negligence or breach of duty to exercise the due care required under the contract of bailment. This is so whether the bailment be gratuitous or for the mutual benefit of the parties.

For other cases, see Evidence, II. h, 1, f, in Dig. 1-52 N. S.

Same — sufficiency.

2. When plaintiff proved that defendant received the animal in a good condition and returned the same with an injury which ordinarily does not happen without negligence of the keeper, a prima facie case was made out, and it was error to then dismiss the action.

For other cases, see Evidence, II. h, 1, f, in Dig. 1-52 N. S.

(December 7, 1917.)

Headnotes by HOLT, J.

Note. — The question of presumption and burden of proof as to care or negligence in respect to subject of bailment is discussed in an extensive note to *Stone v. Case*, 43 L.R.A. (N.S.) 1168; and see later cases, *Nutt v. Davidson*, 44 L.R.A. (N.S.) 1170; *Travelers' Indemnity Co. v. Fawkes*, 45 L.R.A. (N.S.) 381; and *Colburn v. Washington State Art Assn.* L.R.A. 1915A, 594. L.R.A. 1918C.

A PPEAL by plaintiff from an order of the District Court for Nobles County denying new trial of an action brought to recover damages for injuries to a horse while in defendant's care and custody as bailee. Reversed.

The facts are stated in the opinion.

Mr. J. A. Cashel for appellant.

Mr. E. H. Canfield for respondent.

Holt, J., delivered the opinion of the court:

The complaint alleges the loan of a stallion, in good condition to defendant, upon the agreement that he should be used solely for farm work; that the defendant should feed and care for him and take extraordinary precaution to prevent his being injured, disabled, or overworked, and that defendant neglected to care for the animal so that he "became kicked" and permanently injured, in which condition he was returned to plaintiff, the owner, causing a damage in the sum of \$878.25. When plaintiff rested, the action was dismissed on defendant's motion. The appeal is from the order denying a new trial.

Since the horse was returned to the bailor, the cause of action is not to be considered as one in conversion imposing the burden upon the bailee of proving that the loss was not due to want of care, under the rule in *Davis v. Tribune Printing Co.* 70 Minn. 95, 72 N. W. 808, but as one based upon negligence or failure of the bailee to give the subject of the bailment proper care while in his custody. *Shropshire v. Sidebottom*, 30 Mont. 406, 76 Pac. 941. The burden of proof is therefore upon plaintiff to show defendant's negligence or breach of duty to use due care as the cause of the injury. "The final burden is on the bailor to prove

negligence, not on the bailee to prove due care." *Sanford v. Kimball*, 106 Me. 355, 138 Am. St. Rep. 345, 76 Atl. 890. It matters not whether the bailment was gratuitous or for the mutual benefit of both parties, for the character of the bailment would only bear upon the care to be exercised in respect to the property bailed. *Pregent v. Mills*, 51 Wash. 187, 98 Pac. 328. Some decisions involving damages under bailments speak of the burden of proof as shifting to the bailee upon the bailor proving that the property was in good condition when delivered and in a damaged state when returned. But, accurately speaking, the burden of proof never shifts in the trial of a law suit. The burden of evidence may shift. When the testimony is all in, the preponderance thereof must be in favor of that litigant who, under the pleadings and the nature of the cause of action or defense, has the burden of proof; otherwise the decision will go to the other party. *McEleney v. Donovan*, 119 Minn. 294, 138 N. W. 306; *Rustad v. Great Northern R. Co.* 122 Minn. 453, 142 N. W. 727; *J. D. Marshall Livery Co. v. McKelvey*, 55 Mo. App. 240; *Willett v. Rich*, 142 Mass. 356, 56 Am. Rep. 684, 7 N. E. 776.

But, notwithstanding that the burden of proof in this case was upon plaintiff to prove negligence of defendant as the cause of the stallion's injury, we are of opinion that a *prima facie* case was made; hence it was error to dismiss the action. True it is that the authorities are not in harmony as to what proof will make a *prima facie* case in the bailment of animals, some holding that proof of good condition when delivered to the bailee and of injured when returned is not sufficient. *Malaney v. Taft*, 60 Vt. 571, 6 Am. St. Rep. 135, 15 Atl. 326. Others again declare such proof adequate. *Miller v. Miloslawsky*, 153 Iowa, 135, 133 N. W. 357; *Jackson v. McDonald*, 70 N. J. L. 594, 57 Atl. 126, 15 Am. Neg. Rep. 611; *Hislop v. Ordner*, 28 Tex. Civ. App. 540, 67 S. W. 337, 11 Am. Neg. Rep. 507; *Rutherford v. Krause*, 55 App. Div. 210, 66 N. Y. Supp. 781. But it may be a harsh rule to permit an inference of negligence or want of care from the mere fact that a bailee returns an animal in a diseased or injured condition, because, in spite of due care or even the best of care, animals are subject to sickness and accidental injury in moving about. They are different in this respect from other bailable property. Therefore this rule, announced by several courts, appears more fair than either of the two mentioned, to wit: The bailor makes a *prima facie* case when he shows that the animal when left in the keeping of the bailee was in good condition and was re-

turned suffering from an injury that does not ordinarily occur without negligence on the part of its keeper. *Hildebrand v. Carroll*, 106 Wis. 324, 80 Am. St. Rep. 29, 82 N. W. 145; *Powers v. Jughardt*, 101 App. Div. 53, 91 N. Y. Supp. 556; *Collins v. Bennett*, 46 N. Y. 490, 1 Am. Neg. Cas. 690; *Nutt v. Davison*, 54 Colo. 586, 44 L.R.A. (N.S.) 1170, 131 Pac. 390, and cases cited under headings IX, and X, in the note to *Stone v. Case*, 43 L.R.A. (N.S.) 1168.

Without discussing or setting out the testimony it is enough, in view of our conclusion that a new trial must be had, to say that plaintiff's evidence tended to prove that defendant returned the stallion with an injury which, on account of its nature and location, could not well have been caused by disease or by accidental hurt while the animal was unattended in his stall, so that the jury, in the absence of any explanation from the one in whose care defendant had placed him when the injury first appeared, might reasonably infer that improper use or care was the cause thereof. This, under the rule last stated, makes a *prima facie* case which defendant must meet with proof in explanation or avoidance of the inference of improper care, which otherwise the jury might legitimately draw from the facts proven.

There should be a new trial.

Order reversed.

MISSOURI SUPREME COURT. (In Banc.)

MINNIE T. BOLIN

v.

TYROL INVESTMENT COMPANY.

(— Mo. —, 200 S. W. 1059.)

Covenant — restrictive — apartment house.

An apartment house with six apartments is a dwelling within a covenant that a grantee shall not construct upon the property a dwelling less than two stories in height, or construct more than one dwelling on each 50 feet of frontage.

For other cases, see *Covenants and Conditions*, 11. d, in *Dig. 1-52 N. S.*

(Graves, Ch. J., and Walker and Blair, JJ., dissent.)

(February 2, 1918.)

Note.— For multiple residence structures as violation of restrictive covenants, see annotation following this case, post, 873, and references therein to annotation on related questions.

CERTIFICATION by the St. Louis Court of Appeals for determination by the Supreme Court, after reversal by it, of an appeal from a decree of the Circuit Court of the City of St. Louis, dismissing a suit brought to enjoin defendant from erecting an apartment house in violation of a restrictive covenant in a deed. Judgment of the Circuit Court affirmed.

Statement by **Brown, C.:**

This suit was brought to the June term, 1910, of the circuit court for the city of St. Louis, for the purpose of obtaining an injunction restraining the defendant from erecting an apartment house on lot 15 in block 3810 of Chamberlain park, a subdivision of the city of St. Louis. The lot is on the southwest corner of Etzel and Belt avenues, on each of which is a frontage of about 200 feet. The house which defendant proposed to build is a handsome structure to cost between \$25,000 and \$30,000. It is to be three stories in height, with a single entrance in the middle of the front elevation, opening into a common hall, from which access is had to each suite or apartment, of which there are three on each side, each occupying the entire floor on that side. There are no porches or other structures on the outside indicating the different apartments. In short, the words "apartment house" used in the petition properly describe it.

One Chamberlain, being the owner of the land in 1887, laid out the subdivision by statutory plat. The Western Realty Company, having acquired it, conveyed block 3810 to John Jackson by deed dated October 5, 1887, in which it was expressly provided that neither the said grantee, nor anyone claiming by, through, or under him, prior to the 31st day of December, 1920:

"1. Shall construct or allow to be constructed in the premises above described any dwelling house less than two stories in height.

"2. Shall construct or allow to be constructed more than one such dwelling on each 50 feet front of said lot.

"3. Shall construct or allow to be constructed thereon any dwelling to cost less than \$4,000 in cash, nor locate or erect such dwelling nearer than 30 feet to the line of the street on which such dwelling fronts.

"4. Shall construct or allow to be constructed any stable, shed, or outhouse nearer to any public driveway than 100 feet.

"5. Shall construct or allow to be constructed or erected or to exist any nuisance or any livery stable or manufacturing establishment of any kind on said premises.

"6. Shall construct or allow to be constructed, used, or occupied any grocery store, L.R.A.1918C.

barroom, or business place for the bargain and sale of any kind of merchandise on said premises. To have and to hold the premises hereby conveyed, subject to the exceptions, reservations, conditions, and reversions aforesaid."

Both plaintiff and defendant claim by mesne conveyances through Jackson.

Messrs. Frumberg & Russell, for plaintiff:

An apartment house is a number of dwellings, and the erection of such a building is a violation of a restriction against the erection of more than one dwelling.

Sanders v. Dixon, 114 Mo. App. 229, 89 S. W. 577; *Thompson v. Langan*, 172 Mo. App. 64, 154 S. W. 808; *Bolin v. Tyrol Invest. Co.* 178 Mo. App. 1, 160 S. W. 588, 164 S. W. 259; *Schadt v. Brill*, 173 Mich. 647, 45 L.R.A.(N.S.) 726, 139 N. W. 878; *Harris v. Roraback*, 137 Mich. 292, 109 Am. St. Rep. 681, 100 N. W. 391; *Rogers v. Hosegood* [1900] 2 Ch. 888, 69 L. J. Ch. N. S. 652, 48 Week. Rep. 650, 83 L. T. N. S. 186, 16 Times L. R. 489; *Kingston v. Busch*, 176 Mich. 566, 142 N. W. 754; *Bagnall v. Young*, 151 Mich. 69, 114 N. W. 674.

Messrs. Ephrim Caplan and Rassieur, Kammerer, & Rassieur, for defendant:

Restrictive covenants, being in derogation of the right to the unrestricted use of property, are to be construed strictly against the parties seeking to enforce them, and they will not be extended by implication to include anything not plainly prohibited.

Zinn v. Sidler, 268 Mo. 680, L.R.A.1917A, 455, 187 S. W. 1172; *Kitchen v. Hawley*, 150 Mo. App. 497, 131 S. W. 142; *Pank v. Eaton*, 115 Mo. App. 171, 89 S. W. 586; *Hartman v. Wells*, 257 Ill. 167, 100 N. E. 500, Ann. Cas. 1914A, 901.

Where the grantor enters into detail, specifying certain matters as prohibited, it is to be presumed, if nothing to the contrary appears, that buildings of a character not thus excluded are intended as a proper use of the property. All doubts are to be resolved in favor of the free and untrammelled use of the property and against restrictions.

Underwood v. Herman, 82 N. J. Eq. 353, 89 Atl. 21; *Kitchen v. Hawley*, 150 Mo. App. 497, 131 S. W. 142; *Hutchinson v. Ulrich*, 145 Ill. 336, 21 L.R.A. 391, 34 N. E. 556; *Hunt v. Held*, 90 Ohio St. 280, L.R.A.1915D, 543, 107 N. E. 765, Ann. Cas. 1916C, 1051; *St. Andrew's Lutheran Church's Appeal*, 67 Pa. 512.

Restrictions as to construction and restrictions as to user are different and distinct, and a restriction against plural structures will not be construed to prohibit a plural use of a single structure unless such intention is clearly expressed.

Hamnett v. Born, 247 Pa. 418, 93 Atl. 505; Arnoff v. Williams, 94 Ohio St. 145, 113 N. E. 661; Pank v. Eaton, 115 Mo. App. 171, 89 S. W. 586; Kenwood Land Co. v. Hancock Invest. Co. 169 Mo. App. 715, 155 S. W. 861; Reformed Protestant Dutch Church v. Madison Ave. Bldg. Co. 214 N. Y. 268, L.R.A.1915F, 651, 108 N. E. 444.

Where the restriction has reference only to the construction of a permitted structure, and the language employed describes the building which may be erected in terms which have a general significance, and the restriction makes no reference to the use of the structure, then the terms employed will be given their usual and ordinary meaning.

Pank v. Eaton, 115 Mo. App. 171, 89 S. W. 586; Kitchen v. Hawley, 150 Mo. App. 497, 131 S. W. 142; Hamnett v. Born, supra; Hutchinson v. Ulrich, 145 Ill. 336, 21 L.R.A. 391, 34 N. E. 556.

A narrow and restricted meaning will not be given unless such intention is clearly expressed in the deed.

McMurtry v. Phillips Invest. Co. 103 Ky. 308, 40 L.R.A. 489, 45 S. W. 96; Arnoff v. Williams, 94 Ohio St. 145, 113 N. E. 661; Fortesque v. Carroll, 76 N. J. Eq. 588, 75 Atl. 923, Ann. Cas. 1912A, 79.

The term "dwelling house" is a general term merely descriptive of a structure suitable for human habitation, irrespective of how it may be occupied, and one dwelling house may be so constructed as to contain separate apartments, each of which may constitute a dwelling, yet the whole be in fact but one structure.

Berry, Real Prop. § 95; Johnson v. Jones, 244 Pa. 389, 52 L.R.A.(N.S.) 325, 90 Atl. 649; Reformed Protestant Dutch Church v. Madison Ave. Bldg. Co. 214 N. Y. 268, L.R.A.1915F, 651, 108 N. E. 444.

An apartment house is a "dwelling house," and does not violate a restriction prohibiting the erection of more than one dwelling house on a single lot.

Hamnett v. Born, 247 Pa. 418, 93 Atl. 505; Arnoff v. Williams, 94 Ohio St. 145, 113 N. E. 661; Sonn v. Heilberg, 38 App. Div. 515, 56 N. Y. Supp. 341; Bates v. Logeling, 137 App. Div. 578, 122 N. Y. Supp. 251; Holt v. Fleischman, 75 App. Div. 593, 78 N. Y. Supp. 647; Stone v. Pillsbury, 167 Mass. 332, 45 N. E. 768; Hutchinson v. Ulrich, 145 Ill. 336, 21 L.R.A. 391, 34 N. E. 556.

Brown, C., filed the following opinion:

The sole question presented by the parties in this court is whether the erection of the building described would be a violation of any of the restrictive covenants of the deed. Covenants of this character expressed in deeds of conveyance of lands are in the L.R.A.1918C.

nature of easements reserved by the grantor in the lands conveyed, appurtenant to his other lands. Compton-Hill Improv. Co. v. Tower, 158 Mo. 282, 59 S. W. 239; King v. Union Trust Co. 226 Mo. 351, 126 S. W. 415. In these cases we called it "an easement running with the land." It is, as such, an encumbrance consistent with the passing of the fee by the conveyance in which it is reserved. The curious will find this subject interestingly discussed, with reference to many authorities with which it is unnecessary to encumber this record, in §§ 4 and 5 of Berry's "Restrictions on the Use of Real Property." It is useless to waste words in demonstrating that such easements are usually reserved by the grantor in the hope that they will prove valuable to him in the disposition of his land. Being in derogation of the fee conveyed by the deed, such covenants will not be extended by implication to include anything not clearly expressed in them. Zimm v. Sidler, 268 Mo. 680, L.R.A.1917A, 455, 187 S. W. 1172; Kitchen v. Hawley, 150 Mo. App. 497, 131 S. W. 142; Hutchinson v. Ulrich, 145 Ill. 336, 21 L.R.A. 391, 34 N. E. 556; Hartman v. Wells, 257 Ill. 167, 172, 100 N. E. 500, Ann. Cas. 1914A, 901; Hamnett v. Born, 247 Pa. 418, 93 Atl. 505; Johnson v. Jones, 244 Pa. 386, 52 L.R.A.(N.S.) 325, 90 Atl. 649. The words "clearly expressed," as used by this and other courts, have no significance, unless they mean that if a reasonable and substantial doubt is raised by the words employed in the covenant, it must be resolved against the grantor. Stone v. Pillsbury, 167 Mass. 332, 45 N. E. 768, and cases cited; Johnson v. Jones, supra; Grooms v. Morrison, 249 Mo. 544, 155 S. W. 480; Linville v. Greer, 165 Mo. 380, 65 S. W. 579. It is only by such construction that such titles can be made certain, so that the use of lands conveyed in fee shall not depend upon the diverse opinions of judges as to the minds of the parties to the grant, but restrictions thereon shall appear plainly written in the grant.

This subdivision was platted in May, 1887. On October 5, 1887, the Western Realty Company had acquired it, and on that date conveyed block 3810 to John Jackson, with the restrictions we have quoted. This was an important transaction, involving, according to the evidence, between 2,000 and 3,000 feet of the frontage of the subdivision on Bartmer and Etzel avenues. These restrictions were evolved from the desire of the Realty Company to sell and of Jackson to buy. The company was, so to speak, walking on the top rail of the fence which divided profit from loss,—the hoped-for advantage to its other lands from the restrictions it might impose, and the loss of

the bargain it was making,—with only its pen for a balance, and it behooved it to use it carefully to save itself from falling on the wrong side. Mr. Jackson's interest did not lie with its, for restrictions would do him no good. He could create them by his own deeds, should he so desire. The result was that the Realty Company, if it ever had the idea of making block 3810 an exclusive residence district, as charged in the petition and argued at bar, abandoned it, and placed in the deed nothing which could, by any logical stretch of the imagination, be construed into such a restriction. On the contrary, it proceeded, in express terms, to enumerate other structures which it desired to exclude. These were livery stables, manufacturing establishments, grocery stores, barrooms, and business places for the bargain and sale of merchandise. By the operation of the good old maxim, "Expressio unius est exclusio alterius," it excluded all other structures than those mentioned from the category of its restrictive easements. Purchasers under that deed might erect office buildings, hospitals, hotels, boarding houses, churches, homes for the aged and for abandoned infants, and many other structures intended to be used for purposes of business or charity not included in its list. Apartment houses are not referred to unless they come within the description "dwelling house." We gather from the instrument that all these matters were in the minds of the parties when the Jackson deed was made, and that the extent to which the new enterprise was to be encumbered with these restrictions was discussed and determined. The argument of the appellant in this case seems to be founded, to a great extent, upon the ideal which it is assumed the founder of Chamberlain park and the Western Realty Company had in mind when he conceived the enterprise, and not upon the shattered fragments which survived this sale. With the first we have nothing to do. We are only concerned with the last.

The first restrictive clause in the deed refers to the construction of any "dwelling house" on the premises described less than two stories in height. With this clause we have nothing to do except to use the word "house" therein contained in explanation of the meaning of the adjective "such" in the second clause, which shows that it refers to the word "house" as already used, so that the clause reads in effect, "shall construct or allow to be constructed more than one such dwelling house on each 50 feet front of said lot." This is the clause upon which the appellant depends to maintain her suit. If it is not a dwelling house, there is no restriction; if it is a dwelling house,

it is expressly permitted; only on the theory that it is six dwelling houses can she maintain her suit.

The building, according to the testimony, is handsome and expensive, each apartment of the six which it contains costing more than the \$4,000 specified as the minimum cost of an entire house. That it conforms to the building line established is admitted. The only contention upon which appellant rests her case is that each apartment in this house is a "house" within the meaning of the second clause of the restrictions. This implies the absurdity that one house, if it be an apartment house, is six houses, and does mortal violence to the dictionary definition of the word, in which all the lexicographers of our language seem to agree, so that we will quote from the International, which is, we believe, authority. So far as it defines "house" as a structure it is as follows: "A structure intended or used for human habitation; esp., a human habitation which is fixed in place and is intended for the private occupation of a family or families."

This definition is supported by many judicial authorities, some of which refer to the very question before us. Among the latter are the following: Reformed Protestant Dutch Church v. Madison Ave. Bldg. Co. 214 N. Y. 268, L.R.A.1915F, 651, 108 N. E. 444; Hamnett v. Born, 247 Pa. 418, 93 Atl. 505; Bates v. Logeling, 137 App. Div. 578, 122 N. Y. Supp. 251; Johnson v. Jones, supra; Arnoff v. Williams, 94 Ohio St. 145, 113 N. E. 661; Hutchinson v. Ulrich, 145 Ill. 336, 21 L.R.A. 391, 34 N. E. 556; Stone v. Pillsbury, 167 Mass. 332, 45 N. E. 768.

The appellant cites us to Sanders v. Dixon, 114 Mo. App. 229, 89 S. W. 577, and Thompson v. Langan, 172 Mo. App. 64, 154 S. W. 808, as sustaining her contention, as well as to this case, which is reported in 178 Mo. App. at page 1, 160 S. W. 588, 164 S. W. 259, and certified to this court on the ground of conflict with the decisions of this court in Grooms v. Morrison, 249 Mo. 544, 155 S. W. 430, and Linville v. Greer, 165 Mo. 380, 65 S. W. 579. In the Sanders Case the meaning of the word "house" was not involved, nor used in the covenants. So far as either of those cases conflicts with the conclusion at which we have arrived, we do not follow them. Nor do we incline to the doctrine of the Michigan supreme court as expressed in the cases cited by appellant, beginning with and following Harris v. Roraback, 137 Mich. 292, 109 Am. St. Rep. 681, 100 N. W. 391. We consider them, in their application to the deed before us, as clearly against the great weight of authority in other states, as expressed in cases we have already cited, in which precisely

the same question now before us was in issue and decided. We will not refrain, however, from referring to the exact question decided in some of these cases. In *Schadt v. Brill*, 173 Mich. 647, 45 L.R.A. (N.S.) 726, 130 N. W. 878, the restriction prohibited the construction of a "store, factory, or building, other than a dwelling house," upon the premises, and that the premises should be used for residence purposes only. The court held that a double house or flat was not a dwelling house within the meaning of the restriction. In that respect it is an authority directly in respondent's favor. If this building is not six dwelling houses it does not come within the restriction. In *Bagnall v. Young*, 151 Mich. 69, 114 N. W. 674, the condition in the deed was "that nothing but a two-story dwelling house, costing not less than twenty-five hundred dollars, . . . shall be erected on said lots." The court held this restriction to be violated for reasons stated in *Harris v. Roraback*, supra, by the erection of a double two-story house. The covenant was held to mean that "no house except one planned and designed for a single dwelling should be erected." In all these

cases the covenant or condition prohibited the construction on the land of any building other than a dwelling house, and the court held that a double house or flat did not come within that description. In the case before us all other structures except the few especially prohibited are clearly permissible.

In this comment we do not intend to express our approval of the doctrine announced by the Michigan court in these cases, but only to direct attention to the inapplicability of its reasoning to this case.

The judgment of the Circuit Court for the City of St. Louis is affirmed.

Per Curiam:

The foregoing opinion of Brown, C., is adopted as the opinion of the court in banc.

Bond, Faris, Woodson, and Williams, JJ., concur.

Graves, Ch. J., and Walker and Blair, JJ., dissent.

Petition for rehearing denied.

Annotation—Multiple residence structures as violation of restrictive covenants.

This note is supplemental to the note to *Schadt v. Brill*, 45 L.R.A. (N.S.) 726, where the earlier cases are collected, and where there will be found a statement of the general principles.

This note does not include community residence as violation of restrictive covenant as that question is treated in the note to *Easterbrook v. Hebrew Ladies' Orphan Asylum*, 41 L.R.A. (N.S.) 615; And see later case, *Hunter Tract Improv. Co. v. Catholic Bishop Corp.* L.R.A.1918A, 297. Nor does it include the question of hotel or lodging house as violation of restrictive covenants, that question being treated in the note to *Sayles v. Hall*, 41 L.R.A. (N.S.) 625.

The right to enforce restrictive covenants as affected by change in neighborhood is considered in the note to *Brown v. Huber*, 28 L.R.A. (N.S.) 706.

Construction of particular forms of covenants—residence purposes only.

Supplementing note in 45 L.R.A. (N.S.) p. 728.

A clause in a conveyance restricting the use of the property conveyed "for residence purposes only" does not prohibit the erection of a double or two-family house on the premises. *Hunt v. L.R.A.*1918C.

Held (1914) 90 Ohio St. 280, L.R.A. 1915D, 543, 107 N. E. 765, Ann. Cas. 1916C, 1051.

So, an agreement that premises shall be used "for residence purposes only," and that no more than one residence building shall be located upon a lot, does not prohibit the erection of a four-suite apartment house. *Arnoff v. Williams* (1916) 94 Ohio St. 145, 113 N. E. 661.

In *Maine v. Mulliken* (1913) 176 Mich. 443, 142 N. W. 782, the court seemed to consider that a covenant that a lot "shall be used for residence purposes only" was not transgressed by a four-family flat.

For construction of the covenant in *Misch v. Lehman* (1913) 178 Mich. 225, 144 N. W. 556, see infra.

—dwelling house or houses.

Supplementing note in 45 L.R.A. (N.S.) p. 729.

A covenant limiting the use of a city lot to a dwelling house with the ordinary yard appurtenances of dwelling houses, and excepting stables of brick or stone for private dwellings, does not exclude an apartment house, apartment houses not being known when the covenant was drawn. Reformed Protest-

ant Dutch Church v. Madison Ave. Bldg. Co. (1915) 214 N. Y. 268, L.R.A.1915F, 651, 108 N. E. 444.

A covenant in deeds of a subdivision of city property, inserted so that buildings or structures upon the property might harmonize and tend to beautify the entire neighborhood and advance values, which provides that nothing but a church or dwelling house and the necessary outbuildings shall ever be erected upon any part of the land, is not violated by a four-story apartment house, each apartment being suitable only for separate use as a housekeeping apartment. Johnson v. Jones (1914) 244 Pa. 386, 52 L.R.A.(N.S.) 325, 90 Atl. 649.

Where there had been a considerable number of two-family houses erected, and the restriction was not to erect any building other than a dwelling house and its appropriate buildings, the court declined to enjoin the erection of what was termed "a modern high-class apartment house," the apartment house being three stories high, and most of the buildings on the restricted tract being three stories high. Underwood v. Herman & Co. (1913) 82 N. J. Eq. 353, 89 Atl. 21. The court referred to the doctrine that restrictions should be strictly construed against the restrictor, and said: "The grantors in their covenant made no attempt by language to define the meaning of a 'dwelling house and its appropriate buildings,' but allowed each grantee, in the practical adaptation of the land to his personal requirements, to construe the language of the covenant to meet the personal exigency. In this manner language of an uncertain and indefinite character received a practical interpretation upon the land by the grantees, presumably with the acquiescence of the grantors and prior grantees."

— one dwelling or a single dwelling.

Supplementing note in 45 L.R.A. (N.S.) p. 730. See BOLIN v. TYROL INVEST. Co. ante, 869.

A restriction that no more than one dwelling house shall be erected or maintained on each 40 feet of land is not transgressed by a duplex house designed for the occupancy of two families under one roof, so arranged as to furnish each family with a complete and independent apartment having independent and separate entrances after the common front entrance has been passed. Hamnett v. Born (1915) 247 Pa. 418, 93 Atl. 505. L.R.A.1918C.

In Misch v. Lehman (Mich.) supra, the court enjoined the defendant from "proceeding with the construction, erection, or maintenance, or causing to be constructed, erected, or maintained, any flat, double house, apartment, or any other building except a single dwelling house, intended or suitable for the separate occupancy for one family."

The restriction in that case was the same as in Schadt v. Brill (1913) 173 Mich. 647, 45 L.R.A.(N.S.) 726, 139 N. W. 878, prefixed to the earlier note, and was as follows: "That no store, factory, or building other than a dwelling house with the usual appurtenances thereto, shall be erected upon the above-described premises, and that said premises shall be used for residence purposes only, and that no dwelling shall be erected thereon at a cost of less than \$5,000, exclusive of the value of outbuildings and appurtenances thereto, and that such dwelling house shall not be less than two and one-half stories high, and shall have a brick or stone cellar under the whole thereof, and shall not be erected within 20 feet of the front or street line of said premises, and shall front or face the boulevard."

— detached dwelling house.

Supplementing note in 45 L.R.A. (N.S.) p. 731.

A covenant that the property be "used only as a site for a detached brick or stone dwelling house" is transgressed by an apartment house. Pearson v. Adams (1914) 50 Can. S. C. 204, where an injunction was granted. The court reversed (1913) 28 Ont. L. Rep. 154, which, in its turn, had reversed (1912) 27 Ont. L. Rep. 87, cited in the earlier note.

— flat house or apartment house.

Supplementing note in 45 L.R.A. (N.S.) p. 734.

The erection of flats and apartment buildings was enjoined where flats or apartments were forbidden by the restriction. Miller v. Klein (1913) 177 Mo. App. 557, 160 S. W. 562.

— miscellaneous.

See also note in 45 L.R.A.(N.S.) p. 735.

A business block, although it may be used to some extent for residence purposes, is not included within a restrictive covenant that "no dwelling shall be erected on said above premises herein conveyed containing less than six rooms, said dwelling to be located not less than 24 feet from the street line, not in-

cluding porches," the covenant providing further that no intoxicating liquors should be sold or manufactured or trafficked in on said premises. The court considered that the provision relating to the location of a dwelling did not apply to the location of such a business block. *Kiley v. Hall* (1917) — *Ohio St.* —, L.R.A.1918B, 961, 117 N. E. 359.

Application of covenants to particular kinds of buildings — double houses.

Supplementing note in 45 L.R.A. (N.S.) p. 735.

A double or two-family house is not forbidden by a clause in a conveyance restricting the use of the property conveyed "for residence purposes only." *Hunt v. Held* (1914) 90 *Ohio St.* 280, L.R.A.1915D, 543, 107 N. E. 765, Ann. Cas. 1916C, 1051.

A duplex house designed for the occupancy of two families under one roof, so arranged as to furnish each family with a complete and independent apartment, having independent and separate entrances after the common front entrance has been passed, does not transgress a restriction that no more than one dwelling house shall be erected or maintained on each 40 feet of land. *Hamnett v. Born* (1915) 247 *Pa.* 418, 93 *Atl.* 505.

See also *Misch v. Lehman* (1913) 178 *Mich.* 225, 144 N. W. 556, *supra*.

— flat house.

Supplementing note in 45 L.R.A. (N.S.) p. 736.

In *Maine v. Mulliken* (1913) 176 *Mich.* 443, 142 N. W. 782, the court seemed to consider that a four-family flat did not transgress a covenant that a lot "shall be used for residence purposes only."

The erection of flats and apartment houses was enjoined where flats or apartments were forbidden by the restriction. *Miller v. Klein* (*Mo.*) *supra*.

See also *Misch v. Lehman* (*Mich.*) *supra*.

— apartment house.

Supplementing note in 45 L.R.A. (N. S.) p. 737. See *BOLIN v. TYROL INVEST. Co. ante*, 869.

A four-story apartment house, each apartment being suitable only for separate use as a housekeeping apartment, is not a violation of a covenant in deeds of a subdivision of city property, inserted so that buildings or structures upon the property might harmonize and tend to beautify the entire neighborhood and advance values, which provides that nothing but a church or dwelling house and the necessary outbuildings shall ever be erected upon any part of the land. *Johnson v. Jones* (1914) 244 *Pa.* 386, 52 L.R.A.(N.S.) 325, 90 *Atl.* 649.

See also *Arnoff v. Williams* (1916) 94 *Ohio St.* 145, 113 N. E. 661, *supra*; see also *Underwood v. Herman & Co.* (1913) 82 N. J. Eq. 353, 89 *Atl.* 21, *supra*, and *Reformed Protestant Dutch Church v. Madison Ave. Bldg. Co.* (1915) 214 N. Y. 268, L.R.A.1915F, 651, 108 N. E. 444, *supra*.

But it has been held that an apartment house transgresses a covenant that the property be "used only as a site for a detached brick or stone dwelling house." *Pearson v. Adams* (1914) 50 *Can. S. C.* 204, where an injunction was granted. The court reversed (1913) 28 *Ont. L. Rep.* 154, which in its turn had reversed (1912) 27 *Ont. L. Rep.* 87, cited in the earlier note.

See also *Misch v. Lehman* (*Mich.*) *supra*.

In *Miller v. Klein* (1913) 177 *Mo. App.* 557, 160 S. W. 562, the erection of flats and apartment buildings was enjoined where flats or apartments were forbidden by the restriction.

B. B. B.

TENNESSEE SUPREME COURT.

MARY A. GAMBLE, Plff. in Certiorari,
v.

VANDERBILT UNIVERSITY et al.

(138 *Tenn.* 616, 200 S. W. 510.)

Charity — exemption of revenues from endowment fund — office building.

1. The exemption from liability for personal injuries extended to charitable organi-

zations does not extend to the revenues of an office building operated by a charitable educational institution as employment for its endowment funds, so as to afford exemption of such revenues from liability for injury to a tenant of the building through the operation of a defective elevator therein, although a portion of the building is used in connection with the work of the institution.

For other cases, see *Charities, II. c, in Dig.* 1-52 N. S.

Note. — The liability of charitable institutions for personal injuries is discussed in the notes to *Farrigan v. Pevear*, 7 L.R.A. L.R.A.1918C.

(N.S.) 481; *Bruce v. Central M. E. Church*, 10 L.R.A.(N.S.) 74; *Thornton v. Franklin Square House*, 22 L.R.A.(N.S.) 486; *Hor-*

Master and servant — personal liability of servant — injury to stranger.

2. A committee of a charitable educational institution having charge of an office building operated by the institution as an investment of endowment funds is liable to a tenant of the building for injury by a defective elevator which the committee permits to be operated in the building.

For other cases, see Principal and Agent, III. in Dig. 1-52 N. S.

(February 9, 1918.)

CERTIORARI to the Court of Civil Appeals to review a judgment affirming a judgment of the Circuit Court for Davidson County sustaining in part a demurrer to the declaration in an action brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendants' negligence. Reversed in part.

The facts are stated in the opinion.

Messrs. A. F. Whitman and Pitts & McConnico, for plaintiff in certiorari:

There is no exemption from liability of the defendants by reason of the fact that Vanderbilt University is an educational corporation operated without capital stock and without personal profit to the institution or its founders,—in short, because it is a charity.

Schloendorff v. Society of New York Hospital, 211 N. Y. 125, 52 L.R.A.(N.S.) 505, 105 N. E. 92, Ann. Cas. 1915C, 581; Hordern v. Salvation Army, 199 N. Y. 233, 32 L.R.A.(N.S.) 62, 139 Am. St. Rep. 889, 92 N. E. 626; Kellogg v. Church Charity Foundation, 203 N. Y. 191, 38 L.R.A.(N.S.) 481, 96 N. E. 406, Ann. Cas. 1913A, 883, 3 N. C. C. A. 444; Gartland v. New York Zoological Soc. 135 App. Div. 163, 120 N. Y. Supp. 24; Bruce v. Central M. E. Church, 147 Mich. 230, 10 L.R.A.(N.S.) 74, 110 N. W. 951, 11 Ann. Cas. 150; Davis v. Central Cong. Soc. 129 Mass. 367, 37 Am. Rep. 368; Powers v. Massachusetts Homœopathic Hospital, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294; Holder v. Massachusetts Horticultural Soc. 211 Mass. 370, 97 N. E. 630; Hewett v. Woman's Hospital Aid Asso. 73 N. H. 556, 7 L.R.A.(N.S.) 496, 64 Atl.

derm v. Salvation Army, 32 L.R.A.(N.S.) 62; Basabo v. Salvation Army, 42 L.R.A.(N.S.) 1144; and Schloendorff v. Society of New York Hospital, 52 L.R.A.(N.S.) 505; and see later cases, Tucker v. Mobile Infirmary Asso. L.R.A.1915D, 1167; Nicholson v. Atchison, T. & S. F. Hospital Asso. L.R.A.1916D, 1029; and Loeffler v. Shepard & E. P. Hospital, L.R.A.1917D, 967.

Generally, as to liability for injury to elevator passengers, see notes to Edwards v. Manufacturers' Bldg. Co. 2 L.R.A.(N.S.) 744, and Tippecanoe Loan & T. Co. v. Jes-

L.R.A.1915E, 721; and see later cases, Putnam v. Pacific Monthly Co. L.R.A.1915F, 782; Elsey v. J. L. Hudson Co. L.R.A.1916B, 1284; Rumetsch v. John Wanamaker, L.R.A. 1916C, 1245; Jacobi v. Builders' Realty Co. L.R.A.1917E, 696; Ross v. Sisters of Charity, L.R.A.1917F, 260; and Money v. Travelers' Hotel Co. L.R.A.1918B, 493.

Messrs. C. C. Trabue, Douglas & Norvell, and Stokes & Stokes, for defendants in certiorari:

Defendants are exempt from liability.

Abston v. Waldon Academy, 118 Tenn. 24, 11 L.R.A.(N.S.) 1179, 102 S. W. 351; Duncan v. St. Luke's Hospital, 113 App. Div. 68, 98 N. Y. Supp. 867; Vanderbilt University v. Cheney, 116 Tenn. 259, 94 S. W. 90; Ward Seminary v. Nashville, 129 Tenn. 412, 167 S. W. 113; Fordyce v. Woman's Christian Nat. Library Asso. 79 Ark. 559, 7 L.R.A.(N.S.) 485, 96 S. W. 155; Adams v. University Hospital, 122 Mo. App. 675, 99 S. W. 453; Bruce v. Central M. E. Church, 147 Mich. 230, 10 L.R.A.(N.S.) 74, 110 N. W. 951, 11 Ann. Cas. 150; Fire Ins. Patrol v. Boyd, 120 Pa. 624, 1 L.R.A. 417, 6 Am. St. Rep. 745, 15 Atl. 553; Benton v. City Hospital, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836; Holliday v. St. Leonard, 11 C. B. N. S. 192, 142 Eng. Reprint, 769, 30 L. J. C. P. N. S. 361, 8 Jur. N. S. 79, 4 L. T. N. S. 406, 9 Week. Rep. 694; Noble v. Hahnemann Hospital, 112 App. Div. 663, 98 N. Y. Supp. 605; Farrigan v. Pevear, 193 Mass. 147, 7 L.R.A.(N.S.) 481, 118 Am. St. Rep. 484, 78 N. E. 855, 8 Ann. Cas. 1109; Hill v. Tualatin Academy, 61 Or. 190, 121 Pac. 901; Andrews v. Andrews, 110 Ill. 223; Parks v. Northwestern University, 218 Ill. 381, 2 L.R.A.(N.S.) 556, 75 N. E. 991, 4 Ann. Cas. 103; Powers v. Massachusetts Homœopathic Hospital, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294; Downes v. Harper Hospital, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42; Pepke v. Grace Hospital, 130 Mich. 493, 90 N. W. 278; McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529; 1 Jaggard, Torts, p. 184; Story, Agency, §

ter. L.R.A.1915E, 721; and see later cases, Putnam v. Pacific Monthly Co. L.R.A.1915F, 782; Elsey v. J. L. Hudson Co. L.R.A.1916B, 1284; Rumetsch v. John Wanamaker, L.R.A. 1916C, 1245; Jacobi v. Builders' Realty Co. L.R.A.1917E, 696; Ross v. Sisters of Charity, L.R.A.1917F, 260; and Money v. Travelers' Hotel Co. L.R.A.1918B, 493.

As to presumption of negligence from injury to elevator passenger, see notes in 13 L.R.A.(N.S.) 619; 29 L.R.A.(N.S.) 816; and L.R.A.1916C, 378.

321; Labatt, Mast. & S. § 2506; 6 Cyc. 975; Cooley, Torts, 3d ed. p. 1011; Whittaker v. St. Luke's Hospital, 137 Mo. App. 116, 117 S. W. 1189; Heriot's Hospital v. Ross, 12 Clark & F. 507, 8 Eng. Reprint, 1508; Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 33 L.R.A.(N.S.) 141, 78 Atl. 898; Johnson v. Chicago, 24 Ill. App. 26; Lyle v. National Home, 170 Fed. 842; University of Louisville v. Hammock, 127 Ky. 564, 14 L.R.A.(N.S.) 784, 128 Am. St. Rep. 355, 106 S. W. 219; Taylor v. Protestant Hospital Asso. 85 Ohio St. 90, 39 L.R.A.(N.S.) 427, 96 N. E. 1089, 1 N. C. C. A. 438; Arkansas Midland R. Co. v. Pearson, 98 Ark. 399, 34 L.R.A.(N.S.) 317, 135 S. W. 917.

Neill, Ch. J., delivered the opinion of the court:

This was an action brought in the circuit court of Davidson county against Vanderbilt University and its executive committee to recover damages for injuries inflicted upon the plaintiff's intestate by the falling of an elevator in an office building owned and operated by the university.

The first count of the declaration contains all of the matters necessary to be considered in connection with the demurrer on which the questions for decision arise.

This count contains the following averments:

"(1) That defendant Vanderbilt University is a corporation created and organized under the laws of Tennessee and having its situs at Nashville, in said state, and is engaged, and has been for many years, among other things, in the renting and operation of a large building for office purposes, owned by said defendant and situated at Nos. 311 and 313 Fourth avenue north, formerly Cherry street, in the heart of the business district of said city of Nashville, and remote from and wholly separate and distinct from its university buildings and grounds, which are situated in the suburbs of said city.

"(2) That said building consists of five stories, besides a basement, and contains numerous offices which are and have been for many years rented out annually to business and professional persons, firms, and corporations wholly disconnected with said Vanderbilt University or its educational work, in like manner in all respects as other office quarters are owned and rented out to tenants by other property owners of said city, and from whom are collected monthly rentals by said defendant in like manner in all respects as such rentals are collected by other landlords from their tenants in said city.

"(3) That said defendant owns, main-

tains, and operates in said building, and has done so for many years, an elevator for the use of its tenants therein, in like manner in all respects as elevators are owned, maintained, and operated by other owners in other office buildings in said city.

"(4) That only a small part of said building is and has been at any time used by said defendant for its law department, and for its law library for the use of its law students, and the larger portion of said building is and has been for many years rented out, as aforesaid, to tenants as business offices, and the principal use to which the said building is and has always been devoted is that of rented offices, and from which said defendant derives a large annual income, to wit, the sum of between \$5,000 and \$10,000, and the rentals charged and collected are the full, usual, and customary rates charged for similar offices in said city.

"(5) That said defendant owns and operates and has for many years owned and operated other buildings in the business portions of said city of Nashville, which it rents out and has rented out for many years for business, hotel, banking, and residence purposes, to persons, firms, and corporations in no way connected with its university or institution of learning, and from which it receives and has been for many years receiving an annual income of many thousands of dollars; in fact, said defendant is and has been for many years one of the largest business property owners of said city of Nashville.

"(6) That the foregoing facts and conditions existed at and before the time of the injuries hereinafter complained of.

"(7) That, at and before the time of the injuries complained of, defendants J. H. Kirkland, W. R. Cole, G. M. Neeley, and John B. Ransom were members of the executive committee of said defendant Vanderbilt University, and as such had charge and control of the building aforesaid on Fourth avenue north, and they and their associates and their appointees, agents, servants, and employees were charged with the duty of supervision, management, and operation of said building and the elevators therein.

"(8) That plaintiff's said husband, Tip Gamble, at and before the time of the injuries herein complained of, was a tenant of defendants, occupying an office on the fourth floor of said building of defendants at 311 and 313 Fourth avenue north, to wit, in the year 1908.

"(9) That on or about the 25th day of November, 1908, during business hours, the plaintiff's said husband, a lawyer, being at that time a tenant of said building as aforesaid, and lawfully therein, entered the said

elevator at the said fourth floor for the purpose of descending to the street or first floor, the said elevator being at the time in charge of and operated by a temporary servant of defendants, and not the regular operator or conductor, when, as the said elevator descended, the said temporary operator or conductor, by reason of his negligence and incompetence, and the defective, worn, and unsafe condition of the said elevator, lost control thereof and it fell rapidly to the bottom, where the violent and sudden stop and concussion so severely jarred and injured plaintiff's said husband that, by reason of such violent and sudden concussion and injury, which were wholly without any fault or negligence on his part, he suffered great bodily and mental pain and anguish, and was forced to incur, pay out, and expend a large sum of money, to wit, the sum of \$1,000, for medical and other treatment and service in and about efforts for his cure for a long space of time, to wit, until the 2d day of January, 1909, when, as the result of said injury, he died.

"(10) And so the plaintiff avers that the death of her said husband, Tip Gamble, was caused by the negligence of defendants and their agents, servants, and employees in suffering and permitting the said elevator and its braking and controlling apparatus and machinery to be, become, and remain defective, worn, out of repair, unsafe, and insufficient to control the movements of said elevator and so as to render said elevator unsafe and dangerous to tenants and other persons lawfully in said building, and which defects were known to defendants, and not known to plaintiff's said husband; and also by the negligence of defendants in employing and placing in charge of said elevator an unskilled, inexperienced, and incompetent servant as conductor or operator thereof, and whose inexperience and incompetency resulted in his loss of control or inability to control the movements of said elevator; and also by the negligence of the said temporary operator or conductor in failing to operate the same with reasonable care, to plaintiff's damage \$25,000; and therefore she sues and demands a jury to try the cause."

There are several grounds of demurrer, but we need consider only the third, which presents the point that the defendant corporation is a charitable institution, and, as such, holds its funds in trust for eleemosynary purposes, and therefore it cannot be held liable in damages for the injuries complained of. This ground of demurrer was sustained in the trial court, and also in the court of civil appeals, and the case is now L.R.A.1918C.

here on the writ of certiorari to the latter court to review its decision.

We shall defer, for the present, the consideration of the case of the executive committee.

It is conceded by the plaintiff that the defendant is a charitable institution, and the counsel for the latter have so treated the case. Therefore we need not consider whether the declaration charges the fact with sufficient clearness.

The question for determination is whether the defendant charitable corporation is exempt from liability in an action of damages for the tort averred in the declaration. We had occasion to consider the general subject in *Abston v. Waldon Academy*, 118 Tenn. 24, 11 L.R.A.(N.S.) 1179, 102 S. W. 351. In that case it was held that the defendant, a charitable corporation, was not liable for an injury to one of its students caused by the negligence of its servants. We adopted what is known in this class of cases as the trust theory. The general reason given was that to permit the payment of such damages would result in a diversion of the trust fund from the purposes to which it was devoted by the donor. Another general idea was that the tolerance of such liabilities would, in many cases, eventuate in the destruction of the charity, with a consequent discouragement of donors, to the detriment of the public welfare. The case, if the court had conceded the doctrine, might well have been decided on the narrower ground to which many of the modern cases are confined, and on which some of the authorities even at that time stood to the effect that a beneficiary of the charity, in consideration of the privileges enjoyed, must be presumed to have waived any right to damages of the kind referred to. The court, however, with all the authorities before it then in existence, decided to adopt the broader view as being most in accord with sound public policy. We are still of that view, although we do not undervalue the very able opinions (*Powers v. Massachusetts Homœopathic Hospital*, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294; *Bruce v. Central M. E. Church*, 147 Mich. 230, 10 L.R.A.(N.S.) 74, 110 N. W. 951, 11 Ann. Cas. 150; *Hordern v. Salvation Army*, 199 N. Y. 233, 32 L.R.A.(N.S.) 62, 139 Am. St. Rep. 889, 92 N. E. 626; *Basabo v. Salvation Army*, 35 R. I. 22, 42 L.R.A.(N.S.) 1144, 85 Atl. 120, and others in accord) that champion the more restricted theory. There are numerous cases which support the view we have adopted. Among these we may cite the following, in which the rights of third parties were involved: *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 1 L.R.A. 417, 6 Am. St. Rep. 745, 15 Atl. 553; *Fordyce v.*

Woman's Christian Nat. Library Asso. 79 Ark. 550, 7 L.R.A. (N.S.) 485, 96 S. W. 155; Whittaker v. St. Luke's Hospital, 137 Mo. App. 116, 117 S. W. 1189. Also the following, where the parties suing were beneficiaries, but the exemption was placed on the broad ground substantially as we have stated: Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495; Hearn v. Waterbury Hospital, 66 Conn. 98, 31 L.R.A. 224, 33 Atl. 595; Duncan v. Nebraska Sanitarium & Benev. Asso. 92 Neb. 162, 41 L.R.A. (N.S.) 973, 137 N. W. 1120, Ann. Cas. 1913E, 1127; McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529; Thornton v. Franklin Square House, 200 Mass. 465, 22 L.R.A. (N.S.) 486, 86 N. E. 909; Parks v. Northwestern University, 218 Ill. 381, 2 L.R.A. (N.S.) 556, 75 N. E. 991, 4 Ann. Cas. 103; Taylor v. Protestant Hospital Asso. 85 Ohio St. 90, 39 L.R.A. (N.S.) 427, 96 N. E. 1089, 1 N. C. C. A. 438; Adams v. University Hospital, 122 Mo. App. 675, 99 S. W. 453; Gable v. Sisters of St. Francis, 227 Pa. 254, 136 Am. St. Rep. 879, 75 Atl. 1087, 2 N. C. C. A. 381; Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 33 L.R.A. (N.S.) 141, 78 Atl. 898; Lindler v. Columbia Hospital, 98 S. C. 25, 27, 81 S. E. 512. And see Vermillion v. Woman's College, 104 S. C. 197, 88 S. E. 649. Of the foregoing cases, Hearn v. Waterbury Hospital limits the exemption to cases where there has been no negligence on the part of the corporation in the selection or retention of servants. There are quite a number of other cases that support the general exemption with the same limitation. Among these are Lindler v. Columbia Hospital, 98 S. C. 25, 27, 81 S. E. 512; McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529; Thornton v. Franklin Square House, 200 Mass. 465, 22 L.R.A. (N.S.) 486, 86 N. E. 909; and Farigan v. Pevear, 193 Mass. 147, 7 L.R.A. (N.S.) 481, 118 Am. St. Rep. 484, 78 N. E. 855, 8 Ann. Cas. 1109. In the view we take of this case, however, it is not necessary that we should go over the authorities mentioned, or the many other authorities on the general subject, all of which we have examined. A sufficiently clear view of the positions of the various courts, with citation of authorities, may be seen, collected in a summary manner, in 5 R. C. L. 374 to 379, §§ 121 to 124; 11 C. J. pages 374 to 378, §§ 106 to 108.

However, we shall observe here that the doctrine designated as the trust fund doctrine, as applied to charities, in relation to the subject we now have in hand, seems to have had its origin in Heriot's Hospital v. Ross, 12 Clark & F. 507, 8 Eng. Reprint, 1508. There an effort was made to hold L.R.A. 1918C.

the corporation liable for the wrong committed by the trustees in refusing to admit to the enjoyment of the charity one who fell within the class intended to be served by it. To sanction such a demand on the trust estate it was said would be naught less than consent on the part of the court to the diversion of a trust fund from the purposes to which it was devoted by the donor, and therefore the claim could not be entertained. The principle would seem to be broad enough to cover all trusts, but it has not been so ruled. In Bennett v. Wyndham, 4 De G. F. & J. 258, 262, 45 Eng. Reprint, 1183, it appeared that a trustee in the due execution of his trust directed the bailiff employed on the settled estate to have certain trees felled. The plaintiff ordered the woodcutters usually employed on the estate to fell the trees. In doing so they permitted a bough to fall into a lane and on a passer-by, breaking his leg. The injured man, Leany, brought suit to recover damages against the trustees, and recovered judgment for a sum equivalent to \$6,000 of our money. The trustees paid the damages, and applied in chancery for an allowance out of the estate. The application was granted, the court, speaking through the Lord Justice Knight Bruce, said: "The trustee in this case appears to have meant well, to have acted with due diligence, and to have employed a proper agent to do an act the directing which to be done was within the due discharge of his duty. The agent makes a mistake, the consequences of which subject the trustee to legal liability to a third party. I am of opinion that this liability ought, as between the trustee and the estate, to be borne by the estate."

In case of charitable trusts the principle of immunity was at first applied as a general one, then subsequently limited in some jurisdictions as we have stated. The underlying, though perhaps unexpressed, thought suggesting these restrictions was that public policy would be best served thereby, it being judged by the court so holding more just, more in accord with sound policy, that the charity whose servants had caused the injury should bear the burden rather than third persons who had received no direct benefit from the institution. We say this was, as we think, the underlying reason or principle; the immediate reason, however, assigned in these cases, was that direct beneficiaries of the charity, as for example, patients in charitable hospitals, students in schools and universities based on a charitable foundation, and the like, must be presumed to have agreed to the immunity or exemption, or to have waived liability for injuries inflicted by servants selected with ordinary care. Whether the

broad view adopted in our state, and in the states with which we stand, or the more restricted view which obtains in some other jurisdictions, be based on the sounder conception of public policy, is a matter of opinion. Reasons apparently strong have been suggested on each side of the controversy. It seems to us that institutions which so well and so extensively perform public service should in generous measure enjoy the immunity which pertains to those which are strictly public or governmental in their nature; not that the latter principle in terms applies to charities, but that by analogy it should in large measure apply; since charitable institutions, in the care of the sick, the succor of the indigent, the education of the ignorant, and in other fields of activity, perform work which would otherwise devolve on the government, and deplete its revenues. We can only add that, with profound respect for the learned courts that have advanced the theory of implied agreement or waiver as the true ground of exemption, we are unable to regard that theory as furnishing a satisfactory basis. There are cases from time to time occurring, and not altogether infrequent, to which it is, as it seems to us, impossible to apply it,—patients conveyed to hospitals in a demented condition, persons temporarily unconscious from injuries and who require immediate surgical and other attention, those who are so debilitated by disease as to have no power of understanding the terms of a contract, children too young to understand the meaning of a contract, or to make or be bound by one in any form, or even to understand the nature of the work to be done for them. How can such persons be held to waive a right of action which the law gives them? How can they be held to have agreed to an exemption? Manifestly the only sound theory is that of an exemption based on public policy. How this shall be applied to particular cases or classes of cases is a matter in the wise discretion of the courts of each jurisdiction, according to their conception of sound policy. We can see no objection to the application of public policy as a *ratio decidendi*. Every really new question that comes before the courts is, in the last analysis, determined on the theory, when not determined by differentiation of the principle of a prior case or line of cases, or by the aid of analogies furnished by such prior cases. In balancing conflicting solutions, that one is perceived to tip the scale which the court believes will best promote the public welfare in its probable operation as a general rule or principle. But public policy is not a thing inflexible. No court is wise enough to forecast its influence in all possible contingencies.

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Distinctions must be made from time to time as sound reason and a true sense of justice may dictate.

As stated, while we are disposed to adhere to the general doctrine already announced in the *Abston Case*, yet we are of the opinion that a distinction should be taken on the facts of the present case, arising out of the operation by the defendant corporation of the large office building described in the declaration. This is averred to be "remote from and wholly separate and distinct from the university buildings and grounds, which are situated in the suburbs of the city;" that this building consists of five stories, besides the basement, and contains numerous offices which are and which have been for many years rented out annually to business and professional persons, firms, and corporations, wholly disconnected from the university or its educational work, in like manner in all respects as other office quarters are owned and rented out to tenants by other property owners of the city, and from whom are collected monthly rentals by the defendant in like manner in all respects as such rentals are collected by other landlords from their tenants in the city; that defendant owns, maintains, and operates in this office building, and has done so far many years, an elevator for the use of its tenants therein, in like manner in all respects as elevators are owned, maintained, and operated by other owners in other office buildings in the city; that only a small part of the building is and has been at any time used by defendant for its law department and for its law library for the use of its law students, and the larger portion of the building is and has been for many years rented out, as stated, to tenants as business offices, and the principal use to which the building is and has always been devoted is that of rented offices, and from which defendant derives a large annual income, the sum of between \$5,000 and \$10,000, and the rentals charged and collected are the full, usual, and customary rates charged for similar offices in the city.

Although this building was lawfully operated by the university as an investment for the purpose of making profits to be used in its educational work, as held in *Vanderbilt University v. Cheney*, 116 Tenn. 259, 94 S. W. 90, yet it was in our judgment an enterprise sufficiently distinct and remote from the central activities of the charitable organization to make it inadvisable, from the viewpoint of public policy, to extend the exemption from liability thereto. Nor indeed can we believe that the welfare of the charity would be advanced or promoted by such extension, since there can be no doubt that, if it be determined that such acts

of negligence as are averred in the declaration concerning the management and operation of the elevator in an office building are without redress in law, there would be few patrons of so dangerous an establishment. In our opinion as to such a remote enterprise the corporation should be held liable as any other corporation; but such damages as may be adjudged against it for breaches of duty in respect of such management should be charged as expenses of the operation of the particular property, and only the residue of the income should be available for the uses of the charity. This was in effect the holding in *Winnemore v. Philadelphia*, 18 Pa. Super. Ct. 625. In that case, as here, a separate building distinct from Girard College was operated for the purpose of making income to be used in the support of the charity. In that case, as in the one before us, the party suing was injured by the negligent operation of the elevator in the adjunct building named. In disposing of the matter the court said: "Were the trustees of the Girard estate permitted to manage the real estate, as now improved, without liability on the part of the fund for the negligent acts of the servants necessary to the usefulness of the property, it would impose an unwarranted risk upon the public and upon the tenants. Such a condition would certainly result in injury to the trust itself, since tenants and frequenters would scarcely be attracted to a building with such extraordinary protection against liability for negligent employees thrown around its ownership."

To the same general effect, see *Holder v. Massachusetts Horticultural Soc.* 211 Mass. 370, 97 N. E. 630.

We do not think the operation or validity of the exception we have stated is in any wise impaired by the fact that a small part of the building in question is used for the accommodation of the defendant's law department. That is but an incidental use. The main purpose of the building and its chief use is found in its service as an office building let for hire to the general public.

Furthermore, we do not mean to hold that any judgment that may be recovered can be levied upon or collected out of the university grounds or buildings, or any property therein or thereon located capable of use for the conduct of the charity. The declaration shows that there is ample property aside from the university grounds and buildings out of which may be realized any judgment likely to be recovered. It should be noted that in this class of cases the court will not permit judgment to be rendered when it is apparent there is no property out of which it can be collected. *Abston v. Waldon Academy*, 118 Tenn. 24, 11 L.R.A. L.R.A.1918C.

(N.S.) 1179, 102 S. W. 351. Even after judgment the court will restrain any effort to subject the property of the charity not liable to execution because of its exempt character. *Fordyce v. Woman's Christian Nat. Library Asso.* 79 Ark. 550, 7 L.R.A. (N.S.) 485, 96 S. W. 155. It is to be observed also that in a rather recent case where the court seemed to support the liability of the corporation as such without regard to any claim of exemption, this caution was added: "Nor are we to be understood as holding that the trust funds of the defendant may be applied to the payment of this verdict. The question is not involved. Defendant is not supported exclusively from such funds. On the contrary, its maintenance would seem from the evidence to come principally from patients who pay for services rendered them." *McInerny v. St. Luke's Hospital Asso.* 122 Minn. 10, 46 L.R.A. (N.S.) 548, 141 N. W. 837.

In the case before us the facts stated with regard to the defective elevator and its negligent management resulting in the injury of plaintiff's intestate exhibit a clear cause of action. We are of the opinion, therefore, that the court of civil appeals committed error in sustaining the demurrer filed by Vanderbilt University.

Now as to the case against the members of the executive committee:

Their demurrer is, in effect, that the declaration states no cause of action against them. These defendants were not the trustees of the charity in whom the title was vested; therefore the underservants through whom they discharged their duties were not their servants, but the servants of the corporation. Under the averments of the declaration the members of the committee were only intermediate agents of the corporation, charged with the supervision, control, and operation of the building, including, of course, the passenger elevator. Under a fair construction of the language of the declaration we think it must be assumed that the details of operation, as, for example, the running of the elevator, were properly devolved upon subordinate servants selected by them, under the oversight and control of the executive committee, and also that they held under their control and supervision the fitness and efficiency of the elevator for the use for which it was designed. The substance of the averment is that, knowing the elevator was in a defective and unsafe condition, they, having power to forbid its use, permitted it to be used by the elevator boy on the occasion in question, and that by reason of the defect the elevator fell and caused the injury which resulted in the death of plaintiff's

intestate. We attach no importance to the averment concerning the incompetency of the elevator boy, because it is not further averred that the committee had any knowledge or notice of such fact, or that they failed to exercise due care in his selection. Even after the exercise of due care, that is, ordinary care, the defendants in question might have failed to discover the want of competency on the part of the elevator boy. So, the case must turn on the defective condition of the elevator and the use of it in that condition with the knowledge and assent of the committee in charge, and in effect under their continuing order, with the resulting injury.

Does this make a case of liability to a third party, or were the members of the committee on these facts liable only to their principal, the corporation? We think it makes a case of liability to the third party. It was not merely an act of nonfeasance, for which there was responsibility of the intermediate servant to the master only, as, for example, the failure to have the elevator repaired; but a case of actual misconduct, suffering the elevator under their control to be operated that day when they knew it was unsafe and unfit for operation, thereby knowingly subjecting third parties to a great hazard. It was a case not of nonfeasance, but of misfeasance. Having this dangerous agency under their control, they owed to third parties the duty of operating it in such a manner as not to injure them. According to the averment, they knowingly set in motion a dangerous agency which they knew, owing to its defects, would probably injure any passenger riding on it. Under such circumstances they became active participants in the wrong inflicted, and cannot escape liability on the ground of their representative character. They could not be held responsible for any improper management of the machine by the elevator boy, or for negligence on his part (to this the corporation itself would have to respond), but they are responsible for their own act in subjecting third parties, knowingly, to the danger stated. Having supervision, control, and operation of the building and its machinery, the use of the elevator must, as already intimated, be regarded as under their continuing order or command.

For nonfeasance an agent is responsible to his principal only. For misfeasance he may be responsible to third parties also. Nonfeasance is doing nothing. Misfeasance "is a failure to use, in the performance of a duty owing to the individual, that degree of care, skill, and diligence which the circumstances . . . reasonably demand." *State use of Cardin v. McClellan*, 113 Tenn. L.R.A.1918C.

616, 621, 85 S. W. 267, 3 Ann. Cas. 992. "It is often said in the books," writes the supreme judicial court of Massachusetts, "that an agent is responsible to third persons for misfeasance only, and not for nonfeasance. And it is doubtless true that, if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing, but it is misfeasance, doing improperly." *Osborne v. Morgan*, 130 Mass. 103, 39 Am. Rep. 437. One or two illustrations from the decided cases will suffice. In *Hagerty v. Montana Ore Purchasing Co.* (*Hagerty v. Wilson*) 38 Mont. 69, 25 L.R.A.(N.S.) 356, 98 Pac. 643, it appeared that the defendant, superintendent of a mine, permitted a cage to be operated in a defective shaft, known by him to be defective, by means of which a third person unacquainted with the danger, in descending, was injured. He sued *Wilson*, and was met by the defense that the immediate cause of the accident was the negligence of the servant operating the cage, and that he was the servant not of *Wilson*, but of the mining company. The court held that *Wilson* was guilty of misfeasance in permitting the cage to be operated in view of the dangerous condition of the shaft, which contributed to the injury. In *Consolidated Gas Co. v. Connor*, 114 Md. 140, 32 L.R.A.(N.S.) 809, 78 Atl. 725, it appeared that a gas company was acting as agent of the city to keep its service pipes in repair from its mains to the city lamps. By reason of its failure to comply with this duty the gas, when turned in, escaped and injured a third party. It was held that this was misfeasance for which the gas company was responsible to the third party. See also *Mayer v. Thompson-Hutchison Bldg. Co.* 28 L.R.A. 433, and note (104 Ala. 611, 53 Am. St. Rep. 88, 16 So. 620) and note to *Wines v. Crosby*, Ann. Cas. 1913D, 1055. In *Tippence Loan & T. Co. v. Jester*, 180 Ind. 357, L.R.A.1915E, 721, 101 N. E. 915, it was held that an agent in full control and management of an apartment house for the owners was

personally liable to one having a right to use the passenger elevator, for injury to him from the negligence of the agent in respect to it. There is nothing in the foregoing in the least out of harmony with our cases, *Nunnally v. Southern Iron Co.* 94 Tenn. 397, 28 L.R.A. 421, 29 S. W. 361; *Drake v. Hagan*, 108 Tenn. 265, 67 S. W. 476; or *Brown & Sons Lumber Co. v. Sessler*, 128 Tenn. 665, 163 S. W. 812, Ann. Cas. 1915C, 103, 7 N. C. C. A. 614. The second of these was a case in which at most the agent was guilty of a mere nonfeasance. In *Brown & Sons Lumber Co. v. Sessler*, the manager or intermediate agent was guilty of no wrongdoing at all, but was sought to be held liable for the negligence of a subordinate servant. The court cor-

rectly held that the ultimate master was the responsible party, not a mere intermediate servant. In *Nunnally v. Southern Iron Co.*, it was held that the officers of a corporation participating in its wrongdoing were guilty with it to a third party for an injury inflicted. It results that on this branch of the case the court of civil appeals is affirmed.

An order will therefore be entered reversing the Court of Civil Appeals on the first branch of the case, affirming it on the second branch, and remanding the cause to the Circuit Court of Davidson County for further proceedings.

The defendants will pay the costs of the appeal.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

NORTHERN PACIFIC RAILWAY COMPANY, Appt.,
v.

VAN DUSEN HARRINGTON COMPANY.

(245 Fed. 454.)

Equity — compelling transportation over connecting line.

Equity has no jurisdiction of a suit to compel a railroad company to transport a carload of wheat to a point on a connecting road as required by statute, since there is a plain, adequate, and complete remedy at law.

For other cases, see *Equity*, I. b, in *Dig.* 1-52 N. S.

(July 2, 1917.)

APPPEAL by defendant from an order of the District Court of the United States for the District of Minnesota, Morris, District Judge, granting a mandatory injunction to compel defendant to transport a carload of wheat to a certain point on a connecting road. Reversed.

The facts are stated in the opinion.

Argued before Sanborn, Carland, and Stone, Circuit Judges.

Messrs. B. W. Scandrett, O. W. Bunn, and Charles Donnelly for appellant.

Mr. Harold G. Simpson, for appellee:

The so-called embargo was illegal because not filed in accordance with § 6 of the Interstate Commerce Act, and it was unlawful also.

Colorado Coal Traffic Asso. v. Colorado & S. R. Co. 24 Inters. Com. Rep. 618; *Missouri*

& I. Coal Co. v. Illinois C. R. Co. 22 Inters. Com. Rep. 39; *Re Car Supply Investigation*, 42 Inters. Com. Rep. 657.

A carrier cannot change its published tariffs by any contract entered into with a shipper to the contrary.

Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; *Gulf. C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; *Poor v. Chicago, B. & Q. R. Co.* 12 Inters. Com. Rep. 418; *Pond-Decker Lumber Co. v. Spencer*, 30 C. C. A. 430, 58 U. S. App. 173, 86 Fed. 846.

Where a statute prescribes a duty, a court of equity presumes that a noncompliance with that statute will irreparably injure one for whose benefit it is passed, and a court of equity will not and does not inquire as to the actual damage suffered by noncompliance with the statutory provision.

Albany County v. Durant, 9 Paige, 182; *Barnes v. Sabron*, 10 Nev. 217, 4 Mor. Min. Rep. 673; *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243; *Wiemer v. Louisville Water Co.* 130 Fed. 251; *Coe v. Louisville & N. R. Co.* 3 Fed. 775; *Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co.* 34 Fed. 481; *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 738; *Re Lennon*, 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. Rep. 658.

Carland, Circuit Judge, delivered the opinion of the court:

This is an appeal from an order of the district court assuming to act under its equitable jurisdiction, commanding the appellant to forthwith sign, issue, and deliver

Note.—As to injunction to compel carrier to transport freight, see annotation following this case, post, 887. L.R.A.1918C.

a bill of lading to appellee under which Northern Pacific car No. 19,482 will move to Evansville, Indiana. The order appealed from, while for all practical purposes a final order, was really an interlocutory mandatory injunction. The procedure leading up to the making of the order was as follows:

Upon the filing of a complaint on May 11, 1917, a subpoena was issued and served requiring the appellant to appear on May 19, 1917, to answer the same, and also to show cause why an order should not issue commanding the appellant to issue, sign, and deliver to the appellee a bill of lading as prayed for in the complaint. On the return day appellant appeared and filed a motion to dismiss the complaint upon the ground, among others, that the subject-matter of the action was not within the jurisdiction of a court of equity, for the reason that the complaint showed that appellee had a plain, adequate, and complete remedy at law. Affidavits were also filed by both parties in opposition to and in support of the order to show cause. After hearing argument the court granted the order, from which an appeal has been taken. So far as the record shows the main case is still pending in the court below on complaint and motion to dismiss. This statement is made for the purpose of showing that the case is not before us on pleadings and proofs, so that the merits of the controversy can be finally determined. We may, however, in determining the validity of the order appealed from, inquire as to whether the complaint states a cause of action cognizable in equity, as the objection made below that it does not is insisted upon here. The appellee states his cause of action as follows:

I. "That the complainant, the Van Dusen Harrington Company, is a corporation duly organized and existing under and by virtue of the laws of the state of Minnesota; that it is engaged in the business of buying, selling, and shipping grain."

II. "The defendant herein is a duly organized and existing corporation; that it operates lines of railroad in this state and other states; that it is a common carrier for hire."

III. "The complainant shows that on or about the 8th day of March, 1917, Mark P. Miller Milling Company delivered to the Northern Pacific Railway Company, the defendant herein, at Moscow, Idaho, Northern Pacific car No. 19,482, loaded with wheat consigned to Mark P. Miller Milling Company, Minneapolis, Minnesota; that the defendant accepted said car and undertook to transport the same in accordance with its duty as a common carrier and in accordance with all its duly filed and published rates L.R.A.1918C.

and tariffs; that the defendant issued and delivered to said Mark P. Miller Milling Company its negotiable order bill of lading, whereby it agreed to transport said car to Minneapolis, Minnesota, and there to deliver the same to the owner and holder of said bill of lading, or to deliver said car to such person or such place as the owner and holder of said bill of lading should duly designate; and that the defendant agreed and undertook to transport the said car in accordance with its duly filed and published tariffs, and in accordance with all the rules and provisions contained in said tariffs."

IV. "That said Mark P. Miller Milling Company sold said car to the Van Dusen Harrington Company, the complainant herein, and indorsed, delivered, and transferred to the complainant the aforementioned order bill of lading; that the complainant is now the owner of the contents of said Northern Pacific car No. 19,482, and is the owner of said negotiable order bill of lading."

V. "Complainant further shows that it desires to forward said car to Evansville, Indiana, over the lines of the defendant herein, and over the lines of other carriers that connect with defendant's lines."

VI. "That Northern Pacific Railway Company's Tariff No. 11-E, I. C. C. No. 6127, duly filed, published, and in effect under index 520, page 23, provides rates from Moscow, Idaho, to Minneapolis, St. Paul, East St. Louis, and other points beyond Minneapolis and St. Paul. That rule 46 of said tariff, found on page 22, provides as follows: 'Shipments may be diverted, reconsigned in transit, or held in transit for orders at points on the Northern Pacific Railway, Great Northern Railway, or Minneapolis, St. Paul, and Sault Ste. Marie (at rate in effect on date of shipment from original point to final destination), it being understood that point at which diversion is accomplished must be on direct line of movement point of origin of final destination.'"

VII. "That Northern Pacific Railway Company's Tariff No. 770-H, I. C. C. No. 5898, provides as follows: 'A change in destination, consignee, or routing will be permitted on *all carload freight* whether in transit or after arrival at original destination.'"

VIII. "That the Southern Railway Company's tariff issued by W. A. Cameron, Agent, No. 401-A, I. C. C. D-85, provides for proportional rates from St. Louis, East St. Louis, and other points to Evansville, Indiana, and that said Southern Railway Company connects with said defendant's rails and receives from defendant and transports freight delivered to it by defendant from St. Louis, East St. Louis and other points to Evansville, Indiana, and other points, and

that said Southern Railway Company is now and at all times has been ready and willing to receive this particular car as well as other cars from said defendant at East St. Louis and transport the same to Evansville, Indiana."

IX. "Complainant further shows that it has repeatedly requested and demanded that the defendant sign, and deliver to the complainant a bill of lading in the form and with the provisions and contents of Exhibit A, hereto attached and hereby made a part of this complaint, or a bill of lading in any that the defendant agreed to allow said car ville, Indiana."

X. "Complainant further shows that the tariffs and rules of the defendant provide and agree that said car may be reconsigned at Minneapolis, Minnesota, to Evansville, Indiana, via East St. Louis, or to such other point as the owner may duly designate; that the defendant agreed to allow said car to be reconsigned at Minneapolis to Evansville, Indiana."

XI. "Complainant further shows that it has done all things necessary and in compliance with the published rules, regulations, tariffs, and provisions of the defendant in order to entitle complainant to reconsign and forward said car to Evansville, Indiana."

XII. "That the defendant, contrary to its duty as a common carrier, contrary to its contract, arbitrarily, illegally, and contrary to the laws and the statutes of the United States and the state of Minnesota, has repeatedly refused and still refuses to sign, issue, or deliver to the complainant a bill of lading in the form and with the contents and provisions as shown in Exhibit A, or a bill of lading in any proper form under which said car may move to Evansville, Indiana."

"In consideration whereof, and forasmuch as the complainant is remediless in the premises by the strict rules of the common law, and can only have relief in a court of equity, where this matter is properly cognizable and relievable, the complainant prays that your Honors will order the defendant to forthwith issue, sign, and deliver to this complainant a bill of lading in the form and with the contents and provisions as in Exhibit A, or bill of lading in such other proper form that this car may move thereunder to Evansville, Indiana. [Here follows prayer for subpoena and general relief.]"

Exhibit A, referred to in the complaint, was an ordinary bill of lading, whereby, if issued, the appellant agreed to carry the car of wheat mentioned in the complaint to Evansville, Indiana. We assume, without deciding, that the trial court had jurisdiction of the case as a Federal court under L.R.A.1918C.

the proviso of § 24 and paragraph 8 of the Judicial Code (Act March 3, 1911, chap. 231, 36 Stat. at L. 1092, Comp. Stat. 1916, § 991, ¶ 8). Coming to the question of the jurisdiction of the court below as a court of equity, we may quote the language used by Justice Van Devanter in *Singer Sewing Mach. Co. v. Benedict*, 229 U. S. 481, 57 L. ed. 1288, 33 Sup. Ct. Rep. 942: "In the courts of the United States it is a guiding rule that a bill in equity does not lie in any case where a plain, adequate, and complete remedy may be had at law. The statute so declares (Rev. Stat. § 723, Comp. Stat. 1916, § 1244), and the decisions enforcing it are without number. If it be quite obvious that there is such a remedy, it is the duty of the court to interpose the objection *sua sponte*, and in other cases it is treated as waived, if not presented by the defendant in limine. *Reynes v. Dumont*, 130 U. S. 354, 395, 32 L. ed. 934, 945, 9 Sup. Ct. Rep. 486; *Allen v. Pullman's Palace Car Co.* 139 U. S. 658, 35 L. ed. 303, 11 Sup. Ct. Rep. 682. There was no waiver here. The objection was made by the demurrer, and again by the answer; and so, if it was well grounded, it was as available to the defendants in the circuit court of appeals to prevent a decree against them there as it was in the circuit court. *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U. S. 276, 53 L. ed. 796, 20 Sup. Ct. Rep. 426."

In *New York Guaranty & Indemnity Co. v. Memphis Water Co.* 107 U. S. 205, 27 L. ed. 484, 2 Sup. Ct. Rep. 279, the Supreme Court in referring to Revised Statutes, § 723, now § 267, Judicial Code (Comp. Stat. 1916, § 1244), said: "This enactment certainly means something."

We think it can be safely said that it means at least that the courts have not the power to dispense with the ancient rule of equity jurisdiction, which prohibits suits in equity where a plain, adequate, and complete remedy may be had at law. An inspection of the complaint fails to disclose a single ground of equitable jurisdiction. Reduced to its lowest terms, the complaint charges that the appellant is in possession of a carload of wheat belonging to appellee which it refuses to transport to Evansville, Indiana. The real nature of the case cannot be disguised by the fact that appellee is simply demanding the issuance of a bill of lading, for the reason that the bill of lading, once issued, would oblige the appellant to transport the car of wheat. It cannot be disputed but that an action at law for damages is a complete and adequate remedy for the refusal by a common carrier to transport a single carload of wheat. The damages to be recovered are easily ascertainable, and in the present

case would be the difference between the value of the wheat at Minneapolis and at Evansville, Indiana, less expense of carriage. *People ex rel. Ohlen v. New York, L. E. & W. R. Co.* 22 Hun, 533.

Counsel for appellee in his brief, not content with sustaining the theory upon which the present action was brought, seeks to demonstrate that the action could have been brought and maintained on any one of four theories. The third theory advanced by counsel is stated in his brief as follows: "Thirdly. The complainant could have asked for a straight writ of mandamus to compel the issuance of the bill of lading, under the provisions of § 23 of the Interstate Commerce Act."

If the theory so stated is correct, then the question as to whether appellee had an adequate remedy at law is not open to question, as the proceeding by mandamus is a proceeding at law.

Counsel further states as the fourth theory on which the action might have been brought, that appellee could have asked for a mandatory order to compel the issuance of a bill of lading in compliance with § 20 of the Interstate Commerce Act (Act Feb. 4, 1887, chap. 104, 24 Stat. at L. 379), as amended (Act June 29, 1906, chap. 3591, § 7, §§ 11, 12, 34 Stat. at L. 595, Comp. Stat. 1916, §§ 8604a, 8604aa), commonly known as the "Carmack Amendment," and then he states that appellee adopted the fourth or possibly a combination of the third and fourth remedies. What is known as the Carmack Amendment is a part of § 20 of the Interstate Commerce Act, and it does provide for the issuance of a receipt or bill of lading by the receiving carrier, but no form of procedure is mentioned in § 20, except the district court is given jurisdiction upon the application of the Attorney General of the United States, at the request of the Interstate Commerce Commission, alleging a failure to comply with, or a violation of any of the provisions of the act to regulate commerce, to issue a writ or writs of mandamus commanding the carrier to comply with the provisions of the act. This proceeding in equity finds no support in any of the provisions of the Interstate Commerce Act, and as we have before said, if § 23 applies, then the remedy at law is adequate.

Counsel for appellee further insists that a court of equity has jurisdiction to enforce a plain duty imposed by statute, and as he claims the Carmack Amendment imposed a plain duty upon the appellant in this case to issue a receipt or bill of lading, a court of equity in a proper case may compel it to do so. We think counsel has confused the jurisdiction of a court of equity to issue a L.R.A.1918C.

mandatory injunction to enforce a plain statutory duty, where the court for other reasons has equitable jurisdiction, with the question as to whether the court in the present case had any jurisdiction in equity at all. A court of equity has no more authority to enforce a duty imposed by statute than it has to enforce a moral or contractual duty. It will enforce either or all in cases where it has jurisdiction.

We will now notice some of the cases cited by counsel for appellee which it is claimed decide that the present case is one of equitable jurisdiction. In the first place it may be said that this is not a case where a statute has given a right without furnishing a remedy. According to counsel's own argument, he had a remedy by mandamus. The case of *Wiemer v. Louisville Water Co.* 130 Fed. 251, is cited. This was a case where the court issued a mandatory injunction compelling the water company to furnish the complainants with water in accordance with its duty. We have no doubt but that the jurisdiction of a court of equity was properly exercised in this case; but it is no authority for the exercise of equity jurisdiction in the case at bar, as the facts are entirely different.

The case of *Coe v. Louisville & N. R. Co.* (C. C.) 3 Fed. 775, is cited as being in point. This was a case where *Coe & Milson* applied to the court for a mandatory injunction compelling the railroad company to accept and deliver any shipments tendered to it; but that is not the present case. There is only one car involved here, and no allegation that there will ever be another.

The case of *Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co.* (C. C.) 34 Fed. 481, is also cited. This was an action by one railroad company to compel another railroad company to handle its cars. Manifestly there was no adequate remedy at law, and the case furnishes no support for the position of appellee in the present case.

The case of *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461, is cited. In this case *Keith*, who was engaged in buying and selling live stock on commission as well as on his own account, brought the same to and shipped them from the city of Covington, Kentucky, over the Central Railroad. He owned certain live stock lots and yards in Covington, which were provided with all the necessary means of receiving, feeding, and caring for such stock as he purchased, or as might be consigned to him by others for sale; the receiver of the railroad tore up and rendered unsafe for use the connections which the railroad had with his stockyards. It was held that it was the duty of the railroad company to maintain these connections, and

that a mandatory injunction would issue to compel the performance of the duty; but here the whole business of Keith was in jeopardy from day to day. Manifestly there was no adequate remedy at law.

The case of Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. 19 L.R.A. 387, 5 Intern. Com. Rep. 522, 54 Fed. 738, was a case where the Pennsylvania Railroad Company, a connection of the Toledo Railroad, refused to accept cars for transportation tendered it by the Toledo Railroad on the ground that the Pennsylvania employees, being union men, refused to handle cars from a non-union railroad. Manifestly this case is not authority for appellee. All the cases cited by the learned counsel are to the effect that, if a court of equity has jurisdiction of a case, it may in a proper case issue a mandatory injunction. It is further insisted that this court will take judicial notice of the fact that the refusal to forward the car in question, as well as many other cars, will

cause a multiplicity of suits, which in itself is sufficient to sustain equitable jurisdiction. We have no reason to take judicial notice that there is or will be a refusal by appellant to forward any other cars of appellee, and, if we had, we cannot enlarge the facts stated in the complaint, and thereby enlarge the judgment which the court may render. The trial court dealt with one car, and that is all there is in the case. Moreover, the successful prosecution of the present action would not save a multiplicity of suits any more than an action at law, for the reason that the relief asked only affects one car, and the decree could not be broader than the complaint; so there is no merit in this contention.

The court below having no jurisdiction as a court of equity, we may not consider whether the complaint otherwise states a cause of action.

The order appealed from is reversed.

Annotation—Injunction to compel a carrier to transport freight.

Cases involving merely the right to injunction to require a carrier to furnish cars or facilities have been excluded. Cases passing upon the necessity of exhausting remedy before the Interstate Commerce Commission before resorting to the courts have also been excluded.

This note being concerned with a question of remedy, it does not purport to cover the substantive question as to the duty of the carrier to accept goods for transportation. One phase of that substantive question is presented in the notes in 40 L.R.A.(N.S.) 798, and 45 L.R.A.(N.S.) 120, on duty of carrier to accept liquor for transportation to points where its sale is prohibited or restricted.

A very few reported cases have passed upon the power of a court of equity to compel a carrier to transport freight.

As pointed out by the court in NORTHERN P. R. Co. v. VAN DUSEN HARRINGTON Co. ante, 883, it will be observed that the cases in which injunctions have been awarded involved more than a single shipment. No other case has been found containing a discussion of the power of a court of equity to award injunction in a case involving a single shipment only. Injunction to compel a carrier to receive and transport shipments of freight generally have been awarded where the refusal would cause irreparable damage to the shipper's business, on the ground that the remedy at law was inadequate, or L.R.A.1918C.

where a multiplicity of suits would be avoided. Likewise, injunctions have been awarded to compel a railroad company to handle the cars of a connecting carrier.

Thus, in *Coe v. Louisville & N. R. Co.* (1880) 3 Fed. 775, set out and distinguished in *NORTHERN P. R. Co. v. VAN DUSEN HARRINGTON Co.* it was held that shippers maintaining a stockyard for the shipment and receipt of livestock were entitled to a mandatory injunction to prevent a railroad company from carrying out its threat to discontinue the practice of receiving and delivering shipments at the shippers' yards as it had done for many years, and to accept and deliver shipments of live stock in that locality only through the yards of a company about to erect a union stockyard, over the objection, first, that there was an adequate remedy at law, and, second, that no relief in the nature of a mandatory order to compel defendant to continue accommodations to the complainants ought to be made until the final hearing. The court said: "Complainants could, in the event defendant carries its threat into execution and withholds the accommodations claimed as their right, sue at law and recover damages for the wrong to be thus inflicted. But they could not, through any process used by courts of law, compel defendant to specifically perform its legal duty in the premises. And this imperfect redress could only

be attained through a multiplicity of suits, to be prosecuted at great expense of money and labor; and then, after reaching the end through the harassing delays incident to such litigation, complainants' business would be destroyed, and the Union Stockyard Company, born of favoritism and fostered by an illegal and unjust discrimination, would be secure in its monopoly. Here an adequate remedy can be administered and a multiplicity of suits avoided. One other point remains to be noticed. Ought a mandatory order to issue upon this preliminary application? Clearly not, unless the urgency of the case demands it, and the rights of the parties are free from reasonable doubt. The duty which the complainants seek by this suit to enforce is one imposed and defined by law,—a duty of which the court has judicial knowledge. The injunction compelling its performance pending this controversy can do defendant no harm; whereas a suspension of accommodations would work inevitable and irreparable mischief to complainants. The injunction prayed for will therefore be issued."

And in *Royal Brewing Co. v. Missouri, K. & T. R. Co.* (1914) 217 Fed. 146, it was held that a court of equity had jurisdiction to award an injunction to compel a carrier to receive and transport interstate shipments of intoxicating liquors in "dry" territory, where the complainant, a wholesale liquor dealer, alleged that defendant's refusal to transport the liquor will work irreparable damage to his business, which cannot be estimated in damages. Citing *Louisville & N. R. Co. v. F. W. Cook Brewing Co.* (1912) 223 U. S. 70, 56 L. ed. 355, 32 Sup. Ct. Rep. 189.

In the latter case the United States Supreme Court held that the objection that there was an adequate remedy at law where a carrier refused to accept interstate shipments of intoxicating liquors destined to local option or "dry" points in another state, and announced its purpose to persist in such refusals, comes too late, if ever available, when first made on appeal. Justice Lurton said: "The announced purpose of the railroad company to abjure its function and duty as a common carrier in respect of interstate shipments of all intoxicating liquors to localities in the state of Kentucky where the Kentucky local option prohibition laws prevailed threatened the ruin of complainants' business, and relief by injunction against such a continued course of conduct was L.R.A.1918C.

certainly one which in such circumstances might be granted. Where the case is one in which, under any circumstances, relief in equity may be admissible, it is too late to say that there was an adequate remedy at law only upon review proceedings."

In *Rogers Locomotive & Mach. Works v. Erie R. Co.* (1869) 20 N. J. Eq. 379, it was held that a shipper was not entitled to a preliminary injunction before final hearing to compel a railroad company to transport goods at the established rates, but that an injunction would issue to prevent persons from entering into an agreement or from doing anything to prevent or hinder the railroad company from transporting the shipper's goods.

In the following cases injunctions were granted to compel a carrier to receive and transport interstate shipments of intoxicating liquors, without discussion as to the power of a court of equity to grant injunctions: *Bluthenthal v. Southern R. Co.* (1898) 84 Fed. 920; *Crescent Liquor Co. v. Platt* (1906) 148 Fed. 894.

And in the following cases injunctions to compel a carrier to transport interstate shipments of intoxicating liquors were denied upon the merits, without discussion as to the power of the court: *Daneiger v. Wells, F. & Co.* (1907) 154 Fed. 379; *Missouri, K. & T. R. Co. v. Daneiger* (1918) — C. C. A. —, 248 Fed. 36.

In *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* (1893) 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 738, which is set out and distinguished in *NORTHERN P. R. Co. v. VAN DUSEN HARRINGTON Co.* ante, 883, a preliminary mandatory injunction was granted against a railroad company that threatened to refuse to interchange freight with the complainant, a connecting railroad, because of the refusal of its employees, who were union men, to handle cars of the complainant railroad company, whose employees were not union men. The court said: "The office of a preliminary injunction is to preserve the status quo until, upon final hearing, the court may grant full relief. . . . Now the normal condition, the status quo, between connecting common carriers under the Interstate Commerce Law, is a continuous passage of freight backward and forward between them, which each carrier has a right to enjoy without interruption, exactly as riparian owners have a right to the continuous flow of the stream without obstruction.

Since Lord Thurlow's time the preliminary mandatory injunction has been used to remove obstructions and keep clear the stream. *Robinson v. Byron* (1785) 1 Bro. Ch. 588, 28 Eng. Reprint, 1315; *Lane v. Newdigate* (1804) 10 Ves. Jr. 192, 32 Eng. Reprint, 818, 7 Revised Rep. 381. So an obstruction to the flow of interstate freight must be preliminarily enjoined, even though it requires a mandatory injunction. The quasi public nature of the duty to be performed by the common carriers and the irreparable character of the injury likely to result are ample grounds for this. The Interstate Commerce Law recognizes the necessity for such a remedy, for in summary equity proceedings at the instance of the Interstate Commerce Commission, provided by § 16, as amended in 1889, express power to issue injunctions, mandatory or otherwise, to prevent violations of the orders of the commission, is given to circuit courts. In addition to that, a remedy by mandamus in the district and circuit courts is given to an interested person to com-

pel compliance by the common carrier with the provisions of the act. As this latter proceeding is denominated 'cumulative' in the statute, it does not prevent the remedy by injunction, nor would it in any event, because the inadequacy of the legal remedy, which justifies equitable intervention by injunction, is only the inadequacy of a recovery in damages by action at law. *Atty.-Gen. v. Mid-Kent R. Co.* (1867) L. R. 3 Ch. (Eng.) 100, 16 Week. Rep. 258."

And in *Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co.* (1888) 34 Fed. 481, cited and distinguished in *NORTHERN P. R. CO. v. VAN DUSEN HARRINGTON CO.*, a mandatory injunction was granted to compel a railroad company to handle the cars of another railroad company, upon the ground that the remedy at law was inadequate, although the defendant company alleged that its employees threatened to cease work if it handled the cars of the complainant company, whose employees had been ordered to strike. A. L. R.

KANSAS SUPREME COURT.

STATE OF KANSAS EX REL. BLANCHE CARMONS, Appt.,

v.

ROBERT L. WOODS.

(— Kan. —, 170 Pac. 986.)

Bastardy — presumption of innocence.

1. In a bastardy proceeding, the instruction given to the jury that "the law presumes morality and uprightness until the contrary is made to appear from the evidence, and you are instructed that defendant in this case is presumed to be innocent of the charge made against him, and that presumption remains with him through all stages of the trial and until overcome by the evidence of the state by a preponderance of the credible evidence," is held not erroneous.

For other cases, see Trial, III. c, 5, in Dig. 1-52 N. S.

Witness — right to reject testimony.

2. A jury is not warranted in arbitrarily or capriciously rejecting the testimony of a witness, but neither are they required to accept and give effect to testimony which

they find to be unreliable, although it may be uncontradicted.

For other cases, see Witnesses, IV. in Dig. 1-52 N. S.

(February 9, 1918.)

APPEAL by plaintiff from a judgment of the District Court for Chase County denying a motion for judgment notwithstanding a verdict for defendant, and overruling a motion for new trial in a bastardy proceeding. Affirmed.

The facts are stated in the opinion.

Mr. W. H. Carpenter for the State.

Messrs. R. M. Hamer and H. E. Ganse, for appellee:

It is not error to instruct a jury trying an action for bastardy, in which the defendant denies the charge, that the defendant is presumed to be innocent until it has been proved to the satisfaction of the jury by a preponderance of the evidence, that he is the father of the relatrix's child.

State ex rel. Bjorn v. Creager, 97 Kan. 334, 155 Pac. 29.

The record fails to show that the jury was actuated by passion or prejudice, but it does show that the jury did not believe the testimony of the relatrix and the witnesses who supported her. This clearly was within the province of the jury, and it was their sworn duty to return such a verdict as in their judgment the evidence warranted.

Headnotes by JOHNSTON, Ch. J.

Note. — As to presumption and burden of proof in bastardy proceedings, see annotation following this case, post, 891; and references therein to annotation on related questions.

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Howell v. Harper, 86 Kan. 396, 121 Pac. 362; Jevons v. Union P. R. Co. 70 Kan. 491, 78 Pac. 817, 17 Am. Neg. Rep. 234; Cobe v. Coughlin Hardware Co. 83 Kan. 522, 31 L.R.A.(N.S.) 1126, 112 Pac. 115; Saindon v. Morrell, 78 Kan. 53, 95 Pac. 1056; Avery v. Union P. R. Co. 73 Kan. 563, 85 Pac. 600; Missouri, K. & T. R. Co. v. L. A. Watkins Merchandise Co. 76 Kan. 813, 92 Pac. 1102; Harrod v. Latham Mercantile & Commercial Co. 77 Kan. 466, 95 Pac. 11.

Johnston, Ch. J., delivered the opinion of the court:

In a complaint filed by Blanche Carmons she charged Robert L. Woods with the pater- nity of her child. A trial before a jury was had, and a finding was made by the jury and approved by the court that the defendant was not the father of the bastard child. On appeal complaint is made of an instruction that "the law presumes moral- ity and uprightness until the contrary is made to appear from the evidence, and you are instructed that defendant in this case is presumed to be innocent of the charge made against him, and that presumption remains with him through all stages of the trial and until overcome by the evidence of the state by a preponderance of the credible evidence."

It is contended that as the proceedings in a prosecution for bastardy are governed by the rules regulating civil actions, there was no room for a presumption of innocence or good conduct, nor any justification for giving the instruction. In civil actions for wrong or fraud the party charged may ordi- narily rest on the presumption of good faith and good conduct until something to the contrary is shown. In *Baughman v. Penn.* 33 Kan. 504, 508, 6 Pac. 892, it was held that "the law presumes, in the absence of evidence to the contrary, that the busi- ness transactions of every man are done in good faith and for an honest purpose."

Where it was claimed that a railroad company had wrongfully built a railroad through the Indian Territory without right or license, it was held that there is no pre- sumption that a party is a wrongdoer, but, in the absence of a contrary showing, the presumption is the reverse of that. *Speer v. Missouri, K. & T. R. Co.* 23 Kan. 571, in an action to recover on a promissory note properly indorsed, the law presumes, in the absence of evidence to the contrary, that the holder has acquired it honestly, and that it was transferred to him because due and for value. *Ecton v. Harlan*, 20 Kan. 452. Many other cases might be cited to the effect that honesty and good conduct are to be presumed, both as to public officers L.R.A.1918C.

and private persons, where there is no evi- dence to the contrary. In ordinary negli- gence cases the rule is that the burden is upon the plaintiff to prove the negligence alleged, which is only a negative expression of the rule that the defendant is pre- sumed to be free from negligence until a showing to the contrary is made. However, we have an authority more directly in point than any of those cited. In a bastardy pro- ceeding it was said: "The law presumes morality and uprightness of conduct until the contrary is established, and it is not error to instruct the jury trying an action for bastardy, in which the defendant denies the charge, that the defendant is presumed to be innocent until it has been proved to the satisfaction of the jury by a preponder- ance of the evidence that he is the father of the relatrix's child." *State ex rel. Bjorn v. Creager*, 97 Kan. 334, 155 Pac. 29 (Syl. ¶ 3).

The similarity of the language used in the instruction in question indicates that this authority was before the court when the instruction was written, and it is clear that no error was committed in the giving of the instruction.

It is also insisted that the jury ignored the evidence given in behalf of the relatrix, and therefore the verdict should have been set aside. She gave testimony tending to show acts of intimacy with the defendant, and that he was the father of her child. Other testimony was given of admissions made by him to the same effect, but the jury appears to have deemed the evidence to be incredible. The defendant did not testify, and the only evidence offered in his behalf was to the effect that the period of gesta- tion is ordinarily 280 days, whereas the child of the relatrix was born 261 days from the time of the alleged intercourse. It is insisted that as the testimony of the relatrix was not contradicted by the defend- ant nor directly disputed by other testi- mony, the verdict should have been set aside by the court. There was little oppos- ing testimony, but the jury were not re- quired to accredit testimony which they deemed to be unworthy of belief. In its in- structions the court properly advised the jury, as is usually done, to the effect that if they believed any witness had wilfully testified falsely they might disregard all of the testimony of the witness, or so much of it as they believed to be untrue, and that this rule applied to witnesses whose testi- mony was not contradicted by that of other witnesses. Of course, jurors are not war- ranted in arbitrarily or capriciously reject- ing the testimony of a witness, but should carefully and candidly give effect to that which is credible. No fixed rule can be laid

down as to the test of credibility. It is a question for the jury to consider, and it has been decided that, although witnesses are not contradicted, a jury may discard their testimony if they honestly regard it to be unreliable. In *Jevons v. Union P. R. Co.* 70 Kan. 491, 497, 78 Pac. 819, 17 Am. Neg. Rep. 234, where strong evidence had been offered in support of an affirmative defense on which the court had directed a verdict, it was held that, the burden of proving the defense being upon defendant, "it cannot be said, as a matter of law, that the jury were bound to accept the evidence as true, even if not contradicted." In *Cobe v. Coughlin Hardware Co.* 83 Kan. 522, 525, 31 L.R.A. (N.S.) 1126, 112 Pac. 117, where it was insisted that there was no opposing testimony and the court should direct a verdict, it was said that "a court or jury is not required to accept a statement of a witness as conclusive, although there may be no direct evidence contradicting his statements, and hence the court could not direct the verdict."

In *Howell v. Harper*, 86 Kan. 396, 397, 121 Pac. 363, it was remarked that "it does not necessarily follow that a fact is estab-

lished because testimony fairly tending to prove it is uncontradicted by direct opposing testimony. It cannot be said, as matter of law, that the jury (or court trying the fact) is bound to accept evidence as true, although not contradicted by direct evidence."

See also *Harrod v. Latham Mercantile & Commercial Co.* 77 Kan. 466, 95 Pac. 11; *Saindon v. Morrell*, 78 Kan. 53, 95 Pac. 1056; *Fisk v. Neptune*, 96 Kan. 16, 149 Pac. 692; *Wyrick v. Parsons R. & Light Co.* 100 Kan. 122, 163 Pac. 1059.

The court that watched the course of the trial and the appearance of the witnesses denied the motion of relatrix to give judgment against the defendant notwithstanding the verdict of the jury, and also overrules her motion for a new trial based upon the ground that the verdict was contrary to the evidence. No attack is made upon the jury and their conduct other than that they did not credit the testimony offered in behalf of the relatrix. Under the authorities cited, we cannot interfere with the approved finding of the jury, and therefore the judgment is affirmed.

All the Justices concur.

Annotation—Presumption and burden of proof in bastardy proceedings.

It is not intended to include in this note the question as to the proof necessary to establish the bastardy of a child born to a married woman. This is the subject of a note in 36 L.R.A. (N.S.) 255.

With a few exceptions the courts agree that a bastardy proceeding is a civil rather than a criminal proceeding, and the rules of evidence applicable to civil proceedings obtain; hence in establishing the guilt of the defendant, including the birth and parentage of the child, a preponderance of the evidence in favor of the prosecutrix is sufficient. *Fay v. Reynolds* (1891) 60 Conn. 217, 21 Atl. 418; *E. N. E. v. State* (1889) 25 Fla. 268, 6 So. 58; *Cox v. People* (1884) 109 Ill. 457; *Lewis v. People* (1876) 82 Ill. 104; *People v. Christman* (1872) 66 Ill. 162, 1 Am. Crim. Rep. 70; *Allison v. People* (1867) 45 Ill. 37; *Maloney v. People* (1865) 38 Ill. 62; *Mann v. People* (1864) 35 Ill. 467; *Handley v. People* (1915) 196 Ill. App. 556; *People use of Dunn v. Moore* (1914) 188 Ill. App. 418; *People ex rel. Murphy v. Frowley* (1914) 185 Ill. App. 338; *Reynolds v. State* (1888) 115 Ind. 421, 17 N. E. 909; *Harper v. State* (1884) 101 Ind. 109; *Walker v. State* (1841) 6 Blackf. (Ind.) 1; *State v. L.R.A. 1918C.*

Croatt (1917) — Iowa, —, 161 N. W. 648; *State ex rel. Pithan v. Wangler* (1911) 151 Iowa, 555, 132 N. W. 22; *State v. McGlothlen* (1881) 56 Iowa, 544, 9 N. W. 893; *STATE EX REL. CARMONS v. WOODS*, ante, 889; *State ex rel. Beason v. Law* (1914) 93 Kan. 357, 144 Pac. 232; *Overlock v. Hall* (1889) 81 Me. 348, 19 Atl. 169; *Young v. Makepeace* (1869) 103 Mass. 50; *Richardson v. Burleigh* (1861) 3 Allen (Mass.) 479; *Semon v. People* (1879) 42 Mich. 141, 3 N. W. 304; *State v. Nichols* (1882) 29 Minn. 357, 13 N. W. 153; *Sutorious v. Stalder* (1911) 88 Neb. 843, 130 N. W. 750; *Clow v. Smith* (1909) 85 Neb. 668, 128 N. W. 140; *Eggleston v. Quinn* (1908) 81 Neb. 457, 116 N. W. 166; *Soucek v. Karr* (1907) 78 Neb. 488, 111 N. W. 150; *Davison v. Cruse* (1896) 47 Neb. 829, 66 N. W. 823; *Dukehart v. Coughman* (1893) 36 Neb. 412, 54 N. W. 680; *Olson v. Peterson* (1891) 33 Neb. 358, 50 N. W. 155; *Strickler v. Grass* (1891) 32 Neb. 811, 49 N. W. 804; *Altschuler v. Algaza* (1884) 16 Neb. 631, 21 N. W. 401; *Dally v. Woodbridge* (1848) 21 N. J. L. 491; *State v. Goetz* (1911) 21 N. D. 569, 131 N. W. 514; *State v. Brandner* (1911) 21 N. D. 310, 130 N. W. 941; *Powelson v. State* (1917) — Okla. —, 169 Pac. 1093; *Lib-*

by v. State (1914) 42 **Okl.** 603, 142 **Pac.** 406; State v. Bowen (1883) 14 **R. I.** 165; State v. Bunker (1895) 7 **S. D.** 639, 65 **N. W.** 33; Stovall v. State (1877) 9 **Baxt. (Tenn.)** 597; State v. Reese (1913) 43 **Utah**, 447, 135 **Pac.** 270.

It is not necessary that the evidence should establish the guilt of the defendant beyond a reasonable doubt. Bell v. State (1899) 124 **Ala.** 94, 27 **So.** 414; Holston v. State (1917) — **Ala. App.** —, 75 **So.** 175; E. N. E. v. State (1889) 25 **Fla.** 268, 6 **So.** 58; Semon v. People (1879) 42 **Mich.** 141, 3 **N. W.** 304; State v. Nichols (1882) 29 **Minn.** 357, 13 **N. W.** 153.

In a few jurisdictions, however, bastardy proceedings are regarded as criminal in their nature, and it is held that the guilt of the defendant must be proved beyond a reasonable doubt. Vail v. State (1897) 1 **Penn. (Del.)** 8, 39 **Atl.** 451; Norwood v. State (1876) 45 **Md.** 68; Sonnenberg v. State (1905) 124 **Wis.** 124, 102 **N. W.** 233; Van Tassel v. State (1884) 59 **Wis.** 351, 18 **N. W.** 329.

In New York it is held that, since a bastardy proceeding is quasi criminal, evidence of the defendant's guilt should be entirely satisfactory; and since the charge is so easy to make and so hard to defend, there should be careful scrutiny of the record. Drummond v. Dolan (1913) 155 **App. Div.** 449, 140 **N. Y. Supp.** 307; People ex rel. Mendelovich v. Abrahams (1904) 96 **App. Div.** 27, 88 **N. Y. Supp.** 924; Webb v. Hill (1909) 115 **N. Y. Supp.** 267.

In Alabama it is held that the evidence must reasonably satisfy the jury of the guilt of the defendant. White v. State (1911) 170 **Ala.** 1, 54 **So.** 430; Lusk v. State (1901) 129 **Ala.** 1, 30 **So.** 33; Miller v. State (1896) 110 **Ala.** 69, 20 **So.** 392.

The state need not show that no one else was the father of the child, it being sufficient in this regard to show that defendant was the father. Miller v. State (**Ala.**) *supra*.

Even where a preponderance of the evidence is held sufficient to establish the guilt of the defendant, it is the rule that unlawful sexual intercourse is not presumed from mere opportunity. Walker v. State (1908) 43 **Ind. App.** 605, 86 **N. E.** 502; State ex rel. Nusssear v. Breeden (1908) 41 **Ind. App.** 370, 83 **N. E.** 1020.

In determining the preponderance of the evidence, the jury should consider all of the presumptions which, according **L.R.A.1918C.**

to the ordinary course of events or according to the ordinary experience of human nature, arise out of the facts proved. Fay v. Reynolds (1891) 60 **Conn.** 217, 21 **Atl.** 418.

Under a statute providing that, upon a trial of the issue in a bastardy proceeding, the examination of the woman taken and returned shall be presumptive against the accused subject to be rebutted by other testimony which he may introduce, the burden of proof is upon the defendant after the affidavit of the prosecutrix is filed. State v. McDonald (1910) 152 **N. C.** 802, 67 **S. E.** 762; State v. Mitchell (1896) 119 **N. C.** 784, 25 **S. E.** 783, 1020; State v. Cagle (1894) 114 **N. C.** 835, 19 **S. E.** 766.

Where the defendant appeals to the sessions court from an order of affiliation of a bastard child, the burden is upon him to show cause why the order of affiliation should be set aside. Rex v. Knill (1810) 12 **East**, 50, 104 **Eng. Reprint**, 20.

Form of instruction.

Where the court instructed the jury that the guilt of the defendant must be proved by a preponderance of the evidence, it is not error to refuse further instructions which might lead the jury to infer that there was or might be something in addition for the plaintiff to do. Sutorious v. Stalder (1911) 88 **Neb.** 843, 130 **N. W.** 750. For example, it is not necessary further to charge the jury that, if the evidence is equally balanced, their verdict should be for defendant. Harper v. State (1884) 101 **Ind.** 109. Nor is it error to refuse, also, to instruct the jury that the presumption of law is that the defendant is innocent, and this presumption must be overcome or the defendant must be acquitted. Daly v. Melendy (1891) 32 **Neb.** 852, 49 **N. W.** 926. Or to refuse specifically to refer to the testimony of the prosecutrix, and instruct the jury to weigh her testimony with caution, or if the jury find her testimony to be untrue upon one point, they are at liberty to disregard her whole testimony. State v. Reese (1913) 43 **Utah**, 447, 135 **Pac.** 270. Compare with **STATE EX REL. CARMONS v. WOODS**, ante, 889, holding that it is not error to instruct the jury "that the law presumes morality and uprightness until the contrary is made to appear from the evidence, and you are instructed that defendant in this case is presumed to be innocent of the charge made against him, and that presumption remains with him through all

stages of the trial and until overcome by the evidence of the state by a preponderance of the credible evidence."

It is proper to refuse to instruct the jury that if it is probable that the defendant is innocent he shall be acquitted. *Holston v. State* (1917) — *Ala. App.* —, 75 So. 175.

An instruction that the most convincing evidence was on the side of the people without reference to the number of witnesses is misleading and erroneous. *People ex rel. Ray v. De Walt* (1914) 188 *Ill. App.* 3. And it is error to instruct the jury to acquit the defendant if he has established by a preponderance of the evidence that he was not with the prosecutrix at the time and place she claimed the child was conceived. *Eggleston v. Quinn* (1908) 81 *Neb.* 457, 116 N. W. 166.

It is error to instruct the jury that it is not incumbent upon the people to show by a clear preponderance of the evidence that the defendant is the father of the child in question, but it is sufficient if the evidence creates probabilities in favor of that opinion, and the weight of the evidence inclines to that side of the question, although an instruction would not be error which requires the people to show the guilt of the defendant by a

clear preponderance of the evidence. *Peak v. People* (1875) 76 *Ill.* 289. It is also erroneous to instruct the jury that the people are not required to prove the guilt of the defendant beyond a reasonable doubt. If by consideration of all of the evidence they are inclined to believe the defendant is the father of the child, then the jury should so find. *Cox v. People* (1884) 109 *Ill.* 457.

Where the prosecutrix testified to three different occasions on which she had sexual intercourse with the defendant, it is not error for the court to instruct the jury in substance that, if a preponderance of the evidence shows the defendant to be the father of the child, the date when the intercourse took place between the parties is immaterial. *Handley v. People* (1915) 196 *Ill. App.* 556.

Where under the case disclosed by the prosecutrix, in order for the defendant to be guilty, the child must have been of premature birth, it is error for the court to refuse so to instruct the jury as to clearly, unequivocally, and emphatically cast upon her the burden of showing that the child was prematurely born. *Soucek v. Karr* (1907) 78 *Neb.* 488, 111 N. W. 150. A. G. S.

MISSISSIPPI SUPREME COURT. (In Banc.)

DUNCAN THOMPSON, Auditor, et al.,
App'ts.,
v.

A. J. MCLEOD.

(112 Miss. 383, 73 So. 193.)

Tax — on extraction of turpentine — validity.

A tax of a certain amount per cup or box for the privilege of carrying on the business of extracting turpentine from standing trees is a property tax within the constitutional provision that taxes shall be equal and uniform and that property shall be taxed in proportion to its value, and when the land is already taxed it is invalid as double taxation.

For other cases, see *Taxes, I. c, in Dig.* 1-52 N. S.

(Cook and Potter, JJ., dissent.)

(December 11, 1916.)

Note. — For privilege or occupation tax on rights issuing out of or connected with real property as a property tax within the constitutional provision, see annotation following this case, post, 898; and see references therein to annotations on related questions.

APPEAL by defendants from a decree of the Chancery Court for Hinds County overruling their demurrer to a bill filed to restrain them from levying and assessing a privilege tax on plaintiff. Affirmed.

Statement by Stevens, J.:

Appellants are, respectively, auditor of public accounts and treasurer of the state of Mississippi, and prosecute this appeal from a decree of the chancery court of Hinds county, Mississippi, overruling their demurrer to a bill of complaint filed by appellee to restrain these officials from levying and assessing the tax attempted to be imposed by chapter 110, Laws of 1912, being "An Act to Levy and Collect and Enforce the Payment of an Annual Privilege Tax or Occupation Fee upon All Persons, Associations of Persons, or Business Firms and Corporations, Pursuing the Business of Extracting Turpentine from Standing Trees." Appellee is a resident and citizen of Hancock county, Mis-

Mississippi, and engaged extensively in the turpentine business. His bill of complaint is very lengthy, and it is unnecessary to set out the averments thereof in full. The material facts alleged are that complainant is the owner of several turpentine distilleries, and was, during the year preceding January 1, 1913, engaged in the extraction of sap and resin from a large number of pine trees, and transporting the same to his distilleries, and then and there distilling the crude gum or resin into the manufactured product called "turpentine;" that he was operating seventeen crops of turpentine on the trees, described in Exhibit A and A 1 to the bill, consisting of 170,000 boxes; that the land shown in Exhibit A belonged exclusively to the complainant, while the trees standing upon the lands described in Exhibit A 1 were leased to the complainant for the purpose and with the right to extract the crude turpentine; that the timber upon all of the lands mentioned had been duly assessed for ad valorem taxes and taxes paid thereon; that in extracting resin from trees the so-called turpentine crops last usually about three years, and during the first year about 50 per cent of the entire value of the use of the sap is extracted, about 30 per cent the second year, and 20 per cent the third year, and that after the third year the trees are generally of no value for the purpose of extracting resin, but that complainant, however, was operating about two crops tapped or cupped four years ago; that five crops were operated by complainant for the first time, five crops the second year, five crops the third year, and two crops the fourth year; that complainant in operating turpentine distilleries in the state of Mississippi was already paying a privilege tax for the right so to do and in accordance with the statutes of this state. The bill then charges that chapter 110, Laws of 1912, attempting to impose a so-called privilege tax for the right to extract turpentine from standing trees, is unconstitutional and void for many reasons therein alleged, one of which is that the enforcement of the provisions of said act would contravene § 112 of our state Constitution, the contention being that the tax here attempted to be imposed is a property tax, and not a privilege tax, and, being a property tax, it is not equal and uniform.

Section 1 of the act in question is as follows: "Be it enacted by the legislature of the state of Mississippi, that there is hereby levied on the gross annual cutting or extraction the following annual privilege tax or occupation fee for the year 1912, and for each subsequent year, upon each person, association of persons, or

business firms and corporations, pursuing the business of extracting turpentine from standing trees. That for carrying on the business of extracting turpentine from standing trees the license shall be one fourth ($\frac{1}{4}$) of 1 cent each year for each cup or box."

Other sections of this act require sworn statements to be made to the auditor by all persons, firms, and corporations affected by the act; these sworn statements to be rendered on or before the 1st day of February for the year ending December 31st next preceding. The statement required is "a sworn statement of the total extracting of turpentine." A penalty is imposed for failure to pay the tax, and the state treasurer is authorized to distrain the goods and chattels belonging to the person, firm, or corporation in default, and to sell a sufficient amount of the property of the taxpayer at public vendue to pay the taxes, together with 10 per cent thereon for each month for which the taxes remain unpaid; the moneys collected to be placed in the treasury to the credit of the general revenue fund of the state.

Mr. George H. Ethridge, Assistant Attorney General, for appellants.

Messrs. Green & Green, for appellee:

The lease or privilege of plaintiff constitutes property.

Orrell v. Bay Mfg. Co. 83 Miss. 815, 70 L.R.A. 881, 36 So. 561; Millikin v. Carmichael, 134 Ala. 623, 92 Am. St. Rep. 45, 33 So. 9; Gex v. Dill, 86 Miss. 16, 38 So. 193; Hancock County Imperial Naval Stores Co. 93 Miss. 827, 17 L.R.A. (N.S.) 693, 136 Am. St. Rep. 561, 47 So. 177; Union Naval Stores Co. v. Adams, 104 Miss. 299, 61 So. 419; Jones v. Adams, 104 Miss. 401, 61 So. 420.

It being property, constitutional taxation thereupon can only be made in accordance with value under § 112.

Ex parte Drexel, 147 Cal. 766, 2 L.R.A. (N.S.) 588, 82 Pac. 429, 3 Ann. Cas. 878; Mugler v. Kansas, 123 U. S. 661, 31 L. ed. 210, 8 Sup. Ct. Rep. 273; Brown v. Maryland, 12 Wheat. 444, 6 L. ed. 687; M'Cullough v. Maryland, 4 Wheat. 316, 4 L. ed. 579; New York ex rel. Burke v. Wells, 208 U. S. 21, 52 L. ed. 372, 28 Sup. Ct. Rep. 193; Gulf & S. I. R. Co. v. Adams, 90 Miss. 605, 45 So. 91; Citizens' Bank v. Parker, 192 U. S. 73, 48 L. ed. 346, 24 Sup. Ct. Rep. 181; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 782; People ex rel. Manhattan Sav. Inst. v. Otis, 90 N. Y. 48; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 416, 23

L.R.A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1100; Brushaber v. Union P. R. Co. 240 U. S. 1, 60 L. ed. 403, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; Pollock v. Farmer's Loan & T. Co. 157 U. S. 558, 39 L. ed. 811, 15 Sup. Ct. Rep. 673; Wilby v. State, 93 Miss. 769, 23 L.R.A.(N.S.) 677, 47 So. 465; Vann v. Edwards, 135 N. C. 661, 67 L.R.A. 464, 47 S. E. 784; Wynehamer v. People, 13 N. Y. 396; Bloek v. Schwartz, 27 Utah, 387, 65 L.R.A. 311, 101 Am. St. Rep. 971, 76 Pac. 22, 1 Ann. Cas. 550.

The right to buy, own, or hold is inherent and personal, and is not taxable, except under § 112.

Wynehamer v. People, 13 N. Y. 396; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; State ex rel. Richey v. Smith, 42 Wash. 237, 5 L.R.A.(N.S.) 674, 114 Am. St. Rep. 114, 84 Pac. 851, 7 Ann. Cas. 577; Chicago v. Collins, 175 Ill. 456, 40 L.R.A. 408, 67 Am. St. Rep. 224, 51 N. E. 907; Montgomery v. Kelly, 142 Ala. 552, 70 L.R.A. 209, 110 Am. St. Rep. 43, 38 So. 67; Opinion of Justices, 208 Mass. 618, 94 N. E. 1043; Gleason v. McKay, 134 Mass. 425; Standard Oil Co. v. Com. 119 Ky. 75, 82 S. W. 1021; State v. Goodwill, 33 W. Va. 183, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; Owens v. State, 53 Tex. Crim. Rep. 105, 120 Am. St. Rep. 772, 112 S. W. 1676; Trencham v. Moore, 111 Tenn. 346, 76 S. W. 905.

Mr. James R. McDowell, amicus curiæ:

The extraction of turpentine from standing trees is such an occupation as may subject the person pursuing it to the payment of a privilege license at the discretion of the legislature.

Barataria Canning Co. v. State, 101 Miss. 890, 58 So. 769; Vicksburg Bank v. Worrell, 67 Miss. 47, 7 So. 219; 25 Cyc. 613; State v. Wheeler, 23 Nev. 143, 44 Pac. 430; Ex parte Mirande, 73 Cal. 365, 14 Pac. 888; Alcorn v. State, 71 Miss. 464, 15 So. 37.

Stevens, J., delivered the opinion of the court:

It is conceded by counsel for the state that, if the tax here attempted to be imposed is a property tax, the act imposing it is unconstitutional and void. In following the rule, so frequently announced by the courts, of looking through the form to the substance, it is manifest that the tax exacted by the act under review operates, and can only operate, as a property tax, and is really not a privilege tax. We are not called upon to place any limitation

upon the right of the state to exact licenses or impose privilege taxes that are really such, and to require the taxes as a condition precedent to the right to do business within the confines of our commonwealth. We do not question the right of the state, also, to measure a privilege tax by the volume or amount of business done. The act here assailed does not even attempt to require a license or permit to be issued by any officer or department of the government as a condition precedent to the right of a citizen to extract crude turpentine from pine trees. No document of any kind is to be issued in advance. The tax demanded by the act is to be paid at the end of the year and after the resin is extracted,—after the so-called privilege has been exercised. On default by the taxpayer, payment of the tax is enforced by seizure and sale of any property belonging to the defaulter. The enforcement of the tax conforms to the procedure adopted for the enforcement of ad valorem taxes. The act under review does not levy a privilege tax on the right or privilege of selling resin or the gum of the tree as originally extracted and commonly known as "crude;" but the privilege, if any, which is taxed, is the privilege or right of the owner or lessee of pine trees to "extract turpentine from standing trees." Section 1 of the act makes no effort to conceal the subject-matter of the tax. It expressly declares that it is "levied on the gross annual cutting or extraction," and the tax levied is "one fourth of 1 cent each year for each cup or box." It is true the act in other language refers to it as a business—"a business of extracting turpentine from standing trees." The imposition of such a tax is not on a business, but on the property involved. Here we have a citizen of our state who owns and operates his own turpentine distilleries, who owns the pine trees which produce the resin, the crude product, without which his distilleries cannot be operated, and although he pays ad valorem taxes upon his land and standing trees at their true value, and although he pays a privilege tax for the right to manufacture spirits of turpentine from the annual product of the trees, he is now called upon to pay an additional tax of one fourth of 1 cent on each box cut or chopped on the trees, and it requires no refinement to observe at once that this is an additional burden of taxation operating, not indirectly, but directly upon complainant's property. Here the legislature attempts to say to the citizen: "Although we recognize that you are the lawful lessee or owner of standing pine trees which produce when tapped an annual product of resin, and although we have

demand and you have paid your full share of taxes upon these standing pine trees and the soil which continually feeds them, nevertheless thou shalt not lay ax to the tree to extract the natural gum without subjecting any property which you have in the state of Mississippi to an additional tax of one fourth of a cent for each box you cut."

This act strikes down the inherent right of the property owner to lay hand upon his own property. Every owner of a pine tree enjoys the same natural right to extract gum from the tree as the owner of a vineyard has to pluck his own grapes. It would be the same thing to require a privilege tax as a precedent right of the owner to pull the ripe pecans from his pecan orchard, or to enjoy a drink of pure water from the cool spring of the old homestead. As stated, the levy is not imposed for the right to sell crude turpentine. If this were done, then anyone engaged in the regular business of buying and selling crude gum might be liable. The writer is not disposed to commit this court to any unnecessary process of reasoning in this opinion, but, having been born and reared amongst the tall, long-leaf pines of South Mississippi, is familiar therefore with the turpentine business, and feels safe in asserting that there is no well-defined business of buying and selling the crude turpentine. It is true that many individuals tap their own trees and sell the annual crude product to the distilleries. It is also true that the owner of the turpentine distillery, more familiarly known as the "still," frequently leases standing timber for the express purpose of boxing the trees for turpentine. In doing so, however, he is the owner either of the timber or of a valuable lease, generally referred to as a turpentine lease. It has been expressly decided by this court that a turpentine lease is a thing of value—"property," upon the value of which the state can levy and does levy an ad valorem tax.

The nature of this lease was properly characterized by our court in *Harrison Naval Stores Co. v. Adams*, 104 Miss. 392, 61 So. 417. In the language of the opinion by Reed, J., the court says that "the leases give the appellant the right to extract the crude gum from the pine trees, and then thereafter such product is manufactured in Harrison county into turpentine and resin."

And in *Jones v. Adams*, 104 Miss. 401, 61 So. 420, the court, again speaking by Reed, J., says: "The question before us is whether such turpentine lease is personal property, subject to taxation. It is understood that the lease gives a . . .

privilege to enter upon land for a term and extract gum or crude products from the pine trees, which is afterwards manufactured into what is known as naval stores. . . . Now, is it not property? It is subject to ownership, it has a value, and it may be bought and sold. It seems clear to us that it is property. From its very nature it is personal property. The lease or right or privilege which is owned by appellant, being personal property, is subject to be taxed as such."

There can, then, be no such thing as a valid and lawful turpentine lease without the right to extract the crude gum; and the case therefore falls clearly and squarely within the principle recently announced by this court in the companion case of *Thompson v. Kreutzer*, 112 Miss. 165, 72 So. 891, wherein our court, by Chief Justice Smith, observes that "a tax on an essential attribute of a thing is a tax on the thing itself," and "no tax can be imposed on the right of ownership which is not also a tax on property."

As stated by Chief Justice Marshall in *Brown v. Maryland*, 12 Wheat. 444, 6 L. ed. 687: "All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself."

And subsequently, in the case of *New York ex rel. Burke v. Walls*, 208 U. S. 21, 52 L. ed. 372, 28 Sup. Ct. Rep. 193, the rule was again declared by the Supreme Court of the United States, with reference to imports, "that a state cannot, in the form of a license or otherwise, tax the right of the importer to sell."

In *Brushaber v. Union P. R. Co.* 240 U. S. 1, 60 L. ed. 493, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713, the Supreme Court of the United States, discussing the right of the Federal government to levy a direct tax without an apportionment, observes with reference to a tax on income and property: "Coming to consider the validity of the tax from this point of view, while not questioning at all that in common understanding it was direct merely on income and only indirect on property, it was held that, considering the substance of things, it was direct on property in a constitutional sense, since to burden an income by a tax was, from the point of substance, to burden the property from which the income was derived, and thus accomplish the very thing which the provision as to apportionment of direct taxes was adopted to prevent."

So, likewise, in *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 558, 39 L. ed. 811, 15 Sup. Ct. Rep. 680, the court, by its chief justice, well says that "a tax upon property holders in respect of their estates, whether

real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes," and "an annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income. This law taxes the income received from land and the growth or produce of the land. Mr. Justice Patterson observed in *Hylton v. United States*, 3 Dall. 171, 1 L. ed. 556, 'Land, independently of its produce, is of no value.'"

In the language of the distinguished Coke: "What is land but the profits thereof?" 1 Co. Litt. 45.

"A devise of the rents and profits or income of lands passes the land itself both at law and in equity." 1 Jarman, Wills, 5th ed. 789, and cases cited.

Following the reasoning of this court in *Thompson v. Kreutzer*, supra, there cannot be such a thing as a turpentine lease without an owner or lessee. If, then, you tax the lease itself with an ad valorem tax and at the same time exact tribute from the lessee in laying the ax to the tree, it is a case of double taxation pure and simple. There cannot be ownership of standing pine trees without an owner, and if you tax the standing trees with an ad valorem tax, and at the same time exact tribute from the owner as a condition precedent to his right to lay hands upon the tree, the state is imposing double taxation upon the tree itself. Section 112 of our Constitution solemnly declares that "taxation shall be uniform and equal throughout the state," and that "property shall be taxed in proportion to its value." If the tax here questioned can lawfully be imposed, then the legislature of our state in a desperate search for revenue can effectually brush aside the essential feature of equality and uniformity demanded by the Constitution. The provision that property shall be taxed in proportion to its value would be nullified, and the integrity of the Constitution itself destroyed. The legislature is here attempting to denominate private use of property as a public use. Appellee, in taking crude gum from his own trees, is not directly engaged in any kind of mercantile business. He does not bring his wares into the market place nor upon stock markets. He is upon his own private property pursuing a natural right.

"A legislature cannot make a private purpose a public purpose, or draw to itself or create the power to authorize a tax or a debt for such a purpose, by its mere fiat." *Dodge v. Mission Twp.* 54 L.R.A. 242, 46 C. C. A. 661, 107 Fed. 827.

This case, while different from, falls L.R.A.1918C..

within the principle announced by our court in *Wilby v. State*, 93 Miss. 769, 23 L.R.A.(N.S.) 677, 47 So. 465. At page 772 of 93 Miss., our court says: "Laws of this nature approximate an abridgment of the liberty of the citizen guaranteed to him by the 14th Amendment of the Constitution of the United States, and should receive the strictest construction. Liberty, in its broad sense, must consist in the right to follow any of the ordinary callings of life without being trammelled."

The act under review does not undertake to make a distinction between the humble homesteader who taps a few trees by his own home and the large operator of many distilleries. No distinction can in fact be made. The liability here imposed is conclusively fixed at the root of the tree, and not at the market place. The poorest and most humble homesteader in the country might tap a few trees on his 40 acres, load a few barrels of crude turpentine, convey it to the distillery with a one-ox cart, and thereby subject himself to liability.

The conclusion of the whole matter, then, is that this tax operates necessarily and immediately as a property tax, and not as a privilege tax, and the statute imposing it violates § 112 of our Constitution, and the result reached by the learned Chancellor is eminently correct, and his decree is, accordingly affirmed.

Potter, J., dissenting:

I dissent from the majority opinion in this case. The statute under consideration puts a privilege tax on those engaged in the business of extracting turpentine from standing pine trees. The majority opinion in this case says that the statute is a "property tax," and does not put the tax in question on the business of extracting crude turpentine, but the statute, in plain English, says it does.

The majority opinion in this case says that the act under review does not levy a privilege tax on the right or privilege of selling resin, or the gum of the tree as originally extracted and commonly known as "crude." The tax, however, is upon those engaged in the business of extracting crude turpentine; and to engage in a business is to engage in an occupation for profit; and how else is a man who is engaged in extracting turpentine from trees to obtain a profit therefrom except by a sale of his products, either in its crude form or as a more highly manufactured article. The opinion in this case says that the tax in question is a tax on property. But the statute says that it is a tax upon the persons engaged in a particular line of business. That this tax is a tax on the

business, and not on the property, is demonstrated by the fact that the tax imposed is not a lien on the property used in the business, and, if the business is carried on by another than the owner of the land, the owner is not personally liable for the tax.

It is said in the majority opinion that the defendant in this case has paid an ad valorem tax on his property, as the standing pine trees are part of the land and he has paid a tax on the land. That is true, but it does not prevent the state from imposing a privilege tax on persons engaged in a business for profit and using in their business the property taxed. Every merchant in the state pays an ad valorem tax on his stock of goods, but this does not exempt him from paying a privilege tax to sell the same goods. The owner of a cart pays an ad valorem tax on his cart, and, if he owns a mule, an ad valorem tax on his mule. He can use the cart and mule for his own purposes without paying a privilege tax on same. But if he uses this same cart and mule as a public dray for profit, he is required to pay a privilege tax. The statute in this case provides that the tax is upon the business of extracting crude

turpentine. It is a revenue measure pure and simple, and the said tax is in no sense a tax on the property itself.

I know of no way to construe an unambiguous statute except by its plain terms. I take it that this statute means what it says, and its purposes could not be put in clearer language. The tax is on the occupation of "pursuing the business" of extracting turpentine from standing trees. The statute is designated a privilege tax in its title. I know of no good reason why every other occupation, from telling fortunes to running a railroad, can be taxed as a privilege, and the extensive business of extracting resin from pine trees cannot be so taxed.

The fact that this tax is measured by the number of trees taxed does not make the act invalid; for this only fixes the measure or the quantum of tax, just as the amount of stock carried in a grocery store fixes the amount of privilege tax to be charged; or the capacity of a press in an oil mill fixes the privilege tax to be charged upon the cotton seed oil business.

Cook, J., joins in this dissent.

Annotation—Privilege or occupation tax on rights issuing out of or connected with real property as a property tax within the constitutional provision.

A statute imposing what is denominated "an annual privilege tax or occupation fee" of 20 cents per acre upon each person or corporation owning or holding more than 1,000 acres of timber land or land in the state was held invalid as being a tax upon property, and not being in proportion to its value, in *Thompson v. Kreutzer* (1916) 112 Miss. 165, 72 So. 891.

A tax upon the gross value of the production of petroleum or other crude or mineral oil and of natural gas, in lieu of all other taxes, is held to be a property tax in *Large Oil Co. v. Howard* (1917) — Okla. —, L.R.A. —, —, 163 Pac. 537, and as such within the power of the state to impose, although the production is brought about through the instrumentality of a Federal agency.

A statute requiring a license for displaying upon real estate an advertisement containing more than 4 square feet of surface is sustained in *State v. Murphy* (1916) 90 Conn. 662, 98 Atl. 343. The court throughout the opinion treats the statute as imposing a tax, and in this character sustains its validity. L.R.A.1918C.

A statute imposing a license tax upon persons, firms, or corporations engaged in the business of severing natural products, including all forms of timber, turpentine, and minerals, was construed in *State v. Stiles* (1915) 137 La. 539, 68 So. 947, as not imposing a tax upon the lessor of oil lands, consequently no question as to its constitutionality arose in the action, which was one against the lessor to recover the tax.

An ordinance containing similar provisions adopted by the police jury of a parish was before the court for construction in the case of *Standard Oil Co. v. Red River Parish* (1916) 140 La. 42, 72 So. 802, in an action by the lessee of oil lands to recover a tax paid thereunder. The validity of the legislation was sustained, but the point as to its being a property tax was not raised.

An act imposing a tax of a certain percentage on the gross products of any company or individual owning, controlling, or managing oil wells was sustained in *Producers' Oil Co. v. Stephens* (1907) 44 Tex. Civ. App. 327, 99 S. W. 157. The court said: "In our opinion

the tax is not upon the gross products of the oil wells, but upon the occupation of owning, controlling, or managing oil wells producing oil, and the amount of the tax is measured by a percentage of the market value of the gross products." As thus construed, it is held not to violate any provision of the United States Constitution, as the legislature had the authority to single out and make classification for the purpose of levying occupation taxes. "And," the court continues, "although this law imposes an occupation tax upon the oil producers who pay an ad valorem tax upon the real estate producing oil, it does not constitute double taxation not permitted by the law, as it is within the authority of the legislature to impose an ad valorem tax on the oil-producing property of appellants and an occupation tax for the use of this property in the production of oil." A writ of error to this decision was denied by the supreme court of the state. This decision is approved in *Texas Co. v. Stephens* (1907) 100 Tex. 628, 103 S. W. 481.

A tax providing that, "in addition to the privilege license or tax required in

this act, a further tax of 3 cents per barrel is hereby laid upon all oysters canned, packed, shipped, or sold in and from this state, and on all oysters caught and taken from the public reefs and private bedding grounds for packing, canning, shipping, or for sale. . . . This tax shall be paid for by the person, firm, or corporation first marketing the oysters," was held, in *State v. Parker* 5 Ala. App. 231, 59 So. 741, not to be a tax upon property, but a charge or imposition upon the business or act of marketing oysters.

The interest of one other than the owner of the soil in mineral in situ, as independent subject of taxation, is discussed in the note to *Wolfe County v. Beckett*, 17 L.R.A.(N.S.) 688, and the supplement thereto to the case of *Washburn v. Gregory Co.* L.R.A.1916D, 307.

The interest of one other than the owner of the soil in growing trees or timber or their products, as separate subject of taxation, is discussed in the note to *Hancock County v. Imperial Naval Stores Co.* 17 L.R.A.(N.S.) 693.

W. A. E.

NORTH CAROLINA SUPREME COURT.

H. MATTHEWS

v.

CAROLINA & NORTH WESTERN RAILWAY COMPANY, Appt.

(— N. C. —, 94 S. E. 714.)

Master and servant — duty to protect servant's goods.

1. A railroad company owes its servant, living by permission in a shanty car, no duty of moving the car to protect his goods from an unprecedented flood which is sweeping towards the car.

For other cases, see *Master and Servant*, II. a, 1, in *Dig.* 1-52 N. S.

Bailment — goods in shanty car.

2. A railroad company is not liable as bailee for destruction by an unprecedented flood of goods of its servant located in a shanty car where the servant was living by its permission.

For other cases, see *Bailment*, I. in *Dig.* 1-52 N. S.

(December 28, 1917.)

Note. — As to duty and liability of master in respect to goods of servant who lives on his premises, see annotation following this case, post, 900; and see references therein to annotations on related questions.

The duty of a carrier towards shippers L.R.A.1918C.

A PPEAL by defendant from a judgment of the Superior Court for Catawba County overruling a motion to nonsuit an action brought to recover damages for destruction of plaintiff's goods by flood, alleged to have been caused by defendant's negligence. Reversed.

The issues upon which the case was tried are as follows:

Were the plaintiff's goods destroyed by the negligence of the defendant? Answer: Yes.

If so, what damage are plaintiffs entitled to recover? Answer: \$150.

The facts are stated in the opinion.

Messrs. J. H. Marion, W. C. Feimster, and M. H. Yount for appellant.

Messrs. D. L. Russell and R. H. Shuford for appellee.

Brown, J., delivered the opinion of the court:

The evidence tends to prove that plaintiff was employed by defendant as an assistant coal heaver at its coal chute at Cliffs, a station on Catawba river. By permission

to anticipate and guard against the consequences of an act of God is considered in the notes to *Armstrong v. Illinois C. R. Co.* 29 L.R.A.(N.S.) 671, and *Gulf Coast Transp. Co. v. Howell*, L.R.A.1916D, 981.

of defendant, plaintiff and his family occupied as a residence two unused shanty cars located on a sidetrack near the chute. They lived in the cars with their household effects from May 1 to July 16, 1915. On that night an unprecedented flood swept over the banks of the Catawba, submerged the shanty cars, and destroyed plaintiff's property therein.

The evidence shows that during the day of the 16th, before the water reached the track on which the shanties were located, a freight train in charge of conductor Winkler passed Cliffs going towards Hickory. Nothing was said to Winkler by the plaintiff, Matthews, or by Askew, his foreman, about moving the cars. After the freight train passed in the afternoon, Askew, plaintiff's brother-in-law, phoned the defendant's shops at Hickory, and requested that an engine be sent out to move the shanty cars. At that time the water had not reached the shanties. He was told that there was only one engine there and that had to be held on account of a washout on the line at another point. It had required Winkler from 2:30 until 6 o'clock that same afternoon to get his train from Cliffs to Hickory, a distance of 2 or 3 miles.

The court overruled a motion to nonsuit, which is assigned as error. The exception is well taken. We know of no principle of law that imposed upon the defendant the legal duty to protect and rescue plaintiff's chattels from the destructive consequences of an act of God. The plaintiff was occupying the shanty cars as a residence by permission of defendant. His relation to defendant was that of a servant who has brought his effects upon the master's premises by his permission, the servant retaining personal control of his property. The law imposes no duty upon the master to rescue his servant's goods from the consequences of a destructive agency for which the master was in no way responsible. The cause of the destruction was the act of God, and not that of the master. 1 Labatt, Mast. & S. 15. The rule is thus stated by the

Georgia court in *Allen v. Hixson*, 111 Ga. 460, 36 S. E. 810: "When an employee, without fault on the master's part, becomes placed in a dangerous or painful situation, the master is under no positive legal duty of exercising all reasonable care and diligence to effect such employee's speedy release. Being in no way responsible for the unfortunate occurrence, the master cannot be said to be guilty of a tort if he does not promptly take active steps in coming to the rescue. The only duty arising under such circumstances is one of humanity, and for a breach thereof the law does not, so far as we are informed, impose any liability." 24 Cyc. 1072, and notes, and note in 42 L.R.A. (N.S.) 363.

To illustrate: Suppose plaintiff had been a farmer's tenant residing in a tenant house on the banks of the Catawba, and when the flood began to rise he had telephoned his landlord to bring his team and remove his household goods, and the landlord had failed to do so. Would the landlord be liable? Certainly not. The law imposes no such duty on him, although humanity did. Causes of action arise only for violations of duties imposed by municipal law. Unfortunately for plaintiff, he failed to have his cars attached to Winkler's freight train as he could have done, and when he phoned to Hickory for help, the defendant's only engine there was necessarily detained to meet another pressing demand. Had this not been so, we doubt not that it would have been sent to plaintiff's relief.

The position that defendant may be held as a bailee of the household goods is untenable. Possession and control are essential elements in the law of bailment. The defendant was not in possession of the goods simply because they were in its shanty cars, any more than a landlord would be in possession of his tenant's household effects simply because he had furnished the tenant a house to live in. 6 C. J. 1102.

The motion to nonsuit is allowed.

Reversed.

Annotation—Duty and liability of master as to goods of servant who lives on the premises.

Research has disclosed no case precisely in point with *MATTHEWS v. CAROLINA & N. W. R. Co.* ante, 899. The decision in that case, however, appears sound. Although not strictly in point, attention is called to the case of *Doyle v. Union P. R. Co.* (1893) 147 U. S. 413, 37 L. ed. 223, 13 Sup. Ct. Rep. 333, because of the somewhat analogous situation involved. That was an action for

personal injuries and for death of the plaintiff's children by a snowslide. The parties were living in a section house near the base of a high and steep mountain, in a place subject to snowslides and dangerous on that account; the plaintiff had made an agreement with the railroad company to occupy the section house and board section hands and other employees of the company as it

desired, at a certain rate which was to be paid by the employees, but which the company agreed to retain from their wages in order to aid her in collecting for the board. It was held that the relation was that of landlord and tenant, and that the company was not liable although it was aware of the danger, of which the plaintiff was ignorant, and did not notify her thereof.

The case of *Allen v. Hixson* (1900) 111 Ga. 460, 36 S. E. 810, which is cited in *MATTHEWS v. CAROLINA & N. W. R. Co.*, was also a personal injury case, and the language of the court supports apparently the rule applied in the *MATTHEWS CASE*. But it will be seen from

an examination of the note to *Raasch v. Elite Laundry Co.* 7 L.R.A.(N.S.) 940, on the question of the duty of the master to relieve a servant who, without the master's fault, has been caught in a dangerous situation, in which the *Hixson Case* is cited, that that case does not represent the unanimous view of the authorities on the question.

As to occupation of premises as a servant and as a tenant, see the note to *Bourland v. McKnight & Bro.* 4 L.R.A.(N.S.) 698. And see *Minneapolis Iron Store Co. v. Branum*, L.R.A.1917E, 298, and other cases cited in the footnote. R. E. H.

DISTRICT OF COLUMBIA COURT OF APPEALS.

ARLINGTON BREWING COMPANY, Incorporated, Appt.,
v.
BLUETHENTHAL & BICKART, Incorporated.

(36 App. D. C. 209.)

Corporation—knowledge of officer—individual transaction.

A corporation is not chargeable with notice of the fact known to its officer when indorsing to it a stranger's note in payment of his indebtedness to it, that the consideration for the note had failed.

For other cases, see Notice, II. a, in Dig. 1-52 N. S.

(January 3, 1911.)

APPEAL by defendant from a judgment of the Supreme Court in favor of plaintiff in an action on a promissory note. Affirmed.

The facts are stated in the opinion.

Mr. Lorenzo A. Bailey, for appellant:

A corporation is affected with notice of private dealings between its officers and third persons where such officer is the organ of communication with the outside world, and is the proper officer to receive and communicate notice of the particular fact to it.

Distilled Spirits (Harrington v. United States) 11 Wall. 356, 20 L. ed. 167; 10 Cyc. 1054, 1055, 1064.

Messrs. Joseph A. Burkart and J. Althens Johnson for appellee.

Note.—For agent's knowledge of defense to bill or note belonging to him and indorsed or transferred by him to his principal, as affecting the latter's character as a bona fide holder, see annotation following this case, post, 902, and references therein to annotations on related questions. L.R.A.1918C.

Robb, J., delivered the opinion of the court:

This is an appeal from a judgment of the supreme court of the District of Columbia upon a verdict for the plaintiff, appellee here, in an action upon a note for \$500 payable to the order of Thomas F. McNulty and, before maturity, indorsed by him to the plaintiff for value.

There is practically no dispute as to the facts, and but one question is presented for review. McNulty was the owner of a distillery in Baltimore. He sold his business to the plaintiff corporation and became one of its vice presidents and its general manager for the District of Columbia. His credits did not pass in said sale, but remained his individual property. Among those credits was a promissory note of Thomas F. Fay for \$1,900, secured by deed of trust upon Fay's retail liquor business in this city, which included barroom license and fixtures. After the sale of his business to the plaintiff, McNulty was proceeding to collect payment of said Fay note by foreclosure sale under said deed of trust, when a conference was had between officers of defendant corporation and himself. Fay being also indebted to the defendant and its lien being subordinate to the lien of McNulty, and it being evident that a sale under the first trust would exhaust the security and leave the defendant without any security, it was agreed that one Pach, who was well known to the defendant, should become the purchaser at the trust sale; that McNulty would accept in liquidation of his claim \$500 in cash, to be paid by the defendant, as Pach had no money; a ninety-day note in the same amount to be made by the defendant and a \$1,200 note to be made by Pach, secured by a first trust on the business. The defendant was to take a second trust to secure Fay's indebtedness

to it, which indebtedness Pach was to assume. The defendant contends, and its testimony tended to show, that McNulty promised, in consideration of this arrangement, that he would extend credit to the extent of \$500 to Pach that he might get started in his business, and that the defendant was to extend a like credit. The testimony of the plaintiff tended to show that after the terms upon which Pach was to purchase the business had been agreed upon, and independently of that agreement, McNulty suggested the advisability of extending credit to Pach. There was no dispute that McNulty, when he received the note in suit, immediately indorsed it to the plaintiff for value and without informing plaintiff of the conversation or arrangement as to credit to Pach.

The defendant asked the court to instruct the jury that the plaintiff "was chargeable with knowledge, imputed knowledge, or notice of whatever Mr. McNulty knew" in reference to the consideration for this note. This instruction the court refused to give, but did charge on that branch of the case as follows: "Now, in this case, the note is not made by Pach, but is made by the Arlington Brewing Company and payable to Mr. McNulty, but he has assigned it to the plaintiff in this case, Bluethenthal & Bickart. Now if Bluethenthal & Bickart knew nothing about the transaction between these parties, and gave the money for it in good faith, before the note matured, and without notice of any impairment of the consideration of that note when they bought it, they are entitled to recover, no matter what was the consideration as between Mr.

McNulty and the brewing company, unless you find that McNulty really was, when he took the note, acting for the plaintiff in this case, Bluethenthal & Bickart."

It was not error for the court to refuse to charge as requested. McNulty was not the agent of the plaintiff in obtaining this note, nor was he acting for the plaintiff when he indorsed the note to it. It is apparent, therefore, that the rule that notice to the agent is notice to the principal, not only as to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction and still in his mind at the time of his acting as such agent, if the agent is at liberty to communicate such knowledge to the principal (*Distilled Spirits (Harrington v. United States)* 11 Wall. 356, 20 L. ed. 167), does not apply in this case. Here McNulty, an officer of the corporation, was dealing with and not for his principal, and if there was a failure of consideration for the note which he assigned to the plaintiff, and he concealed that fact from it or failed to inform it of that fact, his knowledge in such a situation is not imputable to the plaintiff. *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282; *Winchester v. Baltimore & S. R. Co.* 4 Md. 231. The interests of McNulty, when he indorsed this note to the plaintiff in part liquidation of his indebtedness to it, were antagonistic to its interests. His position as to that transaction was that of a stranger, and knowledge which he possessed and did not disclose cannot be imputed to the plaintiff.

The judgment is affirmed with costs.

Annotation—Agent's knowledge of defense to bill or note belonging to him and indorsed or transferred by him to his principal, as affecting the latter's character as a bona fide holder.

The general principle that notice to one acting as agent for another, of a fact within the scope of his authority, is imputable to the principal, is well settled. To this general principle there is an exception as well settled as the rule itself, that knowledge of an agent is not imputable to his principal when,

in the transaction involving the matter to which the knowledge relates, the agent occupied a position antagonistic to his principal, or in other words was dealing with, not for, his principal. Various phases of this exception to the general rule have been discussed in the notes in this series of reports.¹

¹ The imputation of knowledge of bank officers to banks, where the officers are personally interested, is discussed in the note to *Lilly v. Hamilton Bank*, 29 L.R.A.(N.S.) 558, and the supplement thereto to the case of *First Nat. Bank v. Burns*, 49 L.R.A.(N.S.) 764.

See note to *Brookhouse v. Union Pub. Co.* 2 L.R.A.(N.S.) 993, as to whether a principal is chargeable with knowledge acquired by his agent, when the agent is engaged in L.R.A.1918C.

committing an independent fraudulent act on his own account.

The converse, that is, whether an officer or employee of a corporation is chargeable with its knowledge of infirmities in commercial paper purchased from it, is discussed in the note to *McCarty v. Kepreia*, 48 L.R.A.(N.S.) 65, and the supplementary note thereto to *Hardin v. Dale*, L.R.A.1915D, 1099.

The present note involves the application of this exception to a limited class of cases; viz., cases passing upon the question whether a principal is chargeable with the knowledge of an agent of defenses to a bill or note owned by the agent and indorsed or transferred by him to his principal, so as to preclude the principal from becoming a bona fide holder thereof. It is assumed that the principal is a purchaser for value before maturity without any actual knowledge of defenses to the note.^{1a} The present note has been confined to cases of transfer of notes owned by the agent in his individual capacity. It does not include the question whether a principal is chargeable with the agent's knowledge of defenses to paper owned by a firm or corporation of which the agent is a member, which the agent representing such owner transfers to his principal.

The exception to the general rule above referred to is peculiarly applicable to situations such as was involved in *ARLINGTON BREWING CO. v. BLUETHENTHAL & BICKART*, ante, 901, where on

the very face of the transaction the agent appears as the party with whom the principal is dealing. To charge the principal with the agent's knowledge in such a situation would render it unsafe for a principal to deal with an agent. It is quite generally held that the agent's knowledge of defenses to a bill or note is not imputable to the principal so as to prevent the principal becoming a bona fide holder, where, in the transaction in which the bill or note is transferred or indorsed, the agent is acting for himself, and the principal is represented by another or acts for himself.² Notice is sought to be imputed most frequently in dealings between a corporation and its officers or agent. In accord with the rule as above stated, the corporation is held not chargeable with knowledge of defenses possessed by the corporate officer.³ The reason most frequently given for this decision is that in the transaction in which the transfer or indorsement was made the agent was acting for himself. In other words the officer is not the agent of the corporation in

^{1a} In this connection see *Bettanier v. Smith* (1906) 129 Iowa, 597, 5 L.R.A. (N.S.) 628, 105 N. W. 999, holding that the mere exhibition by an agent for the investment of money, to his principal, of a negotiable note indorsed in blank or representing his money, and the acquiescence by the latter, do not constitute him a bona fide purchaser so as to entitle him to hold the note as against the true owner, who had placed it with the agent for safe-keeping.

² See cases in notes 3 et seq.

It has been held that a landlord to whom his agent wrongfully indorses a note belonging to another, in payment of rents collected by the agent, cannot be said as a matter of law not to be a bona fide holder. *Mason v. Hickox* (1870) 11 Abb. Pr. N. S. (N. Y.) 127.

³ *McDonald v. Randall* (1903) 139 Cal. 246, 72 Pac. 997, holding the knowledge of the president of a bank that a note given to him was without consideration, not imputable to the bank, to whom he transferred it in part payment of his indebtedness to the bank.

Farmers' & C. Bank v. Payne (1857) 25 Conn. 444, 68 Am. Dec. 362, holding the knowledge of a director of a bank of the fraudulent conversion of bills which he transferred to the bank, not imputable to the bank, where such director was not present at any of the meetings in which the transactions relating to these bills were discussed or passed upon, and there is no evidence that he communicated his knowledge to any other director, or to any officer or agent of the bank.

English-American Loan & T. Co. v. Hiers (1900) 112 Ga. 823, 38 S. E. 103, holding a bank not chargeable with knowledge of L.R.A.1918C.

defenses possessed by a director who transferred a note to the bank, the bank not being represented by the director in the transaction, but by its cashier.

Metcalf v. Draper (1900) 98 Ill. App. 399, holding a bank not chargeable with knowledge of defenses possessed by a director who had transferred paper to it.

Frost v. Belmont (1863) 6 Allen (Mass.) 152, holding a bank not chargeable with knowledge of a director who presented a note for discount, and did not act officially with the other members in deciding the question whether it should be discounted.

First Nat. Bank v. Babbidge (1894) 160 Mass. 563, 36 N. E. 462, holding a bank not chargeable with the knowledge of its president that a note discounted for the president was without consideration, where the cashier acted for the bank in discounting the note.

Merchants' Nat. Bank v. Lovitt (1892) 114 Mo. 519, 35 Am. St. Rep. 770, 21 S. W. 825, holding a bank not chargeable with the knowledge of the vice president of defenses to a note which the vice president, who was payee therein, sold to the bank, where the vice president conducted his negotiations of sale with the president, who agreed on behalf of the bank to take the note.

Third Nat. Bank v. Tinsley (1882) 11 Mo. App. 498, holding a bank not chargeable with the knowledge of a director of defenses to a note payable to the director which he sold to the bank.

Buffalo County Nat. Bank v. Sharpe (1894) 40 Neb. 123, 58 N. W. 734, holding a bank not chargeable with knowledge of defenses to a note possessed by a director who was payee therein, and who sold the same to the bank.

the transaction in question.⁴ There is no presumption that an agent who is

Loomis v. Eagle Bank (1857) 1 Disney (Ohio) 285, affirmed without reference to this point in (1859) 10 Ohio St. 327, holding a bank not chargeable with knowledge of its director of defenses to a note indorsed to it by him. The director was a member of the finance committee of the bank, but whether he was present when the note was discounted or took any part in the action did not appear.

Dominion Trust Co. v. Hildner (1914) 243 Pa. 253, 90 Atl. 69, holding a bank not chargeable with knowledge of its president of defenses to a note purchased from him by the bank.

Thurston v. Assets Realization Co. (1914) 58 Pa. Super. Ct. 99, holding a bank not chargeable with knowledge of its treasurer of false and fraudulent representations made by the treasurer in securing notes purchased by the bank. It is not clear who represented the bank in making the purchase.

National Bank v. Feeney (1897) 9 S. D. 550, 46 L.R.A. 732, 70 N. W. 874, holding a bank not chargeable with the knowledge of its cashier, who was the payee of a note discounted by the bank, where the bank acted wholly through its discount committee, of which the cashier was not a member, and the cashier acted only for himself.

Third Nat. Bank v. Harrison (1882) 3 McCrary, 316, 10 Fed. 243, holding a bank not chargeable with knowledge of defenses possessed by a director, to paper discounted by the bank for the director.

Lilly v. Hamilton Bank (1909) 29 L.R.A. (N.S.) 558, 102 C. C. A. 1, 178 Fed. 53, holding a bank not chargeable with knowledge of its president and a director of defenses to a note sold by the officers to the bank, where such officials took no part in the negotiation in behalf of the bank in making the purchase.

A bank was held not chargeable with knowledge of fraud possessed by its cashier in notes transferred to the bank, in *First Nat. Bank v. Bevin* (1900) 72 Conn. 666, 45 Atl. 954. In one part of the opinion the notes are stated to have been transferred by the cashier to the bank as security for a loan; in another part of the opinion the notes are stated to have been transferred to the bank by a third party. Whether the cashier was acting for the third person is not clear.

In *Louisiana State Bank v. Senecal* (1839) 13 La. 525, a bank was held not chargeable with knowledge of defenses possessed by a director, to a note which had been given upon a sale of property of the director's wife, and delivered to the director, who discounted it at the bank.

A bank which was the payee of a note delivered to its president for the purpose of enabling him to discount it and use the proceeds for a specified purpose was held, in *First Nat. Bank v. Persall* (1910) 110 Minn. 333, 136 Am. St. Rep. 499, 125 N. W. 506, 675, not chargeable with knowledge possessed by its president, who discounted L.R.A.1918C.

the note at the bank and was credited with the amount thereof. And it having shown that the bank gave a valuable consideration for the note and accepted it in good faith before maturity, it was held a bona fide holder.

A bank was held chargeable, in *Messick v. Roxbury* (1854) 1 Handy (Ohio) 190, with knowledge of its cashier of defenses to a note which at one time was owned by the cashier personally; but the facts are obscurely stated and it is not clear that it was transferred directly from the cashier to the bank.

In *Kauffman v. Robey* (1883) 60 Tex. 308, 48 Am. Rep. 264, one who was an agent for several parties held notes as collateral security for a debt owing one of his principals; subsequently, an agreement was made by which the note thus held as collateral was transferred to another of the principals, who was the plaintiff in the action. The plaintiff was held not chargeable with knowledge of defenses to the note acquired by the agent when acting for his other principal.

In *Hawkins v. First Nat. Bank* (1915) — Tex. Civ. App. —, 175 S. W. 163, where the president of a bank took the note of a third person, apparently payable to the bank, for money owing by the president to the bank, the court, in refusing to charge the bank with knowledge of defenses possessed by the president, states that, if the president took the note in question to evidence a debt that he himself was owing the bank, his interest would be adverse to that of the bank, and the general rule that notice to the agent is notice to the principal does not apply.

A corporation was held not chargeable with knowledge of defenses to a draft indorsed by a corporate officer who was payee therein to the corporation. *Levy & C. Mule Co. v. Kauffman* (1902) 52 C. C. A. 126, 114 Fed. 170. It does not appear whether the corporation was represented by any other officer than the payee of the draft; if not, the case would seem to fall within the rule discussed below in cases in which the officer was the sole representative.

It is stated obiter in *Tilden v. Barnard* (1880) 43 Mich. 376, 38 Am. Rep. 197, 5 N. W. 420, that if a note signed by the cashier as one of the makers thereof, and payable to the cashier as payee in the note, was at any time negotiated to the bank of which the maker and payee was cashier, the bank would not be a bona fide holder.

The mere fact that one who discounted a note at a bank was a director thereof does not charge the bank with knowledge possessed by him. *Washington Bank v. Lewis* (1839) 22 Pick (Mass.) 24. It is stated that, in applying for the discount, he did not act as director, nor could he with any propriety so act; he was the party with whom the bank contracted in discounting the note and to whom the money was paid.

⁴In *Louisiana State Bank v. Senecal*

acting for himself in thus transacting business with the principal will communicate his knowledge to his principal.⁵ It is stated in one case that, while the general doctrine is recognized that the principal is charged with notice of what an agent knows in transactions where said agent is acting for the principal, yet a bank director, "in asking for a discount of his own paper, is not an agent of the bank, but acting as the adverse contracting party. Were this held otherwise, no bank could discount paper to which a director is a party, without losing the position of an innocent indorsee for value under the law merchant. Hence no bank could have dealings in commercial paper with any of its directors on ordinary business principles."⁶ In a case involving the sale of a note by the president of a bank to the bank, it is stated that "a bank officer who offers to his bank a note for discount is to be regarded in that trans-

action as a stranger, and the bank is not chargeable with the officer's knowledge of fraud or want of consideration for the note."⁷

As shown above, the corporation has usually been represented by another officer or agent in purchasing the note. The fact that the corporation is thus represented by another agent is emphasized. It has been stated, in a case in which the knowledge of the president of a bank was sought to be imputed to the bank, that, if he alone had acted in discounting the note and in placing the proceeds to his own credit, the bank would be bound by his knowledge.⁸ That the bank is not chargeable with knowledge of its officer of defenses to a note indorsed or transferred by him to it has been held true, although the officer was present and acting as a member of the discount committee when his note was discounted.⁹ It has been held, however, that a bank is chargeable with

(1839) 13 La. 525, where a bank was held not chargeable with knowledge of its director of defenses to a note indorsed by him to it, the court states that, if this knowledge had been brought home to the president or cashier, the bank would be chargeable therewith, and continues: "But directors are not officers of a bank in the proper sense of the word, nor have they individually any power or control in the management of its concerns; they act collectively, and at stated times, and have otherwise no more to do with the general management of the institution than the other stockholders. The director in this instance had a direct interest in suppressing the information he possessed; and it would be extending constructive notices beyond all reasonable bounds to say that the plaintiffs must be held cognizant of facts which are proved to have been intentionally concealed from them by a person who, individually, was neither their officer nor their agent."

⁵ *Farmers' & C. Bank v. Payne* (1857) 25 Conn. 444, 68 Am. Dec. 362.

The court in *Hummel v. Bank of Monroe* (1888) 75 Iowa, 689, 37 N. W. 954, made an exception to the general rule that notice to the agent is imputable to the principal, where circumstances make it probable that the agent will not communicate his knowledge or information to his principal, and states, with reference to the facts in the case at bar, that, if the cashier had communicated to the bank the facts within his knowledge before receiving the benefit which accrued to him under the transaction, all the objects which he had in view would have been defeated; that there is no probability that the bank would with that knowledge have taken the draft and thereby incurred the liability.

⁶ *Third Nat. Bank v. Harrison* (1882) 3 McCrary, 316, 10 Fed. 243. L.R.A. 1918C.

⁷ *Dominion Trust Co. v. Hildner* (1914) 243 Pa. 253, 90 Atl. 69.

⁸ *First Nat. Bank v. Babbidge* (1894) 160 Mass. 563, 36 N. E. 462.

⁹ *Terrell v. Branch Bank* (1847) 12 Ala. 502, holding a bank not chargeable with knowledge of a director that paper offered by him to the bank for discount for his own purposes was received by him in blank from a customer of the bank for the purpose of renewing a note held by the bank against such customer, the note being filled up by the director for a much larger amount than was authorized, and negotiated to the bank as above stated.

A bank has been held not chargeable with knowledge possessed by its president of defenses to a note which he sold to the bank, although the president, together with the cashier, constituted the discount committee, and it seems acted for the bank in the transaction in which the note was purchased by it. The court states that the president did not act at all for the bank, that his conduct was actuated wholly by personal reasons, "and if he knew that he was taking part in an unlawful transaction, the bank cannot be charged by his guilty participation." *Graham v. Orange County Nat. Bank* (1896) 59 N. J. L. 225, 35 Atl. 1053.

A bank was held not chargeable with knowledge of a director in *Custer v. Tompkins County Bank* (1848) 9 Pa. 27, where the director appeared as an indorser on the note. It does not appear, however, that he was an indorser in regular course and transferred the note to the bank. In holding the corporation not chargeable with notice, the court states that notice to the director is not notice to the corporation unless he constitutes an organ of communication between it and those who deal with it. Although the director was present when the note was discounted, the court states

notice of the fraudulent diversion of the proceeds of a bill intrusted by the drawer to a director to be discounted for the drawer, where the director put his own name upon the bill and discounted it for himself, acting as a member of the discount committee in making the discount.¹⁰

An exception to the exception that a principal is not chargeable with the agent's knowledge where the agent is acting for himself is made in some cases of corporate agents in which the agent is the sole representative of the corporation. In such a case it has been held that the corporation is chargeable with the agent's knowledge.¹¹ Likewise, if the agent is an essential representative of the corporation the corporation is chargeable.¹² A corporation has not, however, in all instances, been held chargeable with knowledge of its officer who alone represents the corporation in the transfer of negotiable paper

to it. Thus, a bank which cashed a draft for its cashier is held not chargeable with the knowledge of its cashier that the draft was the proceeds of a note secured by him by fraudulent means, and sold to another bank.¹³ The effect of a corporate agent being the sole representative of the corporation has been discussed in a note in this series of reports, and reference should be had thereto for a full discussion of this question.¹⁴

The classes of cases to which this note is confined must be distinguished from cases in which the agent is merely transferring to his principal a note which, although taken in the agent's name, was taken in the course of the principal's business, and which in reality belonged to the principal. It seems clear that in such a case the principal is chargeable with knowledge of the agent of defenses to the note, and so it has been held.¹⁵ A principal to whom a note is indorsed

that he was not such an organ of communication.

¹⁰ *Bank of United States v. Davis* (1842) 2 Hill (N. Y.) 451.

In *Tagg v. Tennessee Nat. Bank* (1872) 9 Heisk. (Tenn.) 479, a bank is held chargeable with knowledge of defenses to a note transferred to it by its president, who it seems was the sole agent of the bank; at least he acted on behalf of the bank in making the transfer.

¹¹ *Morris v. Georgia Loan Sav. & Bkg. Co.* (1899) 109 Ga. 12, 46 L.R.A. 506, 34 S. E. 378, holding a bank chargeable with the knowledge of its cashier of the invalidity of paper transferred to it by him.

Grebe v. Swords (1914) 28 N. D. 330, 149 N. W. 126, holding a bank chargeable with knowledge of its cashier of defenses of a note indorsed by him to it, where he alone acted for the bank in the transaction.

First Nat. Bank v. Burns (1913) 88 Ohio St. 434, 49 L.R.A.(N.S.) 764, 103 N. E. 93, holding a bank chargeable with the knowledge of its president and active manager of defenses to a note sold and discounted by him to the bank, where he acted for the bank as its president and manager, and no other officer or person connected with the bank had anything to do with the purchase of the notes.

First Nat. Bank v. Blake (1894) 60 Fed. 78, holding a bank chargeable with knowledge of its president of defenses to a note executed to the president, and by him transferred to the bank, where he was the sole representative of the bank in the transaction.

In *Black Hills Nat. Bank v. Kellogg* (1893) 4 S. D. 312, 56 N. W. 1071, a note payable to the cashier of a bank had been by him assigned to the bank; subsequently, the maker executed a renewal directly to the bank, the cashier transacting the entire L.R.A.1918C.

business pertaining to the renewal of the note. In an action by the bank on this renewal, the plaintiff was held affected by the knowledge of the cashier.

See *Tagg v. Tennessee Nat. Bank* (Tenn.) supra.

¹² In *Le Duc v. Moore* (1892) 111 N. C. 516, 15 S. E. 888, where it was sought to charge a bank with knowledge of its president of defenses to a note which he indorsed to the bank for his own benefit, it appeared that the president and cashier alone constituted the discount committee, and it required the active official participation of the president in order to discount the papers. The bank was accordingly held chargeable with his knowledge.

¹³ *Hummel v. Bank of Monroe* (1888) 75 Iowa, 689, 37 N. W. 954. The action in this case was against the bank by the maker of the note, who had been compelled to pay the same, on the theory that, as the note was obtained by fraud, the maker had a lien upon the proceeds in the cashier's hands for his indemnity, and that he might pursue the proceeds in the hands of any person who received them from the cashier with notice of his right, and that the bank was charged with knowledge of the fact out of which the maker's lien or ownership to the draft arose by the knowledge of its cashier.

¹⁴ *Note to Brookhouse v. Union Pub. Co.* 2 L.R.A.(N.S.) 993.

¹⁵ *Neil v. Cummings* (1874) 75 Ill. 170, holding notes given to an agent upon the purchase of a patent right, subject to defenses in the hands of the principal, to whom they were afterwards assigned, where a deed to the territory included in the purchase was made by the agent in the name of the principal.

A bank for which a debtor executes a chattel mortgage on a stock of goods, and

by his agent, who, upon purchasing the same for his principal, took an indorsement from the seller to himself, is chargeable with knowledge possessed by his agent.¹⁶ It has been held in the case of a note given to the local agent of a life insurance company in payment of a premium on a policy to be issued to the maker, that the state agent to whom the note was indorsed by the local agent was not charged with all the knowledge possessed by the local agent with reference to the note, where the state agent took the note in his individual capacity, and not as agent for the company. The defense in this case was that the policy afterwards issued by the life insurance company did not corre-

spond to the representations of the agent. The court holds that, if the state agent, when he bought the note in his individual capacity for value and before maturity, also held an application by the maker of the note for a certain policy, and if the policy actually issued and delivered to the applicant was one exactly of the kind described in the application, the maker could not set up in defense to an action by the state agent in his individual capacity fraud on the part of the local agent in inducing him to sign the application.¹⁷ The present discussion does not deal in general with cases such as are referred to in this paragraph.

sells the goods as the agent of the bank, is bound by warranties and representations made by the agent in the sale of the goods, so as to prevent its becoming a bona fide holder of a check taken by the agent and sold and transferred to the bank. *National Citizens' Bank v. Ertz* (1901) 83 Minn. 12, 53 L.R.A. 174, 85 Am. St. Rep. 438, 85 N. W. 821.

A general agent of a life insurance company is chargeable with knowledge of a subagent of defenses to a note taken by the subagent for life insurance premiums when acting within the scope of his agency, and assigned to the general agent. *Webb v. Moseley* (1902) 30 Tex. Civ. App. 311, 70 S. W. 349.

First Nat. Bank v. Harvey (1912) 29 S. D. 284, 137 N. W. 365.

Buckeye Saw Mfg. Co. v. Rutherford (1909) 65 W. Va. 395, 64 S. E. 444, holding a principal chargeable with the knowledge of an agent authorized to sell and collect,

of defenses to a negotiable note taken by the agent payable to himself, and assigned to his principal before maturity without consideration.

An owner in common of land, who has authorized his cotenant to sell the same, and who has received from his cotenant a note taken upon a sale of the land, is chargeable with defenses known to the cotenant. *Kelly v. Pembér* (1862) 35 Vt. 183.

The part owner of a horse, for whom his co-owner acted in a sale thereof, is not a bona fide holder of a note taken by the co-owner in payment of the purchase price, and subsequently indorsed to the other owner. *Pease v. McClelland* (1866) 2 Bond, 42, 19 Fed. Cas. No. 10,882.

¹⁶ *Merrill v. Packer* (1890) 80 Iowa, 542, 45 N. W. 1076.

¹⁷ *Shedden v. Heard* (1900) 110 Ga. 461, 35 S. E. 707, on error to a second trial (1901) 113 Ga. 162, 38 S. E. 387.

W. A. E.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

BEAR CAT MINING COMPANY, Plff. in Err.,

GRASSELLI CHEMICAL COMPANY.

(247 Fed. 286.)

Damages — minimizing — trifling cost.

The damages which a lessee of a mine can recover because of the breach by his sublessee of his contract to keep the water pumped out of the mine, after notice of intention to surrender the sublease, but before the surrender day, by reason of which the owner forfeits the lease, is not the value of the leasehold, since it was his duty to

bear the trifling cost necessary to protect his lease.

For other cases, see *Damages*, I, in Dig. 1-52 N. S.

(December 27, 1917.)

ERROR to the District Court of the United States for the Western District of Missouri, Van Valkenburgh, District Judge, to review a judgment in plaintiff's favor for nominal damages only, in an action brought to recover damages for failure of defendant to comply with the terms of his sublease of a mine. Affirmed.

The facts are stated in the opinion.

Argued before Hook and Smith, Circuit Judges, and Amidon, District Judge.

Messrs. John S. Marley and Albert S. Marley, for plaintiff in error.

The burden of proving that damages could have been prevented by the injured

Note.—As to duty of party to lease to minimize damages due to a breach of contract by other party thereto, see annotation following this case, post, 910.
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party at a nominal cost rested upon the wrongdoer, the Grasselli Chemical Company.

Lillard v. Kentucky Distilleries Warehouse Co. 67 C. C. A. 74, 134 Fed. 178; *Costigan v. Mohawk & H. R. Co.* 2 Denio, 609, 43 Am. Dec. 758; *Hamilton v. McPherson*, 28 N. Y. 72, 84 Am. Dec. 330.

The duty to minimize damages can only arise where the injured party is in a position to do so and the wrongdoer is at a helpless disadvantage.

Louisville, N. A. & C. R. Co. v. Sumner, 106 Ind. 56, 55 Am. Rep. 719, 5 N. E. 404; *Brazell v. Cohn*, 32 Mont. 556, 81 Pac. 339; *Burk Bros. Meat & Provision Co. v. Foster*, 159 Mo. App. 542, 141 S. W. 442; *Hurst v. St. Louis & S. F. R. Co.* 117 Mo. App. 25, 94 S. W. 794.

The rule laid down in *Fisher v. Goble*, 40 Mo. 475, has been modified by subsequent decisions of the same court.

Miller v. St. Louis, I. M. & S. R. Co. 90 Mo. 394, 2 S. W. 439; *Schenk v. Forrester*, 102 Mo. App. 127, 77 S. W. 332; *Powell v. St. Louis & S. F. R. Co.* 229 Mo. 283, 129 S. W. 963; *MacDonald v. Metropolitan Street R. Co.* 219 Mo. 491, 118 S. W. 78, 16 Ann. Cas. 810; *Burk Bros. Meat & Provision Co. v. Foster*, 159 Mo. App. 542, 141 S. W. 442.

The question of possession is the true test by which the liability of one or the other is determined, and that possession and equal knowledge being in the defendant company, the duty to act was exactly where the contract placed it.

Ramsey v. Perth Amboy Shipbuilding & Engineering Co. 72 N. J. Eq. 165, 65 Atl. 461; *Atkinson v. Kirkpatrick*, 90 Kan. 515, 135 Pac. 579; *Mabb v. Stewart*, 147 Cal. 413, 81 Pac. 1073; *Oxford Knitting Mills v. American Wringer Co.* 6 Ga. App. 642, 65 S. E. 791; *Warren v. Stoddard*, 105 U. S. 224, 26 L. ed. 1117; *Sherman Center Town Co. v. Leonard*, 46 Kan. 354, 26 Am. St. Rep. 101, 26 Pac. 717.

Messrs. George J. Grayston and A. E. Spencer, for defendant in error:

The damages to be recovered in actions of this character are such as are the direct, immediate, and proximate consequence of defendant's act or neglect. And where plaintiff knows of defendant's breach or default, it is the former's duty to minimize the damages, and so far as he can avoid or lessen this damage by reasonable expense or exertion on his part, it is his duty so to do; if he fails in this, he cannot recover for the damage he might thus have avoided.

Fisher v. Goebel, 40 Mo. 475; *Warren v. Stoddard*, 105 U. S. 224, 26 L. ed. 1117; *Dillon v. Anderson*, 43 N. Y. 231; *Burdon Cent. Sugar Ref. Co. v. Ferris Sugar Mfg.* L.R.A.1918C.

Co. 78 Fed. 417; *Lawrence v. Porter*, 26 L.R.A. 169, 11 C. C. A. 27, 22 U. S. App. 483, 63 Fed. 62; *Yellow Poplar Lumber Co. v. Chapman*, 20 C. C. A. 503, 42 U. S. App. 21, 74 Fed. 444; *Haysler v. Owen*, 61 Mo. 270; *Niehaus v. Gillanders*, — Mo. App. —, 184 S. W. 949; *Hamilton v. McPherson*, 28 N. Y. 72, 84 Am. Dec. 330; *Cronan v. Stutsman*, 168 Mo. App. 46, 151 S. W. 166; *Harrington v. Western U. Teleg. Co.* 187 Mo. App. 580, 174 S. W. 169; *Russell v. Giblin*, 25 N. Y. S. R. 827, 5 N. Y. Supp. 545; *Dalbeattie S. S. Co. v. Card*, 59 Fed. 159; *Gallagher v. The Young America*, 31 Fed. 749; *Hiltebrant v. The City of Chester*, 34 Fed. 429; *Nordlinger v. Nelson*, 61 Fed. 633; *Dolph v. Troy Laundry Machinery Co.* 28 Fed. 553; *Pennsylvania R. Co. v. Washburn*, 50 Fed. 335; *Cunningham Iron Co. v. Warren Mfg. Co.* 80 Fed. 878; *Logan v. Wabash R. Co.* 96 Mo. App. 461, 70 S. W. 734; *Harrison v. Missouri P. R. Co.* 88 Mo. 625; *Chicago, S. F. & C. R. Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931; *Macon v. Dannenberg*, 113 Ga. 1111, 39 S. E. 446; *Chambers v. Kyle*, 87 Ind. 83; *Gniadek v. Northwestern Improv. & Boom Co.* 73 Minn. 87, 75 N. W. 894; *Sweeney v. Montana C. R. Co.* 19 Mont. 163, 47 Pac. 791, 25 Mont. 543, 65 Pac. 912; *Knight Bros. v. Chicago, R. I. & P. R. Co.* 122 Mo. App. 38, 98 S. W. 81; *Weller v. Missouri Lumber & Min. Co.* 176 Mo. App. 243, 161 S. W. 853; *Barnett v. Elwood Grain Co.* 153 Mo. App. 458, 133 S. W. 856; *Louisville & N. R. Co. v. Moore*, 31 Ky. L. Rep. 141, 10 L.R.A. (N.S.) 579, 101 S. W. 934; *Garrett v. Winterich*, — Ind. App. —, 84 N. E. 1006; *Cincinnati, N. O. & T. P. R. Co. v. Gillispie*, 130 Ky. 213, 113 S. W. 89; *Aune v. Austin-Williams Timber Co.* 52 Wash. 356, 100 Pac. 746; *Southern R. Co. v. Poetker*, 46 Ind. App. 295, 91 N. E. 610; *Poutra v. Martin*. — Tex. Civ. App. —, 135 S. W. 725; *Sloss-Sheffield Steel & I. Co. v. Mitchell*, 181 Ala. 576, 61 So. 934; *Groh v. South*, 119 Md. 297, 86 Atl. 1036; *Atkinson v. Kirkpatrick*, 90 Kan. 515, 135 Pac. 579.

Amidon, District Judge, delivered the opinion of the court:

The plaintiff, the Bear Cat Mining Company, held a lease dated April 29, 1913, for a mining property in Jasper county, Missouri, including the machinery for the operation of the mine. The lease ran for a term of ten years, with a royalty of 10 per cent of the value of all ore sold. On July 18, 1913, the plaintiff subleased the same property to the defendant, Grasselli Chemical Company, for similar purposes, for a term ending April 29, 1923. It was agreed in the lease that, if the defendant should at any time fail or refuse to keep

any stipulation on its part, plaintiff might, at its option, terminate the lease, and retake possession of the property, giving the defendant ten days' written notice thereof. The royalty was fixed at 15 per cent. The lease further provided that defendant "shall also have the right and privilege of terminating this lease at any time upon giving said first party thirty days' notice in writing of its intention to terminate this lease at least thirty days after the delivery to said first party of such written notice." Defendant operated the mine until September 28, 1913, when it mailed a notice of its intention to terminate the lease to the plaintiff. The evidence is reasonably satisfactory that this notice was received. At the same time the defendant notified plaintiff that it would suspend operating the pumps. The mine was one which required the operation of the pumps constantly to prevent flooding. In the notice defendant also notified plaintiff that he could take possession of the property at any time, and operate the same, and do whatever was necessary for its protection. Defendant left the mine on October 4, 1913. Neither he nor the plaintiff did anything by its operation to protect it during the month of October, and at the end of the month the owner of the mine declared a forfeiture of his lease with plaintiff, and went into possession of the property.

The present action is brought by the plaintiff to recover \$50,000 damages (the alleged value of plaintiff's lease), for defendant's failure to comply with the terms of his sublease, and the breach relied upon is his abandonment of the property during the thirty days covered by the notice, thus giving a right to the owner of the property to forfeit plaintiff's lease. The court directed a verdict in favor of the plaintiff for \$1 damages only, upon the ground that it was the duty of the plaintiff himself, upon receiving the notice that was given him, and the right, to retake possession of the property and safeguard his own leasehold interests, to do whatever was necessary to that end, for the purpose of mitigating his damages; that he could not stand by and permit his lease to be forfeited, and then seek to recover full damages therefor.

This decision was clearly right. The rule of law applicable to the case was never better stated than by Judge Selden in *Hamilton v. McPherson*, 28 N. Y. 72, 76, 84 Am. Dec. 330: "The law, for wise reasons, imposes upon a party subjected to injury from a breach of contract the active duty of making reasonable exertions to render the injury as light as possible. Public interest and sound morality accord with the law in demanding this; and if the injured party, through negligence or wilfulness, allows the L.R.A.1918C.

damages to be unnecessarily enhanced, the increased loss justly falls upon him."

Mr. Benjamin, in his work on *Sales*, 4th Am. ed. page 1327, says that a man thus situated must do all that "a reasonable man of business" would have done under the same circumstances to prevent the damages from being enhanced. *Sedgwick on Damages*, 9th ed. § 205, says: "Where damages are claimed, not for the direct injury, that is, the loss of the value of the contract itself, but for consequential loss, the plaintiff cannot recover for such loss if he might reasonably have avoided it," and cites a multitude of cases, English and American, to support this rule.

The damages here which the plaintiff sought to recover were clearly "consequential," as that term is employed by Mr. Sedgwick. If the plaintiff had gone into possession of the mine, and worked it during the period of thirty days, he could have recovered as damages all the loss which he suffered by that operation. Such damages would have been the direct result of the defendant's violation of the contract. But the damages which the plaintiff is in fact seeking to recover are not the direct result of defendant's violation of the sublease, but are more properly referable to plaintiff's violation of his own lease with the owner of the mine. In the leading case in the Supreme Court, *Warren v. Stoddart*, 105 U. S. 224, 26 L. ed. 1117, the rule is stated as follows: "Where a party is entitled to the benefit of a contract and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as, with reasonable endeavors and expense, he could not prevent."

The word "trifling" in this passage has reference to the situation of the parties. It means a sum which is trifling in comparison with the consequential damages which the plaintiff is seeking to recover in the particular case. The rule which we have stated will be found further illustrated in the following cases: *Ramsey v. Perth Amboy Shipbuilding & Engineering Co.* 72 N. J. Eq. 165, 65 Atl. 461; *Atkinson v. Kirkpatrick*, 90 Kan. 515, 135 Pac. 579; *Mabb v. Stewart*, 147 Cal. 413, 81 Pac. 1073; *Oxford Knitting Mills v. American Wringer Co.* 6 Ga. App. 642, 65 S. E. 791; *Kimball Bros. Co. v. Citizens' Gas & E. Co.* 141 Iowa, 632, 118 N. W. 891; *Sherman Center Town Co. v. Leonard*, 46 Kan. 354, 26 Am. St. Rep. 101, 26 Pac. 717.

The judgment is affirmed.

Petition for rehearing denied.

Annotation—Duty of party to lease to minimize damages due to a breach of contract by other party thereto.

It is not intended to include herein cases involving the question as to the duty of the tenant to make repairs where the landlord fails to comply with his covenant in this regard.

The general rule applicable to damages for breach of contract, that it is the duty of the injured party to exercise ordinary care to minimize his damages; applies to leases, and it is the duty of the party to a lease, injured by a breach thereof by the other party thereto, to exercise reasonable diligence and due care to prevent or minimize, as far as he can, the injury or loss due to the breach. This doctrine is applied to landlords in *BEAR CAT MIN. CO. v. GRASSELLI CHEMICAL CO.* ante, 907.

Where the lessee abandons the premises before the expiration of the lease, it is the duty of the lessor to exercise due diligence to re-rent the premises and thereby diminish the damages. *Sears v. Curtis* (1914) 189 Ill. App. 420.

As to the duty of the lessee where the lessor breaches his lease, see *Moses v. Autuono* (1908) 56 Fla. 499, 20 L.R.A. (N.S.) 350, 47 So. 925, stating the rule that if the lessee, by reasonable exertion or care, can prevent damages resulting to him by reason of the landlord's breach of contract to lease, it is his duty to do so. So far as he could have prevented loss to himself, he cannot recover damages therefor.

The lessee in a lease containing a covenant to repair is under the duty of using ordinary care and diligence to lighten the consequential damages resulting therefrom. *Brunswick Grocery Co. v. Spencer* (1895) 97 Ga. 764, 25 S. E. 764. To the same effect where the statute requires the landlord to repair is *Ball v. Walsh* (1912) 137 Ga. 350, 73 S. E. 585; *Aikin v. Perry* (1903) 119 Ga. 263, 46 S. E. 93.

See upon this point, *Roberts v. Lehl* (1915) 27 Colo. App. 351, 149 Pac. 851, holding that where the landlord breached his covenant to furnish water to irrigate the leased premises, if the tenant, by the expenditure of a few dollars and the payment of a water tax, might have secured the necessary water for irrigation, he cannot recover damages for the loss of the crop, due to the failure to secure water.

The rule has been applied to tenants frequently in cases of injury to the tenant's property from the elements or de-

fective water pipes. For example, it has been held that a tenant whose landlord has agreed to put the premises in repair, but has failed to do so, the tenant knowing that his property will be exposed to injury from storms or otherwise endangered if left upon the premises, has no right to take the hazard, and if he does and his property is injured, he cannot recover from the landlord therefor. *Hendry v. Squier* (1890) 126 Ind. 19, 9 L.R.A. 798, 25 N. E. 830; *Cook v. Soule* (1874) 56 N. Y. 420, affirming (1873) 1 Thomp. & C. 116 (leaky roof); *Rose v. Butler* (1893) 69 Hun, 140, 23 N. Y. Supp. 375; *Reiner v. Jones* (1899) 38 App. Div. 441, 56 N. Y. Supp. 423; *Klausner v. Herter* (1901) 36 Misc. 869, 74 N. Y. Supp. 924; *Margolius v. Muldberg* (1904) 88 N. Y. Supp. 1048; *Weinberg v. Ely* (1906) 114 App. Div. 857, 100 N. Y. Supp. 283.

So, where the roof is injured by fire, it is the tenant's duty to exercise ordinary care to protect his goods kept therein from injury by the elements, and if he fails in this regard he cannot hold the lessor liable for a consequent injury to his goods, although the lessor told him it was not necessary for him to move on account of the fire. *Gavan v. Norcross* (1903) 117 Ga. 356, 43 S. E. 771, 13 Am. Neg. Rep. 495.

Where the lessee had reasonable opportunity to place his goods under shelter before it rained, he cannot recover from the lessor damages due to injury by the elements, although the goods were exposed by the wrongful act of the lessor in moving them from a building on the leased premises. *Mershon v. Williams* (1899) 62 N. J. L. 779, 42 Atl. 778.

And even though the lessor wrongfully destroyed a building upon the leased premises and left the lessee's goods exposed to the elements, the latter cannot wilfully and negligently leave them to be destroyed, and hold the lessor for their value; and if the conduct of the lessor prevents the lessee from making further use of the building in his business, it is his duty to use reasonable efforts to secure at a reasonable expense another building equally as good, in which to continue his business. *Hahn v. Mackay* (1912) 63 Or. 100, 126 Pac. 12, rehearing denied in (1912) 63 Or. 111, 126 Pac. 991.

It is the duty of the tenant to minimize injury to his goods, due to the failure of the landlord to repair defective water pipes. *Atkinson v. Kirkpatrick* (1913) 90 Kan. 515, 135 Pac. 579; *Huber v. Ryan* (1901) 57 App. Div. 34, 67 N. Y. Supp. 972.

The rule holding that the lessee must use reasonable care to minimize damages has been held to apply only where he was in possession of the premises and had a right to make the repairs himself, and was in a position to inform himself by investigation as to whether or not repairs had been made by the lessor; and the rule has been held not to apply where the lessee was a tenant of only a portion of the premises, and the lessor retained possession of the roof, which was defective, for in such case the lessee had no right to go upon it to ascertain whether or not the lessor had fulfilled his promise to repair it. *Phillips v. Ehrmann* (1894) 8 Misc. 39, 28 N. Y. Supp. 519.

And the lessee is not guilty of con-

tributory negligence in not protecting his goods from injury by rain over Sunday, although he knew the lessor was repairing the roof and that it would not shed water, since he had the right to rely upon the lessor or the latter's contractor making repairs, to protect the roof. *Blumenthal v. Prescott* (1902) 70 App. Div. 560, 75 N. Y. Supp. 710.

Although recognizing the general rule, it has been held that where the lessor undertook to repair the roof so as to make it rain proof, even though the lessee did not remove his goods, but permitted them to remain exposed to injury by storms, and to damage from the damp condition of the building, due to the defects in the roof, it was nevertheless a question of fact for the jury as to whether or not the lessee exercised ordinary care in protecting his goods, and a verdict in his favor upon this point will not be disturbed. *Sanger v. Smith* (1911) — Tex. Civ. App. —, 135 S. W. 189. A. G. S.

NORTH CAROLINA SUPREME COURT.

MAGGIE S. BROWN, Admr., etc., of
Denie T. Brown, Deceased,

v.

MARY ADAMS, Exrx., etc., of J. E. S.
Adams, Deceased, Appt.

(— N. C. —, 93 S. E. 989.)

Witness — transaction with person
since deceased — next of kin of
claimant.

The next of kin of a woman who contracted to perform services for a person since deceased cannot, in an action to recover upon the contract after the death of her ancestor, which is defended by deceased's executor, testify that her ancestor was under obligation to care for decedent, and performed services under such obligation, and that decedent promised compensation, under a statute forbidding testimony as to transactions with deceased in an action against his executor or administrator, since the interest of the next of kin is the same as that of the ancestor.

For other cases, see *Witnesses, I. c.*, in *Dig.*
1-52 N. S.

(Clark, Ch. J., dissents.)

(November 7, 1917.)

Note. — As to right of surviving spouse, heir, or next of kin to testify in favor of the estate, see annotation following this case, post, 918.
L.R.A.1918C.

APPEAL by defendant from a judgment of the Superior Court for Pitt County in favor of plaintiff in an action brought to recover the value of services alleged to be due under a contract to care for defendant's decedent. New trial.

The facts are stated in the opinion.

Messrs. Harding & Pierce and W. F. Evans, for appellant:

Testimony of the plaintiff administratrix concerning communications and transactions between her decedent and the decedent of the defendant executrix was inadmissible.

Grisson v. Grisson, 170 N. C. 97, 86 S. E. 996; *Harrell v. Hagan*, 150 N. C. 242, 63 S. E. 952; *Witty v. Barham*, 147 N. C. 479, 61 S. E. 273; *Wilson v. Featherston*, 122 N. C. 749, 30 S. E. 325.

Testimony concerning the value of the alleged services is incompetent.

Stocks v. Cannon, 139 N. E. 60, 51 S. E. 802.

Messrs. Albion Dunn and M. K. Blount for appellee.

Walker, J., delivered the opinion of the court:

This action was brought for the purpose of recovering the value of services performed in taking care of the defendant, J. E. S. Adams, in his old age, and while he was feeble and infirm, upon the promise made by him at the time that he would leave to plaintiff's intestate, Denie T. Brown, and her children, plaintiff herself

being one of them, all of his property, both real and personal, worth about \$20,000. Plaintiff sued as administratrix of her mother, and in her own behalf, to recover whatever amount is due, on account of the services rendered by them under the contract, and in order to establish her case she was permitted to testify, as a witness in her own behalf, to divers transactions and communications between her intestate and the defendant, since deceased.

When this case was argued before us, we received the impression that the defendant had "first opened the door" in regard to the testimony of transactions and communications between the plaintiff's mother, Mrs. Denie T. Brown, and the original defendant, J. E. S. Adams. We find, upon further investigation, that such was not the case; but on the contrary, that the plaintiff offered this testimony at the outset of the trial before the jury. It will suffice to state generally that the testimony of the plaintiff herself related mostly to transactions and communications between her mother and intestate, Denie T. Brown, and the original defendant, J. E. S. Adams, who has since died. The defendant Mary Adams, his sister, is his executrix, and as such has been made a party to this action, in his place, as defendant. The plaintiff, a witness for herself individually and as administratrix, was permitted, under the examination of her counsel, to state very fully conversations and dealings between her mother and the defendant's testator, which, she alleged, occurred in her presence. That she is a deeply interested party, and has a large interest in the result of this action, not the slightest doubt can be entertained. There was also testimony of the plaintiff which was admitted over objection by defendant, and which related directly to a transaction or communication between the plaintiff herself and Mr. Adams. After giving a summary of the "actings and doings" of her mother and herself, on the one side, and Mr. Adams and his sister Mary, in 1912, when the latter moved to Greenville for the purpose of taking up their residence with them, where they were to receive the care and attention described by her, certain questions were propounded to her, which, with the answers thereto, are as follows:

Question 1: "State whether you or your mother were under obligations to care for or attend to the wants and necessities of Mr. Adams." Answer: "Yes, sir; we were under obligations to take care and attend to him and help them in sickness and in health."

Question 2: "State if you heard any conversation between Mr. Stanley Adams and your mother with reference to any con-

sideration which he agreed to pay her in consequence of her waiting on and taking care of him." Answer: "Yes; he did say that he would make to her all his property."

Question 3: "Just state any conversation you may have heard between Mr. Adams and your mother relating to any compensation your mother was to receive."

Answer: "He said he would give her the house and lot they now live in and give her a deed of gift for it to take place at his death; that pending the suit with Colin Tucker he said it would not be any good to make anything then until that was settled, and then he would make a will to her, including that and everything else; that the conversation took place in our home."

Witness further stated that they moved there then, and that his physical condition was bad, not being able to sit up. That Miss Mary's health was also bad.

Question 4: "Describe what attention and care, if any, your mother devoted to the comfort of Mr. Adams and Miss Mary."

Answer: "She cooked for them, nursed them and sat up with them, read for them, and did everything that she could think of that would comfort him."

Question 5: "In consequence of that conversation, tell us what your mother did from 1912, when you say Mr. Adams and Miss Mary moved to Greenville." Answer: "In February, 1912, they moved in our home on Church street; mama had attended to that; and they moved to our home and stayed there with us until some time in April; and during that time my mother cooked for them, carried meals to them, and made extra nourishment for them; and it was necessary to rub him with liniment, and that was done. In April they moved from mama's house to an adjoining house, and we moved with them; after we moved with them mama cooked for them and did as I have said. Mr. Adams's condition was such as to require a physician several times."

Question 6: "From your knowledge of what your mother did,—the attentions paid to the old people that you have testified about,—what, in your opinion, would be a reasonable compensation for her services?"

Answer: "Three thousand dollars. I did not know about Mr. Adams leaving a will when he died; my mother was not paid anything for the services rendered."

Question 7: "How long did the care and attention your mother gave Mr. Adams and Miss Adams last? Answer: "Up until the day she was taken sick, eight days before she died."

Other interested witnesses were allowed to be asked, and to answer, similar questions. These questions and answers were each duly objected to by the defendant, and

the several objections were overruled. Defendant excepted, and from the verdict and judgment in favor of the plaintiff, she appealed to this court, and here insists that the evidence was incompetent under Revisal, § 1631, and we agree with her that there was evidence which should have been excluded. Her counsel asked the witness, and she was permitted to answer, the first of the questions, which for convenience we have numbered. This answer clearly involved a personal transaction or communication between the plaintiff and Mr. Adams, who at the time of the trial was dead; the interests of those to whom his estate belongs under his will being defended by his executrix. This testimony should have been excluded, as its admission is expressly forbidden by the Revisal, § 1631, and this error, and the erroneous admission of other like testimony, entitles the defendant to a new trial.

But if the other testimony of the plaintiff, in regard to the transactions between her mother and Mr. Adams, is to be considered, we are of opinion that it was likewise incompetent under the same section. The plaintiff relies upon *Ballard v. Ballard*, 75 N. C. 191; *Loffin v. Loffin*, 96 N. C. 99, 1 S. E. 837; *McCall v. Wilson*, 101 N. C. 600, 8 S. E. 225; *Bunn v. Todd*, 107 N. C. 266, 11 S. E. 1043; *Johnson v. Cameron*, 136 N. C. 244, 48 S. E. 640. We will now consider these cases, and show that not one of them applies, but that each and all of them dealt with questions which are radically different. *Ballard v. Ballard*, supra, was one of the "proof of handwriting" cases, like *State ex rel. Peoples v. Maxwell*, 64 N. C. 313, which, as Justice Bynum stated, do not involve any personal transaction or communication, but may be based on knowledge acquired in quite a different way. Referring to *State ex rel. Peoples v. Maxwell*, supra, in *Ballard v. Ballard*, supra, he said: "In *State ex rel. Peoples v. Maxwell*, supra, it was held that although it was competent for the plaintiff to prove the handwriting of the intestate of the defendant, it was incompetent for him to prove that he saw the intestate actually sign a particular paper. The distinction is that handwriting is proved by a general knowledge of it, and the proof is abstract, and as applicable to one case as another. But proof by him that he saw the deceased sign a particular paper is proof of a transaction between him and the deceased. In our case *Wooten*, the assignee, it is true, was not called to prove directly the assignment to him by the intestate, but he was called to prove, and did prove, that he saw J. Gooding 'sign his name as witness to the indorsement of the intestate, Council Gooding.' The signature of the intestate was a cross mark, incapable

of identification and proof, without an attesting witness, whereupon the defendant Gooding was called in by the parties as this witness to the ceremony of transferring the bond from the intestate of Wooten. And now Wooten, a party to that 'transaction,' is called to prove, and under objection does prove, all the facts necessary to make effectual this transaction between him and the intestate; to wit, that he saw the defendant sign his name as a witness. He thus indirectly, but conclusively, testifies to a transaction between himself and a person since deceased. The case falls directly within the principle established in *State ex rel. Peoples v. Maxwell*, above cited, and *Whitesides v. Green*, 64 N. C. 307; *Murphy v. Ray*, 73 N. C. 588; *McCanless v. Reynolds*, 74 N. C. 301. The witness Wooten, having indorsed the bond to the plaintiff with a guaranty, the result of this action, of course, can affect his interest or the interest previously owned by him. Code Civ. Proc. § 343. We are not disposed to relax the common-law rules of evidence beyond the innovations clearly established by the recent legislature."

We have quoted Justice Bynum's language somewhat at length, because it is very significant in this connection, and surely indicates with striking emphasis that an interested witness will not be allowed to testify indirectly to a transaction or communication with a deceased party which will affect his interest favorably in the event of the action, no more than he will be permitted to do so directly, provided his interest is adverse to that of such deceased party. Equally unfortunate to the plaintiff are the other citations. *Loffin v. Loffin*, supra, had nothing to do with a transaction or communication between the plaintiff, Mrs. Loffin, and the deceased party, to wit, her father, but it was between her and a third party. Justice Davis said: "It was a substantive transaction, with no one now deceased, under whom she, or any of the parties to this action, derived any interest. It was a transaction with Wm. Gooding alone. *Loffin* was not present, and the case of *Halyburton v. Dobson*, 65 N. C. 88, and *Ballard v. Ballard*, 75 N. C. 190, relied on by counsel for the defendant, are distinguishable from this, in that in *Halyburton v. Dobson*, the communication, though not between the witness and Harshaw, the deceased testator, yet it was between Harshaw and Pearson (both of whom were dead), about the matter in dispute, and the witness and Harshaw had, by agreement, gone to Pearson to advise with him about it, so in fact the witness was the party really interested in the conversation between Harshaw and Pearson, and though the conversa-

tion was carried on by Harshaw and Pearson, the witness was present, and in fact a party to it, as it related to advice given by Pearson, upon which they were to act."

That case also favors the defendant's position, for there it is virtually said that the presence of the witness, when the transaction or communication is had between the deceased and another party, is sufficient to disqualify him, especially when he has an interest in the event. It should be noted here that the plaintiff in this case, who testified, had a direct and important interest, besides being a party to the action, and that her mother was also interested, so that the heirs and distributees of Mr. Adams, who are represented by the defendant, his executrix, have no one to testify in rebuttal of plaintiff's testimony. Said Chief Justice Pearson, in *McCanless v. Reynolds*, 74 N. C. 314: "Allowing a party to an action to give evidence in his own behalf is a wide departure from the rules of evidence at common law, and the proviso in § 343, which fixes a limit to this departure, should be construed liberally. The effect of it is to exclude one of the parties to a transaction, who is afterwards a party to an action, concerning the right or property involved in the transaction from the enabling clause of the statute, in the event of the death of the other party to the transaction. The proviso rests on the ground, not merely that the dead man cannot have a fair showing, but upon the broader and more practical ground that the other party to the action has no chance, even by the oath of a relevant witness, to reply to the oath of the party to the action, if he be allowed to testify. The principle is, unless both parties to a transaction can be heard on oath, a party to an action is not a competent witness in regard to the transaction."

Could words be devised which more strongly condemn testimony of the kind here offered by the plaintiff, both upon principle and a sound construction of the statute? It shocks our ideas of fair play thus to place one of the parties at the mercy of the other, by allowing one to speak in his own behalf, when he is under the power and influence of self-interest, by silencing the other so that he cannot reply. This is an unjust advantage not contemplated by the statute.

But, continuing our examination of plaintiff's authorities, *McCall v. Wilson*, 101 N. C. 598, 8 S. E. 225, only held that the evidence did not relate to a transaction or communication between the witness and a deceased person, under which the defendant claimed, but only to what she saw in her husband's hands. He was the only party concerned, and had no transaction or com-

munication with anyone. The case did not come within the terms of the statute, nor within its letter or spirit. There were no dealings between a party deceased and another person, which was witnessed by a third and interested person, who was the witness, as in our case. We may add that we do not see how the testimony in the *McCall* Case was material or harmful to defendants. Their contention was that the deed from John E. Moore to Joseph McCall was void as against the deed from Moore's administrator to assignors of defendants, for want of registration. Justice Davis says that was the only ground relied upon in the case.

Bunn v. Todd, 107 N. C. 266, 11 S. E. 1043, involves no such question as we have here. The plaintiff and her mother, the witness, were each entitled to half of the crop of plaintiff's father, the witness's husband, by separate and distinct rights. The witness claimed as his widow, and the plaintiff under a trust created by her grandfather, and it was proposed to prove by the writing the admissions of the deceased as to the trust. This was clearly competent, for there was no transaction or communication in which the witness could be interested, and the witness, therefore, had no interest in the event of the action, and she was not a party thereto. That case is valuable for its fine analysis of the statute into proper subdivisions by the present Chief Justice, which relieves it of much obscurity. But its facts do not bear any resemblance to our case. The Chief Justice makes this appear, when he pointedly says: "She is not: (1) A party to the suit; nor (2) is she shown to be interested in the event of the action; nor (3) does any person belonging to the above two classes claim title under or through her. That she had a claim to the other part of the crop of her husband than that, the proceeds of which the plaintiff claims the deceased held in trust for her, does not disqualify" (citing *Mull v. Martin*, 85 N. C. 406).

We do not see what application *Lane v. Rogers*, 113 N. C. 171, 18 S. E. 117, can possibly have to this case. The court held there that the testimony was incompetent, but did say that the witness could have testified that she saw the intestate have the book on the day of her marriage, as this was no transaction or communication. The point was not in the case, and we merely repeat what was said therein to show that there was nothing in the statute that applied to those facts. It was like knowing a man's handwriting, because the witness had often seen it. Besides, the witness had no interest in the result of the action, so far as appeared, and if she had, her evidence

was against that interest, as she was testifying against the defendants, to whom she had conveyed her dower. So that case is not applicable. Here the witness testified to a transaction and communication between her mother and Mr. Adams, defendant's testator, while in that case, the witness testified "abstractly" concerning a single individual fact which came within her vision. The court said in the Ballard Case, *supra*, if the witness had said, "I saw him sign the paper," or, in the Lane Case, "I saw him pay for the deed and get it," it would be different and come within the statute as a transaction or communication. It will be found that all the cases cited by the plaintiff have this special feature of single action, and not joint action by the testator and another, and of a thing accomplished, and not one going on to completion; but more of this hereafter.

Judge Reade, in *Halyburton v. Dobson*, 65 N. C. 88, stated this question as a grave one, likely to arise in the future, and strongly intimated against the competency of the evidence under our statute.

The cases of *Carroll v. Smith*, 163 N. C. 204, 79 S. E. 497, and *Zollicoffer v. Zollicoffer*, 168 N. C. 326, 84 S. E. 349, do not, in the least, conflict with our views. In the first of these cases, Justice Allen said: "The evidence of the widow was objected to under § 1631 of the Revisal, but she did not testify to a communication or transaction with the deceased (*Johnson v. Cameron*, 136 N. C. 243, 48 S. E. 640), nor was her evidence against the personal representative of the deceased, or against anyone claiming under the deceased (*Buna v. Todd*, 107 N. C. 267, 11 S. E. 1043). She simply told what she saw, and against one claiming under Henry Carroll, and not under Albert Carroll."

In the second of the cases, the alleged transaction or communication was substantially admitted in the pleadings, and the witness, as in several of the cases already cited by us, "told only what he saw," viz., an indorsement on the paper signed by Mrs. Thomas, which was placed by her in the Bible. When the cases upon this subject are properly classified, they are easily reconciled.

There are several decisions by this court, of comparatively recent date, which decide this very question against the competency of such evidence as was admitted in this case. It was held in *Wilson v. Featherston*, 122 N. C. 749, 20 S. E. 325, and the court squarely decided this point as indicated by us. The question there was: "Defendant, Clara, testifying, was asked by her counsel: 'State whether or not you heard a conversation between your father and J. E. L.R.A. 1918C.

Rankin at the Battery Park Bank in July, 1893, in regard to his bank deposit, and what disposition he had made of it?"

The question was excluded, and this court affirmed the ruling unanimously, the Chief Justice saying: "One purpose of § 590 was to disqualify an interested party to testify to a conversation or transaction between the deceased and the witness, because there is no one to contradict the witness, and we think a true construction of that much-construed section excludes the evidence of a third party to such conversation, if the third party is interested in the result of the action, and there is no one to contradict the statement of the witness. Here, Wilson is dead, Rankin is a party and incompetent, and the witness Clara is a defendant, and claims the property through a gift of her deceased father. So she is interested, and there is no one else who can speak of the transaction or contradict the witness. In *Halyburton v. Dobson*, 65 N. C. 88, this court recognized the gravity of the question, but left it for 'future consideration.' In a later case the plaintiff's testator was a trustee of the slave in question for one Lloyd. In the course of the trial Lloyd was offered to prove a conversation between the plaintiff's testator (trustee of the witness) and the defendant's intestate. The court excluded Lloyd's evidence, as he was practically the plaintiff in the action. *Barlow v. Norfleet*, 72 N. C. 535."

The same was the decision in *Witty v. Barham*, 147 N. C. 479, 61 S. E. 372, upon similar facts, and the identical question is precisely stated and tersely, but unquestionably, decided, the present Chief Justice writing the opinion: "The court also properly excluded the testimony of one of the defendants offered to prove that she heard the aforesaid conversation between her mother and said Charles G. Daniel, as that would be the 'indirect testimony of an interested witness as to a transaction or communication with the deceased.' *Stocks v. Cannon*, 139 N. C. 60, 51 S. E. 802."

Such witness would have been competent to testify to "any substantive and independent fact" that is not "a communication or personal transaction" with the deceased, as, in *Gray v. Cooper*, 65 N. C. 183, that the deceased had possession and use of the slaves, or *March v. Verble*, 79 N. C. 19, that the deceased had owned but one bull since the war, and his value, and the numerous cases which held that an interested witness can prove the handwriting of the deceased, "but not that she saw him sign the paper sued on" (citing *Davidson v. Bardin*, 139 N. C. 2, 51 S. E. 779). We could not state the point more clearly, or by language set at rest more definitely, securely, and

permanently any controversy as to the incompetency of this testimony. It has the great merit of being the final word, strongly and unanswerably expressed upon a matter where there had been almost, but not entire, uniformity of decision, and must be so considered. But it has since been approved and adopted, without any question, by a unanimous court as decisive of the question, as closing the controversy, and as forever shutting the door against further discussion. To reopen it now would be regrettable and positively unwise, in view of the direct, consistent, and final opinions of this court so frequently expressed. We will show later that it is the just and correct decision, and the proper and intended construction of the statute. We refer to *Harrell v. Hagan*, 150 N. C. 242, 63 S. E. 952, and *Grissom v. Grissom*, 170 N. C. 97, 86 S. E. 996 (opinion by Justice Brown), where *Witty v. Barham*, *supra*, was expressly approved, without any further discussion, as the settled law upon this subject. In *Grissom v. Grissom*, 170 N. C. at page 99, Justice Brown says, quoting from *Harrell v. Hagan*, *supra*: "Whether the construction by the court of Revisal, § 1631, is the correct one, it is useless for us now to discuss. The true meaning of the statute and of the intent of the legislature have been settled by this court in well-considered opinions, which we are not disposed to disturb."

He also cites *Wilson v. Featherston* and *Witty v. Barham*, *supra*, as finally settling the law. All of these cases were decided with the concurrence of all the members of the court. If there has been any contrary expression of opinion by us, in the less recent past, it has been superseded in our later decisions with unanimous approval. *Johnson v. Cameron*, 136 N. C. 243, 48 S. E. 640, was correctly decided on other grounds, as I thought then, and therefore concurred in the result. My opinion is the same now.

The decisions in other jurisdictions are equally emphatic in the rejection of such evidence, the statutes being the same as ours, relating to personal transactions or communications. Justice Brewer, afterwards a member of the highest Federal court for many years, and an eminent jurist, as shown by his long judicial career and his valuable services, said in *Wills v. Wood*, 28 Kan. at page 408, discussing a question similar to ours: "Mrs. Forbes, as well as Mrs. Maples, was plaintiff, each claiming as heir of Willis Wills, and each seeking to recover from the administratrix and heirs of David E. James. Neither could testify under the statute as to any transaction or communication had personally

with David E. James. Can it be possible that, when the two are present with James and a conversation is carried on, that while neither could testify as to what James said to herself personally, she could testify as to what he said to the other? We think not. Such a ruling would be forbidden by the spirit, at least, of the statute. That statute plainly contemplates preventing one party from introducing in evidence conversations had with the ancestor of the adverse party, and this because the lips of such ancestor, closed by death, cannot be heard to give his version of the conversation; and where there are two persons on the one side, having like interests, they should, for the purpose of giving force to the statute, be considered as one, and neither be permitted to give her version of the conversations and statements of the deceased to the other in her presence. Counsel for defendants in their brief well expose the injustice of the ruling asked by plaintiff when they say: 'For instance, James might have conversed with the mother for five minutes about the bond, in the presence and hearing of the daughter, and then turned around and conversed with the daughter upon the same subject, in the presence and hearing of the mother, and while neither would be allowed to testify as to the conversation had with herself, either could testify as to the conversation heard by her between James and the other.' The ruling of the district court was correct."

And so in *Dawson v. Waggaman*, 23 App. D. C. 428, it was said, at page 434: "With reference to the second question, that is, whether the testimony of one of the defendants, Julia Dawson, was admissible to prove conversations between the deceased and the defendant Charles E. Dawson, it is sufficient to say that § 1064 of the Code is too plain and explicit to allow of any controversy in this regard. The provision is a just one, and the testimony was properly excluded."

It was held in *Parks v. Caudle*, 58 Tex. 216, that "a party to a suit against heir-claiming the property through their deceased ancestor is precluded under article 2248, Rev. Stat., not only from testifying to statements made to him by the deceased, and to transactions between the deceased and himself, but also as to any such statements to or transactions between deceased and third persons; and this although occurring at a time when the witness had no interest in such statements or transactions."

In *Comstock v. Comstock*, 76 Minn. 396, 79 N. W. 300, it was held: "A party to an action, or interested in the result thereof, cannot give evidence as to conversations

with a deceased person, even though the witness took no part in the conversation."

In *Tison v. Gass*, 46 Tex. Civ. App. 163, 102 S. W. 752, it was proposed by the plaintiff, heir of the deceased wife, to give evidence of a conversation between the wife and her husband, tending to show that the husband bought the property in dispute with money received from a sale of his wife's separate property, and the evidence was excluded as incompetent under their statute as to transactions, etc., of a deceased. But *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054, is like our case exactly in its facts. There it was held: "A party to a suit is not a competent witness, under the act of 1880, to testify adversely to another party suing in a representative capacity, as to a transaction of the deceased with a person other than the witness, in which the witness and such person are interested, although such interests are divisible."

Other cases to the same effect are *Holland v. Holland*, 98 App. Div. 366, 90 N. Y. Supp. 208; *Pederson v. Christofferson*, 97 Minn. 491, 106 N. W. 958. In *Erwin v. Erwin*, 54 Hun, 166, 7 N. Y. Supp. 365, it appeared that a father told his son, in the presence and hearing of the latter's wife, that he gave him a certain tract of land, and the son assented to the gift. The wife said nothing. In an action against the deceased father's grantee to enforce performance of the contract, it was held the wife was an incompetent witness to prove the contract, being virtually a party to the transaction.

The testimony of an interested witness, especially one who will be as greatly benefited by a recovery as the plaintiff in this case, concerning a transaction between the deceased and another interested party, would be practically the same as the latter's testimony as to the same transaction, with no opportunity to contradict it; and, even if the person who had the transaction or communication were living, the representative of the deceased would be handicapped by the fact of her interest in the event of the action, making her a hostile witness. The mere presence of the witness made her practically a party to the transaction or communication, and, though passively so, yet with the same effect as if she had really and personally taken an active part in it. *Roberts v. Remy*, 56 Ohio St. 255, 46 N. E. 1066. A recovery in this case will inure almost directly to the plaintiff as next of kin to her mother.

We might cite many other cases to the same effect as those above named, but it is unnecessary to do so, as those already cited are quite sufficient to show the strong leaning of judicial opinion against the admissi-

bility of this kind of testimony. All of the statutes on the subject, in the states upon which we have drawn for authorities in support of this view of the law, are substantially like ours, and some literally so.

We do not think that there is any force at all in the objection of plaintiff to the form of the exceptions and assignments of error based upon them. They squarely raise the question we have discussed. It was not necessary to except to the answers separately, as they were directly responsive to the questions, to which the exceptions were properly taken.

There was error, we think, in the rulings of the court upon the objections to evidence, which entitle the defendant to a new trial of the issues.

Clark, Ch. J., dissenting:

This action is brought by the plaintiff, as administratrix of her mother, Denie T. Brown, and by herself individually, for services rendered decedent, J. E. S. Adams, who has died since this action was begun, and his executrix, Mary Adams, is substituted as party defendant.

The evidence of the plaintiff was that J. E. S. Adams was an old man and in poor health, living with his sister (now his executrix), who was also old, and in bad health; that said Adams made a bargain with the plaintiff's mother that if they would live with them and take care of him and his sister, he would leave to Denie Brown, his property, at his death. There was evidence that he made such will, but that after the death of Denie Brown he tore up said will, and this action is brought to recover value of the services rendered under said contract by plaintiff and her mother.

The first seven exceptions are to the admission of the testimony of the plaintiff, Maggie Brown, who testified as to the conversation between her mother and J. E. S. Adams in making the contract. The defendant contends that this evidence is incompetent under § 1631 of the Revisal, because the plaintiff is interested as a party to the action, and is testifying against the estate of one now deceased. The conversation, however, was not between the plaintiff witness and the decedent (the testator of the defendant), and the evidence was therefore competent. In *Ballard v. Ballard*, 75 N. C. 191, Bynum, J., says, in his clear-cut style: It is not by being a party to the action, or interested in the event, that one becomes disqualified, for notwithstanding that fact he is competent "except . . . as to any transaction or communication between such witness and the person . . . deceased."

This section is analyzed in *Bunn v. Todd*,

107 N. C. 266, 11 S. E. 1043, where it is held that a person who is interested or a party is competent to testify against the estate of a person deceased when the conversation or transaction is not between the witness and the deceased, but between the deceased and another party. The principle of the code system is the general competency of testimony, though the witness is a party, or interested in the event of the action, leaving its credibility to the jury, the only exception being where the witness is not only a party to the action or interested in its event, and is testifying in his own interest and against the interest of the person deceased, but, further, the testimony must be in regard to the transaction or communication between the witness and the person since deceased; otherwise the testimony is competent. The provision being statutory, the court must observe it, and cannot exclude evidence except when authorized by its terms.

In *Johnson v. Cameron*, 136 N. C. 244, 48 S. E. 640, the exact point was discussed and decided, the court saying: "The Code, § 500 [now Revisal, § 1631], disqualifies a party to an action, or one interested in the event thereof, from testifying in his . . . interest against the person claiming adversely as to 'a personal transaction or communication between the witness and the deceased person or lunatic,' except when the executor of such opposing party or the testimony of the deceased person or lunatic is given in evidence concerning the same transaction or communication. But here the witness testified as to no transaction or communication between herself and W. M. Cameron. It was a transaction between W. M. Cameron and her husband, and as to that she was a competent witness notwithstanding her interest. *State ex rel. Dobbins v. Osborne*, 67 N. C. 259; *McCall v. Wilson*, 101 N. C. 600, 8 S. E. 225; and *Loffin v. Loffin*, 96 N. C. 99, 1 S. E. 837, are in point, as also *Ballard v. Ballard*, 75 N. C. 191 [quoting *Bynum, J., ut supra*]," and citing further *State ex rel. Peoples v. Maxwell*, 64 N. C. 313 (where such witness was held competent to prove the handwriting of the deceased); *Bright v. Marcom*, 121 N. C. 86, 28 S. E. 60 (where an interested wit-

ness was allowed to prove the delivery of a deed between the deceased and another); *Lane v. Rogers*, 113 N. C. 171, 18 S. E. 117.

In *Halyburton v. Dobson*, 65 N. C. 88, relied upon by the defendant, the point was not decided. *Johnson v. Cameron*, *supra*, has been cited since with approval by *Allen, J.*, in *Carroll v. Smith*, 163 N. C. 205, 79 S. E. 497, and by *Walker, J.*, in *Zollicoffer v. Zollicoffer*, 168 N. C. 329, 84 S. E. 349, who cited also the other cases above quoted. In *Wilson v. Featherston*, 122 N. C. 749, 30 S. E. 325, prior to *Johnson v. Cameron*, *Fairecloth, Ch. J.*, seems to take a different view. But the statute is so plain that we cannot disregard it, and must hold that case an inadvertence, which we cannot approve.

While there has been some conflict in the past in our decisions on this point, it has been settled in accordance with the decision in *Johnson v. Cameron*, 136 N. C. 243, 48 S. E. 640, by the last two opinions in this court, which have cited it with approval. In *Carroll v. Smith*, 163 N. C. 205, 79 S. E. 497, *Allen, J.*, says: "The evidence of the widow was objected to under § 1631 of the Revisal, but she did not testify to a communication of the transaction with the deceased (*Johnson v. Cameron*, 136 N. C. 243, 48 S. E. 640)."

In *Zollicoffer v. Zollicoffer*, 168 N. C. 329, 84 S. E. 351, *Walker, J.*, says: "As to the question of evidence, we think the court confined the testimony of plaintiff, D. B. Zollicoffer, to what occurred between Mrs. Thomas and the defendant E. T. Zollicoffer, and in this view there could be no valid objection to it, as the witness was not speaking of any communication or transaction between him and Mrs. Thomas, but of one between her and a third party. *Johnson v. Cameron* and *Bunn v. Todd*, *supra*; *Dobbins v. Osborne*, 67 N. C. 259; *McCall v. Wilson*, 101 N. C. 600, 8 S. E. 225; *Loffin v. Loffin*, 96 N. C. 99, 1 S. E. 837; *Ballard v. Ballard*, *supra*."

Besides, *Johnson v. Cameron*, thus approved to date, is in conformity with the exact language of Revisal, § 1631 (*Bunn v. Todd*, *supra*), and the statute should have precedence over any conflicting decisions.

Annotation—Right of surviving spouse, heir, or next of kin to testify in favor of the estate.

Upon the question as to whether or not a statutory rule excluding testimony of transaction with a deceased person by party or person in interest may be invoked against the estate of the decedent or person claiming under the es-

tate, see note appended to *Bailey v. Robison*, 42 L.R.A.(N.S.) 305.

As to the competency of assignor of claim in suit to testify with regard to transactions with or statements by a deceased person, where not expressly ex-

cluded by the terms of the statute, see note in 42 L.R.A.(N.S.) 316.

As to the competency of an interested witness to testify with reference to transactions with deceased in which he did not participate, see notes in 29 L.R.A.(N.S.) 1179, and 42 L.R.A.(N.S.) 320.

As to the applicability of the rule excluding testimony of an interested person in controversy over succession to estate, see note in 51 L.R.A.(N.S.) 187, and especially pages 206-209, which deal with the extent of the exclusion, and pages 210-213, which deal with the different classes of persons to whom the disqualification applies.

In general.

This note is limited to cases considering the right of the relatives of a deceased person to testify in favor of the estate as affected by statutory provisions disqualifying designated persons as witnesses where one party to the action is deceased. It is to be noted that this disqualification in some instances goes to the competency of the witness, and in other cases merely to the character of the testimony. In the latter class of cases, if a case merely holds that the testimony offered is not of a character within the prohibitory provision of the statute, it is not within the scope of this note. Another class of cases excluded are those denying the right of the surviving spouse to testify on the ground that the testimony relates to communications between the parties during the life of the deceased. As thus limited, the question presented is whether relatives of the deceased are within the prohibitory or disqualifying provision of statutes of the character under consideration.

The common-law rule disqualifying as witnesses all persons interested in the event of the action has been changed by statutes permitting persons interested in the event of the suit to testify therein. About the only limitation of the statute is that which affects the right of one spouse to testify against the other, or the right of an interested person to testify where one party to the suit is deceased. Of course, the specific language of the statute is the controlling factor in determining the right of a relative to testify in favor of the estate of a deceased person. While in many respects the statutes differ in important matters, as a rule they may be divided into three classes: First, those which in general terms disqualify

all persons having an interest in the event of the action; second, those which disqualify the parties to the action or transaction; third, those which disqualify persons in interest or parties to the action from testifying in their own favor or against the estate.

Where statute disqualifies person interested.

In construing these statutory provisions, the courts have evidenced a disposition so to construe them as to enforce them according to the spirit as well as the letter. In line with this purpose it is held that where the statute in effect disqualifies as witnesses persons having a pecuniary interest in the result of the suit, the surviving spouse or relative is not a competent witness in behalf of the estate. *McDonald v. Harris* (1901) 131 Ala. 359, 31 So. 548 (widow and son—action to enforce claim against the estate); *Conner v. Root* (1887) 11 Colo. 183, 17 Pac. 773 (statute disqualifies party to action or person interested in the event thereof—husband—action by personal representative to set aside gift).

Under a statute disqualifying as a witness a party to a suit or any person directly interested in the event thereof, if the adverse party sues or defends as administrator, etc., the interest of heirs or distributees of the estate is not direct, within the terms of the statute, and hence they are not disqualified as witnesses in favor of the estate. *Freeman v. Freeman* (1871) 62 Ill. 189 (husband an heir of distributee—action to enforce claim against the estate); *Gregory v. Gregory* (1906) 129 Ill. App. 96 (widow); *Collar v. Patterson* (1889) 137 Ill. 403, 27 N. E. 604, affirming (1890) 34 Ill. App. 632 (heir); *Ledford v. Weber* (1880) 7 Ill. App. 87 (husband).

Where statute disqualifies party to suit or transaction.

Under a statute providing in effect that where one party to the transaction is dead, the other party shall not be permitted to testify in his own favor, a surviving spouse or relative of the decedent is not disqualified as a witness in behalf of the estate. *Hinchman v. Parlin & O. Co.* (1896) 21 C. C. A. 273, 41 U. S. App. 301, 74 Fed. 698 (husband and administrator of deceased wife's estate—action involving title to property of estate); *McIntyre v. Meldrim* (1869) 40 Ga. 490 (widow—action to enforce claim against the estate); *Jackson v. Jackson* (1869) 40 Ga. 150

(widow—action against estate); *Adams v. Jones* (1869) 39 *Ga.* 479 (widow—action to enforce trust in favor of estate); *Jaquith v. Davidson* (1878) 21 *Kan.* 341 (widow, also executrix—action by estate to enforce claim); *Watts v. Myers* (1915) 93 *Kan.* 824, 145 *Pac.* 827 (widow and sole heir—action to set aside deed executed by decedent in his lifetime); *Stacy v. Alexander* (1911) 143 *Ky.* 152, 136 *S. W.* 150 (children of decedent—action affecting title to real estate); *McCall v. Burk* (1903) 25 *Ky. L. Rep.* 643, 76 *S. W.* 177 (widow—action to enforce trust); Compare with *Bott v. Fitzpatrick* (1845) 5 *B. Mon. (Ky.)* 397 (holding that where the father is the heir and legal representative of the deceased son, he is incompetent as a witness in favor of the estate in an action to enforce an obligation against it); *Robinson v. Talmadge* (1867) 97 *Mass.* 171 (widow—action on note); *Litchfield v. Merritt* (1869) 102 *Mass.* 520 (widow—action by estate on a note); Compare with *Ford v. Ford* (1835) 17 *Pick. (Mass.)* 418 (holding that where the heir releases his interest in a note sued upon by the administrator, he is a competent witness in favor of the estate); *Stuhlmuller v. Ewing* (1860) 39 *Miss.* 447 (widow—action to enforce claim against the estate); *Smith v. Brinkley* (1910) 151 *Mo. App.* 494, 132 *S. W.* 301 (children of decedent—action against estate); *Norvell v. Cooper* (1911) 155 *Mo. App.* 445, 134 *S. W.* 1095 (children of decedent—action to enforce claim against the estate).

Under a statute disqualifying as a witness a party to a transaction with a deceased person in an action where the adverse party is the personal representative of the decedent, a father who is the sole heir of a deceased son cannot testify in favor of the latter's estate to any personal transaction or communication between him and the decedent (*Cushman v. Blakesly* (1856) 3 *G. Greene (Iowa)* 542), but the disqualification is limited to evidence of this character, and does not extend to evidence relating to other matters, and the surviving spouse or heir is a competent witness in favor of the estate to matters not relating to personal transactions or communications with the deceased (*Sweezy v. Collins* (1875) 40 *Iowa*, 540; *Bradley v. Kavanagh* (1861) 12 *Iowa*, 273).

Under a statute disqualifying the opposite party as a witness to matters equally within the knowledge of a deceased person as to personal transactions or communications with the de-

ceased, an heir of the deceased is not disqualified as a witness in favor of the estate. *Moore v. Machen* (1900) 124 *Mich.* 216, 82 *N. W.* 892 (son a competent witness to show demand made by him as agent for the decedent in the latter's lifetime).

But where the action is between two estates, a daughter and heir of one of the deceased persons is not a competent witness in favor of the estate in which she is interested. *Penny v. Croul* (1891) 87 *Mich.* 15, 13 *L.R.A.* 83, 49 *N. W.* 311.

However the husband of the daughter of the decedent has not such an interest in the estate as to disqualify him as a witness in favor of the estate, although the action is between two estates. *Ashley v. Smith* (1908) 152 *Mich.* 197, 115 *N. W.* 1052.

Where party to suit or person interested is disqualified as a witness against the estate.

Under statutes prohibiting persons interested in the event of the action from testifying in behalf of the party succeeding to a deceased person's title, or against the representative of a deceased person, as to any personal transaction or communication between the witness and the decedent, where the evidence is of a character designated by the statute, the next of kin of the deceased person are disqualified as witnesses in favor of the estate (*Holcomb v. Holcomb* (1880) 20 *Hun (N. Y.)* 156); but this qualification does not preclude the next of kin from testifying with regard to the declarations of the decedent, as bearing upon his mental capacity (*Ibid.*).

So, where the action is by one estate against another estate, the heir of one estate is disqualified as a witness in favor of the other estate, where the evidence is of the character designated by the statute. *Parks v. Andrews* (1890) 56 *Hun*, 391, 10 *N. Y. Supp.* 344.

Where the statute in effect disqualifies as witnesses persons who are necessary parties to the issue, or whose interest is adverse to the estate, it has been held that the surviving spouse or relatives of the deceased are not within the terms of the statute, and are not disqualified to testify as witnesses in favor of the estate. *Cincinnati, H. & I. R. Co. v. Cregor* (1895) 150 *Ind.* 625, 50 *N. E.* 760 (widow and administratrix—action to recover for injuries to deceased, resulting in his death); *Floyd v. Miller* (1878) 61 *Ind.* 224 (widow—action to enforce claim against the es-

tate); *Denbo v. Wright* (1876) 53 Ind. 226 (widow—action to enforce claim against estate); *Skillen v. Jones* (1873) 44 Ind. 136 (child—action by administrator to recover decedent's share in a partnership); *Lewis v. Buskirk* (1896) 14 Ind. App. 439, 42 N. E. 1118 (widow—action to enforce claim against the estate).

Under a statute providing that neither party shall testify against the other, where one party to an action is deceased, heirs, next of kin, or the surviving spouse is not disqualified as a witness in favor of the estate in which he is interested. *Hughlett v. Conner* (1873) 12 Heisk. (Tenn.) 83 (heirs—action involving title to land); *Russell v. Beckert* (1917) — Tex. Civ. App. —, 195 S. W. 607 (widow). Compare with *Anglin v. Barlow* (1898) — Tex. Civ.

App. —, 45 S. W. 827, holding that the widow is not a competent witness in favor of her husband's estate in an action to recover property from a third person. The terms of the disqualifying statute are not stated.

Where one estate is suing another, however, the surviving spouse or heir of one of the decedents is not a competent witness in favor of the estate in which he is interested, since such testimony is against the other estate. *Brown v. Marmaduke* (1915) 248 Pa. 252, 93 Atl. 1021; *Crosetti's Estate* (1905) 211 Pa. 490, 60 Atl. 1081; *Miller v. Miller* (1890) 1 Pa. Dist. R. 95 (widow—action to enforce claim against the estate); *Keener v. Zartman* (1891) 144 Pa. 179, 22 Atl. 889 (heir—action to enforce claim against the estate—heir was also grantee of land from decedent). A. G. S.

WASHINGTON SUPREME COURT.
(Department No. 1.)

STATE OF WASHINGTON EX REL.
MABEL I. MCGHEE

v.

SUPERIOR COURT IN AND FOR THE
COUNTY OF PIERCE et al.

(— Wash. —, 170 Pac. 130.)

Habeas corpus — appeal — supersedeas — effect.

1. An appeal with supersedeas bond will not, in a habeas corpus proceeding to secure custody of a child, have the effect of restoring the child to the former custody pending appeal.

For other cases, see Appeal and Error, III. b, in Dig. 1-52 N. S.

Mandamus — to compel court to retain jurisdiction of child.

2. Mandamus will not lie to compel a court which has changed the custody of a child in a habeas corpus proceeding, to provide for its retention within its jurisdiction pending appeal, if no application for such relief has been made to that court.

For other cases, see Mandamus, II. a, in Dig. 1-52 N. S.

Appeal — writ in aid of jurisdiction.

3. An appellate court cannot, in the absence of anything to show that steps have been taken to invest it with jurisdiction, issue a writ to control the custody of a child in aid of its jurisdiction.

For other cases, see Appeal and Error, III. in Dig. 1-52 N. S.

(January 28, 1918.)

Note. — For effect of appeal as stay of judgment in habeas corpus proceedings, see annotation following this case, post, 923. L.R.A.1918C.

PROCEEDING by relator for an order requiring respondents to fix the amount of a supersedeas bond in a habeas corpus proceeding, and prohibiting entry of judgment awarding custody of the child pending the hearing of the application. Demurrer to the petition sustained and alternative writ quashed.

The facts are stated in the opinion.

Mr. Carroll A. Gordon, for relator:

An appeal lies from an order of discharge from custody in habeas corpus proceedings.

Re Garfinkle, 37 Wash. 650, 80 Pac. 188.

Habeas corpus is a civil proceeding, and an appeal therein without bond is ineffectual.

State v. Fenton, 30 Wash. 325, 70 Pac. 741; *State ex rel. Roberts v. Superior Ct.* 32 Wash. 143, 72 Pac. 1040.

Any judgment which alters the status quo may be stayed.

State ex rel. Byers v. Superior Ct. 28 Wash. 403, 68 Pac. 865.

Mandamus will issue if the fruits of the appeal would be lost by reason of the refusal to accept a supersedeas bond.

State ex rel. Denham v. Superior Ct. 28 Wash. 590, 68 Pac. 1051.

And in aid of the writ, the lower court may be restrained from further proceeding.

State ex rel. Barnard v. Board of Education, 19 Wash. 8, 40 L.R.A. 317, 67 Am. St. Rep. 706, 52 Pac. 317.

Mr. A. O. Burmeister also for relator.

Messrs. Henry Conger and A. L. Haight, for respondents:

The filing of the supersedeas bond will not operate to stay the execution of the lower court's order awarding the custody of a

minor child to the petitioner in habeas corpus proceedings; and that being the only relief sought, the court did not err, and did not exceed his jurisdiction, in refusing to fix the amount of such bond.

State ex rel. Davenport v. Poindexter, 45 Wash. 37, 87 Pac. 1080; State v. Kirkpatrick, 54 Iowa, 373, 6 N. W. 258, 588; State v. Fenton, 30 Wash. 325, 70 Pac. 741; State ex rel. Hamilton v. Superior Ct. 56 Wash. 91, 105 Pac. 171.

Prohibition will not issue unless the proceedings of the lower court are without, or in excess of, its jurisdiction (Rem. & Bal. Code, § 1027); nor where the lower court has jurisdiction of the parties and the subject-matter (32 Cyc. 605).

Webster, J., delivered the opinion of the court:

Prior to June 8, 1917, L. D. Oar and relator, Mable I. McGhee, were husband and wife, residing in the state of Nevada; Coral Emeline Oar, a minor child of the age of three years, being the issue of this marriage. On that date, by a decree of the district court of Nevada, the parties were divorced, the custody of the minor child being awarded to the mother and father respectively, for alternate periods of six months following the entry of the decree. Thereafter the relator married and removed with the minor child to Pierce county, Washington, where she now resides. After the expiration of the first period provided in the decree, the father, who still resides in Nevada, made application to the superior court of Pierce county by habeas corpus proceedings for the custody of the child, and upon the hearing thereof the court found that the father was a suitable person to have the care and custody of the child, and announced its decision that the child, which had been in the custody of the court during the pendency of the proceedings, be forthwith delivered to the petitioner therein. Whereupon relator applied for an order fixing the amount of a supersedeas bond to stay the judgment pending appeal to this court, which being denied, relator filed an original application in this court setting forth, in substance, the foregoing facts, and in addition thereto alleging that she is desirous of obtaining a review of the habeas corpus proceeding by appeal, and that, unless prevented, the father will remove the minor child from the jurisdiction of this court, thereby depriving relator of the fruits of such appeal in the event the same is successful. Relator prays that an order be issued by this court requiring the superior court to fix the amount of such supersedeas bond, and that it be prohibited

from entering a judgment delivering the custody of the child to its father pending the hearing of this application. An alternative writ issued as prayed, and on the return day respondent demurred to the petition upon the ground that the facts therein stated are not sufficient to warrant the granting of the relief sought.

In support of the application relator contends that upon the execution of a supersedeas bond the judgment in the habeas corpus proceeding is stayed, and the custody of the child transferred to the relator, in whose custody it was when the proceeding was instituted. We cannot accede to this view. While we have held that an appeal will lie from a final judgment in habeas corpus proceedings, we have never held that such judgments may be superseded pending appeal. In State ex rel. Davenport v. Poindexter, 45 Wash. 37, 87 Pac. 1069, we said: "It is contended here by relators that the filing of the supersedeas bond had the effect of leaving all parties in the position they occupied at the commencement of the habeas corpus proceedings before respondent, and that, as they then had the possession and custody of the children, they became immediately entitled thereto again upon the giving of said stay bond, and that a writ should issue requiring respondent to direct the delivery of said minors to relators. We do not think this position tenable. Where minor children are involved a much different consideration is presented than obtains with reference to mere property rights. The welfare of the children is a matter of prime importance and public concern, and must be the subject of careful consideration at all stages of any proceeding wherein their possession, custody, or control is involved. In such a proceeding as this we do not think the giving of a supersedeas bond has any effect whatever upon the possession, custody, and control of the minor children in question. It being presumed that the order of the trial judge was correct, and that he was actuated by a consideration for the minors' welfare, it would be against public policy to have that welfare imperiled during an appeal, in the absence of a statute clearly permitting the staying of such orders. The trial court had jurisdiction to take said children into its possession, if it believed that their physical or moral welfare or other substantial interests necessitated such action."

This language is so apt as not to require further comment. To the same effect see State ex rel. Clark v. Superior Ct. 90 Wash. 80, 155 Pac. 398; State ex rel. Martin v. Poindexter, 43 Wash. 147, 86 Pac. 176; State ex rel. Gibson v. Superior Ct. 39

Wash. 115, 1 L.R.A. (N.S.) 554, 109 Am. St. Rep. 862, 80 Pac. 1108, 4 Ann. Cas. 229; Willis v. Willis, 165 Ind. 332, 2 L.R.A. (N.S.) 244, 75 N. E. 655, 6 Ann. Cas. 772; State v. Kirkpatrick, 54 Iowa, 373, 6 N. W. 588; 12 R. C. L. p. 1258; Re De Lemos, 143 Cal. 313, 76 Pac. 1115.

It is insisted, however, that unless relator is permitted to supersede the judgment, the father will remove the child from the state of Washington, thereby depriving the relator of the fruits of her appeal in the event of success. The answer to this contention is that the execution of the supersedeas bond will in no way affect the possession or custody of the child pending the appeal, nor prevent its removal from the state. It is not the policy of the law to require the doing of a useless thing, or the performance of an act that will be ineffectual for any purpose.

Neither can we treat the application as one for a writ of mandate directing the

respondent to enter an order suspending the operation of the judgment pending the appeal, or to exercise discretion in making suitable provision for the retention of the child in the state during the pendency of the appeal, for the reason that it does not appear that any such application has been made to respondent, or that the superior court has refused to act in the matter. In the absence of such showing the writ will not issue from this court.

Nor can we, in the aid of our appellate and revisory jurisdiction, grant such relief. It is not shown that relator has given notice of appeal and filed an appeal bond as required by statute to invest this court with jurisdiction in furtherance or aid of which it is authorized to act.

For these reasons, we conclude that the demurrer to the petition should be sustained, and the alternative writ quashed.

Ellis, Ch. J., and Parker, Fullerton, and Main, JJ., concur.

Annotation—Effect of appeal as stay of judgment in habeas corpus proceedings.

This question has been previously treated in the note to Willis v. Willis, 2 L.R.A. (N.S.) 244, and the cases in the present note are supplementary.

For habeas corpus decree as to custody of infant as res judicata, see the notes to Re King, 67 L.R.A. 783, and Knapp v. Tolan, 49 L.R.A. (N.S.) 83.

The holding of STATE EX REL. MCGHEE v. SUPERIOR Ct. ante, 921, that an appeal with supersedeas bond will not restore the custody of a child which has been changed in habeas corpus proceedings, is sustained by State ex rel. Davenport v. Poindexter (1906) 45 Wash. 37, 87 Pac. 1069, which is sufficiently set out in STATE EX REL. MCGHEE v. SUPERIOR Ct.

The case of Garner v. Gordon (1872) 41 Ind. 92, which takes a contrary view in a similar situation, is set out and overruled in Willis v. Willis, the case to which the earlier note 2 L.R.A. (N.S.) 244, is appended.

The case of People ex rel. Young v. Stout (1894) 10 Misc. 247, 31 N. Y. Supp. 421, set out in the earlier note in 2 L.R.A. (N.S.) 245, was affirmed without opinion in (1895) 144 N. Y. 699, 39 N. E. 858.

But it is held in Goldsmith v. Valentine (1910) 35 App. D. C. 299, that, where the respondents in a habeas corpus proceeding gave a supersedeas bond L.R.A.1918C.

on taking an appeal from an order awarding the custody of the infant son of the petitioner to petitioner's brother, who was not a party to the proceeding, the lower court had no power thereafter, on motion of the petitioner, to direct the respondents to transfer the custody of the infant to the petitioner's brother pending the appeal, upon his giving a counter bond. The court said that "rule 10 of this court provides, in effect, that an appeal from any order, judgment, or decree of the supreme court of the District shall operate as a stay of execution or supersedeas, if an approved bond is filed, 'conditioned for the successful prosecution of such appeal.' The conditions of this rule having been complied with, we see no reason why the appeal was not as effective in this case as in any other. Upon the perfecting of said appeal, the court below was ousted of its jurisdiction, and the cause transferred to this court. . . . The effect of the order of the court below might, and probably would, render futile the appeal taken. Such a situation, cannot, of course, be permitted. The parties to the appeal are entitled to have the status quo maintained during its pendency. Certainly, after they have given a bond to stay all further action until the determination of their appeal, they ought not to be

put in a position where they could be kept out of the rights determined in that appeal."

And in *Re Atcherley* (1909) 19 *Haw.* 347, upon authority of *Ex parte Ah Oi* (1901) 13 *Haw.* 534, it was held that an appeal from an order of discharge on habeas corpus operates as a supersedeas notwithstanding the statutory provision that no person who has been discharged upon a writ of habeas corpus shall be again imprisoned or restrained for the same cause; the court took the view that a prisoner is not discharged within the meaning of that provision until his case is finally determined.

It will be observed that in the following cases the decision in habeas corpus proceedings from which the appeal was taken was against, and not in favor of, the petitioner, as in the *MCGHEE CASE* and the cases previously cited in this note:

Thus, in *Re McKane* (1894) 61 *Fed.* 205, it was contended that, pending appeal from denial of a writ of habeas corpus, requiring petitioner to do hard labor in accordance with the sentence of the state court was a violation of U. S. Rev. Stat. § 766, Comp. Stat. 1916, § 1292, providing for a stay of proceedings against the person in the state court in such cases; but the court held that the custody of petitioner should remain undisturbed, there being a rule which supplemented the statute by providing that, although "proceedings against the person" by the state court or state authority are to be deemed null and void, the custody in which the prisoner was when he applied for the writ shall remain undisturbed despite the pendency of his appeal.

The decision in *McKane v. Durston* (1894) 153 U. S. 684, 38 L. ed. 867, 14 Sup. Ct. Rep. 913, was that the continued execution of a sentence under a judgment of a state court in a criminal case, after an appeal to the United States Supreme Court from a decision of the United States circuit court denying a writ of habeas corpus, was not a violation of U. S. Rev. Stat. § 766, Comp. Stat. 1916, § 1292.

Where a prisoner, after conviction and sentence to imprisonment, but before commitment, obtains a writ of habeas corpus, and after hearing thereon is remanded to custody under the criminal proceedings, it is held, in *State ex rel. Beekley v. McDonald* (1913) 123 *Minn.* 84, 142 N. W. 1051, that an appeal by him from the order discharging

the writ and so remanding him does not stay the criminal proceedings, so as to deprive the court of authority to issue a commitment upon such conviction and sentence pending the appeal. The court observed that the habeas corpus proceedings were no part of the criminal action, but in fact were in opposition thereto. An appeal in one proceeding or action does not stay proceedings in another, and the fact that the statute gives the right of appeal in habeas corpus proceedings, and exempts appellant from the necessity of giving a bond, in no wise affects the rule.

So it was held in *State v. Fenton* (1902) 30 *Wash.* 325, 70 *Pac.* 741, that an appeal from a judgment in habeas corpus proceedings adjudging petitioner properly restrained of his liberty under an information charging assault with intent to commit a felony did not stay proceedings in the criminal cause; and that a statute providing for a stay in either civil or criminal actions did not contemplate a stay in a case of this kind.

So, where one was in custody charged with a felony, and a writ of habeas corpus was applied for and denied, the supreme court in *State ex rel. Hamilton v. Superior Ct.* (1909) 56 *Wash.* 91, 105 *Pac.* 171, refused to stay the trial of the cause in the superior court pending appeal. The court observed that the case fell within the principle of *State v. Fenton* (*Wash.*) *supra*, where it was said: "This, unlike any other case, is the attempted injection of the habeas corpus proceedings in the trial of another case which is on appeal to this court. When the writ was denied by the lower court and the applicant remanded, that was the end of the case so far as the stay of the case then pending was concerned, and must necessarily be so to insure the orderly and effective administration of justice. This court placed a very liberal construction upon the statute when it sustained the right of appeal in habeas corpus cases, and it is not inclined, nor do we think the law compels us, to go to the extent of aiding defendants in criminal actions to prevent indefinitely a trial of causes on the merits by repeated applications for writs of habeas corpus, and appeals from the decisions in such cases if the applications are unsuccessful, which would be the result of sustaining appellant's contention. If this contention can be sustained at all, it can be so only on the theory that the appeal by virtue of itself worked a stay of pro-

ceedings. If there is a stay it is by force of the statute, and we are not cited to any statutory provision in that regard. The statutory provisions for a stay in either a civil or criminal action are found in §§ 6506 & 6529, Ballinger's Codes & Stat. [Pierce's §§ 1054, 1057], and neither contemplates a stay in a case of this kind."

While the question was not involved in *Winnovich v. Emery* (1908) 33 *Utah*, 345, 93 *Pac.* 988, the court stated that an appeal does not of its own force suspend judgment in a habeas corpus proceeding without any express statutory provision to that effect; and *State v. Kirkpatrick* (1880) 54 *Iowa*, 373, 6 *N. W.* 588, set out in the note in 2 *L.R.A. (N.S.)* 245, is cited to the proposition that, even in those states where an express right of an appeal is given by

statute, the courts have held that the taking of an appeal does not suspend judgment.

It is held in *Irwin v. Jackson* (1864) 34 *Ga.* 101, that the filing of a bill of exceptions to the decision of the judge below in habeas corpus, remanding the relator, does not operate as a superseas; but the applicant must remain in the condition in which he is placed by the judgment, whether exception be taken or not. See also *McLendon v. Smith* (1881) 68 *Ga.* 36, where the court, commenting upon the *Irwin Case (Ga.)* supra, states that it is questionable whether, pending an appeal to the supreme court from a decision on a writ of habeas corpus refusing to release a prisoner, the court can discharge him from custody on any terms. J. D. C.

WASHINGTON SUPREME COURT.
(Department No. 1.)

NELS HANSEN, Resp't.,
v.

DODWELL DOCK & WAREHOUSE COMPANY, Appt.

(— Wash. —, 170 *Pac.* 346.)

Master and servant — contract to protect servant from strikers — validity.

1. An agreement by a master to protect his servant against striking employees is not void as impossible of performance or contrary to public policy, or as being a policy of insurance not conforming to the statutory requirements relating to that subject.

For other cases, see Contracts, III. c, 1, in Dig. 1-52 N. S.

Same — farming out employee — effect.

2. An employer of longshoremen cannot relieve himself from liability under his contract to protect one from injury by strikers, by the fact that at the time of the injury such person had been farmed out for service with another employer, if he was actually in the employ of the contracting employer. *For other cases, see Master and Servant, I. b, in Dig. 1-52 N. S.*

Note.—As to contract by employer to protect employee from personal violence by strikers, see annotation following this case, post, 929.

As to which of two or more persons is the master of another who is conceded to be the servant of one of them, see the note to *Hardy v. Shedden Co.* 37 *L.R.A.* 33; and for later notes and cases on this subject, see the *L.R.A. Indexes* under the title, "Master and Servant," subtitle, "When relation exists." *L.R.A.* 1918C.

Accord — receipt in full — services and injury.

3. A receipt in "full of amount due to date," which is on a blank for services rendered, does not settle a claim for breach of contract to protect the employee from injury by strikers.

For other cases, see Compromise and Settlement, in Dig. 1-52 N. S.

Appeal — requested instruction — complaint.

4. One cannot complain of an instruction requested by him.

For other cases, see Appeal and Error, VII. g, 2, in Dig. 1-52 N. S.

Pleading — damage — sufficiency.

5. Damages for anguish of mind and body because of assault may be recovered, although not claimed or proved in terms, if the facts shown are such that no other result than anguish of mind and pain of body could be reached.

For other cases, see Pleading, II. f, in Dig. 1-52 N. S.

(January 31, 1918.)

A PPEAL by defendant from a judgment of the Superior Court for King County in favor of plaintiff in an action brought to recover damages for breach of a contract to protect plaintiff from injury by strikers. Affirmed.

The facts are stated in the opinion.

Messrs. Hall & Cosgrove and Huffer & Hayden for appellant.

Messrs. Saunders & Nelson, for respondent:

The contract is not void as against public policy.

Holshouser v. Denver Gas & E. Co. 18 *Colo. App.* 431, 72 *Pac.* 289, 13 *Am. Neg.*

Rep. 635; *McCalman v. Illinois C. R. Co.* 131 C. C. A. 15, 215 Fed. 465; *Baxter v. Roberts*, 44 Cal. 187, 13 Am. Rep. 160, 13 Am. Neg. Cas. 514.

There was, in fact, no real evidence of the transfer of plaintiff's services to another master; but, if there was, the court fully and correctly covered the situation in its instructions.

Morris v. Malone, 200 Ill. 132, 93 Am. St. Rep. 180, 65 N. E. 704, 13 Am. Neg. Rep. 22; *Illinois C. Co. v. Timmons*, 30 Ky. L. Rep. 1155, 100 S. W. 337; *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101; *Delaware, L. & W. R. Co. v. Hardy*, 59 N. J. L. 35, 34 Atl. 986; *Missouri, K. & T. R. Co. v. Ferch*, — Tex. Civ. App. —, 36 S. W. 487; *Goodin v. Smith*, 23 Ky. L. Rep. 1810, 66 S. W. 179.

Fullerton, J., delivered the opinion of the court:

The respondent, plaintiff below, while in the employ of the appellant as a longshoreman, was assaulted by members of a riotous mob and severely injured. At the time of the injury a strike was pending by union longshoremen of the cities of Seattle and Tacoma, and the mob making the assault was composed of such longshoremen and their sympathizers. The respondent instituted this action to recover in damages for his injuries, basing his cause of action upon an oral contract which he alleges was entered into between himself and the appellant, by the terms of which the appellant promised and agreed to afford and furnish him "ample protection from violence, injury, or hurt from said union longshoremen, or any others co-operating with or aiding them, and to prevent any injury, hurt, or damage being done to plaintiff while being employed by the defendant in any labor or service assigned to him by defendant, and to afford and furnish plaintiff a safe place in which to work free from assault on the part of any persons whatsoever." The appellant took issue on the complaint by a general denial, and by a plea of settlement and discharge. The settlement was denied by a reply, and on the issues thus framed a trial was had which resulted in a verdict and judgment in the respondent's favor. This appeal is prosecuted from the judgment entered.

Noticing the errors assigned in the order in which the appellant presents them, the first is that the evidence was insufficient to establish the contract alleged. But this question does not seem to us to require extended discussion. The respondent himself and a witness whom he brought to his support testified emphatically to the contract. While the contract is denied by the representative of the appellant who did the hiring, and the denial is supported by the testi-

mony of others to a greater or less degree, it is conceded that there was danger of such an assault, and that the question of protection was discussed at the time of the hiring. It was shown, moreover, that for the purpose of protection the respondent was given his board and lodging at a pier of the appellant which was protected by a guard, and that some form of protection was afforded him and his collaborators at all of the places where he was put to work. In the light of this testimony it was clearly for the jury to say whether the contract was entered into; and, this being so, their verdict cannot be overturned by an appellate court whose province is confined to a review of the record for error.

It is next contended that the contract alleged, conceding it to have been proved, is void. If we have correctly understood the appellant's learned counsel, the contention is that it is so for three principle reasons: (1) Because it is impossible of performance; (2) because it is against public policy; and (3) because it is a contract of insurance, and was not entered into in conformity with the statutes regulating insurance.

It is true there are certain agreements which do not give rise to a liability by non-performance for the reason stated: as, for example, an agreement incapable of performance in itself because contrary to the laws of nature, or agreement to do an act forbidden by some legal principle or by statute law. So, also, the modern cases generally hold that a contract or agreement incapable of performance in fact by reason of the existence of a state of things which renders performance impossible will not give rise to a liability on breach; this because the parties are presumed to have contracted with reference to the existence of a state of things making performance possible. But it is elementary law that, when the contract is to do a thing which is possible in itself, the promisor will be liable for a breach thereof notwithstanding it was beyond his power individually to perform it; for it is his own fault if he undertakes to do a thing which to him is an impossibility. If, for illustration, a man for a sufficient consideration undertakes to pay a given sum of money at a fixed time, having neither the means on hand nor the power to procure the means to make the undertaking good, no one will suppose that the breach of the obligation gives rise to no liability. Or perhaps a more nearly analogous illustration is found in that class of contracts where a man undertakes to do a thing incapable of performance without the aid and assistance of others, as when he undertakes to furnish the materials and

erect a building, having on hand neither the necessary materials nor the ability to perform by himself the necessary labor involved. In no such case has it ever been held that the breach of the contract gave rise to no liability because the contract was impossible of performance.

It appears to us that the case at bar falls within the last, rather than within the first, of these principles. The contract was not impossible of performance within itself, nor is such a contract forbidden by any legal principle or by any statute law, nor was there any change of condition in the subject-matter of the contract which rendered its performance impossible. It may have been impossible of performance by the appellant, in whose behalf the promise was made, but manifestly its inability to perform it as an individual or corporation did not relieve it from liability for its breach so long as the contract was capable of being legally performed.

The argument in support of the second reason given for holding the contract void is based on the assumption that protection could not be given without the employment of a private armed force, and that to employ such a force is contrary to the policy of the law. It may be that, had the contract between the parties provided in express terms for protection by a privately employed armed force, it would have been so far unlawful as to give rise to no liability for its breach. But we cannot think this contract so provides. Certainly it does not do so in express terms, and it cannot be held that it does so impliedly, unless there is no other means by which protection could be afforded. Seemingly other ways might have been adopted. The appellant might have done effectively what it attempted to do and did ineffectively; it might have erected an impassable barrier across the way of approach which the rioters were obliged to take in order to reach the respondent's place of work. Again, it might have called upon the public authorities for protection. Government is not as yet impotent, even as against rioting strikers, and seemingly, had proper representations been made to the proper executive officers, a lawful force could have been provided which would have afforded ample protection. Other means equally lawful might be suggested, but these are sufficient to show that the appellant, to perform the contract, did not have to resort to an unlawful means solely. We are aware that the evidence tends to show that the appellant did apply to the police of the city where the riot occurred for protection, and that certain police officers were sent to the place for that purpose, who failed to quell L.R.A.1918C.

the rioters or prevent the doing of the riotous acts which resulted in the respondent's injury. But this does not prove an exhaustion of the possible means of protection; it proves only that the protection attempted to be afforded was insufficient.

The third reason given for holding the contract void is equally untenable. This was in no sense a contract of insurance within the meaning of the laws relating to that subject. The contract is a stranger to the books because of its novelty, but it differs in no sense in its essentials from other contracts by which one person for a sufficient consideration agrees with another to do or not to do a particular thing. It has none of the elements of an insurance contract not found in ordinary contracts by which one person agrees to do some act or perform some service for the benefit of another. In this connection the appellant lays stress upon the words "absolute protection," used by the witnesses in defining the terms of the contract, and argues therefrom that it is an insurance contract because they cover every possible species of harm that can happen, no matter from what cause. But in answer it is sufficient to say that the appellant, in order to give the words this extraordinary meaning, ignores the construction in which they were used. As we read the record, the witnesses meant no more than to say that they were guaranteed absolute protection from injuries caused by riotous longshoremen and their sympathizers; not protection against injuries that might be received in other ways. But, were the words as broad in meaning as the appellant construes them to be, still, in our opinion, it would not be an insurance contract as that form of contract is defined by the statutes. Assuredly, when a master employs a servant, he may enter into a binding agreement with him to protect him against the hazards of the employment, or the hazards surrounding the employment, without resorting to the forms of contract prescribed by the Insurance Code.

Another contention is that the respondent was not in the appellant's employ at the time of the injury. The evidence does indeed show that he was working for the benefit of another at that time, but it also shows that he was doing so while under contract to work for appellant. The record does not make very clear the relation existing between the various dock owners and shipping lines involved in the controversy, but it can be gathered therefrom that the appellant maintained in its employ men whom it farmed out to others as they were needed for particular purposes, paying the men itself, and receiving

its remuneration from the others for whom the men actually worked. The respondent was one of such men and plainly was at all times in the appellant's employ.

As we have said, the appellant pleaded as an affirmative defense a satisfaction and settlement in full of the differences between itself and respondent. On the trial it introduced in evidence a writing dated subsequent to the injury, signed by the respondent, acknowledging the receipt of "\$11 in full payment of the amount due me to date." On the margin of the writing, under columns headed "Regular Time" and "Overtime" was a statement showing the number of hours the appellant had worked, with the rate of wages per hour, the total aggregating the sum of \$11. No evidence was offered showing or tending to show that the receipt was intended as a full settlement of the demand the respondent might have against the appellant for his injury, or that it was anything other than it purported on its face to be, namely, a receipt for wages theretofore earned. At the proper time during the course of the trial the appellant requested the court to give the jury the following instruction: "If you find that the plaintiff signed a release in writing and acknowledged receipt of payment from defendant in full of the amount due up to date, and if you find that the receipt was signed subsequent to the alleged injury of plaintiff, then your verdict must be for the defendant."

The request was refused, and error is assigned thereon. In the form presented it was clearly not error to refuse to give the instruction. Since the appellant admitted his signature to the writing, and there was otherwise no dispute as to its genuineness, to give the instruction in the form requested would have been, in effect, a direction to find for the defendant. The question, of course, was whether there had been a settlement and discharge of the liability for which the respondent sued. The receipt on its face purported to relate to another matter, and did not by itself in any manner tend to prove the issue; much less was it conclusive evidence on the question.

But perhaps the appellant means that the proffered instruction was equivalent to a request for an instruction on the question of settlement and discharge, and that the court should at least have submitted the matter to the jury on a proper instruction. But, so construing it, we cannot agree with the contention. As we say, the receipt did not on its face purport to be a discharge of the liability sued upon, and there was no extrinsic evidence tending to show that

it was intended for that purpose. This being the state of the record, the court did not err in failing to notice the plea of settlement and discharge in its instructions.

Among its instructions the court gave the jury the following: "If you find from the evidence that the plaintiff, while at the Great Northern dock in Seattle, was informed that he was about to go to Tacoma, if he was willing, to work on the deck unloading the Nome City, and that said work was to be done for persons other than the defendant, and that the people operating the dock in Tacoma at which the Nome City was to land had promised to provide protection, and if you find that the dock owners in Tacoma failed to provide such protection, then the defendant would not be liable, and your verdict should be for the defendant."

The instruction is claimed as error because of the inclusion of the words italicized. But an examination of the record shows that the instruction was a compound of a number of instructions requested by the appellant, in one of which the very words objected to were requested to be given. This being true, the appellant is not in a position to complain. But in any event the instruction was not error from the appellant's point of view. It was an instruction in its favor, and included no element for which there was not justification in the evidence.

In its instruction on the measure of damages the court told the jury that, if they found for the respondent, he was entitled to recover such a sum as would be a fair compensation for the "pain and anguish of mind and body" he had suffered caused by the assault and battery complained of. It is objected to this that there is neither an allegation in the complaint nor evidence in the record that the respondent suffered any pain and anguish of mind and body. It is true that the complaint does not set forth in so many words that the treatment he received at the hands of the rioters caused him anguish of mind or pain of body, but the facts of the assault are set forth in detail, and there was a demand for general damages. The proofs concerning the injuries inflicted were as minute as the allegations of the complaint, and from them no other result than anguish of mind and pain of body could follow. But, if this were not so, the cause was tried upon the theory that the complaint was sufficient in these respects, and this is a waiver of the objection, however effective such an objection might have been if suggested at the proper time. The case of *Bennett v.*

Oregon-Washington R. & Nav. Co. 83 Wash. 64, 145 Pac. 62, is not in point on the question presented here. There the court submitted to the jury the question whether the injured plaintiff would probably suffer future mental anguish, and it was held that there was no evidence in the record which justified the instruction of the court. On the other hand, it was clearly recognized that mental anguish was a proper subject for the consideration of the jury in all cases where there is "evidence of a state of facts from which the jury might find mental anguish."

It is urged further with reference to this instruction that it is erroneous in that it assumes that the respondent suffered pain and anguish by reason of the assault, whereas this was a question for the determination of the jury. But we cannot think the objection well taken. The instruction as a whole shows that the court's statements wherein he referred to facts were made hypothetically, leaving it to the

jury to say whether or not the conclusion was justified by the evidence.

Other objections to the instructions were based on a different view of the law from that adopted by the trial court, and are sufficiently answered by what we have said on cognate questions.

The jury returned a verdict for the sum of \$500. This is objected to as excessive. The objection, however, is based on the contention that the complaint contains no claim for damages on account of physical pain and mental anguish suffered. As no contention is made that the verdict would be excessive were these elements of damage within the province of the jury to consider, and as we have concluded they were within its province, no further consideration of the objection is necessary.

The judgment is affirmed.

Ellis, Ch. J., and Parker, Webster, and Main, JJ., concur.

Petition for rehearing denied.

Annotation—Contract by employer to protect employee from personal violence by strikers.

The decision in *HANSEN v. DODWELL DOCK & WAREHOUSE Co.* ante, 925, upholding a contract by an employer to protect an employee from the violence of strikers as against the objections that it was impossible of performance, that it was against public policy, and that it was a contract of insurance not entered into in conformity with the statutes regulating insurance, is undoubtedly sound. It does not necessarily follow, however, that a breach of such a contract entitles the servant to recover for personal injuries received from strikers, in an action *ex contractu* based upon the breach. This point is apparently not considered in this case. It is to be noted in this connection, however, that the employee was injured while he was engaged in the line of his employment, and there was therefore presented the question of the duty of the

employer, who had expressly assumed the duty of protecting his employee from apprehended violence while at work. The only case found at all similar as to the facts is *Lewis v. Taylor Coal Co.* (*Foreman v. Taylor Coal Co.*) (1902) 112 Ky. 845, 57 L.R.A. 447, 66 S. W. 1044, which holds that the breach of an agreement to protect an employee from the violence of strikers will not give a right of action under statutes making an employer liable for the death of an employee through his negligent or wrongful act, and also providing that an action for injury to the person except by assault shall not abate on the death of the injured person. In this case, however, the employee was injured by strikers after he had finished his labor for the day and had gone to his home.

A. G. S.

WASHINGTON SUPREME COURT. (Department No. 2.)

WILLIAM MASKELL (Fidelity & Deposit Company of Maryland, Assignee), Appt.,
v.

J. D. ALEXANDER et al.

SPOKANE CYCLE & AUTO SUPPLY COMPANY et al., Respts.

(— Wash. —, 170 Pac. 350.)

Bulk Sales Law — transfer to corporation — applicability of statute.

A transfer of a stock in trade to a cor-
L.R.A.1918C.

poration organized to take over the business for its capital stock is not within a statute requiring the giving of certain notices in case of the purchase of a stock in bulk for cash or on credit.

For other cases, see *Fraudulent Conveyances*, I. in Dig. 1-52 N. 8.

(January 31, 1918.)

Note. — As to applicability of Bulk Sales Law to transfer to corporation or partnership organized to take over the business, see annotation following this case, post, 932.

APPEAL by the garnisher from a judgment of the Superior Court for Spokane County in favor of the garnishees in a proceeding to set aside a transfer of a stock of goods to the garnishee corporation, because of its failure to comply with the Bulk Sales Law. Affirmed.

The facts are stated in the opinion.

Messrs. Danson, Williams, & Danson and George D. Lantz, for appellant:

Appellant's assignor, Maskell, was a creditor of defendants.

Allen v. Kane, 79 Wash. 248, 140 Pac. 534; Henry v. Yost, 88 Wash. 93, 152 Pac. 714; Johnson v. Blomdahl, 90 Wash. 625, 156 Pac. 561; Calkins v. Howard, 2 Cal. App. 233, 83 Pac. 280; 20 Cyc. 430; Stewart & H. Drug Co. v. Reed, 74 Wash. 401, 133 Pac. 577; Eklund v. Hopkins, 36 Wash. 179, 78 Pac. 787.

The transfer was a sale within the Bulk Sales Law.

Foley v. Mason, 6 Md. 37; Sampson v. Brandon Grocery Co. 127 Ga. 454, 56 S. E. 488, 9 Ann. Cas. 331; Lee v. Cutrer, 96 Miss. 355, 27 L.R.A.(N.S.) 315, 51 So. 808, Ann. Cas. 1912B, 478; Berlaiwsky v. Rosenthal, 104 Me. 62, 71 Atl. 69; Eau Claire Canning Co. v. Western Brokerage Co. 213 Ill. 561, 73 N. E. 430; Bishop v. Bishop, 81 Conn. 509, 71 Atl. 583; Union & N. H. Trust Co. v. Taintor, 85 Conn. 452, 83 Atl. 697; Mead v. McLaughlin, 42 Mo. 198; Breck v. Barney, 183 Mass. 133, 66 N. E. 643.

Messrs. Graves, Kizer, & Graves, for respondents:

Maskell was not a creditor.

Armour & Co. v. Western Constr. Co. 36 Wash. 537, 78 Pac. 1106; Barto v. Stewart, 21 Wash. 615, 59 Pac. 480; State ex rel. Puget Sound & W. H. R. Co. v. Northern P. R. Co. 94 Wash. 1, 161 Pac. 852; State ex rel. Willis v. Monfort, 93 Wash. 4, L.R.A.1917B, 801, 159 Pac. 890; Everett Produce Co. v. Smith Bros. 40 Wash. 566, 2 L.R.A.(N.S.) 331, 111 Am. St. Rep. 979, 82 Pac. 905, 5 Ann. Cas. 979; McAvoy v. Jennings, 44 Wash. 79, 87 Pac. 53.

The particular transfer was not within the Bulk Sales Act.

Peterson v. Doak, 43 Wash. 251, 86 Pac. 663; Daniels v. Pacific Brewing & Malting Co. 86 Wash. 416, 150 Pac. 609; McAvoy v. Jennings, 44 Wash. 79, 87 Pac. 53; Kasper v. Spokane Merchants' Asso. 87 Wash. 447, 151 Pac. 800; Coaldale Coal Co. v. State Bank, 142 Pa. 283, 21 Atl. 811; Sayers v. Texas Land & Mortg. Co. 78 Tex. 244, 14 S. W. 578; Scripps v. Crawford, 123 Mich. 173, 81 N. W. 1098; Plaut v. Billings-Drew Co. 127 Mich. 11, 86 N. W. 399; Kingman v. Mowry, 182 Ill. 256, 74 Am. St. Rep. 169, 55 N. E. 330; Kessler v. Levy, 11 Misc. 275, 32 N. Y. Supp. 260; L.R.A.1918C.

Densmore Commission Co. v. Shong, 98 Wis. 380, 74 N. W. 114; Bristol Bank & T. Co. v. Jonesboro Bkg. & T. Co. 101 Tenn. 545, 48 S. W. 228; Thorpe v. Pennock Mercantile Co. 99 Minn. 22, 108 N. W. 940, 9 Ann. Cas. 220; Byrne & H. Dry Goods Co. v. Willis-Dunn Co. 23 S. D. 221, 29 L.R.A.(N.S.) 589, 121 N. W. 620.

Holcomb, J., delivered the opinion of the court:

Appellant instituted garnishment proceedings against respondents, averring that the assignor of appellant was a creditor of the defendants Alexander; that at a time when he was such, they transferred a stock of goods to the respondent corporation, and failed to comply with the Bulk Sales Law. and that the individual respondent holds the stock of goods as a common-law assignee for the benefit of the corporation's creditors.

The facts are stipulated as follows: J. D. Alexander was engaged in the bicycle and motorcycle business in Spokane. On September 6, 1914, William Maskell received personal injuries through the negligence of one of Alexander's employees. On September 23, 1914, the Spokane Cycle & Auto Supply Company was incorporated by Alexander and other parties acting in his interest. The capital stock was \$125,000, divided into 1,250 shares of the par value of \$100. On October 15, 1914, Alexander transferred his entire business, credits, good will, etc., to the corporation, and 750 shares of its capital stock were issued to him. The remainder of the capital stock was never issued. At the time of the transfer Alexander owed on bills and accounts payable approximately \$23,000. There was then owing to him on bills and accounts receivable approximately \$27,000, and the value of the merchandise excluding credits, fixtures, good will, etc., transferred by him to the corporation, was \$45,000. All of Alexander's indebtedness save \$6,800, for which the corporation gave its notes, was afterwards paid by it. It collected all the indebtedness owing to him, and continued to carry on the business as he had theretofore conducted it. Alexander received all the stock issued as the consideration for the transfer of his business to the corporation. and he was always the only real shareholder; other holdings being purely formal for the purpose of completing the corporate organization.

In December, 1914, Maskell brought an action against Alexander to recover damages for the injuries sustained by him through the negligence of Alexander's employees. The action was contested, liability being denied, but resulted in a judgment for \$4,000 and costs against Alexander. De-

siring to appeal, he applied to the Fidelity & Deposit Company of Maryland to execute a supersedeas bond to stay the judgment pending the appeal. The Fidelity company knew that Alexander had transferred his business to the Cycle company between the time of the accident and the time of application. It furnished the bond as requested, for compensation, taking from Alexander an indemnity agreement, with which was deposited forty-five shares of the Cycle company stock as security for its performance. The judgment against Alexander was affirmed by this court on May 8, 1916, (*Maskell v. Alexander*, 91 Wash. 363, 157 Pac. 872), and judgment was rendered thereon against the Fidelity company as surety on the supersedeas bond. When the remittitur went down the Fidelity company paid over to Maskell the amount of the judgment, interest, costs, and accrued costs, and received from him an assignment of the judgment.

On September 18, 1916, the Cycle company executed to the respondent Wilson a common-law assignment of all its property for the benefit of all of its creditors, and shortly thereafter he took possession of the property, and has since managed it for the benefit of the creditors. At the time the transfer of the business was made by Alexander to the corporation organized by him, he was solvent. There was no intent on his part to defraud anyone, the corporation having been formed by him in good faith as a business proposition. In making the transfer the Bulk Sales Act was utterly ignored, and no affidavit or statement as required by it was made by Alexander or required by the corporation. Of the 750 shares of Cycle company stock issued and delivered to Alexander the appellant still had the forty-five shares which Alexander had pledged to it to indemnify it for becoming surety on the supersedeas bond, and 703 shares of the stock in the hands of Alexander were pledged to one Crandall to secure an indebtedness of about \$750 owed by Alexander to Crandall. The value of the assets of the Cycle company at the time of the trial was \$28,961.49 more than the amount of its liabilities.

Judgment was entered on the stipulated facts that the 703 shares of stock pledged to Crandall were subject to the judgment assigned to appellant, and they were ordered sold in satisfaction of the judgment subject to Crandall's claim. Other relief was denied appellant, the theory of the court being that the transfer of the stock of goods in bulk to the corporation organized by Alexander was not a sale within the meaning of the Bulk Sales Law. The Bulk Sales Law, so-called, provides: "Whenever

any person shall bargain for, or purchase any stock of goods, wares or merchandise in bulk, for cash, or on credit, and shall pay any part of the purchase price, or execute or deliver to the vendor, thereof, or to his order, or to any person for his use, any promissory note, or other evidence of indebtedness for said purchase price, or any part thereof, without first having demanded and received from said vendor, or from his agent, the statement provided for in § 5296 and verified as there provided, and without paying, or seeing to it that the purchase money of the said property is applied to the payment of the bona fide claim of the creditors of the vendor as shown upon such verified statement, share and share alike, such sale, or transfer shall be fraudulent and void." Rem. & Bal. Code § 5297.

Section 5296 preceding provides that "it shall be the duty of every person who shall bargain for or purchase any stock of goods, wares or merchandise in bulk, for cash or on credit, before paying to the vendor, or his agent, or representative, or delivering to the vendor, or his agent, any part of the purchase price thereof, or any promissory note, or other evidence therefor, to demand of and receive from such vendor, or agent, . . . a written statement, sworn to substantially as hereinafter provided, of the names and addresses of all the creditors of said vendor, to whom said vendor may be indebted, together with the amount of the indebtedness due or owing, and to become due or owing, by said vendor to each of such creditors; and it shall be the duty of said vendor, or agent, to furnish such statement, which, shall be verified by an oath [then giving the form of the oath]."

We shall not follow counsel over the extended field of discussion as to whether or not Maskell at the time of the transaction involved was the creditor of Alexander within the meaning of the Bulk Sales Law, for the reason that we are of the opinion, as was the court below, that the transfer was not a sale within the Bulk Sales Law.

The statute uses the words "cash" and "credit," in regulating such transfers as contradistinguished from each other. The common meaning of the word "cash" is "money." 1 Words & Phrases, 995.

We have held that the object of the Bulk Sales Law was to prevent the vendor, usually a retail merchant, from selling his stock of goods, pocketing the proceeds, and leaving his creditors remediless (*McAvoy v. Jennings*, 44 Wash. 79, 87 Pac. 53; *Kasper v. Spokane Merchants Assn.* 87 Wash. 447, 151 Pac. 800), and in the latter case that no such result followed where the property was so disposed of as to make it available

to the creditors; and hence, the reason for the rule failing, the rule itself failed.

We certainly would not hold that a creditor was remediless where a merchant transferred his stock of merchandise in bulk to another for an adequate exchange of real estate; for the real estate would be as available to the creditors as the stock of goods. While we might be disposed, in upholding the objects of the act, to consider commercial paper, bonds, warrants, and other securities as the equivalent of cash, because of their easy disposition and convertibility into cash, for the protection of creditors, such a case is not analogous to that here.

Where no fraudulent intent taints the transaction, a debtor may transfer his property to a corporation which he has formed in consideration of the issuance to him of its capital stock, and of that his creditors cannot complain. The corporate stock is as available for the satisfaction of the claim of creditors after the transfer of the merchandise as the merchandise was before.

"There was nothing illegal or improper in the formation of the plaintiff company, nor in the transfer to it by Holt & Chipman of the property in question. At the time the company was formed, that firm appears to have been solvent, and there is nothing to show that it was intended as a fraud upon their present or future creditors. It was not a withdrawal of their property from the grasp of creditors. On the contrary, it remained subject to their claims, though in a changed form. The interest of

the partners in the corporation was represented by stock. This stock was as much liable to the demands of creditors as was the property itself before the formation of the company." *Coaldale Coal Co. v. National State Bank*, 142 Pa. 288, 21 Atl. 811.

See also *Plaut v. Billings-Drew Co.* 127 Mich. 11, 86 N. W. 399; *Kingman v. Mowry*, 182 Ill. 256, 74 Am. St. Rep. 169, 55 N. E. 330; *Densmore Commission Co. v. Shong*, 98 Wis. 380, 74 N. W. 114.

We will not, of course, countenance a mere transmutation of the business of individuals into a corporate business and a fraudulent manipulation of its stock in such a way as to deprive the creditors of any remedy against the individual debtors. But as we view the present case appellant has little or nothing of which to complain. It is not hurt. It has almost the entire capital stock in its possession and control, subject to some slight indebtedness, with a large margin of assets over the liabilities, apparently amply sufficient, if properly administered, to satisfy appellant's indebtedness. Consequently, as to the particular case before us, we might say that appellants' right is limited to the satisfaction of its claim. It does not extend to enforcing its satisfaction out of some particular property of the debtor or by some particular means.

The judgment below was right, and is affirmed.

ELLIS, Ch. J., and CHADWICK, Mount, and MORRIS, JJ., concur.

Annotation—Applicability of Bulk Sales Law to transfer to corporation or partnership organized to take over the business.

Generally as to applicability of Bulk Sales Law to sale of an undivided interest, see annotation in L.R.A.1917D, 623. And in connection with the present question see especially the following cases as set out in that note, which are also within the scope of the present annotation because involving transfers made to form a partnership to carry on the existing business: *Marlow v. Ringer* (1917) — *W. Va.* —, L.R.A. 1917D, 619, 91 S. E. 386; *Daly v. Sumpster Drug Co.* (1913) 127 *Tenn.* 412, 155 S. W. 167, *Ann. Cas.* 1914B, 1101; *Yancey v. Lamar-Rankin Drug Co.* (1913) 140 *Ga.* 359, 78 S. E. 1078; and *Virginia-Carolina Chemical Co. v. Bouchelle* (1913) 12 *Ga. App.* 661, 78 S. E. 51.

This leaves for further discussion in this annotation merely those cases in which there was a transfer of the whole

of the stock in trade to a corporation or partnership organized to take over and carry on the business. But few cases have passed upon this phase of the question, and they, like those above referred to, furnish a diversity of conclusion. Upon the one hand is the holding in *MASKELL v. ALEXANDER*, ante, 929, to the effect that a transfer of an entire business without any fraudulent intent to a corporation organized to take over the same in consideration for capital stock is not a transfer within the Washington Bulk Sales Law (*Rem. & Bal. Code* 1915, § 5297), which provides that a purchaser of any stock of goods, wares, or merchandise in bulk for cash or on credit without giving certain notices is fraudulent and void. This decision was upon the ground that the sale was not for cash, but for corporate stock, which was as available for the satisfac-

tion of the claims of creditors after the transfer of the merchandise as the merchandise was before, wherefore the transaction did not violate the object of the law, which it was said was to prevent a vendor from selling his stock of goods, pocketing the proceeds, and leaving his creditors remediless.

And even in jurisdictions where the Bulk Sales Acts are regarded not as prohibiting sales in bulk, but as merely prescribing a rule of evidence, at least in so far as they declare that sales of merchandise without compliance with their terms will be presumed to be fraudulent and void, and under which such sales are held to be only presumptively fraudulent, it seems that a transfer to a corporation organized to take over a business, even though it be regarded as primarily within the act, cannot be avoided as in violation thereof, where the parties thereto establish that they acted in good faith, and not for the purpose of defrauding creditors. This was the position taken in *Thorpe v. Pennock Mercantile Co.* (1906) 99 Minn. 22, 108 N. W. 940, 9 Ann. Cas. 229, where a corporation was formed to take over the business of an insolvent partnership, and in which the contest was between the creditors of the partnership and the creditors of the successor corporation. The court applied the rules that in the absence of fraud the partnership may sell and transfer the property of the firm, and that the purchaser takes it free from any equity on the part

of the simple creditors of the partnership, and that the fact that the transfer was made to the corporation which was organized by the partners for the purpose of carrying on the business was not in itself evidence of fraud; and said that, while such a transaction might be fraudulent, each case must be judged by its own facts, and that the evidence under consideration failed to show intent to defraud either in the formation of the corporation or in the transfer to it of the partnership assets.

But admitting that a transfer to a corporation organized to take over a business is within the purview of the act, and that there is fraud in fact, a contrary conclusion is reached. Thus, in *West Shore Furniture Co. v. Murphy* (1913) 141 N. Y. Supp. 835, in construing and applying New York Bulk Sales Law (Personal Prop. Law, § 44, Consol. Laws, chap. 41), which declares that sales of merchandise in bulk "shall be presumed to be fraudulent and void," unless, etc., it was held that where the insolvent continuing partner of a mercantile firm transferred his whole stock in trade to a newly created corporation in consideration for the whole capital stock, and then conveyed a portion of the stock to relatives to whom he was indebted, pursuant to a scheme devised for the purpose of excluding other creditors,—the transaction was clearly fraudulent as to such other creditors.

G. J. C.

IOWA SUPREME COURT.

HARRY A. LEE et al., by Next Friend,
Appts.,
v.

MRS. A. H. HOFFMAN et al.

(— Iowa, —, 166 N. W. 565.)

Constitutional law — reasonableness of statute.

1. Mere unreasonableness does not render a statute unconstitutional.

For other cases, see *Statutes, I. c.*, in *Dig. 1-52 N. S.*

Legislature — delegation of power — exclusion from school.

2. The delegation by the legislature to school boards, of power to determine whether or not youths who are members of fra-

ternal societies or are soliciting such membership shall be admitted to the public schools, does not render the statute invalid. For other cases, see *Constitutional Law, I. c.*, in *Dig. 1-52 N. S.*

Constitutional law — class legislation — exclusion from school.

3. Exclusion from public schools of pupils affiliating with fraternal organizations is not unconstitutional as class legislation.

For other cases, see *Constitutional Law, II. a.*, in *Dig. 1-52 N. S.*

Same — personal rights.

4. Forbidding pupils in a public school to affiliate with a fraternal society without the sanction of the school authorities does not unconstitutionally interfere with personal rights of the pupils.

For other cases, see *Constitutional Law, II. b.*, in *Dig. 1-52 N. S.*

Schools — validity of rules.

5. A rule of a school board is not void for unreasonableness if it is a mere re-enactment of the statute which authorizes it.

For other cases, see *Schools, I.* in *Dig. 1-52 N. S.*

Note. — The right to forbid a student's affiliation with a secret society is discussed in the notes to *Wayland v. School Directors*, 7 L.R.A. (N.S.) 352, and *University of Mississippi v. Waugh*, L.R.A.1916D, 568. L.R.A.1918C.

Constitutional law — due process — absence of hearing.

6. A rule of a school board providing for notice to the parents of a pupil who affiliates with a secret society, and suspension of the pupil from school in case of failure to offer a satisfactory excuse for his conduct, is not void for want of due process of law.

For other cases, see Constitutional Law, II, b, 7, c, in Dig. 1-52 N. S.

(March 5, 1918.)

APPEAL by plaintiffs from an order of the District Court for Polk County sustaining a demurrer to a petition filed to obtain reinstatement in certain public schools from which plaintiffs were suspended for violation of rules enacted by the school directors which were alleged to be unconstitutional. Affirmed.

Statement by Salinger, J.:

The plaintiffs and others in the same class, and all minors, were by the defendants excluded from the benefits of a public school under a rule adopted by the defendant board. A petition seeking a mandatory order to restore the plaintiffs to admission in said schools was dismissed, and the plaintiffs appeal.

Mr. O. M. Brockett for appellants.

Messrs. Stipp, Perry, Bannister, & Starzinger, for appellees:

The petition as amended does not state facts sufficient to constitute a cause of action.

Hunt v. Industrial Commission, 96 Misc. 499, 160 N. Y. Supp. 696; *Wiley v. Sinkler*, 179 U. S. 58, 66, 45 L. ed. 84, 89, 21 Sup. Ct. Rep. 17; *Collins v. Texas*, 223 U. S. 288, 295, 56 L. ed. 439, 443, 32 Sup. Ct. Rep. 286; *Lehon v. Atlanta*, 242 U. S. 53, 61 L. ed. 145, 37 Sup. Ct. Rep. 70; *Hunter v. Colfax Consol. Coal Co.* 175 Iowa, 245, L.R.A. 1917D, 15, 154 N. W. 1037, 157 N. W. 145, Ann. Cas. 1917E, 803, 11 N. C. C. A. 886; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576, 59 L. ed. 364, 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570, 12 C. J. 1917, pp. 760-764; *Ft. Smith v. Scruggs*, 70 Ark. 549, 58 L.R.A. 921, 91 Am. St. Rep. 100, 69 S. W. 679; *Chicago, I. & L. R. Co. v. Indianapolis & N. W. Traction Co.* 165 Ind. 433, 74 N. E. 513; *Kentucky Heating Co. v. Louisville*, 174 Ky. 142, 192 S. W. 4; *State ex rel. Applegate v. Taylor*, 224 Mo. 393, 123 S. W. 892.

The school board has the right to suspend or expel a pupil for improper conduct out of school.

Mechem, Pub. Off. § 730; *Burdick v. Babcock*, 31 Iowa, 562; *Lander v. Seaver*, 32 L.R.A.1918C.

Vt. 114, 76 Am. Dec. 156; *Deskins v. Gose*, 85 Mo. 485, 55 Am. Rep. 387; *Hutton v. State*, 23 Tex. App. 386, 59 Am. Rep. 776, 5 S. W. 122; *Cleary v. Booth* [1893] 1 Q. B. 465, 68 L. T. N. S. 349, 62 L. J. Mag. Cas. N. S. 87, 5 Reports, 263, 41 Week. Rep. 391, 17 Cox, C. C. 611, 57 J. P. 375; *Sherman v. Charlestown*, 8 Cush. 160; *Jones v. Cody*, 132 Mich. 13, 62 L.R.A. 160, 92 N. W. 495; *Kinzer v. Independent School Dist.* (*Kinzer v. Toms*) 129 Iowa, 441, 3 L.R.A. (N.S.) 496, 105 N. W. 686, 6 Ann. Cas. 996; *Wilson v. Board of Education*, 233 Ill. 464, 15 L.R.A. (N.S.) 1136, 84 N. E. 697, 13 Ann. Cas. 330.

The statute is constitutional.

Kinzer v. Independent School Dist. (*Kinzer v. Toms*) 129 Iowa, 441, 3 L.R.A. (N.S.) 496, 105 N. W. 686, 6 Ann. Cas. 996; *Wayland v. Hughes* (*Wayland v. School Directors*) 43 Wash. 441, 7 L.R.A. (N.S.) 352, 86 Pac. 642; *Wilson v. Board of Education*, 233 Ill. 464, 15 L.R.A. (N.S.) 1136, 84 N. E. 697, 13 Ann. Cas. 330; *Favorite v. Board of Education*, 235 Ill. 314, 85 N. E. 402; *Bradford v. Board of Education*, 18 Cal. App. 19, 121 Pac. 929; *Waugh v. University of Mississippi*, 237 U. S. 589, 59 L. ed. 1131, 35 Sup. Ct. Rep. 720; *Burdick v. Babcock*, 31 Iowa, 562; *Hubbell v. Higgins*, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822; *Brady v. Mattern*, 125 Iowa, 158, 106 Am. St. Rep. 291, 100 N. W. 358; *Hall v. Geiger-Jones Co.* 242 U. S. 539, 551, 61 L. ed. 480, 489, L.R.A.1917F, 514, 37 Sup. Ct. Rep. 217, Ann. Cas. 1917C, 643; *Caldwell v. Sioux Falls Stock Yards Co.* 242 U. S. 559, 61 L. ed. 493, 37 Sup. Ct. Rep. 224; *Merrick v. N. W. Halsey & Co.* 242 U. S. 568, 61 L. ed. 498, 37 Sup. Ct. Rep. 227; *Hunter v. Colfax Consol. Coal Co.* 175 Iowa, 245, L.R.A.1917D, 15, 154 N. W. 1037, 157 N. W. 145, Ann. Cas. 1917E, 803, 11 N. C. C. A. 886; *Hawkins v. Bleakly*, 243 U. S. 210, 215, 216, 61 L. ed. 678, 683, 684, 37 Sup. Ct. Rep. 255, Ann. Cas. 1917D, 637; *Fairbank v. United States*, 181 U. S. 283, 285, 45 L. ed. 862, 863, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135.

Salinger, J., delivered the opinion of the court:

I. The argument of appellant assumes that legislative enactments are open to every objection that may be made to a mere rule or to an ordinance. And, in support of attack upon the statute upon which appellees rely for authority to do what they did, appellant refers us to cases which nullify mere rules and ordinances, and to general language in these cases which, broad as it is, must still be limited to rules and ordinances. See *Yick Wo v. Hopkins*, 118 U. S. 356, 39 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Bear v.*

Cedar Rapids, 147 Iowa, 341, 21 L.R.A. (N.S.) 1150, 126 N. W. 324; Cicero Lumber Co. v. Cicero, 176 Ill. 9, 42 L.R.A. 696, 68 Am. St. Rep. 155, 51 N. E. 758; Richmond v. Dudley, 129 Ind. 112, 13 L.R.A. 587, 28 Am. St. Rep. 180, 28 N. E. 312; State ex rel. Stallard v. White, 82 Ind. 286, 42 Am. Rep. 496.

Some objections good as to ordinances or rules are not valid objections to a statute. Wherefore we will at this time deal with the objections made by appellant as though they were addressed to the statute alone. This eliminates two objections often lodged against ordinances or rules, to wit, that grant from the legislature is lacking, and mere unreasonableness. An ordinance or a rule may be void because the legislature has not authorized it. Manifestly, every statute is authorized by the legislature; and no statute is invalid because no other statute grants power to enact it. Again, no legislative enactment is void merely because it is unreasonable. It is a universal rule that unreasonableness in a statute is of no importance except on the question of what was intended by the legislature; that if there is no room for construction the law is what the act says, no matter how unreasonable that is. The remedy is not to substitute what the courts deem reasonable, but an appeal to the legislature. That a law is unreasonable merely does not make it unconstitutional.

II. Appellants contend that the statutes in question are invalid because they delegate certain powers. It is true they do in a sense delegate both legislative and judicial power, and we think that this is permissible. As far back as *Wayman v. Southard*, 10 Wheat. 1, 6 L. ed. 253, Chief Justice Marshall said that Congress can delegate "what powers it may rightfully exercise itself;" and grants of legislative power to municipal corporations and administrative boards have uniformly been sustained. See *Martin v. Witherspoon*, 135 Mass. 175; *Sabre v. Rutland R. Co.* 86 Vt. 347, 85 Atl. 694, Ann. Cas. 1915C, 1269; State ex rel. Webster v. Superior Ct. 67 Wash. 37, L.R.A. 1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78; *Denny's Case*, 143 Iowa, 474, 121 N. W. 1066; *Re Sioux City Stock Yards Co.* 149 Iowa, 5, 11, 127 N. W. 1102. Acts have been upheld which authorized medical boards to refuse or revoke certificates of qualification for certain causes. *France v. State*, 57 Ohio St. 1, 47 N. E. 1041. It is competent for the legislature to delegate to a county auditor the power to determine the character of the security to be given for damages resulting from the taking of private property for drainage purposes. L.R.A.1918C.

Sisson v. Buena Vista County, 128 Iowa, 443, 70 L.R.A. 440, 104 N. W. 454.

If there be involved a delegation of judicial power, such delegation will not avoid the statute. See *Re Sioux City Stock Yards Co.* 149 Iowa, 5, 11, 127 N. W. 1102; State ex rel. Atty. Gen. v. Hawkins, 44 Ohio St. 98, 5 N. E. 228; *Hunter v. Colfax Coal Co.* 175 Iowa, 310, L.R.A.1917D, 15, 154 N. W. 1037, 157 N. W. 145, Ann. Cas. 1917E, 803, 11 N. C. C. A. 886; State v. Mason City & Ft. D. R. Co. 85 Iowa, 516, 52 N. W. 490; State Sav. & Commercial Bank v. Anderson, 165 Cal. 437, L.R.A.1915E, 675, 132 Pac. 755; *Re Kollock*, 165 U. S. 526, 41 L. ed. 813, 17 Sup. Ct. Rep. 444; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 54 L. ed. 435, 30 Sup. Ct. Rep. 356.

We gather the complaint is, not that either legislative or judicial powers or both are delegated, but that the delegation is arbitrary and unregulated. For instance, it is said there is an attempt to delegate arbitrary and unregulated discretion to school boards to determine whether or not the youths who are members of certain fraternities or societies shall be admitted to the privileges and benefits of public schools; that as to any who are already admitted these statutes give unregulated and unlimited power to determine which of them having such associations shall be admitted and which excluded, and because unregulated, undefined, and unlimited discretion is given to sanction or refuse to sanction certain societies or associations. The statutes in question are § 2782a, Code Supplement 1913, as amended by Act of the 37th General Assembly. The powers delegated are not "blanket powers." The right to act at all is limited (a) to those who are pupils; (b) to pupils who become members of or solicit other pupils to become members of any fraternity or society wholly or partially formed from pupils, or to take any part in the organization or formation of any such society; (c) to determining whether the inhibition may be waived as to some societies or associations; (d) to enforce the statutes by the adoption of rules and regulations carrying penalties which the statutes specifically describe; (e) they provide for an investigation and that the penalty shall be inflicted only after such investigation has satisfied a majority of the directors that the statute has been violated.

Whatever objection there may be to this, it is not that it is an unbridled delegation. It could not well be more specific without making it unnecessary to delegate at all. If the legislature has power to delegate, then, of necessity, it has power to leave

to others the details to effectuate the declared legislative policy. As said, if this be not so, the legislature could do nothing but make the rules and prescribe each step to be taken. On this theory it can delegate, provided it delegates nothing.

It is true these statutes also contain broad provisions giving the board full power and authority to make, adopt, and modify all rules and regulations which in their judgment and discretion may be necessary for the proper governing of the school, and they authorize punishment for violation of any such rule. But this general language must be limited by the entire scope and purpose of the enactment, which is, not to deal with all possible rules, but with rules to enforce the provisions of these statutes. Be that as it may, nothing but an enforcement of rules in aid of these statutes is complained of. It will be time to deal with the validity of the broader language in these statutes when there shall be before us an attempt to enforce some rules not specifically authorized by these. We shall have occasion to speak later to what the attitude of the courts should be where unconstitutionality is asserted because of something that might be done.

III. One complaint is that the statute works an arbitrary differentiation and discrimination—is arbitrary class legislation—because it authorizes exclusion for such affiliation. The argument is that there is an arbitrary grouping, in that pupils who belong to no such societies, and those that affiliate with them on sanction, are the only ones who retain the privilege of school. We do not think that such a classification constitutes inhibited “class legislation.” The statute avoids all that constitutes such legislation. It puts all who are of the class to be affected into that class. It includes no one therein who should not be. It deals with none save enrolled pupils. Only such pupils need the sanction of the board to affiliate with these societies. All of them need it. It attempts no distinctions between those who are affected. It makes no arbitrary distinctions, say, that pupils having red hair or those of English parentage may affiliate without obtaining the sanction. Waiving the distinction between statutes and rules to which we have adverted, and accepting cases nullifying rules at their broadest, and we find that when mere rules were annulled it was because of discriminations as unjustifiable as those based on the color of hair or nationality. In *Clark v. Board of Directors*, 24 Iowa, 266, there was a discrimination against pupils because they were negroes, and all said for the right to enjoy school privileges must be read in the light of that fact. What the case turns L.R.A.1918C.

on is not shown by general language concerning abstract rights, but by declarations that the discretion of the board does not justify assigning to different schools because parents happen, to be Irish or German or Catholic or Protestant; that if it should happen that there be one or more poorly clad or ragged children in the district, and public sentiment was opposed to the intermingling of such with the well-dressed youths of the district in the same school, “it would not be competent for the board of directors in their discretion to pander to such false public sentiment and to require the poorly clothed children to attend a separate school.” The *Smith Case*, 40 Iowa, 518, and the *Dove Case*, 41 Iowa, 689, also deal wholly with the right to exclude pupils because of their color. In *Perkins v. Independent School Dist.* 56 Iowa, 476, 9 N. W. 356, what is in effect condemned, is a rule which would exclude a pupil because damages for breaking a window were not paid. It is held that breaking a window glass by accident and without evil purpose will not warrant exclusion, and said that “Plaintiff was expelled, not because he broke the glass, but because he did not pay the damage sustained by the breaking. His default in this respect was no breach of good order or good morals. The rule requiring him to make payment is not intended to secure good order, but to enforce an obligation to pay a sum of money.”

The statute does not deny the equal protection of the law by making an arbitrary differentiation, even if a statute had no better standing than a mere rule. But it has. Unlike a mere administrative board, the legislature is clothed with a large discretion in determining upon classification and making differentiations. “The power to classify is primarily in the legislature, that the courts accord it the widest latitude in performing this function, and that a classification adopted by it will be sustained unless it is so palpably arbitrary as that there is no room for doubt that discretion has been abused by indulging in an unjustifiable discrimination.” *Hunter v. Colfax Consol. Coal Co.* 175 Iowa, 288, L.R.A.1917D, 15, 154 N. W. 1053, Ann. Cas. 1917E, 803, 11 N. C. C. A. 886. The courts do not and should not readily find that the legislature abused this discretion, and the statute should not be set aside by the judiciary unless “it is unmistakably and palpably in excess of the legislative powers.” *McLean v. Arkansas*, 211 U. S. 539, 547, 53 L. ed. 315, 2 Sup. Ct. Rep. 206. These statutes are clearly within that discretion.

IV. We take it that what is really complained of is not so much arbitrary classification or differentiation, but that the re-

quirements of the statute work an arbitrary and capricious destruction of personal rights secured by fundamental law by means of exercising an utterly unjustified paternalism. Of course, there are limitations upon the power of the legislature to abrogate personal rights. But the courts will not annul a statute unless the interference is beyond reasonable doubt purely fanciful and arbitrary. *Mathison v. Minneapolis Street R. Co.* 126 Minn. 286, L.R.A. 1916D, 412, 148 N. W. 71, 5 N. C. C. A. 871; *Sexton v. Newark Dist. Teleg. Co.* 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569. The judicial arm will not interfere "unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily and in a manner wholly arbitrary, interfered with or destroyed without due process of law." *Gundling's Case*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633. As to tax laws, it has been held that they will not be annulled "if there be the least possibility that making the gift will be promotive in any degree of the public welfare." *Booth v. Woodbury*, 32 Conn. 118, 128. To like effect is *Brodhead v. Milwaukee*, 19 Wis. 658, 668, 88 Am. Dec. 711; *Sharpless v. Philadelphia*, 21 Pa. 147, 174, 59 Am. Dec. 759; *Cunningham's Case*, 44 Mont. 180, 119 Pac. 554, 1 N. C. C. A. 720. Even as the legislature has a large discretion in making classes, it has it in determining what is for the public welfare; and that discretion has sustained exercises of paternalism in infinite variety. See *McGuire v. Chicago, B. & Q. R. Co.* 131 Iowa, 360, 33 L.R.A.(N.S.) 706, 108 N. W. 902. It is a fair summary of the case law that no statute is violative of the Constitution if it have for its legitimate object anything that may fairly be said to be for the good of the state or promotive of good order, good morals, or the education of the citizen. *Giozza v. Tiernan*, 148 U. S. 662, 37 L. ed. 601, 13 Sup. Ct. Rep. 721. That the legislature may be paternal is not open to doubt in this day. The question is whether the statutes in consideration are an unwarranted paternalistic regulation. Their purpose is manifest. They declare that affiliations of pupils with certain associations should be restricted, and have the approval of the school authorities, because in the judgment of the legislature the privilege of the membership in a public school will be or may be made less valuable if such affiliations are not restricted. It is one of many attempts to check youth in wasting its assets, and to keep what the state bestows at its highest efficiency. It is directed against what is matter of com-

mon knowledge,—that activity in matters other than the school work will divide the interest of the pupil and subtract from the work that should be devoted to the school curriculum; and that affiliation with a society, no matter how innocent in itself, still has a tendency to breed hatreds and jealousies, because this society may exclude some while receiving others; that the tendency of such affiliations is to breed division and class hatred. If the state may compel the solvent bank to help pay losses sustained by depositors in insolvent banks; if it may enact workmen's compensation laws in order that the workman shall have no strained relations with his employer nor become embittered towards society because, though an industry has crippled him, it has paid him nothing; if acts aiming to make better citizens by diminishing the chances of pauperism are sustained; if it is competent for the state to protect the minor from impoverishing himself by contract,—it surely is not an arbitrary exercise of the functions of the state to insist upon methods that will tend to prevent the educational privileges furnished by the state from being in any degree wasted. We hold that these statutes are not unduly paternalistic, and that it is their ultimate object to raise the school privilege to its highest possible efficiency.

There is nothing in *State ex rel. Stallard, v. White*, 82 Ind. 287, 42 Am. Rep. 496, which in the least militates against our conclusion that these statutes are a proper regulation. The case involves a consideration of a board rule. It distinguishes between the right to compel renunciation of a society already affiliated with as a condition to entering a school, and the control of the pupil after he has once entered. Even as to a rule the case expressly holds that, after the status of the pupil is established, such rules as this statute makes are valid. While *Kinzer v. Independent School Dist. (Kinzer v. Toms)* 129 Iowa, 441, 3 L.R.A.(N.S.) 496, 105 N. W. 686, 6 Ann. Cas. 996, uses some broad language which would be fairly controlling if undue paternalism were indulged in, the decision itself is against the appellants, and it upholds a football playing regulation made by rule only because of the general discretion lodged in boards of directors.

The case of *University of Mississippi v. Waugh*, 105 Miss. 623, L.R.A.1915D, 588, 62 So. 827, Ann. Cas. 1916E, 522, and the consideration of that case in the Supreme Court of the United States (237 U. S. 589, 59 L. ed. 1131, 35 Sup. Ct. Rep. 720), rule every material point in this appeal against the appellants; and we cannot agree that

there is any difference in facts exhibited which makes these decisions inapplicable here. It is said that the writer who spoke for the Mississippi supreme court in the Waugh Case also spoke for that court in *Hobbs v. Germany*, 94 Miss. 469, 22 L.R.A. (N.S.) 983, 49 So. 515, and that the holding in the last case is such as that the opinion in the Waugh Case cannot mean what it plainly says. The sum of such contention is that the *Hobbs Case* is in conflict with the *Waugh Case*. We might follow the *Waugh Case* rather than the *Hobbs Case* if the two did conflict. But it is a sufficient answer that the two cases are not in conflict. The *Waugh Case* holds that the state has power to regulate affiliation with certain fraternities. The *Hobbs Case* holds that, if the school officers act beyond their power and in violation of law, the courts may interfere, even though the statute provides for an appeal to a county superintendent.

V. We decline to go extensively into the question of what some school boards might do under statutes such as these. We do not care to dwell at length upon the claim that affiliation with religious societies might be interfered with upon a liberal reading and enforcement of these statutes. It is not amiss to say that the Constitution guarantees religious liberty and that we may assume the legislature did not intend by these statutes to override that constitutional guaranty. Neither is it amiss to add we are not prepared to hold that the school authorities can in no manner regulate the activities of pupils in associations whose object it is to advance religion. See *Donahoe v. Richards*, 38 Me. 376. It will be time enough for us to determine whether these statutes have unduly interfered with religious liberty when someone affected shall complain that affiliation with some society for the promotion of religion is being interfered with. The courts are, and should be, reluctant to declare a law unconstitutional. From this it has followed that they will not consider a constitutional challenge unless the case cannot be decided without considering it. The application of this rule might well operate to deny these appellants the right to be heard at all. For all we know, there might have been no constitutional question to present had appellants asked the sanction of the school authority. Had the sanction been given, there would have been no suit. We do not mean to say that one may not urge a statute is unconstitutional without first doing what such statute might require. If this statute demanded that the applicant for permission to affiliate should pay \$10,000 into the school L.R.A.1918C.

fund, such a statute would be void, and could be attacked, though payment of the fee would make attack needless. But there is nothing unconstitutional about requiring an application for permission to join a society. And if the courts, instead of hunting opportunities to declare statutes void, seek in every reasonable way to avoid the necessity for pronouncing upon their validity, no good reason is perceivable why they may not decline to interpret the Constitution for suitors who have hunted, instead of attempted to avoid, a controversy over the Constitution,—who are before the court only because they refused to do what if done might have made it unnecessary for them to ask the courts to construe the Constitution.

VI. The rule adopts the words of the statute. It adds that the principal shall report to the board the names of all students who according to the judgment of the board in any way violate said statute provision; that the board shall, through its proper officers, notify the parents or guardians of all such pupils, calling attention to the supposed violation of such law; that, if within a reasonable time a satisfactory explanation is not given to the board, the superintendent and principal shall suspend any pupils guilty of violating any of the provisions of the statute. Since the rule is substantially nothing more than re-enactment of the statute and the creation of perfectly natural methods for performing the duties placed upon the board by the statute, and since the statute itself is valid, the rule cannot be invalid for being either unreasonable or in excess of statute authority. The only remaining contention is that no provision is made for a hearing, and that therefore there is a denial of due process of law. There is a provision for notifying the parents and guardians and for action if no satisfactory explanation be made. We think this is sufficient to save the rule against objection that it works a denial of due process. See *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; *Cunningham's Case*, 44 Mont. 180, 119 Pac. 554, 555, 1 N. C. C. A. 720; *State Sav. & Commercial Bank v. Anderson*, 165 Cal. 437, L.R.A.1915E, 675, 132 Pac. 755; *Opinion of Justices*, 209 Mass. 607, 96 N. E. 308, 1 N. C. C. A. 557; *Borgnis's Case*, 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649.

We are of opinion that the judgment below should be, and it is, affirmed.

Preston, Ch. J., and Ladd and Evans, JJ., concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH OF MASSACHUSETTS
v.

FRED L. CLOSSON.

(— Mass. —, 118 N. E. 653.)

Municipal corporations — traffic ordinance — criminal intent.

1. Criminal intent is not necessary to conviction for violation of a traffic ordinance. For other cases, see *Criminal Law, I. a, in Dig. 1-52 N. S.*

United States — mail carrier — state regulation — violation — liability.

2. One in charge of a vehicle transporting United States mail is not exempt from the operation of state statutes and municipal ordinances regulating traffic on the highways, although by Federal statutes the highways are post roads.

For other cases, see *Criminal Law, III. in Dig. 1-52 N. S.*

(February 25, 1918.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of a complaint charging him with violations of certain traffic rules and regulations, which resulted in his conviction. Overruled.

The facts are stated in the opinion.

Mr. Frederick T. Conley for defendant.

Mr. A. C. Webber, for the Commonwealth:

The grant of power to the general government by article 1, § 8, of the Constitution of the United States, permitting the establishment of postoffices and post roads, and the regulation of foreign and interstate commerce, created only a special jurisdiction of the Federal government in state highways, general jurisdiction remaining with the states, subject, however, to such regulations as Congress may make in the exercise of its admitted powers.

Com. v. Alger, 7 Cush. 53; *Chicago & A. R. Co. v. Carlinville*, 200 Ill. 314, 60 L.R.A. 391, 93 Am. St. Rep. 190, 65 N. E. 730; *Weyl v. Chicago, M. & St. P. R. Co.* 40 Minn. 350, 42 N. W. 24.

The establishing of post roads was not intended to be an act derogatory to the sovereignty of a state, or to divest the state of its title to these roads. It was merely intended that the general government should have the right of transit over these roads for the purpose of carrying the mails.

Cleveland, P. & A. R. Co. v. Franklin

Note. — As to state or municipal regulations affecting those engaged in handling United States mail, see annotation following this case, post, 940.
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Canal Co. Fed. Cas. No. 2890; *Postal Tele. Cable Co. v. Chicopee*, 207 Mass. 341, 32 L.R.A.(N.S.) 997, 93 N. E. 927; *Vermilye v. Western U. Tele. Co.* 207 Mass. 401, 93 N. E. 635.

This grant did not even exempt the business of the postoffice from paying tolls on toll roads and turnpikes.

Buncombe Turnp. Co. v. Newland, 15 N. C. (4 Dev. L.) 463; *Dickey v. Maysville, W. P. & L. Turnp. Road Co.* 7 Dana, 113; *Proctor v. Crozier*, 6 B. Mon. 268; *Harper v. Endert*, 103 Fed. 911.

The act of Congress forbidding the obstruction of the transmission of the mail was intended to establish a penal offense, and was not an assertion by the general government of a paramount right over the highways of a state to the exclusion of all local regulations over the same, so as to create a privilege or immunity on behalf of Federal employees from the effect of these regulations.

United States v. Kirby, 7 Wall. 482, 19 L. ed. 278; *Harper v. Endert*, supra; *Penny v. Walker*, 64 Me. 430, 18 Am. Rep. 269; *United States v. Hart*, 3 Wheeler, C. C. 304, Fed. Cas. No. 15,316; 5 Ops. Atty. Gen. 554; *Chicago & A. R. Co. v. Carlinville*, 200 Ill. 314, 60 L.R.A. 391, 93 Am. St. Rep. 190, 65 N. E. 730.

Braley, J., delivered the opinion of the court:

The defendant does not contend that the rules and regulations of the respective commissioners of parks and of streets had not been duly promulgated, or were not in force at the time stated in the complaints, or that he did not violate those rules which require the driver of vehicles to keep to the right-hand side of the way, and when passing on his left to an intersecting street he must before turning proceed to the right until beyond the center of the intersecting street. It is immaterial that he was not actuated by any criminal intent. In prosecutions for misdemeanors created by statute under the exercise of the police power, proof of a guilty mind or corrupt purpose is not essential to a conviction. *Com. v. New York C. & H. R. R. Co.* 202 Mass. 394, 23 L.R.A.(N.S.) 350, 132 Am. St. Rep. 507, 88 N. E. 764, 16 Ann. Cas. 587. But by the plea to the jurisdiction, requests for rulings, and exceptions to a portion of the instructions, his defense rests upon the ground that, being employed as a mail carrier using a vehicle for the delivery of mail, he is immune from prosecution and punishment. The designated streets or ways are not, however, instrumentalities created by the general government, where "exemption from state control is essential to the inde-

pendent sovereign authority of the United States within the sphere of their delegated powers." If they were, the defendant has committed no offense. *Com. v. Clary*, 8 Mass. 72; *Newcomb v. Rockport*, 183 Mass. 74, 76, 78, 66 N. E. 587. While undoubtedly they are post roads under Act of Congress, March 1, 1884, chap. 9, enacting that "all public roads and highways, while kept up and maintained as such, are hereby declared to be post routes" (23 Stat. at L. 3, Comp. Stat. 1916, § 7457), and whoever knowingly and wilfully obstructs or retards "the passage of the mail, or any carriage, . . . driver, or carrier, . . ." is upon conviction subject to fine or imprisonment, or both, by U. S. Rev. Stat. § 3905, Act of March 4, 1909, chap. 321, § 201, 35 Stat. at L. 1127, Comp. Stat. 1916, § 10,371, yet the ways remain public ways laid out and maintained by the commonwealth, which has the exclusive power not only of alteration and of discontinuance, but to make and enforce reasonable regulations for their use. Nor do the facilities thereby afforded for transportation of the mails confer extraordinary rights upon mail carriers to use the ways as they please, or necessarily or impliedly do away with the power of super-

vision and control inherent in the state. *Com. v. Breakwater Co.* 214 Mass. 10, 100 N. E. 1034; *Postal Teleg. Cable Co. v. Chicopee*, 207 Mass. 341, 350, 32 L.R.A. (N.S.) 997, 93 N. E. 927; *Dickey v. Maysville, W. & P. L. Turnp. Road Co.* 7 Dana, 113; *Scaright v. Stokes*, 3 How. 151, 11 L. ed. 537; *Price v. Pennsylvania R. Co.* 113 U. S. 221, 28 L. ed. 981, 5 Sup. Ct. Rep. 427; *St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485; *Martin v. Pittsburg & L. E. R. Co.* 203 U. S. 284, 51 L. ed. 184, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87. The use of the streets by travelers of every description is not prohibited. It is only the mode of operation by drivers of vehicles which is regulated, and, being reasonable, because well adapted for the security and protection of all travelers, the rules are constitutional, and their violation is punishable as a criminal offense. *Com. v. Kingsbury*, 199 Mass. 542, L.R.A. 1915E, 264, 127 Am. St. Rep. 513, 85 N. E. 848; *Com. v. Maletaky*, 203 Mass. 241, 24 L.R.A. (N.S.) 1168, 89 N. E. 245; *Com. v. Feeney*, 221 Mass. 323, 108 N. E. 1068. The plea to the jurisdiction and the exceptions accordingly must be overruled.

Annotation—State or municipal regulations affecting those engaged in handling United States mail.

The question raised by the subject of this note, especially as argued and decided in *Com. v. Closson*, ante, 939, involves the broader question of conflict between the authority of the United States government and that of state and local officials over post roads with special reference to the act of Congress which provides that "all public roads and highways, while kept up and maintained as such, are hereby declared to be post routes." The other acts quoted by the court merely impose a penalty for the wilful obstruction of the post roads.

In this broader aspect, two questions at once arise: (1) What power has Congress over post roads that are public highways within a state, under the constitutional provision for establishing postoffices and post roads? (2) To what extent has Congress, by the acts mentioned, attempted to supplant the power of the states in regulating traffic upon such roads? Neither of these two questions is within the scope of the present annotation except to the extent that regulations affecting those handling mails are concerned, and the note does not purport to be exhaustive on L.R.A. 1918C.

any phase of the questions not within its scope.

In *Dickey v. Maysville, W. P. & L. Turnp. Road Co.* (1830) 7 Dana (Ky.) 113, the court, in holding that the owners of a toll road operated under a state franchise have the right to exact, from one using the road in carrying the United States mail under contract, payment of the same amount of toll as it charged others for the use of the road, gave a very elaborate and interesting discussion of the first question above stated; i. e., the power of Congress under the clause in question. Among other things it said: "Can the carrier of the United States mail have a right, either legal or moral, to use the bridge of a private person or of an incorporated company without paying pontage, or the ferry of a grantee of such franchise without paying ferriage? That he would have no such right is, in our judgment, indisputable. And the denial of such an unjust and anomalous pretention is not at all inconsistent with the proper supremacy of the general government in the exercise of its necessary power to transport the mail as cheaply, speedily, and certainly as

possible, and when and where Congress shall have prescribed and had authority to prescribe. The power delegated to the general government over the mail cannot be greater than that which each state once possessed within its own borders; and had the people of the states never delegated any such power to Congress, the state of Kentucky, in all the plenitude of her power, upon that hypothesis, would surely have no right to use the Lexington and Maysville turnpike as a post road without paying a just equivalent to the company; for the Constitution of Kentucky, like that of the United States, provides that private property shall not be taken for public use without 'just compensation' to the owner, or without his consent; and, moreover, no state can, consistently with the Federal Constitution, pass any legislative act impairing the obligation of a contract; and not only is the turnpike stock private property, but the charter of the company is a contract, entitling the stockholders, for a valuable consideration, to prescribed tolls, of which the legislature could not deprive them without impairing the obligation of a solemn contract, and violating the plighted faith of Kentucky. There can, we think, be no doubt that the state had a perfect right to make such a contract, and, having made it, is certainly under a clear, moral, and political obligation to observe it scrupulously and in good faith. But if the Lexington and Maysville turnpike should be deemed in all respects a state road, and if the power to establish post roads should be understood as giving to Congress authority to designate and use, as a post road, any highway in a state without the consent of the state, nevertheless, such a power could not be understood as implying a right to use state roads upon any terms or in any manner the general government may choose to prescribe, or on better terms than those on which the people of the states themselves are permitted to use them in a similar manner. It certainly does not impose on any state the duty, either moral or political, of making or of repairing roads for post roads, but leaves them in the full possession of all the discretion they would otherwise have had to make such state roads, and to keep them in such repair as their own convenience and judgment alone may suggest. The people of the several states are under no constitutional obligation to make or repair roads for the use of the general govern-

ment; nor can they be required to apply their own labor or money even to the keeping open of any one of their roads which shall have been designated as a post route; for, though a state highway once legally designated or established as a post route may continue de jure a post road as long as the act of Congress by which it was so designated or established shall remain unrepealed, yet certainly the state will not, therefore, be bound to continue it, but may discontinue it as a state road; and, consequently, if, after such discontinuance of any such state road, the general government choose still to use it as a post road, Congress must keep it open and in suitable condition by the application of national means. The people of a single state are not exclusively interested in the transportation of the national mails within and through their own commonwealth; the people of all the states are benefited by the proper and effectual transportation of intelligence through each state. And hence, the interest being thus common, and the power therefore national, the burden, and the responsibility also, should be, and undoubtedly are, equally national in each and every state. The right to judge, and the responsibility of judging, as to what roads and kind of roads the United States shall have for post roads, having been devolved on Congress, a state can neither exercise any controlling authority in that respect, nor be held responsible for any deficiency in any of the facilities necessary or proper for the most effectual transportation of the mails. A right of way, upon terms equal and common to all, is, in our opinion, the utmost privilege that can be implied by an authority to designate state roads as post routes. If one state should, at great expense, construct and preserve excellent roads, for the use of which it should exact a prescribed and reasonable toll sufficient for reparation, or even for indemnity for the cost, the people of other states, not choosing to provide such roads for themselves, would have no right to require or expect that the public mails, in which they are all interested as a national concern, should be transported in carriages, or otherwise, upon those costly and superior roads, without any contribution from the national purse for such national use, and for the wear and deterioration necessarily resulting from it. If Congress, representing the interests and wills of the people of all the states, shall fail or refuse to make any appropriation for

constructing or repairing, or for aiding the construction or reparation of, good roads in a state, the general government would, as it seems to us, have no pretense for claiming for the Federal public any exclusive privileges in using such roads as post routes, or any exemption from the burden common to every individual of the local public, whose labor and money alone made and must preserve them. It appears to us that permission to the general government to use state roads as the state and its own citizens use them, and on the same terms, should be considered a boon rather than a burden,—a valuable privilege rather than an unjust or unauthorized exaction."

Whether the term "post routes" is synonymous with "post roads" seems to depend upon the context of the statute in which the terms are used. *Railway Mail Service Cases* (1877) 13 Ct. Cl. (Fed.) 199. The context of the Act of 1884, above quoted, seems to indicate that Congress intended "post routes" to mean the same as "post roads," wherever they are used as such. *Western U. Teleg. Co. v. Hopkins* (1911) 160 Cal. 106, 116 Pac. 557.

This is the sense in which the term is used in some other acts of Congress, although not in all statutes. *Blackham v. Gresham* (1883) 21 Blatchf. 354, 16 Fed. 609; *United States v. Easson* (1883) 18 Fed. 590.

And under this act all the streets of a city are post roads, because they are letter carriers' routes. *Western U. Teleg. Co. v. New York* (1889) 3 L.R.A. 449, 2 Inters. Com. Rep. 533, 38 Fed. 553; *Western U. Teleg. Co. v. Hopkins* (1911) 160 Cal. 106, 116 Pac. 557.

The act in question does not authorize a telegraph company to construct its lines over the right of way of a railroad company without making compensation therefor. *Atlantic & P. Teleg. Co. v. Chicago, R. I. & P. R. Co.* (1874) 6 Biss. 158, Fed. Cas. No. 632. The court said: "The authority to do this is claimed to exist under various acts of Congress, some of which declare all railroads in the United States to be post routes. By these acts understand nothing more is meant than that the mails can be transported over railroads, as over ordinary public highways, with all those securities and safeguards thrown around the transit of the mails by various congressional enactments. It does not necessarily follow that because railroads are thus declared post routes [Act of Congress 1872, Rev. Stat. § 3964, L.R.A. 1918C,

Comp. Stat. 1916, § 7456], the United States can therefore, without the consent of the railroad companies, and without compensation, transport the mails over them."

In *Cleveland, P. & A. R. Co. v. Franklin Canal Co.* (1853) Fed. Cas. No. 2890, the court said: "But the complainants allege that they are entitled to an injunction on another ground. They are contractors for carrying the mail of the United States over the road they have made, in railroad cars, from Cleveland to Erie, and from thence back to Cleveland; and by an act of Congress this road has been made a post road. The power given by the Constitution to establish post roads has always been construed to mean, and as I think rightly, such roads as were regularly laid out by authority of the states, or by counties under the laws of the states. The government of the United States cannot construct a post road within a state of this Union without its consent; but Congress may declare, that is, establish, such a road already opened and made a public highway by the direct or indirect authority of the state. The post roads of the United States are the property of the states through which they pass; they may temporarily part with the possession of them by charter, and the grantees, while the charter continues, have the right to preserve such roads and prevent their threatened destruction. The United States has the mere right of transit over these roads for the purpose of carrying the mail, and in case of obstructing this right their laws provide an adequate remedy. The government itself could not obtain the injunction applied for to prevent the destruction of a mail road; the right to do so follows the right of property or possession; a mail contractor and any other person may have a right of action for damages in the courts of the state for an obstruction to a mail road, or the wrongdoer there may be punished by indictment, but no injunction can legally issue upon an application to restrain a threatened injury to the road. This power must always be exercised with great caution; to allow it in a case like this would be an alarming extension of jurisdiction, open to great abuses, and extending over many thousands of miles, and to persons who as mail contractors have no interest in the roads they pass over. The act of Congress making all railroads post roads, means only such as have charters from the several states; it is not to be inferred

that they intended to do anything in derogation of the sovereignty of a state, by declaring that to be a post road which was the work of an individual or of a company for his or their profit, without law, or it may be in opposition to law."

In *Western U. Teleg. Co. v. Richmond* (1909) 178 Fed. 310, affirmed in (1912) 224 U. S. 160, 56 L. ed. 710, 32 Sup. Ct. Rep. 449, where it was held that a telegraph company can, under an act of Congress authorizing such companies to erect poles on all post roads, erect and maintain poles upon the public streets of a city without the consent of the local authorities, but that in doing so it must conform to all reasonable regulations made by the city, the court said: "The object sought to be obtained, the benefits intended to be secured to the government of the United States, through the regulation of the business mentioned, and the facilities for communication between its departments in distant sections of the nation, would be jeopardized, if not destroyed, by the antagonistic interests likely to be found in different localities, if the officials thereof possessed the power to determine when and how the right granted by the Federal government should become operative. Such companies, under the legislation of the Congress, have the right to use the post roads of the United States in conducting their business; but such use is subject to the police power of the localities where they so operate, which, properly exercised by state and municipal authority, must be respected be complainant and by all companies similarly situated. The rules and regulations promulgated by such authority must be reasonable, should be free from local prejudice or favoritism, and enacted in an honest endeavor to best subserve existing rights and conditions. It is the duty of the local authorities to see that the safety and the interests of the communities where such companies are located are protected, and that for the use of the property of the public such compensation is paid as will at least keep in good repair the streets, alleys, and post roads that are intended for the enjoyment of all alike. As a matter of course, all such companies are subject to taxation on their property in the same manner and to the same extent as are the other companies and citizens generally of the sections where the property is situated. They must contribute their due proportion to the expenses of the local governments, the

benefits of which they enjoy, and whose protection they are entitled to."

And it was held in *Western U. Teleg. Co. v. Hopkins* (1911) 160 Cal. 106, 116 Pac. 557, that, under the statutes mentioned in the preceding cases, a state could charge and receive, from a telegraph company operating under the Federal authority, compensation for the use by it of so much of the street or highway as it exclusively appropriates, but that it has no right to compel it to accept a franchise from the state and then tax that franchise. The court said: "The question of the extent and character of the rights granted by the Federal act is, of course, exclusively a Federal question, upon which the decisions of the United States Supreme Court are necessarily final. There is apparently considerable difference in the views of learned counsel appearing in this case, and also in the views of different judges, both Federal and state, as to the effect of various decisions of the United States Supreme Court touching this question. But we think there can reasonably be no difference of opinion as to the meaning of those decisions so far as all questions necessary to the determination of this case are concerned. It was clearly and definitely established by the decision of that court in *St. Louis v. Western U. Teleg. Co.* (1893) 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485, that the privilege conferred by the Act of July 24, 1866, on telegraph companies, to construct, maintain, and operate lines of telegraph over such post roads as are public streets or highways of a state, is subject to the right of the state to charge and receive compensation from the telegraph company for the use by it of so much of the street or highway as is exclusively devoted to its purposes."

As already indicated, this annotation does not purport to contain an exhaustive list of cases dealing with the general questions stated, nor is it exhaustive on the particular question raised in any of the cases above cited. However, from the general trend of the decisions cited and the basic principles underlying them, it seems clear that the court in *Com. v. Closson*, ante, 939, was correct in its holding that a mail carrier is not, because of his work in handling United States mail, entitled to disregard the reasonable traffic regulations established by the municipality over whose streets he travels in this performance of his duties, although there

is no other reported case in which that particular question was decided.

An analogous question was before the court in *Ex parte Marshall*, *infra*, where it was held that a city has power to exact the customary reasonable license fees from a taxicab owner using the streets of the city in conveying United States soldiers, for pay from the soldiers, to and from a military camp outside the city, under a contract with the commandant in charge of the camp granting a monopoly of the soldier

trade, and requiring that the automobiles be run on schedules and that the fare be reasonable, and imposing other regulations.

The power to compel stoppage of mail trains is considered in the notes in 14 L.R.A.(N.S.) 293, and 29 L.R.A.(N.S.) 159; and as to interstate trains, see those notes and the note in 44 L.R.A.(N.S.) 478, and later cases, *State ex rel. Caster v. Dickinson*, L.R.A. 1918B, 534, and *Missouri, K. & T. R. Co. v. Texas*, *ante*, 535. J. W. M.

FLORIDA SUPREME COURT.

EX PARTE A. C. MARSHALL.

(— Fla. —, 77 So. 869.)

License — motor vehicles — line to army camp.

Where a partnership composed of individuals residing in the city of Jacksonville are engaged in, and presumably licensed to do, a general business of running autobuses and other motor-driven vehicles for hire over the streets and public highways in and around said city, who, as an incident of their general business of petro-motor carriers, enter into a side contract with the commanding officer of a military encampment of United States soldiers located within a few miles of said city, by which they acquire a monopoly of conveying such military officers and soldiers back and forth between such city and such encampment at a reduced fare paid by each individual soldier carried, and by which they agree to observe such rules and regulations in the operation of such vehicles as are prescribed in such contract, under penalty only of forfeiture of such contract for noncompliance therewith, such motor vehicles or their operation not being under military control, and the United States not having any interest or ownership therein or control thereover,—under these circumstances, held that such contract was not the grant of such a franchise as will exempt such partnership from the payment of the license tax imposed by the state, county, or municipality for conducting the business of petro-motor carriers for hire; and held, further, that such partnership was not exempt from, but was liable for, the payment of such licenses.

For other cases, see License, II. c, in Dig. 1-52 N. S.

(Browne, Ch. J., dissents.)

(January 19, 1918.)

Headnote by TAYLOR, J.

Note.—The question decided in *Ex parte Marshall* is a novel one. In *Com. v. Closson*, *ante*, 939, a somewhat similar question was passed upon, i. e., the power of L.R.A.1918C.

APPLICATION for a writ of habeas corpus to secure petitioner's release from custody to which he had been committed for operating an autobus without a license in violation of a city ordinance. Writ denied.

The facts are stated in the opinion.

Messrs. Kay, Adams, & Ragland, for petitioner:

The franchise or privilege granted to petitioner by the commanding officer at Camp Johnston constitutes a franchise and privilege granted by the military branch of the United States government, and is not subject to the license tax imposed by the ordinance or state statute.

Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; *California v. Central P. R. Co.* 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *San Benito County v. Southern P. R. Co.* 77 Cal. 518, 19 Pac. 827; *San Francisco v. Western U. Teleg. Co.* 96 Cal. 140, 17 L.R.A. 301, 31 Pac. 10; *Western U. Teleg. Co. v. Lakin*, 53 Wash. 326, 101 Pac. 1094, 17 Ann. Cas. 718; *Williams v. Talladega*, 226 U. S. 404, 57 L. ed. 275, 33 Sup. Ct. Rep. 116; *Cooley, Const. Lim.*, 7th ed. p. 680; *Union P. R. Co. v. Peniston*, 18 Wall. 5, 21 L. ed. 787; *Choctaw, O. & G. R. Co. v. Harrison*, 235 U. S. 292, 39 L. ed. 234, 35 Sup. Ct. Rep. 27.

Taylor, J., delivered the opinion of the court:

The petitioner, A. C. Marshall, by his petition for the writ of habeas corpus filed here, seeks relief from arrest by the chief of police of the city of Jacksonville under a warrant based on an affidavit charging him with operating an autobus with a seating capacity of twelve persons on a public street of said city without having paid the license tax of \$50 required by

a municipality to enforce its traffic regulations against mail carriers upon its streets that have been declared to be post roads. See annotation following that case.

Ordinance No. C—4 of said city, approved August 13, 1917.

The petition alleges that on November 21, 1917, your petitioner as manager of Orange Belt Auto Line, a copartnership composed of himself and K. C. McCullogh, obtained from Fred L. Munson, Lieutenant Colonel Quartermaster Corps, the commanding officer of the quartermaster camp located at Camp Johnston, near Jacksonville, Florida, a franchise and permit to maintain a satisfactory autobus service between said city and said camp, the same being granted in consideration of certain enumerated conditions and regulations therein prescribed by the said commanding officer with reference to the character of equipment, character of service, precautions to be observed, route to be traversed, fares to be charged, etc., all of which will more fully appear by a copy of said franchise hereto attached, marked Exhibit C, as follows:

Headquarters Camp Joseph E. Johnston,
Jacksonville, Florida.

#004x500 November 21, 1917.

Mr. A. C. Marshall, Manager Orange Belt
Auto Line,

Jacksonville, Florida.

Dear Sir:—

This is to certify that you are authorized to maintain a satisfactory autobus service between the city of Jacksonville and Camp Joseph E. Johnston, Florida.

That in consideration of this privilege, you have agreed in writing to abide by the following enumerated conditions, viz.:

(a) To run only first-class cars driven by competent and reliable chauffeurs.

(b) That during the construction of the camp you will cause your chauffeurs to drive slowly and carefully through the congested streets of the camp, and that your cars will in no way interfere with the working traffic of the constructing quartermaster or of his building contractors.

(c) That you, personally, will be held liable for any injury to persons or animals or to damage caused other vehicles that may become injured or damaged on the camp reservation through the faulty or careless driving of any of your chauffeurs.

(d) That the termini of the route will be the vicinity of the Mason Hotel, corner Julia and Bay streets, Jacksonville, Florida, and the clubhouse at Camp Johnston.

(e) That the fare will not exceed 40 cents per one way trip, nor more than 75 cents per round trip.

(f) That so long as you abide by all of the above-named conditions, you will be L.R.A.1918C.

authorized to continue your bus service for at least six months following the completion of the electric car line from Ortega to the camp.

(g) That a noncompliance with any or all of the said conditions may cause a forfeiture of the privilege of operating your bus service within the camp reservation.

Very truly yours,

[Signed] F. L. Munson,
Lt. Col. Q. M. Corps.

Indorsement:

I have carefully read the above letter and do hereby agree to comply with all of its requirements to the best of my ability.

[Signed] A. C. Marshall,
General Manager Orange Belt Auto Line.

That on December 24, 1917, pursuant to said franchise and permit, which was duly accepted by your petitioner as appears by the indorsement thereon, the said commanding officer promulgated General Order No. 33, prescribing further regulations under which said bus service shall be operated by petitioner and enjoyed by the officers and enlisted men of the United States government stationed at said camp, which order is as follows:

Headquarters Camp Joseph E. Johnston,
Jacksonville, Florida, December 24, 1917.
General Orders, No. 33:

1. A contract has been entered into between the commanding officer and the Orange Belt Auto Line, under the management of Mr. A. C. Marshall. All cars operating under the management of this company are marked "O. B. A. L. Govt. Controlled."

2. Under his contract Mr. Marshall guarantees to use only first-class equipment to be driven by competent and experienced chauffeurs. These chauffeurs will hold a certificate of service signed only by Mr. Marshall. The questions of speed and the overloading of cars are fully covered in the contract.

3. Every effort has been made by this office to safeguard the limbs and lives of all men of this command who may enter any car licensed to operate between the camp and the city of Jacksonville.

4. In view of the above all officers and enlisted men are warned against entering any car after the chauffeur thereof has informed them that there is no further room. The last man or men to enter a car after its authorized seating capacity has been reached are the offenders, and must at once leave said car upon being asked to do so by the chauffeur. It shall be the duty of any officer or noncommissioned

officer who may be either inside or near a car, to order off and keep off any surplus passengers when appealed to for assistance by the chauffeur.

5. In case a car is overloaded and the offending man will not get off upon request by the chauffeur, said chauffeur has orders to hold his car at a standstill until the offender leaves said car.

6. Any chauffeur who allows his car to be overloaded, or who fails to stop at the gate upon being ordered to do so by the gate guard, or fails to obey the letter as well as the spirit of this order, will be excluded from entering this camp for a period of six (6) months, or his car will be excluded for same period, or both.

7. In order that all men of this camp may enjoy a fairly equal opportunity of getting accommodations in the various authorized busses, on and after the 25th instant, the starting point of one third of the busses will be from the junction of old brick road and Twelfth street, north of Y. M. C. A. No. 2; one third from junction of brick road and Sixth street; and one third from Hostess House (old clubhouse).

8. All cars starting from camp from these three points will be plainly marked "Twelfth Street," "Sixth Street," and "First Street," respectively. All cars so marked will deliver their passengers as far in the camp as said passengers desire to go, but all Sixth and Twelfth Street cars must arrive at their respective stations on the return trip to Jacksonville empty.

9. The Twelfth Street bus line is primarily intended for the accommodation of the troops living in blocks H, J, K, and L; Sixth Street line for blocks D, E, F, and G; and First Street line for Headquarters, Hostess House, and blocks A, B, and C.

10. A strict compliance with the terms of this order on the part of all concerned will result in better service, contentment, and safety.

By order of Lieut. Colonel Munson.

J. H. Spengler,

Captain Q. M., U. S. R., Adjutant.

That in addition to the regulations set forth in said original franchise of November 21, 1917, and in said General Order No. 33, the said commanding officer made other requirements and regulations of said bus service rendered by your petitioner; the aforesaid franchise, and the conditions under which the same were to be enjoyed by petitioner were fully confirmed and authorized by the said commanding officer; a copy of the said confirmation, together with petitioner's acceptance thereof, is at-L.R.A.1918C.

tached to the petition, marked Exhibit E, as follows:

Headquarters Camp Joseph E. Johnston,
Jacksonville, Florida, January 5, 1918.
Mr. A. C. Marshall, Manager Orange Belt
Auto Line,
Jacksonville, Florida.

Dear Sir:—

I have deemed it advisable to confirm the privilege granted to you under date of November 21, 1917, for the maintenance of a bus service between the city of Jacksonville and Camp Joseph E. Johnston, pursuant to the modifications thereof ordered or authorized by me since the date of same, and to that end I hereby certify and confirm that you have been authorized by me to have the exclusive right and privilege to maintain a satisfactory autobus service between said city and said camp, as long as the service supplied by you over said route shall be adequate and satisfactory to me as commanding officer of said camp, subject to the following regulations and orders, and such further orders and regulations as may be made or authorized by me. That in consideration of said exclusive right and privilege, you have agreed in writing, and will agree by your acceptance hereof, to abide by the following enumerated conditions:

1. To run only first-class cars, driven by competent and reliable chauffeurs.

2. That you, personally, shall be held liable for any injury to officers and enlisted men, or government property that may become injured or damaged on said camp reservation, or upon any portion of the route hereinafter designated, through the faulty or careless driving of any of the chauffeurs operating cars owned by your auto line; and you shall also be personally liable for like injuries or damages arising under like circumstances, due to the faulty or careless driving of any of the chauffeurs operating all other cars which may come under your control, although owned by other parties, when engaged in said service.

3. That the termini of the route over which said bus service shall be maintained shall be the points at said camp heretofore designated in General Order No. 33, under date of December 24, 1917, and the vicinity of the Mason and Aragon Hotels, in the city of Jacksonville, Florida. That between said termini, said route shall traverse the public highways and public streets now existing between said camp and said termini in said city: Provided, however, that, upon special orders or requests from me or my staff officer detailed for that purpose, you may be required to divert cars to or from the Union Station in said city, when neces-

sary to transport officers or enlisted men to or from said station.

4. That all cars operated by you in said service, whether owned by your auto line or under your control, shall be marked "O. B. A. L. Govt. Controlled," and each shall carry a designated number for the purpose of identification.

5. That you will cause all chauffeurs operating each and every of the cars under your management and control in said service, to drive slowly and carefully through the congested streets of said camp reservation, and shall require said chauffeurs to observe all reasonable traffic regulations over the entire route, as hereinbefore designated.

6. That the fares which you are authorized to charge officers and enlisted men when transported in autobusses between said camp and said city shall be 35 cents each way, and 25 cents each way between the end of the street car line at Ortega, Florida, and said camp; these rates to apply between the hours of 5 A. M. and 12 midnight; between 12 midnight and 5 A. M. the rates shall be 50 cents each way. The fares for officers and enlisted men when transported in touring cars between said camp and said city shall be 50 cents each way, irrespective of the hour. That the fare for civilians between said city and said camp shall be 50 cents each way, without regard to the hour or equipment. That until the construction of said camp shall be completed by A. Bentley & Sons Company, you will also be required to transport employees of said contractors for a fare of 35 cents each way, the transportation of such employees, however, to be subordinated to the transportation of the officers and enlisted men stationed in said camp. That as exceptions to the fares above provided, you will be required to transport free of charge provost guards detailed by my staff to police said highway and to perform police duty in said city, and in order to facilitate the aforesaid free transportation, you are authorized to issue free passes to said provost guards.

7. That all automobiles and autobusses placed in said service, either owned by your auto line or under your control, shall be devoted primarily to the transportation of officers and men between said camp and said city, the transportation of civilians to be subordinated to the needs of said officers and men, and the cars devoted to said service shall not, during the continuance of your privilege as aforesaid, be diverted to any other service without my consent or authorization.

8. That, as to the matter of schedules and details of the service, you will be governed L.R.A.1918C.

by the orders and directions of Captain C. Walcott, Q. M., U. S. R., a member of my staff, having in charge the transportation facilities to be rendered by you, and you will also be required to make said service conform to my General Order No. 33, under date of December 24, 1917, and such further orders as may from time to time be made by me with reference to said service.

9. That the equipment which you will be required to furnish shall be sufficient to meet the average daily demand for transportation between said camp and said city; it being recognized that the unusual demands upon holidays or other special occasions cannot be made the test of the adequacy of your equipment.

10. In order to enlarge the equipment of your auto line, you are authorized to make contracts with other parties, providing for the placing of their machines under your exclusive management and control, to be subject to the regulations hereinbefore mentioned, and as a consideration to you for the time and expense of supervising, and for the responsibility assumed by you in regard to injuries or damage to government men or property as aforesaid, you are authorized to require such other parties to pay you a percentage not exceeding 10 per cent of the gross receipts received from the operation of their respective cars in said service.

11. In the exercise and enjoyment of the exclusive privilege and right herein granted and confirmed to you, you will recognize that my reasons for granting you the same, among other things, are that I have found it essential to the morale of the officers and men stationed at said camp to permit them to visit said city on private business and for recreation, also to have said provost guards detailed for police duty in said city, to prevent said men, as far as possible, from participating in various forms of dissipation, and have further found it necessary to the morale of said officers and men to permit their relatives and friends to visit them at said camp, and have found it necessary also for myself and members of my staff to go to and from said city on official business of the United States government, for which purposes it was essential to provide a means of transportation between said camp and said city for the officers and enlisted men stationed there, as well as for civilians having occasion to visit said camp, there being no street car line to said camp and no other adequate means of transportation available; also that I was desirous of having the entire bus service rendered to said camp under one management, so that the responsibility for injuries or dam-

age to government men or property would be definitely located and assumed by a responsible party; also that the greatest possible safety would be obtained to the officers, men, and government property affected by said service; and in view of these considerations, you will be expected to carefully observe the foregoing regulations and such others as may be from time to time duly authorized, and so long as you abide thereby, your exclusive privilege and right, as hereinbefore defined, shall continue. That a noncompliance with any or all of said conditions may cause a forfeiture of said right and privilege.

Yours very truly,

F. L. Munson,
Lieutenant Colonel, Q. M. Corps.

Indorsement:

I have carefully read the foregoing communication, and do hereby agree to comply with all its requirements to the best of my ability.

A. C. Marshall,
General Manager Orange Belt Auto Line.

That at the time of his arrest the alleged autobus mentioned in said warrant was being operated in said bus service under the authority and subject to the conditions and regulations of the said franchise of November 21, 1917, as also said subsequent regulations, and also subject to said confirmation of January 5, 1918, and not otherwise.

That the service rendered by your petitioner with each and every of the autobusses and automobiles employed in said service, including the aforesaid bus being operated at the time of his arrest, is a service constituting business of the United States government; that the said autobusses and automobiles employed in said service, as aforesaid, are instrumentalities engaged in the transaction of business for the military branch of the United States government, under the exclusive direction and control of said commanding officer, or such member of his staff as he may detail for that purpose. That under the franchise granted and confirmed to your petitioner as aforesaid, and subject to the rules, regulations, and conditions therein prescribed, your petitioner, in performing a part of said service with the aforesaid autobus, as well as some forty additional autobusses and automobiles now owned and controlled by your petitioner and engaged in said service, constituted an agency of the United States government. That the right to operate said bus line over said route, and to receive tolls therefrom in accordance with the rules, regulations, and conditions provided in the said franchise or confirmation L.R.A.1918C.

thereof, constituted a franchise of the Federal government, and is not subject to the license tax provided in said ordinance.

Many cases from the Supreme Court of the United States and other Federal and state courts are cited to support the contentions of the petitioner, such as *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *California v. Central P. R. Co.* 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *San Benito County v. Southern P. R. Co.* 77 Cal. 518, 19 Pac. 827; *San Francisco v. Western U. Tele. Co.* 96 Cal. 140, 17 L.R.A. 301, 31 Pac. 10; *Western U. Tele. Co. v. Lakin*, 53 Wash. 326, 101 Pac. 1094, 17 Ann. Cas. 718; *Williams v. Talladega*, 226 U. S. 404, 57 L. ed. 275, 33 Sup. Ct. Rep. 116; *Choctaw, O. & G. R. Co. v. Harrison*, 235 U. S. 292, 59 L. ed. 234, 35 Sup. Ct. Rep. 27. We are in accord with the holdings of all of these cases, except possibly some expressions used therein illustratum arguendo that may be classed as obiter dictum; but unfortunately for the petitioner none of them fit the facts of the case in hand. In all of them a license tax was sought to be imposed by a state, county, or municipality upon the right to do business either by a bank, a railroad company, or telegraph company that had been chartered, and had been granted its franchise and right to do business by the Congress of the United States, and in all of them it was held in effect that such license tax was invalid because it was an unwarranted invasion of rights properly granted by the Federal government, and amounted virtually to an attempt to annul such Federal grant. In the case of *Choctaw, O. & G. R. Co. v. Harrison*, supra, the state of Oklahoma undertook to impose an occupational tax upon the railroad company for the mining of coal that the railroad company, as lessee of the Federal government, had agreed to mine, the Federal government being under obligations by treaty contract with an Indian tribe to develop the mines from which it had been taken. The sum total of the decision in that case was that "a Federal instrumentality acting under congressional authority cannot be subjected to an occupation or privilege tax by a state." There the Federal government was itself under contract obligations to develop the mines owned by the Indians; it procured its lessee, the railroad company, to fulfil its obligations by mining, in its place and stead, the coal from said mines. To have permitted the imposition of the occupational tax sought to be made in that case would have been to impose such tax by a state directly upon the Federal government; that, of course, is impossible. No such facts governing

the decisions in any of the cited cases exist in the case in hand. It is insisted by the petitioner that he is operating his automobiles and autobuses on the streets of the city of Jacksonville under and by virtue of a "franchise" granted to him by the commanding officer of a military camp located a few miles from said city, by which he is granted the right to convey the United States soldiers there quartered back and forth between said city and said camp on business or recreation bent. We have examined carefully the documents quoted above that are urged here as being a "franchise" to do the business of an autobus line in this state, the county of Duval, and the municipality of Jacksonville, but we fail to find in any of them any feature or semblance of the grant of a franchise to conduct such business. Even if it be conceded that an army officer has any lawful authority to grant any such "franchise" in a state where he and the troops under him may be quartered, there is in the documents put forward here as constituting such franchise no attempt at any such grant. We grant that, if the exigencies of a state of war should demand it, a commanding officer of an army may commandeer, seize, and utilize privately owned autobuses on the streets or other highways in the transportation of troops and all the other paraphernalia of war, and may do this without payment of any taxes for the operation thereof on the public highways; but when it is asserted that he can go into a state not under martial law, and there grant franchises to any of its citizens generally to conduct any class of business enterprise within the civil jurisdiction of such state, we very strongly doubt the asserted authority.

But in the documents put forward here as being a franchise there is no attempt at the grant of any such franchise, but on their face they are nothing more than a voluntary contract between a partnership of individuals conducting a general business of carrying passengers and their baggage by autobuses and automobiles to and from points in and around the city of Jacksonville on the one part, and the commanding officer of a United States encampment of soldiers on the other part, by which, in consideration of the furnishing of good auto vehicles with skilled and careful drivers, and of a reduction in the fares to soldiers per man conveyed, and of the observance of certain regulations prescribed as to stopping places, and the giving of preference to soldier passengers over civilians, such commanding officer undertakes to give to said auto partnership a monopoly over all other organized bus

lines and automobiles for hire of the right of entrance into said camp grounds and of conveying therefrom the soldiers there encamped. Each soldier individually pays his own fares for being carried back and forth, and the only penalty fixed in the contract for any nonobservance of its terms is not a military arrest or other military punishment, but simply a forfeiture of the rights acquired by such contract. The case presented is simply of a firm of individuals residing in Jacksonville engaged in and presumably licensed to do a general business of running autobuses and automobiles for hire over the streets of said city, who, as an incident of their general business, make a side contract, so to speak, with an officer in command of an encampment of United States soldiers, by which they acquire a monopoly of conveying such soldiers back and forth to and from such camp, and by which, for a consideration individually paid by each soldier who becomes a passenger on their line, they agree to convey such soldiers back and forth between said city and said camp; the government of the United States having no interest in or ownership over any of the autos used. Under these circumstances, we do not think that the petitioner is exempt from the payment of his license tax, and the writ of habeas corpus is therefore hereby denied.

Whitfield, Ellis, and West, JJ., concur.

Browne, Ch. J., dissenting:

The several orders of Lieutenant Colonel Munson, whereby he granted to the petitioner the privilege or franchise to operate the bus line between Camp Joseph E. Johnston and the city of Jacksonville, are set out in full in the opinion of the court. I will, however, quote from the eleventh paragraph of the confirmation of the "privilege" granted to petitioner, which contains some of the reasons for the order:

"11. In the exercise and enjoyment of the exclusive privilege and right herein granted and confirmed to you, you will recognize that my reasons for granting you the same, among other things, are that I have found it essential to the morale of the officers and men stationed at said camp to permit them to visit said city on private business and for recreation, also to have said provost guards detailed for police duty in said city, to prevent said men, as far as possible, from participating in various forms of dissipation, and have further found it necessary to the morale of said officers and men to permit their relatives and friends to visit them at said camp, and have found it necessary also for

myself and members of my staff to go to and from said city on official business of the United States government, for which purposes it was essential to provide a means of transportation between said camp and said city for the officers and enlisted men stationed there, as well as for civilians having occasion to visit said camp, there being no street car line to said camp and no other adequate means of transportation available; also that I was desirous of having the entire bus service rendered to said camp under one management, so that the responsibility for injuries or damage to government men or property would be definitely located and assumed by a responsible party; also that the greatest possible safety would be obtained to the officers, men, and government property affected by said service."

The precise question involved in this case has never been determined by the Federal courts, but from the doctrines enunciated in cases involving analogous questions, and from the trend of recent decisions, and from the spirit of the times, I have an abiding conviction that wherever the question of the power of a state court to nullify or to review an order made by a military commander in time of war, whereby he contracts for the performance of any service which he considers essential to the morale and safety of the officers and soldiers under his command, it will be determined against such power being exercised by the state courts.

When a nation is at war, its rulers must necessarily be clothed with autocratic and absolute power; less than this may result in failure to accomplish the purpose of the war, if not in defeat and disaster. Neither can the people demand all their constitutional rights, for all rights must be subordinate to and submerged in the great object of winning the war.

The people having elected to engage in a foreign war, they must be prepared to sacrifice their lives, their fortunes, their peace ideals, and even their constitutional rights, if need be, to gain an overwhelming victory.

The military arm of the government must not be hampered by local laws, ordinances, or regulations. The commanding officer of a military camp is charged with the duty of maintaining the morale of his men and providing for their safety and comfort, and for any dereliction of his duty in these respects he is answerable to military authority. When he promulgates an order, rule, or regulation, wherein, as in this case, he states that he does so because it is "essential to the morale of the officers and men stationed at said camp," L.R.A.1918C.

and "that the greatest possible safety would be obtained to the officers, men, and government property affected by the service," neither a city nor a state has any authority to nullify the effect of his orders by requiring the agencies which he establishes or instrumentalities which he uses for the accomplishment of his ends to pay a license tax for the privilege of performing the duties which he charges them with.

The power to require the payment of an occupational license tax carries with it the power to impose so great a tax as to amount to a prohibition, and it is quite clear that when the military authorities in time of war consider certain services which are to be performed by another necessary for the morale and safety of the Army, such services cannot be crippled, hampered, or prevented by the exercise of the licensing power of the state. If the services which the commanding officer of Camp Joseph E. Johnston considers essential for the morale and safety of his men are not in fact necessary, it is a matter for the national authorities to determine, and is not subject to review by the state courts, and we cannot controvert his declaration that the auto service which he has established between the camp and the city of Jacksonville is essential to the purposes stated in General Order No. 33, and the amplification and confirmation thereof made by him on January 5, 1918. If he has no authority under military regulations in time of war to grant the franchise to the defendant, his act is subject to review and disapproval by the military arm of the nation, and not by the state authorities, and as long as his order remains uncountermanded by the national authorities, its validity must be respected and given full recognition and obedience.

What the President himself as Commander in Chief of the Army may do attaches to the officer in charge of the military forces at Camp Johnston. As was said by the court in *Ex parte Vallandigham*. Fed. Cas. No. 16,816: "The only reason why the appointment is made is that the President cannot discharge the duties in person. He therefore constitutes an agent to represent him, clothed with the necessary power for the efficient supervision of the military interests of the government throughout the department, and it is not necessary that martial law should be proclaimed or exist to enable the general in command to perform the duties assigned him."

The last portion of this citation meets the reference in the opinion of this court that this state is not under martial law.

Discussing the power of the courts to annul or reverse the action of a military commander in time of war, the court said: "He has done this under his responsibility as the commanding general of this department, and in accordance with what he supposed to be the power vested in him by the appointment of the President. It was virtually the act of the executive department under the power vested in the President by the Constitution; and I am unable to perceive on what principle a judicial tribunal can be invoked to annul or reverse it. In the judgment of the commanding general, the emergency required it, and whether he acted wisely or discreetly is not properly a subject for judicial review."

The reasons given by Judge Leavitt for holding that a Federal court has no power to annul or reverse an order of a commanding officer in time of war apply with greater force to the power of a state court.

It is contended that because the military authorities permit the petitioner to transport civilians to and from the camp, when the space in the busses is not wholly occupied by soldiers, he transcended his authority, and that ipso facto the instrumentality created by him for the benefit of his troops became subject to the operation of the state and city laws imposing occupational taxes on the petitioner. To concede this contention is to assert the authority of state courts to review, modify, or annul an order of a military commander in time of war, thus making the states the final arbiters of the wisdom, the necessity, or the reasonableness of a military order. It begs the question to say that the order under which the petitioner was performing the service for which he is being held by the state authorities was made by the commanding officer of a camp only, and not entitled to the dignity of a military order. The President of the United States advised Congress to "declare the recent course of the Imperial German Government to be in fact nothing less than war against the United States," and Congress promptly acted on his advice and provided for raising an army to carry on the war. The duty of organizing, equipping, arming, training, disciplining this huge military machine, is the result of congressional action, and it devolved upon the President of the United States as Commander in Chief of the Army to carry it into effect, and through and by him this authority descends until it reaches the commanding officers of camps established for the purpose of preparing the Army for war, and every order made by a military officer of a camp for the safety and morale of his officers and men, until revoked or disapproved by his superior in command, is made by L.R.A.1918C.

virtue of and under the authority of the Commander in Chief of the military forces of the United States. To say that the orders of the commanding officer of a camp whereby he creates agencies or instrumentalities for the benefit of the Army under his command can be nullified by a city ordinance imposing an occupational tax on a person to whom the commanding officer has given a franchise or privilege for what he believes to be essential for the morale and safety of his men is to strike at the Commander in Chief of the Army himself, under whose authority and command the officer is acting. When Lieutenant Colonel Munson granted to petitioner the privilege or franchise, which the imposition of this occupational tax would tend to impede, cripple, or destroy, he acted under the authority of Congress and for the President of the United States, as every official act of a military commander in time of war is the act of the Commander in Chief until disapproved or reviewed by him, or some other military authority acting under him.

It may be that Lieutenant Colonel Munson is mistaken when he says that it is necessary for the morale and safety of his men that civilians who have business at the camp or who desire to visit his officers and men may be transported in the busses of this transportation line, but such mistake, if it be one, is not reviewable by the state courts; nor does his mistaken view of its necessity subject to imprisonment by state authorities for nonpayment of an occupational tax the person who is performing the duty imposed upon him by such military order. The privilege granted to the petitioner by Colonel Munson in this instance is no less a franchise than one granted by Congress or any other department of the national government.

The Federal courts have passed on the question of the power of the states to destroy or abridge a franchise or privilege granted by the Federal authorities for national purposes by the imposition of taxes, and the doctrine laid down in these cases decided in time of peace apply with greater force in time of war.

Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204, is one of the great cases in which Chief Justice Marshall wrote his views into the Constitution of the United States, and settled the question that a state had no power to tax an instrumentality of the Federal government, and the court illustrated its reasoning with a statement which is peculiarly applicable to this case: "Can a contractor for supplying a military post with provisions be restrained from making purchases within any state, or from transporting the pro-

visions to the place at which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative. It is true that the property of the contractor may be taxed as the property of other citizens; and so may the local property of the bank. But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under state control."

Other cases which follow and extend the doctrine of *Osgorn v. Bank of United States*, supra, are *California v. Central P. R. Co.* 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *San Benito County v. Southern P. R. Co.* 77 Cal. 518, 19 Pac. 827.

In the case of *Western U. Teleg. Co. v. Lakin*, 53 Wash. 326, 101 Pac. 1094, 17 Ann. Cas. 718, the court said: "The franchise to do business on and over the highways and post roads in the United States is not only a permission, but an advantage to the government, growing out of the necessities of administration. In it the government has an interest. Upon it it must place dependence in time of war and in time of peace. It is a creature not alone of the bounty of the government; it is born of its needs, and is essential to its maintenance. . . . It requires no argument to sustain the point that a mere tax on the privilege of doing business, which in one way or another might interrupt this governmental interest, cannot be sustained."

The transportation line established by Lieutenant Colonel Munson is born of the needs of the Army, or so much of it as is under his command, and "is essential to its maintenance," and is not subject to state regulation or control. If the city can require the transportation line to take out a license as a condition to the right to operate, it can fix and control its tolls, its points and time of departure and return, its routes, and so regulate it as to defeat the purpose for which it was established by the commanding officer of the camp. The power to license includes the power to regulate and control, and thus we would have the situation of the orders of a military officer in time of war subject to control by the city authorities. To illustrate the impotence of the municipal ordinances when it is sought to impose their conditions upon the military authorities in time of war, we need only call attention to those which prohibit keeping explosives within the limits of a city. What effect would such an ordinance have on the action of a military officer who considered it necessary to store ammunition within the corporate limits?

The question in this case is somewhat L.R.A.1918C.

obscured by the difficulty of thinking in terms of war, and attempting to apply doctrines which might be conclusive in time of peace, but which must yield to the higher authority of national necessity in time of war. To appreciate this distinction I need only call attention to the national government "having assumed possession and control of the railroads;" the orders of the Fuel and Food Administrators, and the proposed action by Congress to regulate what food we may eat, and on what days we must abstain from eating prohibited articles.

In the case under consideration the nation in its purpose of carrying on a great foreign war, through the military commander of Camp Joseph E. Johnston, is performing a function which it deems necessary for the morale of the army and the safety of its officers and men, and if the state possesses the power to tax an agency of the Federal government whereby it performs any of its functions, it might so impose taxation as to "cripple, if not wholly defeat, the operations of the national authority within its proper and constitutional sphere of action."

Judge Cooley in his work on *Constitutional Limitations*, 7th ed. p. 680, says: "One of the implied limitations is that which precludes the states from taxing the agencies whereby the general government performs its functions. The reason is that, if they possessed this authority, it would be within their power to impose taxation to an extent that might cripple, if not wholly defeat, the operations of the national authority within its proper and constitutional sphere of action."

In the case of *Farmers' & M. Sav. Bank v. Minnesota*, 232 U. S. 516, 58 L. ed. 706, 34 Sup. Ct. Rep. 354, the court held that a Federal instrumentality acting under congressional authority cannot be subjected to an occupation or privilege tax by a state.

The petitioner is not only a Federal, but a military, instrumentality, acting under the orders of the commanding officer of Camp Joseph E. Johnston,—a camp organized by congressional authority,—and the franchise or privilege granted the petitioner by Lieutenant Colonel Munson for the safety and morale of his men should not be subjected to the imposition of an occupational tax which might cripple, if not wholly defeat, the purpose for which camps are established—the preparation and training of the army to fight in the great foreign war in which we are now engaged.

The power of Congress to create a vast army to be sent out of the country to engage in a foreign war was fully sustained by the Supreme Court of the United States

in a decision rendered by Mr. Chief Justice White on January 7th, in the case of *Arver v. United States* (U. S. Adv. Ops. 1917-18 p. 193) 245 U. S. 366, 62 L. ed. —, ante, 361, 38 Sup. Ct. Rep. 159, and other cases decided at the same time, known as the "Draft Cases." The court said that the "authority to enact the statute must be found in the clauses of the Constitution giving Congress power 'to declare war; . . . to make rules for the government and regulation of the land and naval forces.' Article 1, § 8. And of course the powers conferred by these provisions, like all other powers given, carry with them, as provided by the Constitution, the authority 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.' Article 1, § 8."

Whatever is done by the military authorities in the organization of the Army provided for in the Act of Congress of May 18, 1917, is done by virtue of this constitutional provision, and the regulation of the Army belongs exclusively to the United States government. If there is any difference in degree in the powers granted to Congress by the national Constitution, the power to declare war, to raise and support armies, to make rules for their government and regulation, is the highest of all, for upon it the existence, the integrity, of the nation depends, and the power of Congress over it is absolute.

While the question presented in this case has never been before the Supreme Court of the United States, there is a long line of decisions on the interstate commerce clause of the Constitution pointing to the conclusion that will be reached by that court whenever this question comes before it, and which guide me in reaching my conclusion.

The power of Congress over interstate commerce is absolute. See *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851, in which case the court said: "We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

A distinction sought to be made that because the order of the commanding officer of Camp Johnston was not limited to the transportation of the officers and soldiers under his command, but permitted also the transportation of civilians, this license tax may be imposed. The license tax complained of makes no such distinction, but is imposed for the occupation of transporting both the military and civil population, and in this it is obnoxious under L.R.A.1918C.

the doctrine of the Supreme Court of the United States that licenses for carrying on both interstate and intrastate commerce are unconstitutional. The states have the right to impose licenses on intrastate, but not on interstate, business, and they cannot link them together and impose a license on the entire business. In the case of *Osborne v. Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214, a state tax imposed upon an express company for doing business in Florida was upheld because the act applied solely to business of the company within the state. The court in that case said: "The statute herein differs from the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of any business in the state whatever unless upon the payment of the fee or tax. It was said as to those cases that, as the law made the payment of the fee or the obtaining of the license a condition to the right to do any business whatever, whether interstate or purely local, it was on that account a regulation of interstate commerce, and therefore void."

The distinction is clear that, if a license tax is sought to be imposed as a condition to doing a business which includes both interstate and intrastate business, it is void. If, however, the law applies only to intrastate business, it is valid.

Examining the ordinance under consideration, we find that it requires the payment of a fee or tax and the obtaining of a license as a condition to the right to do any transportation business whatever, and includes the transportation of soldiers as well as civilians, and in so far as it does this, it is void.

Although I have discussed this phase of the case, and think it supports my conclusion that the license tax sought to be imposed is inoperative and void in so far as it affects the business which the petitioner is carrying on, still I rest my conclusion particularly and especially on the lack of authority of the state courts to pass upon the validity or the reasonableness of a military order in time of war, and as the petitioner is being held for not taking out a city license for operating a transportation line between Camp Johnston and Jacksonville under the authority of an order of the military arm of the government, his arrest was unauthorized, and he is being unlawfully deprived of his liberty.

When the nation is engaged in a great foreign war which will tax the patriotism of the people to the extremest limit, when our nationals are called upon to give their lives without asking their consent,

in order that we may win the war, it seems preposterous to contend for the shadow of state's rights,—if there remains even a shadow of that sacred doctrine upon which rested our constitutional liberties,—and make the collection of a few dollars for licenses paramount to the morale and safety of the soldiers who are called upon to sacrifice their lives for the nation.

The President of the United States has said: "We are now about to accept the gage of battle with the natural foe of liberty, and shall, if necessary, spend the whole force of the nation to check and nullify its pretentiousness and power."

Camp Joseph E. Johnston was established in pursuance of the plan to prepare an army to carry out this declaration of the President, and the establishment of

the bus line by Lieutenant Colonel Munson is the exercise of his military authority to prepare the army to "accept the gage of battle." The bus line is an instrumentality or agency which the commanding officer says is necessary to accomplish this end. Military exigencies or necessities are to be determined by the military authorities, or at least by the national, and not by state, authorities, and a city cannot cripple, hamper, impair, or destroy the instrumentalities established to meet a military necessity or exigency by passing an ordinance imposing a license tax on such instrumentalities, or by applying to them the provisions of an existing ordinance.

I think the application for a writ of habeas corpus should have been granted.

MONTANA SUPREME COURT.

ÆTNA ACCIDENT & LIABILITY COMPANY, Appt.,

v.

H. B. MILLER, Receiver of Farmers' State Bank of Bridger, Montana, Resp't.

(— Mont. —, 170 Pac. 760.)

State — prerogative — priority of claim.

1. The state is entitled to priority over general creditors for repayment of money deposited by it in a bank which becomes insolvent.

For other cases, see Banks, V. in Dig. 1-52 N. S.

Subrogation — surety of state depositary.

2. A surety on the bond of a bank which is a state depositary is entitled to subrogation to the right of the state to priority of its claim over that of general creditors in case the bank becomes insolvent and the surety is compelled to pay the state's claim. *For other cases, see Subrogation, VI. in Dig. 1-52 N. S.*

State — priority — abrogation.

3. The state's right to priority for repayment of funds deposited in a bank which becomes insolvent is not abrogated by a statute giving a preference to wage claims in case of insolvency.

For other cases, see Banks, V. in Dig. 1-52 N. S.

Note.—The common-law priority of a state or the United States in payment from assets of a debtor is discussed in the notes to *State v. Foster*, 29 L.R.A. 226, 243; *Re Carnegie Trust Co.* 46 L.R.A.(N.S.) 260; and *State v. First State Bank*, L.R.A.1918A, 398. The question of the subrogation of a surety to the preference or priority is treated at page 240 of the note first mentioned, and at page 399 of the last-mentioned note. L.R.A.1918C.

Same — waiver of priority.

4. The state does not lose its right to priority in payment of its claims out of funds in an insolvent bank by failing to assert the claim until after the bank's assets have passed into the hands of a receiver appointed at its instance.

For other cases, see Banks, V. in Dig. 1-52 N. S.

(January 24, 1918.)

APPEAL by plaintiff from a judgment of the District Court for Carbon County sustaining a demurrer to the complaint in an action brought for the determination of plaintiff's claim of priority over general creditors, and for an order directing defendant to make such payment. Reversed.

The facts are stated in the opinion.

Messrs. Frank & Gaines, for appellant:

Under the common law the Crown, or sovereign power, had originally an absolute preference in the matter of payment of debts due to it, and subsequently this right was modified to the extent that the right attached in all cases where the property sought to be seized and applied to satisfaction of the debt was not subject to a prior lien or liens in favor of other subjects of the Crown.

Robinson v. Bank of Darien, 18 Ga. 66; *Seay v. Bank of Rome*, 66 Ga. 609; *Booth v. State*, 131 Ga. 750, 63 S. E. 502; *State ex rel. Metcalf v. District Ct.* 52 Mont. 46. L.R.A.1916F, 132, 155 Pac. 278, Ann. Cas. 1918A, 985; *State v. Bank of Maryland*. 6 Gill & J. 205, 26 Am. Dec. 561; *Re Carnegie Trust Co.* 151 App. Div. 606, 136 N. Y. Supp. 466, affirmed in 206 N. Y. 390. 46 L.R.A.(N.S.) 260, 99 N. E. 1096; *United States Fidelity & G. Co. v. Carnegie Trust Co.* 161 App. Div. 429, 146 N. Y. Supp. 804, affirmed in 213 N. Y. 629, 107 N. E.

1087; *Orem v. Wrightson*, 51 Md. 34, 34 Am. Rep. 286; *Central Bank & Trust Corp. v. State*, 139 Ga. 54, 76 S. E. 587; *United States Fidelity & G. Co. v. Rainey*, 120 Tenn. 357, 113 S. W. 397; *American Bonding Co. v. Reynolds*, 203 Fed. 358; 26 Am. & Eng. Enc. Law, 479; *Cheesebrough v. Millard*, 1 Johns. Ch. 409, 7 Am. Dec. 494.

Messrs. Nichols & Willson for respondent.

Sanner, J., delivered the opinion of the court:

On May 8, 1915, the affairs of the Farmers' State Bank of Bridger were in such condition that the district court of Carbon county, upon the complaint of the attorney general, filed pursuant to §§ 59 and 60 of chapter 89, Laws of 1915, appointed the respondent, H. B. Miller, as its receiver. There was at the time on deposit with the bank, subject to check, \$10,000 of state funds "theretofore raised by levies of taxes, assessments, and collections," secured by a bond in said amount, upon which bond the appellant, Ætna Accident & Liability Company, stood as surety. Thereafter the surety, by and because of the conditions of such bond, was compelled to and did pay to the state the amount of the penalty of the bond, to wit, \$10,000. In consequence of these circumstances, as well as of an assignment to it of the state's claim, the surety brought this action, seeking an adjudication that it is entitled to the payment of said sum in preference to the claims of general creditors, and an order directing the receiver to make such payment; he having in his hands funds sufficient for that purpose. Judgment for the receiver followed an order sustaining his general demurrer to the complaint, and this appeal is from that judgment.

The fundamental question presented is: Did the state have the preference right asserted? If it did, there does not seem much room for doubt that, unless in some way lost, such right passed by subrogation to the appellant. Rev. Codes, §§ 5691, 5692, note in 90 Am. St. Rep. 488; *United States Fidelity & G. Co. v. Carnegie Trust Co.* 161 App. Div. 429, 146 N. Y. Supp. 804, affirmed in 213 N. Y. 629, 107 N. E. 1087.

Whether the state was entitled to a preference over all the unsecured general creditors of the insolvent bank cannot be determined by resort to any express statute or constitutional provision, for confessedly none such exist; hence the question is one to be resolved according to the common law. Rev. Codes, §§ 3552, 8060. Just what is meant by the "common law" in this connection, however, is a matter open to definition. Broadly speaking, it means, of course, L.R.A.1918C.

the common law of England; but it means that body of jurisprudence as applied and modified by the courts of this country up to the time it became a rule of decision in this commonwealth. *State ex rel. Metcalf v. District Ct.* 52 Mont. 46, 50, L.R.A. 1916F, 132, 155 Pac. 278, Ann. Cas. 1918A, 985. The distinction is noted here because the common law as administered in England without a doubt commands the recognition of the sovereign as entitled to the preference (1 Co. Litt. 131B; 8 Bacon, Abr. 91); whereas the respondent insists that the common law as recognized and applied in the United States is otherwise.

At the time the territory of Montana was organized and first formally adopted the common law as our rule of decision in the absence of statute (*Bannack, Stat. p. 356*), there existed a vast number of decided cases from almost all of the states holding that divers and sundry prerogatives ascribed to the King at common law had passed to the states; those only being denied which had attached to the King in his personal character rather than as *parens patriæ*, or personification of the sovereignty. Among these cases, which are illuminative collaterally, were thirteen directly bearing upon the question here involved, to wit: Eight from Maryland (*State v. Bank of Maryland*, 6 Gill & J. 205, 26 Am. Dec. 561; *State v. Baltimore*, 10 Md. 504; *Jones v. Jones*, 1 Bland, Ch. 443, 18 Am. Dec. 327; *Smith v. State*, 5 Gill, 45; *Contee v. Chew*, 1 Harr. & J. 417; *State v. Rogers*, 2 Harr. & McH. 198; *Murray v. Ridley*, 3 Harr. & McH. 171), one from Georgia (*Robinson v. Bank of Darien*, 18 Ga. 65), one from North Carolina (*Hoke v. Henderson*, 14 N. C. (4 Dev. L.) 20, 24), two from South Carolina (*State v. Harris*, 2 Bail. L. 598; *Klinck v. Keckley*, 2 Hill, Eq. 250, 256), and one from the Supreme Court of the United States (*United States v. State Bank*, 6 Pet. 29, 8 L. ed. 308). Of these, only the two opinions from South Carolina deny the right to preference as a surviving prerogative, and they do this without serious attempt to soberly reason the matter. There was an earlier decision in that state, referred to in the *Klinck Case* (*Public Account Comrs. v. Greenwood*, 1 Desauss. Eq. 450), which seems to hold that the right, if it exists, cannot prevail over mortgages, judgments, and other liens,—a proposition which, so far as we know, no American court has ever disputed.

When our state Constitution was adopted and the Compiled Statutes of 1887 (including § 201, div. 5) were continued in force, the decided cases bearing upon the particular claim here asserted had been increased by eight (*Central Trust Co. v. New*

York City & N. R. Co. 110 N. Y. 250, 259, 1 L.R.A. 260, 18 N. E. 92; Re Columbian Ins. Co. 3 Abb. App. Dec. 239; State v. Baltimore & O. R. Co. 34 Md. 374; Orem v. Wrightson, 51 Md. 34, 34 Am. Rep. 286; State v. Dickson, 38 Ga. 171; Seay v. Bank of Rome, 66 Ga. 609; State use of Phillips v. Rowse, 49 Mo. 586, 592; Middlesex County v. State Bank, 29 N. J. Eq. 268, affirmed in 30 N. J. Eq. 311), of which one, the New Jersey case, denied the right "as an actual prerogative of government," chiefly because it had not been exerted or recognized in that state for over a hundred years, and "a prerogative which has remained so long practically useless can hardly be said to exist."

Since the adoption of our state Constitution and up to the present time, a considerable addition has been made to the decisions, notably: Booth v. State, 131 Ga. 760, 63 S. E. 502; Re Carnegie Trust Co. 151 App. Div. 606, 136 N. Y. Supp. 466, affirmed in 206 N. Y. 390, 46 L.R.A.(N.S.) 260, 99 N. E. 1096; United States Fidelity & G. Co. v. Carnegie Trust Co. 161 App. Div. 429, 146 N. Y. Supp. 804, affirmed in 213 N. Y. 629, 107 N. E. 1087; Central Bank & Trust Corp. v. State, 139 Ga. 54, 76 S. E. 587; United States Fidelity & G. Co. v. Rainey, 120 Tenn. 357, 113 S. W. 397; American Bonding Co. v. Reynolds (D. C.) 203 Fed. 356, reversed in Brown v. American Bonding Co. 127 C. C. A. 406, 210 Fed. 844; State v. Foster, 5 Wyo. 199, 29 L.R.A. 226, 63 Am. St. Rep. 47, 38 Pac. 926; State v. First State Bank, — N. M. —, L.R.A.1918A, 394, 167 Pac. 3; Central Trust Co. v. Third Ave. R. Co. 110 C. C. A. 1, 186 Fed. 292; Potter v. Fidelity & D. Co. 101 Miss. 823, 58 So. 713; Commissioners of Banking v. Chelsea Sav. Bank, 161 Mich. 691, 125 N. W. 424, 127 N. W. 351. The last five are usually cited as opposed to the right here claimed, while the others vigorously uphold it; but the five referred to are not entitled to be classed as authoritative voices in opposition. The Wyoming and New Mexico cases, for instance, actually recognize the right, but deny its application to the particular instance; the Federal opinion is squarely in the teeth of a prior declaration to the contrary by the circuit court of appeals of New York, viz., Re Carnegie Trust Co. 206 N. Y. 390, 46 L.R.A.(N.S.) 260, 99 N. E. 1096; the Michigan decision consists of two utterances, one discussing the preference as a prerogative right, but saying: "The question is not presented;" the other seeming to hold that explicit legislation is necessary to put the right into effect; the Mississippi case is squarely against the right, but assigns no reason except Shields v. Thomas, 71 Miss. 260, 42 Am. St. Rep. 458, 14 So. 84, which, so far L.R.A.1918C.

as we can see, has not the remotest bearing upon the question.

Special notice must, however, be taken of American Bonding Co. v. Reynolds, 203 Fed. 356, and Brown v. American Bonding Co. 127 C. C. A. 406, 210 Fed. 844, because the case which had its issue in these opinions arose in this state and represents an effort to settle the law of this state upon the identical questions now before us. Ordinarily, these utterances would be entitled to very respectful consideration, although in a matter of this sort the voice of the state tribunals is supreme. But the case presents a singular situation. The district court held that the state of Montana has a preference over general creditors to payment from an insolvent debtor; that the right is not discretionary in the officers of the state, but is of a prerogative character; and that it may pass by subrogation to the debtor's surety compelled to make such payment. This was reversed and its standing as authority destroyed on appeal; yet the opinion on appeal is not persuasive for these reasons: It assumes the domestic law of New York to be as stated by the second circuit court of appeals (Central Trust Co. v. Third Ave. R. Co. 110 C. C. A. 1, 186 Fed. 292) against the claim to such prerogative right, notwithstanding the declaration of the highest court of that state in favor of the claim (Re Carnegie Trust Co. supra); it suggests that since the United States asserts its preference under specific statute, and not upon prerogative, this state may not possess any prerogative preference, because "no state can have any greater sovereign right than the general government of the entire country," notwithstanding that the Federal Constitution is a grant of power, and, under Amendment 10, states can and do have sovereign rights which the general government does not possess; it raises the question whether, if the prerogative right exists, such right can pass to a private party by subrogation, without actually deciding whether such right does exist or can so pass; and it determines the appeal upon a proposition which we cannot accept, viz., that the prerogative right, if it exists and can so pass, may be defeated because a ministerial officer of the state has failed to cast its claim in proper form and has assigned that claim to the surety. If anything may be taken as a truism, it is that no right of the sovereign can be waived by any power short of the sovereign; so that, whatever claim on behalf of the state was filed with the receiver, the measure of its demand was not the form of the claim, but the right behind the claim: and, if that right passed by subrogation, no written assignment of any kind could aid it or destroy it.

So much for the decisions, considered numerically. By states and by substance the disparity between the two classes is very marked. Those opposed to the preference seem so overwhelmed by the term "prerogative" that they lose sight of the reality for which it stands and which is inseparable from sovereignty in any form. The prevailing view, and the view that has always held the weight of authority, is emphatically in favor of the preference, and the philosophy of it is sentimentously expressed by the Supreme Court of the United States thus: "The right of priority of payment of debts due to the government is a prerogative of the Crown well known to the common law. It is founded, not so much upon any personal advantage to the sovereign, as upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens, and discharge the public debts." *United States v. State Bank*, supra.

Likewise, the New York court of appeals: "Under our Constitution we have no king. The king, therefore, and the prerogatives that were personal to him, being repugnant to our Constitution, are abrogated; but his sovereignty, powers, functions, and duties, in so far as they pertain to civil government, now devolve upon the people of the state, and consequently are not in conflict with any of the provisions of our Constitution. Inasmuch, therefore, as the claims or moneys due the king for the support and maintenance of the government, whether derived from taxes or other sources of income, were preferred over the claims of others, it follows that, under the first subdivision of the . . . Constitution of 1777, quoted, such preference became a part of the common law of our state, and is so continued under our present Constitution." *Re Carnegie Trust Co.* supra.

Finally, the court of appeals of Maryland: "Notwithstanding all that has been said in disparagement of this right of priority, it is not perceived to be inconsistent with the principles or spirit of our political institutions. . . . It . . . is a rule only in the distribution of the property of the debtor, requiring the debt due to the state to be first paid, where the individual creditor has no antecedent lien overreaching it. The government of the state is established for the good of the whole, and can only be supported by means of its revenue; which revenue the good of the whole requires to be protected. And as it can only act by its agents, who, no matter how vigilant, cannot always be present to protect its rights, a priority in the payment of its debts (which must always be of a public nature) is necessary to enable it to accomplish the ends of

its institution. It is not, therefore, opposed to a sense of right that the interests of all should prevail over that of an individual, when it can be asserted without disturbing vested rights, which diligent creditors can more readily acquire than the government through its agents." *State v. Bank of Maryland*, 6 Gill & J. 205, 26 Am. Dec. 561.

Some contention is made that the provisions of Code, §§ 6123-6125, and 6140, by defining "creditors" and authorizing preferences, operate as an abrogation of any special right in the state under the common law. We do not appreciate the force of this. Sections 6123 and 6124 are not even suggestive. Section 6125 provides that a debtor may pay or secure one creditor in preference to another; if this has any relation to cases of insolvency, it is limited by the rule stated in § 6142, that no voluntary preference can affect or impair the right of a creditor whose claim stands preferred by contract or by operation of law. Section 6140 does deal with insolvency proceedings, and into such it injects an automatic preference in favor of wage claims to an amount not exceeding \$200 each; but this at most could amount to nothing more than an assent by the state to share its preference in such cases with such claims. Whether it goes so far is doubtful in the absence of an express declaration to that effect, since the rule—accepted universally we believe—is that the sovereign authority is not bound by the general language of a statute which tends to restrain or diminish the powers, rights, or interests of the sovereign. *United States v. Herron*, 20 Wall. 251, 22 L. ed. 275; *Guaranty Title & T. Co. v. Title Guaranty & S. Co.* 224 U. S. 152, 155, 56 L. ed. 706, 708, 32 Sup. Ct. Rep. 457.

It is insisted, however, that under no theory of the sovereign prerogative accepted in this country can the state's preference prevail "because it was not sought to assert the right in this case until after the debtor's title to the property had been divested and the property passed beyond its control." Undoubtedly the sovereign right of preference is effective only while the debtor retains title to the property out of which payment is sought to be made. But is it correct to say that there was such a divestiture here as to forestall the preference? Counsel cite, as supporting the affirmative, certain cases involving assignments for the benefit of creditors. These, however, are unavailing, because, as we have seen, no such assignment can be effective in this jurisdiction to prevent a preference created by operation of law. Equally valueless are the holdings cited to the effect that a receivership divests the title of the owner;

for, whatever may be the law elsewhere, the rule is different in this state. *Gardner v. Caldwell*, 16 Mont. 221, 224, 40 Pac. 590; *Lyon v. United States Fidelity & G. Co.* 48 Mont. 591, 600, 140 Pac. 86, Ann. Cas. 1915D, 1036. But, it is said, by the receivership the bank lost all control over its assets, and this is sufficient to defeat the preference. It is certainly true that during receivership the owner loses the control of his property, and in receiverships like this such control may never be regained. Yet to regain control is always theoretically possible, for the purpose of any receivership is to husband the property thereby sequestered for whoever may be entitled to it. Nor is it decisive that the receiver may sell, under order of court, because that power is given and may be used only in furtherance of the purpose to husband; so, too, an executor or administrator may sell, yet it cannot be contended that he has title or such control over the real estate of his decedent as would defeat a lawful preference. A receivership and an assignment for the benefit of creditors are two different things. *Babcock v. Maxwell*, 21 Mont. 507, 513, 54 Pac. 943. But this court has said that the

position of a receiver is no better and no higher than that of an assignee; he occupies a situation not materially different from that of the insolvent prior to the appointment; he is the arm of the court to accomplish, when necessary, the distribution of the assets of the insolvent according to the rights of those entitled thereto. *Williams v. Johnson*, 50 Mont. 7, 144 Pac. 768, Ann. Cas. 1916D, 595. This of necessity involves a recognition of the order in which such rights shall come. The present receivership was procured by the state, under its own banking laws, for the protection of itself and other creditors; it would be a strange result if such a proceeding, so brought, must operate to impair the right thus sought to be conserved.

We see no rational escape from the view that the order sustaining the demurrer to the complaint was a mistake. The judgment founded thereon is therefore reversed, and the cause remanded for further appropriate proceedings.

Holloway, J., concurs. **Brantly, Ch. J.**, being absent, did not hear the argument and takes no part in the foregoing decision.

OKLAHOMA SUPREME COURT.

CHARLES COWEN, by Guardian, Plff. in Err.,
v.

CHARLES J. HUBBARD et al.

(50 Okla. 671, 151 Pac. 678.)

Guardian and ward — sale — validity.

A guardian's deed will not be held void on a collateral attack merely because the petition of the guardian to sell the real estate of his ward defectively states the existence of the conditions under which the statute authorizes the sale.

(August 31, 1915.)

ERROR to the District Court for Bryan County to review a judgment in defendants' favor in an action brought to set aside and vacate a guardian's sale of certain real estate belonging to plaintiff, and to

Headnote by **WILSON, C.**

Note.—Collateral attack upon a judgment because of insufficiency is discussed in the note to *Jarrell v. Laurel Coal & Land Co.* L.R.A.1916E, 316; and see later case, *Chivers v. Johnston County*, L.R.A.1917B, 1296. Some courts make a distinction between collateral attacks on judgments of a court of general jurisdiction and those of courts of limited jurisdiction. But most courts do not make such distinction. See L.R.A.1918C.

cancel a guardian's deed purporting to convey said land to defendants. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. **Charles E. McPherrren**, **Charles B. Cochran**, and **Charles P. Abbott**, for plaintiff in error:

The petition for an order of sale of the allotment of plaintiff, filed by his guardian in the county court of Bryan county, was insufficient to confer upon the said court jurisdiction to make the order for the sale of the plaintiff's said allotment.

Fitch v. Miller, 20 Cal. 382; *Smith v. Biscailuz*, 83 Cal. 344, 21 Pac. 15, 23 Pac. 314; *Kertchem v. George*, 78 Cal. 597, 21 Pac. 373; *Re Byrne*, 112 Cal. 176, 44 Pac. 467; *Wilson v. Hastings*, 66 Cal. 243, 5 Pac. 217; *Gregory v. McPherson*, 13 Cal. 577; *Re Billy*, 34 Okla. 120, 124 Pac. 608.

Messrs. **C. C. Hatchett** and **A. H. Ferguson**, for defendants in error:

The petition filed with the county court

notes 6 and 7 in L.R.A.1916E, 320, 321. The order attacked in *COWEN v. HUBBARD* was made by a court of limited jurisdiction, but that fact seems to have been ignored. The decision may therefore be properly classed under the general rule that the judgment of a court of competent jurisdiction cannot be attacked collaterally because of insufficiency of pleadings.

for the sale of said lands stated facts sufficient to give the court jurisdiction.

Sockey v. Winstock, 43 Okla. 758, 144 Pac. 373; *Spade v. Morton*, 28 Okla. 384, 114 Pac. 724; *Greer v. McNeal*, 11 Okla. 519, 69 Pac. 891; *Steele v. Kelley*, 32 Okla. 547, 122 Pac. 934; *Continental Gin Co. v. De Börd*, 34 Okla. 66, 123 Pac. 159; *Weems v. Masterson*, 80 Tex. 45, 15 S. W. 590; *Watts v. Cook*, 24 Kan. 278; *Howbert v. Heyle*, 47 Kan. 58, 27 Pac. 116; *McKeever v. Ball*, 71 Ind. 398; *Worthington v. Dun-kin*, 41 Ind. 515; *Nesbit v. Miller*, 125 Ind. 106, 25 N. E. 148; *Trumble v. Williams*, 18 Neb. 144, 24 N. W. 719; *Sprigg v. Stump*, 7 Sawy. 280, 8 Fed. 207; *United States use of Hine v. Morse*, 218 U. S. 493, 54 L. ed. 1123, 31 Sup. Ct. Rep. 37, 21 Ann. Cas. 782; 10 Enc. Pl. & Pr. 782; *Ward v. Logan County*, 12 Okla. 267, 70 Pac. 378; *Threadgill v. Colecord*, 16 Okla. 447, 85 Pac. 703; *Homer v. McCurtain*, 40 Okla. 406, 138 Pac. 807.

Wilson, C., filed the following opinion:

Plaintiff in error, by his guardian, as plaintiff, sued the defendants in error, as defendants, in the trial court, to set aside and vacate a guardian's sale of certain real estate belonging to him, and to set aside a guardian's deed purporting to convey said land to defendants, and to award the plaintiff judgment for the possession thereof. Several grounds for the relief prayed for were assigned in plaintiff's petition; but the only one relied on in his petition in error, and urged in his brief, is the alleged ground that said deed is absolutely void, for the reason that the guardian's petition for the order of the county court to sell said land did not set out facts sufficient to confer jurisdiction on the court to make the order of sale, and for the further reason that the order of sale made pursuant thereto was absolutely void for want of jurisdiction of the court to make the same. On the trial of the action in the district court, the prayer of plaintiff's petition was denied, and the title of the defendant Charles J. Hubbard forever quieted as against the plaintiff.

The material parts of the petition of plaintiff's former guardian to sell the lands involved in this action, and the one complained of as not being sufficient to confer jurisdiction on the county court to order the sale of land, reads as follows, omitting the description of the lands:

"Your petitioner further states that said Charles Cowen is a minor under the age of fourteen years, and resides with your petitioner, who is his father, and that the said Charles Cowen is a citizen of the Choctaw Nation or Tribe of Indians, of less than

one-half blood, and that there are no restrictions upon the alienation of his property. Your petitioner further states that as such citizen there has been allotted to him as his allotment, of which he is the fee simple owner, the following lands, to wit: [Describing lands.] That Frances Cowen was the mother of said minor, and a citizen by blood of the Choctaw Nation, and the wife of your petitioner, and that she departed this life about the month of February, 1908, intestate, and left surviving her your said petitioner, her husband, and said minor, Charles Cowen, and Myrtle Susie Cowen, the sister of said Charles Cowen, and that she left no other heirs her surviving, within the said degree of relationship. That as a portion of her allotment as such citizen the said Frances Cowen died seised and possessed of the following described lands, to wit: [Describing lands.] That the said Charles Cowen inherited and became the owner of an undivided one-half interest in the tracts of land last above described upon the death of his said mother, Frances Cowen, and that the said minor is not the owner of any other property, real or personal, except the lands above described, and that he is of scholastic age and should be placed in school.

"Your petitioner further states that said Frances Cowen, mother of said Charles Cowen, aforesaid, died of consumption, and that said disease is hereditary in the family, a number of her family having died of said disease, and that the said Charles Cowen is of a feeble structure and liable to become affected with said disease if kept in the climate where he now lives, and that it is necessary for the health and protection of said minor that he be removed to a more healthy climate, where he will be free from the natural causes which produce disease germs, and that his said land above described can be sold for a reasonable price and will bring their value on the market, and that said land should be sold and the proceeds invested in other real estate in a more healthy climate for the benefit of said minor, or in other revenue-bearing property for his benefit or his maintenance and education, and that a necessity now exists for the sale of said lands for said purposes. Your petitioner therefore prays the order of this court," etc.

Upon the hearing of the petition the county court of Bryan county ordered a sale of the land by the guardian, and it was afterward sold to one of the defendants pursuant to said order or license. Was the petition sufficient to confer jurisdiction on the court to make such order of sale, which would be good as against a collateral at-

tack; this being a collateral attack on the validity of the order?

Section 5498 of Snyder's Compiled Laws 1909 (§ 6553, Rev. Laws 1910) provides: "When the income of an estate under guardianship is not sufficient to maintain the ward and his family, or to maintain and educate the ward when a minor, his guardian may sell his real or personal estate for that purpose, upon obtaining an order therefor."

Section 5499 (§ 6554, Rev. Laws 1910) provides: "When it appears to the satisfaction of the court, upon the petition of the guardian, that for the benefit of his ward his real estate, or some part thereof, should be sold, and the proceeds thereof put out at interest, or invested in some productive stock, or in the improvement or security of any other real estate of the ward, his guardian may sell the same for such purpose, upon obtaining an offer therefor."

Section 5502 (§ 6557, Rev. Laws 1910) provides: "To obtain an order for such sale, the guardian must present to the county court of the county in which he was appointed guardian, a verified petition therefor, setting forth the condition of the estate of his ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale."

It is contended by the plaintiff that a substantial compliance with the provisions of the last-quoted section of the statute was necessary to confer jurisdiction on the court to order the sale of the real estate involved in this action, and that the guardian's petition for such sale did not substantially comply with the provisions of said section, and that consequently the court was without jurisdiction to order the sale, and the sale was void even as against a collateral attack thereon. In *Sockey v. Winstock*, 43 Okla. 758, 144 Pac. 372, it was held that "the petition of a guardian to sell the real estate belonging to his ward must state the condition of the estate and facts tending to show the expediency or necessity of such sale, in order to give the court jurisdiction to order the sale."

And under that rule it is very doubtful if the allegations of the petition referred to were sufficient to warrant the sale when attacked directly by some proceeding provided by the statute for the express purpose of defeating it; but the action appealed from was a collateral attack on a judgment of a court having jurisdiction of the person and to order the sale of real estate in guardianship matters, and the question for our decision is whether the proceedings were so utterly void as to be subject to an attack L.R.A.1918C.

of this kind. We think not. In 10 Enc. Pl. & Pr. 782, is the following statement of the law on the subject: "The authority to grant a license to sell real estate carries with it the implied power to determine the necessity for such sale, and the sufficiency of the pleadings presented to the court for that purpose. Therefore, as a general rule, the authority of a guardian's sale cannot be attacked in a collateral proceeding on the ground that the petition for the order was insufficient. The power to hear and determine is jurisdictional. If the court thus having jurisdiction errs in holding an insufficient petition to be good, it is mere error, reviewable on appeal, but not a defect of jurisdiction."

To the same effect see *United States use of Hine v. Morse*, 218 U. S. 493, 54 L. ed. 1123, 31 Sup. Ct. Rep. 37, 21 Ann. Cas. 782; *Equitable Invest. Trust Co. v. Wyandotte County*, 86 Kan. 708, 121 Pac. 1097; *Wyandotte County v. Equitable Invest. Trust Co.* 80 Kan. 492, 103 Pac. 996.

In *Baldwin v. Foster*, 157 Cal. 643, 108 Pac. 714, the supreme court of California states the rule as follows: "On collateral attack, a judgment will be set aside, generally speaking, for but one of three reasons: Lack of jurisdiction of the person; lack of jurisdiction of the subject-matter; or an absolute lack of jurisdiction to render such a judgment as the one given."

In *Reid v. Morton*, 119 Ill. 118, 6 N. E. 414, an Illinois case, it is held that "the rule that, where a court has jurisdiction of the subject-matter and of the parties to the litigation, its judgments and decrees will be held valid when questioned collaterally, is held . . . to extend to the special and extraordinary proceedings of a guardian's sale."

In *Beachy v. Shomber*, 73 Kan. 62, 84 Pac. 547, the identical question under discussion was decided by the supreme court of Kansas in the following language to be found in the syllabus: "A guardian's deed will not be held void upon a collateral attack merely because the petition of the guardian for leave to sell his ward's real estate does not affirmatively show the existence of the conditions which under the statute authorize such sale."

A statute of the state in force at the time the petition complained of was filed and passed on by the county court of Bryan county conferred upon that court the jurisdiction in matters of the estates of minors, and the section of the statute quoted, supra, conferred upon that court the jurisdiction to order a guardian of a minor to sell his ward's real estate under certain conditions and for certain designated purposes. The petition complained of was filed in that

court, alleging the fact that the ward had certain real estate in the county, the fact that he was of scholastic age, that he had no other property, that he was predisposed to consumption, and that it was necessary for the preservation of his health that he be removed to a more healthful climate, and that it was necessary to sell the lands in controversy for his benefit and for his maintenance and education; and while the petition was very defective, and probably demurrable, at the same time it was sufficient to invoke the jurisdiction of the court to determine whether, on consideration of the

facts alleged, the relief prayed for was within or beyond its jurisdiction, and any mistake the court may have made in its conclusion could have only been error, reviewable on appeal, and could not and did not render the judgment void.

Finding no error in the judgment appealed from, we recommend that it be affirmed.

Per Curiam:

Adopted in whole.

Petition for rehearing denied.

RHODE ISLAND SUPREME COURT.

STATE MUTUAL LIFE ASSURANCE COMPANY

v.

CORA I. BESSETT et al.

JEREMIAH E. O'CONNELL et al., Admrs., etc., of William H. Crone, Deceased, Apts.

(— R. I. —, 102 Atl. 727.)

Insurance — change of beneficiary — execution of form.

1. The execution by one having a right to change the beneficiary in a life insurance policy, of a blank form for nomination of beneficiary, and its delivery to the general agent of the insurer, to be filled up and forwarded, will effect the change if the blanks are filled before his death occurs, although the form does not reach the insurer until after that event.

For other cases, see *Insurance*, IV. b, in *Dig.* 1-52 N. S.

Same — valuer of objection to change.

2. An insurance company waives any right it would have had to object to the sufficiency of an attempted change of beneficiary because of its failure to note the change before the death of the insured, by making no attempt to recall its act, and bringing the new beneficiary into court to protect his rights.

For other cases, see *Insurance*, IV. b, in *Dig.* 1-52 N. S.

(January 18, 1918.)

APPEAL by the respondent administrators from a decree of the Superior Court for Providence and Bristol Counties in favor of respondent Bessett upon a bill of interpleader filed for the purpose of determining to whom should be paid the proceeds of

a policy of insurance upon the life of William H. Crone, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. **Phillip S. Knauer, John F. Collins, and Walter L. Ladd**, for appellants:

What took place in Rhode Island, either a few hours before, or a few hours after, the death of the insured (William H. Crone), did not effect a change of beneficiary from his estate to Cora I. Bessett.

Tyler v. Treasurer & Receiver General, 226 Mass. 306, L.R.A.1917D, 633, 115 N. E. 300; French v. Provident Sav. Life Assur. Soc. 205 Mass. 424, 91 N. E. 577; Langdeau v. John Hancock Mut. L. Ins. Co. 194 Mass. 56, 18 L.R.A.(N.S.) 1190, 80 N. E. 452; Abbott v. Supreme Colony, U. O. P. F. 190 Mass. 67, 76 N. E. 234; O'Brien v. Continental Casualty Co. 184 Mass. 584, 69 N. E. 308; Clark v. Supreme Council, R. A. 176 Mass. 468, 57 N. E. 787; McCarthy v. Supreme Lodge, N. E. O. P. 153 Mass. 314, 11 L.R.A. 144, 25 Am. St. Rep. 637, 26 N. E. 866; Clark, Contr. pp. 665, 667.

A change of beneficiary must be accomplished in the manner called for in the policy, which could not be brought about at Providence, the branch office.

Freund v. Freund, 218 Ill. 189, 109 Am. St. Rep. 283, 75 N. E. 925; Kemper v. Modern Woodmen, 70 Kan. 119, 78 Pac. 452; Muller v. Penn Mut. L. Ins. Co. — Colo. —, 161 Pac. 148; German-American Trust Co. v. Ten Winkel, — Colo. —, 160 Pac. 188; Christman v. Christman, 163 Wis. 433, 157 N. W. 1099; New York L. Ins. Co. v. Murtagh, 137 La. 760, 69 So. 165; Filley v. Illinois L. Ins. Co. 93 Kan. 193, L.R.A.1915D, 134, 144 Pac. 257; Rumsey v. New York L. Ins. Co. 59 Colo. 71, 147 Pac.

later case, Brown v. Modern Woodmen, L.R.A.1916E, 588.

For other questions in relation to change of beneficiary, see the L.R.A. Indexes under the title "Insurance," subtitle, "Change of beneficiary."

Note.—The effect of the death of the assured before a contemplated change of beneficiary is complete is treated in the notes to *Ancient Order of Gleaners v. Bury*, 34 L.R.A.(N.S.) 277, and *Modern Woodmen v. Headle*, L.R.A.1915A, 580; and see L.R.A.1918C.

337; *Johnson v. New York L. Ins. Co.* 56 Colo. 178, L.R.A.1916A, 868, 138 Pac. 414; *Farra v. Braman*, 171 Ind. 529, 86 N. E. 843; *Holland v. Taylor*, 111 Ind. 124, 12 N. E. 116; *Arnold v. Empire Mut. Annuity & L. Ins. Co.* 3 Ga. App. 685, 60 S. E. 470; *Isgrigg v. Schooley*, 125 Ind. 94, 25 N. E. 151; *O'Donnell v. Metropolitan L. Ins. Co.* — Del. Ch. —, 95 Atl. 289; *Stephenson v. Stephenson*, 64 Iowa, 534, 21 N. W. 19; *Washington L. Ins. Co. v. Berwald*, 97 Tex. 111, 76 S. W. 442, 1 Ann. Cas. 682; *Thomas v. Thomas*, 131 N. Y. 205, 27 Am. St. Rep. 582, 30 N. E. 61; *De Silva v. Supreme Council*, P. U. 109 Cal. 373, 42 Pac. 32; *Charch v. Charch*, 57 Ohio St. 561, 49 N. E. 408; *McLaughlin v. McLaughlin*, 104 Cal. 171, 43 Am. St. Rep. 83, 37 Pac. 865; *Wendt v. Iowa Legion of Honor*, 72 Iowa, 682, 34 N. W. 470; *Union Mut. Asso. v. Montgomery*, 70 Mich. 587, 14 Am. St. Rep. 519, 38 N. W. 588; *Deal v. Deal*, 87 S. C. 395, 69 S. E. 886, Ann. Cas. 1912B, 1142; *Begley v. Miller*, 137 Ill. App. 278; *Sheppard v. Crowley*, 61 Fla. 735, 55 So. 841; *Metropolitan Ins. Co. v. Clanton*, 76 N. J. Eq. 4, 73 Atl. 1052; *Modern Woodmen v. Headle*, 88 Vt. 37, L.R.A.1915A, 580, 90 Atl. 893; *Finnell v. Franklin*, 55 Colo. 156, 134 Pac. 122; *Faubel v. Eckhart*, 151 Wis. 155, 138 N. W. 615; *Ancient Order of Gleaners v. Bury*, 165 Mich. 1, 34 L.R.A.(N.S.) 277, 130 N. W. 191; *Londry v. Sovereign Camp*, W. W. 140 Mo. App. 45, 124 S. W. 530; *Gray v. Sovereign Camp*, W. W. 47 Tex. Civ. App. 609, 106 S. W. 176; *Knights of Maccabees v. Sackett*, 34 Mont. 357, 115 Am. St. Rep. 532, 86 Pac. 423; *Indiana Nat. L. Ins. Co. v. McGinnis*, 180 Ind. 9, 45 L.R.A.(N.S.) 192, 101 N. E. 289.

The parties are left as the death of insured finds them; their rights are fixed by that event; and the company cannot waive the rights of others.

Weil v. Marquis, 256 Pa. 608, 101 Atl. 70; *Freund v. Freund*, 218 Ill. 189, 109 Am. St. Rep. 283, 75 N. E. 925; *Tyler v. Treasurer & Receiver General*, 226 Mass. 306, L.R.A.1917D, 633, 115 N. E. 300; *Muller v. Penn Mut. L. Ins. Co.* — Colo. —, 161 Pac. 148; *Filley v. Illinois L. Ins. Co.* 93 Kan. 193, L.R.A.1915D, 134, 144 Pac. 257; *Hellenberg v. District No. 1*, I. O. B. B. 94 N. Y. 580; *Foster v. Gile*, 50 Wis. 603, 7 N. W. 555, 8 N. W. 217; *Kentucky Masonic Mut. L. Ins. Co. v. Miller*, 13 Bush, 489; *Langdeau v. John Hancock Mut. L. Ins. Co.* 194 Mass. 56, 18 L.R.A.(N.S.) 1190, 80 N. E. 452; *Stephenson v. Stephenson*, 64 Iowa, 534, 21 N. W. 19; *Ireland v. Ireland*, 42 Hun. 212; *De Silva v. Supreme Council*, P. U. 109 Cal. 373, 42 Pac. 32; *McLaughlin v. McLaughlin*, 104 Cal. 171, 43 Am. St. Rep. 83, 37 Pac. 865; *Wendt v. Iowa Legion* L.R.A.1918C.

of Honor, 72 Iowa, 682, 34 N. W. 470; *Union Mut. Asso. v. Montgomery*, 70 Mich. 587, 14 Am. St. Rep. 519, 34 N. W. 588; *Wilkes v. Hicks*, 124 Ark. 192, 186 S. W. 830; *Modern Woodmen v. Headle*, 88 Vt. 37, L.R.A.1915A, 580, 90 Atl. 893; *Hodalski v. Hodalski*, 181 Ill. App. 158; *Londry v. Sovereign Camp*, W. W. 140 Mo. 45, 24 S. W. 530; *Finnell v. Franklin*, 55 Colo. 156, 134 Pac. 122; *Rollins v. McHatton*, 16 Colo. 203, 25 Am. St. Rep. 260, 27 Pac. 254; *Ancient Order of Gleaners v. Bury*, 165 Mich. 1, 34 L.R.A.(N.S.) 277, 130 N. W. 191; *Knights of Maccabees v. Sackett*, 34 Mont. 357, 115 Am. St. Rep. 532, 86 Pac. 423; *Sheppard v. Crowley*, 61 Fla. 735, 55 So. 841.

The fact that the insurance company has interpleaded the respondents does not give Miss Bessett any rights superior to those of the administrators.

Freund v. Freund, 218 Ill. 207, 109 Am. St. Rep. 283, 75 N. E. 925; *Johnson v. New York L. Ins. Co.* 56 Colo. 178, L.R.A.1916A, 868, 138 Pac. 414; *O'Donnell v. Metropolitan L. Ins. Co.* — Del. Ch. —, 95 Atl. 289; *Ireland v. Ireland*, 42 Hun. 212; *Wendt v. Iowa Legion of Honor*, 72 Iowa, 682, 34 N. W. 470; *Sheppard v. Crowley*, 61 Fla. 735, 55 So. 841; *Sullivan v. Maroney*, 76 N. J. Eq. 104, 73 Atl. 842; *Wilkes v. Hicks*, 124 Ark. 192, 186 S. W. 830; *Modern Woodmen v. Headle*, 88 Vt. 37, L.R.A.1915A, 580, 90 Atl. 893; *Hodalski v. Hodalski*, 181 Ill. App. 158; *Hughes v. Modern Woodmen*, 124 Minn. 458, 145 N. W. 387; *Finnell v. Franklin*, 55 Colo. 156, 134 Pac. 122; *Rollins v. McHatton*, 16 Colo. 203, 25 Am. St. Rep. 260, 27 Pac. 254; *Faubel v. Eckhart*, 151 Wis. 155, 138 N. W. 615; *Ancient Order of Gleaners v. Bury*, 165 Mich. 1, 34 L.R.A.(N.S.) 277, 130 N. W. 191; *Londry v. Sovereign Camp*, W. W. 140 Mo. App. 45, 124 S. W. 530; *Keener v. Grand Lodge*, A. O. U. W. 38 Mo. App. 543; *Ballou v. Gile*, 50 Wis. 614, 7 N. W. 561; *Sofge v. Supreme Lodge*, K. H. 98 Tenn. 446, 39 S. W. 853; *Grand Lodge*, A. O. U. W. v. *Ehlman*, 246 Ill. 555, 92 N. E. 962; *Supreme Council*, R. A. v. *McKnight*, 236 Ill. 349, 87 N. E. 299; *Knights of Maccabees v. Sackett*, 34 Mont. 357, 115 Am. St. Rep. 532, 86 Pac. 423; *French v. Provident Sav. Life Assur. Soc.* 205 Mass. 424, 91 N. E. 577; *Abbott v. Supreme Colony*, U. O. P. F. 190 Mass. 67, 76 N. E. 234; *Brierly v. Equitable Aid Union*, 170 Mass. 218, 64 Am. St. Rep. 297, 48 N. E. 1090; *National L. Ins. Co. v. Pingrey*, 141 Mass. 411, 6 N. E. 93.

Mr. William H. McSoley, for respondent Cora I. Bessett:

The assured has done everything that was

necessary on his part to be done to change the beneficiary under the policy.

John Hancock Mut. L. Ins. Co. v. White, 20 R. I. 457, 40 Atl. 5; John Hancock Mut. L. Ins. Co. v. Bedford, 36 R. I. 116, 89 Atl. 154; Niblack, Ins. § 223; National Asso. v. Kirgin, 28 Mo. App. 80; 4 Cooley, Briefs on Ins. p. 3767; Supreme Lodge, O. G. C. v. Terrell, 99 Fed. 330; Berkeley v. Harper, 3 App. D. C. 308; Nally v. Nally, 74 Ga. 669, 58 Am. Rep. 458; Hirschl v. Clark, 81 Iowa, 200, 9 L.R.A. 841, 47 N. W. 78; Schmidt v. Iowa K. P. Ins. Asso. 82 Iowa, 304, 11 L.R.A. 205, 47 N. W. 1032; Wood v. Brotherhood of American Yeomen, 148 Iowa, 400, 126 N. W. 949; Heydorf v. Conrack, 7 Kan. App. 202, 52 Pac. 700; Manning v. Ancient Order, U. W. 86 Ky. 136, 9 Am. St. Rep. 270, 5 S. W. 385; Schoenau v. Grand Lodge, A. O. U. W. 85 Minn. 349, 88 N. W. 999; St. Louis Police Relief Asso. v. Strode, 103 Mo. App. 694, 77 S. W. 1001; Independent Foresters v. Keliher, 36 Or. 501, 78 Am. St. Rep. 785, 59 Pac. 324, 1109, 60 Pac. 563; Donnelly v. Burnham, 86 App. Div. 226, 83 N. Y. Supp. 659, affirmed without opinion in 177 N. Y. 546, 69 N. E. 1122; Tolson v. National Provident Union, 60 Misc. 460, 115 N. Y. Supp. 534, affirmed in 130 App. Div. 884, 114 N. Y. Supp. 1149; Bernheim v. Martin, 45 Wash. 120, 88 Pac. 106; McGowan v. Supreme Court, 1. O. F. 104 Wis. 173, 80 N. W. 603; Waldum v. Homstad, 119 Wis. 312, 96 N. W. 806; Supreme Conclave, R. A. v. Cappella, 41 Fed. 1; Walsh v. Sovereign Camp, W. W. 148 Mo. App. 179, 127 S. W. 645.

The coadministrators of the estate of William H. Crone cannot urge and insist that the change of beneficiary to Cora I. Bessett did not take effect because the State Mutual Life Assurance Company did not consent to the change of the beneficiary by indorsing its consent upon the policy in the lifetime of Crone.

John Hancock Mut. L. Ins. Co. v. White, 20 R. I. 457, 40 Atl. 5; John Hancock Mut. L. Ins. Co. v. Bedford, 36 R. I. 116, 89 Atl. 154; Connecticut Mut. L. Ins. Co. v. Tucker, 27 R. I. 171, 61 Atl. 142; Mutual L. Ins. Co. v. Lowther, 22 Colo. App. 622, 126 Pac. 882; Hogue v. Minnesota Packing & Provision Co. 59 Minn. 39, 60 N. W. 812; Mechanics' Nat. Bank v. Comins, 72 N. H. 12, 101 Am. St. Rep. 650, 55 Atl. 191; Howe v. Fidelity Trust Co. 28 Ky. L. Rep. 485, 89 S. W. 521; Gaston v. Bailey, 14 Ind. App. 581, 43 N. E. 254; Prudential Ins. Co. v. Young, 14 Ind. App. 560, 56 Am. St. Rep. 319, 43 N. E. 253; Travelers' Ins. Co. v. Grant, 54 N. J. Eq. 208, 33 Atl. 1060.

The beneficiary was changed to Cora I. L.R.A.1918C.

Bessett at the time of Crone's death, and she was entitled to the fund in question.

4 Cooley, Briefs on Ins. p. 3767; John Hancock Mut. L. Ins. Co. v. White, 20 R. I. 457, 40 Atl. 5; John Hancock Mut. L. Ins. Co. v. Bedford, 36 R. I. 116, 89 Atl. 154; Mutual L. Ins. Co. v. Lowther, 22 Colo. App. 622, 126 Pac. 882; Niblack, Ins. § 223; National Asso. v. Kirgin, 28 Mo. App. 80; Hirschl v. Clark, 81 Iowa, 200, 9 L.R.A. 841, 47 N. W. 78.

Messrs. Waterman & Greenlaw for the Assurance Company.

Baker, J., delivered the opinion of the court:

This is an appeal by Jeremiah E. O'Connell and Robert Grieve, as administrators with will annexed on the estate of William H. Crone, late of Providence, in this state, deceased, from a decree of the superior court entered July 7, 1917, in the above-entitled suit.

The complainant, which is a corporation having its home office in Worcester, in the commonwealth of Massachusetts, issued a five-year term policy for \$10,000 on the life of said William H. Crone, dated September 22, 1913, payable to said Cora I. Bessett as the "intended wife" of the insured. The policy authorized the insured to exchange it "for a life or endowment policy of like amount," and by it also the right was reserved and secured to "change and successively change the beneficiary" thereunder.

On April 22, 1916, the insured made application to the complainant for the conversion of the policy above referred to to an ordinary life policy, and in place of Miss Bessett nominated his estate as beneficiary. The application for the change of policy and the nomination of the new beneficiary were left at the office of George H. Collett, the general agent in this state of the complainant, and were forwarded the same day to the home office in Worcester by Miss Christine Ludwig, cashier in the Providence office. The original policy, which appears to have been in the possession of Miss Bessett, at this time was delivered to Miss Ludwig on Monday, April 24th, and the same day sent to the home office, and under date of April 25th indorsement was made thereon by the company that the insured nominates his estate as beneficiary. Under date of April 28th the home office sent to Mr. Collett the life policy on Mr. Crone's life for \$10,000, payable to the insured's "executors, administrators, or assigns." This policy contained the same privilege that was in the term policy as to the change of beneficiary, and was dated March 22, 1916.

There was testimony that on the morning of May 2, 1916, Mr. Crone signed one of

the company's printed forms for the nomination of a beneficiary, on which at that time in the space left for the name of the beneficiary was written in pencil, "C. S. Bess., Fian.," and that after signing he gave it to Mr. Collett to be filled out, and then to be sent to the home office with the new policy in order to have Miss Bessett's name as beneficiary indorsed thereon by the company. There was testimony also that in place of the penciled abbreviations on the nomination paper the words "Fiancée, Cora I. Bessett," were typewritten, and the paper completed before 9 o'clock of the morning of May 3d. On that day, at about thirty minutes after 9 in the forenoon, Mr. Crone died suddenly in his law office. Later in the day the policy of insurance and the new designation of Miss Bessett as beneficiary were sent by mail to the home office, and were there received early on May 4th, and under that date the insuring company indorsed on the policy in the usual form that the insured, under date of May 2d. had nominated "his fiancée, Cora I. Bessett, as beneficiary;" the officers of the company in Worcester not then having heard of the insured's death.

The company raised no question of its liability under the policy, but, inasmuch as Miss Bessett, the administrators with the will annexed, and the next of kin of the deceased, were making claim to the fund, it filed in the superior court its bill of interpleader, making all of the claimants respondents. By decree entered January 15, 1917, the complainant was ordered to pay into the registry of the superior court the sum of \$9,441.30 as the amount, less costs of suit and counsel fees, due under the policy, the decree also providing that upon so doing it would be relieved and discharged from all liabilities to the said respondents for or on account of said fund. The complainant, in compliance with the order, paid the money into the registry of the superior court on January 19, 1917. The respondents (excepting one of the next of kin) have interpleaded, and have been heard, and a final decree was entered which directed the payment of the proceeds of the policy now in the hands of the clerk of the superior court to Cora I. Bessett. From this decree the said administrators are the only appellants. The administrators make two objections to the decree: the first, that as a matter of fact Crone did not "authorize or issue" the nomination of Cora I. Bessett as beneficiary; second, that if he did designate her as beneficiary, he did not accomplish the change in the manner called for in the policy.

The court below in its rescript finds that, "after the life policy had been issued and L.R.A.1918C.

returned to the local agent, Crone signed in blank a nomination of the defendant Cora I. Bessett as beneficiary," and that this "nomination of . . . beneficiary was completed before the death of said Crone so far as the filling out of said nomination paper," and in effect says that it was in the possession of the local agent for the purpose of being "returned to the home office for indorsement upon the policy." We think that the court could properly so find and conclude from the evidence, and therefore we accept as a fact that Crone did authorize and issue the nomination of Miss Bessett as beneficiary.

This leaves for consideration the question of whether a change of beneficiary was accomplished by what was done. The provision of the policy relating to a change of beneficiary, so far as it is important in the present case, is as follows: "If the right to do so has been reserved in the application for this policy, the insured, if of full age, at any time during the continuance of this policy, may change and successively change the beneficiary hereunder, whether original or substituted, without his or her assent.

Every change or designation must be made by written notice to the company at its home office, accompanied by the policy, and will take effect only when indorsed on this policy by the company."

Mr. Crone in his application reserved the right to change the beneficiary. The general rule in such cases requires the insured, in changing the beneficiary, to do it in the manner pointed out by the policy, the charter, or by-laws of the corporation, or by the statute applicable to the case, if such there be. Any material deviation from such requirements will defeat the attempted change. The cases on this point are so numerous as to render their citation unnecessary.

But there are exceptions to the rule above stated. Cooley, on page 3769 of vol. 4 of his *Briefs on Insurance*, says: "If, however, the insured has done substantially all that is required of him to effect a change of beneficiary, and all that remains to be done are the ministerial acts of the officers of the association, the change will take effect though the formal details were not completed before the death of the insured."

See also Joyce on *Insurance*, vol. 2, § 751, and 14 R. C. L. *Insurance*, § 556.

In *Supreme Conclave, R. A. v. Cappella* (C. C.) 41 Fed. 1, where the subject is carefully considered, these exceptions are grouped in three classes. An examination of the cases of this character shows that in general they are proceedings in equity, and that the decisions are based on equitable grounds. Cooley, in support of the proposi-

tion quoted above, cited, among several other cases, *John Hancock Mut. L. Ins. Co. v. White*, 20 R. I. 457, 40 Atl. 5. In that case this court held that the insured had done everything necessary to change the beneficiary, and the fact that the change was not completed in its details was due to the neglect of the company.

In the more recent case of *John Hancock Mut. L. Ins. Co. v. Bedford*, 36 R. I. 116, 89 Atl. 154, the provision as to change of beneficiary was substantially the same as in the present case. The insured duly filed at the home office a written request upon a blank of the company for a change of beneficiary, but did not present the policy to have the change indorsed thereon, for the reason that the original beneficiary had it in her possession and refused to give it to the insured on his request. The court held that, in consideration of the conduct of the original beneficiary in "unlawfully refusing to deliver up the policy," and of the facts "that the insured had done all that he could do to effect the change of beneficiary," and that the insurer had "disregarded or waived the provision of the policy requiring indorsement of any change of beneficiary," a change of beneficiary had been effected.

This court, therefore, has unmistakably adopted the view that an insured may change a beneficiary under an insurance policy (having reserved the right to do so) by doing all that is required of him to effect the change, or all that is possible for him to do, although certain formal or ministerial acts of the officers of the insurer are not performed before the death of the insured. The question in a particular case, therefore, will ordinarily be as to whether the acts required, but unperformed, were essential parts of the contract or were ministerial and formal details. This distinction will be found to be stated or implied in many of the decided cases, although, as might be expected, courts may have differed as to what acts are ministerial and what essential. This question must be determined by the terms and conditions of the contract contained in the policy and any statute affecting it. If the right to change the beneficiary on the part of the insured be absolute and without condition, and he does all that is required of him by the contract to effect the change, the mere indorsement or noting of the change has been held by many courts to be a formal or ministerial act.

This view was considered at length and upheld in *Mutual L. Ins. Co. v. Lowther* (1912) 22 Colo. App. 622, 126 Pac. 882. The policy in that case contained a provision for a change of beneficiary by filing a written notice thereof at the home office of the company, together with the policy, L.R.A.1918C.

such change to "take effect upon the indorsement of the same on the policy by the company." The insured died February 22d. Two days before his death he had mailed the policy and his written notice of a change of beneficiary to the home office of the company, where it was received February 24th, and on February 27th the company indorsed the change on the policy. The court in its opinion considers the rights of the insured as to changing a beneficiary and the effect of the death of the insured before indorsement of the change on the policy. Referring to the written notice of change and the policy sent to the home office, it says:

"Had they reached that office before his death the company was legally bound, under the contract, to file the same and indorse on the policy the change of beneficiaries as designated by him. It had no discretion to exercise in the premises. The company could not in the slightest degree question the revocation of the former beneficiary by the insured, nor the selection made by him of the substituted beneficiaries. By the terms of the policy the company had conferred on the insured an unconditional right to, at any time or place, revoke the appointment of the existing beneficiary and substitute another in her place. . . .

"Had the company, when making this contract, reserved any right to itself to control, or finally pass upon, the actions of the insured in changing beneficiaries, we would be confronted with a different question. . . .

"Death intervening between the deposit of the notice in the mail and its full delivery at the home office may, and we think should, be regarded as one of the contingencies making it impossible to complete the change after all had been done that could be done by the insured, and that in such case . . . equity will treat the substitution as complete. . . .

"It appears to the court as illogical to hold that, where the company was bound to give full force and credence to the change, the time of indicating its willingness to do what it was obliged to do, willingly or unwillingly, is of controlling importance. . . .

"The receipt of the notice and policy by the company two days after insured's death, of which it had no knowledge, did not relieve it of the ministerial duty imposed by the terms of the contract of filing and indorsing the same. There is in this case no question of waiver involved, as the company had no discretion in the premises."

These citations are from 22 Colo. App. at pages 629, 630, and 631. While this case does not appear to have been taken to the

supreme court of the state, other decisions of that court recognize the exception referred to in the quotation hereinbefore cited from Cooley. See *Rollins v. McHatton*, 16 Colo. 203, 207, 25 Am. St. Rep. 260, 27 Pac. 254; *Johnson v. New York L. Ins. Co.* 56 Colo. 184, L.R.A.1916A, 868, 138 Pac. 414. Among many other cases in which the insured did all that was required of him, or all possible for him to do, and a similar conclusion was reached, are *McGowan v. Supreme Court*, 1. O. F. 104 Wis. 173, 80 N. W. 603; *Waldum v. Homstad*, 119 Wis. 312, 96 N. W. 806; *Wandell v. Mystic Tool-ers*, 130 Iowa, 639, 105 N. W. 448; *National Asso. v. Kirgin*, 28 Mo. App. 80; *Walsh v. Sovereign Camp*, W. W. 148 Mo. App. 179, 127 S. W. 645; *Grand Lodge, A. O. U. W. v. McFadden*, 213 Mo. 269, 111 S. W. 1172; *Marsh v. Supreme Council*, A. L. H. 149 Mass. 512, 4 L.R.A. 382, 21 N. E. 1070; *Luhrs v. Luhrs*, 123 N. Y. 367, 9 L.R.A. 534, 20 Am. St. Rep. 754, 25 N. E. 388; *Hirschl v. Clark*, 81 Iowa, 200, 9 L.R.A. 841, 47 N. W. 78; *Bernheim v. Martin*, 45 Wash. 120, 88 Pac. 106; *Berkeley v. Harper*, 3 App. D. C. 308; *Supreme Conclave, R. A. v. Cappella (C. C.)* 41 Fed. 1.

But when the insured has not an unconditional right to change the beneficiary, and the approval or assent of the insurer is, by the terms of the contract, essential to such change, inasmuch as the giving of consent involves the exercise of judgment, it has been held that such consent is not a formal or ministerial act, and accordingly, although the insured may in such case do all required of him, but dies before the insurer's consent is given, it has been held that in such case the change of beneficiary is not effected.

Freund v. Freund, 218 Ill. 189, 109 Am. St. Rep. 283, 75 N. E. 925, is, no doubt, a leading case of the latter kind. The facts relative to the attempt to change the beneficiary, the subsequent death of the insured, and the forwarding of the papers thereafter, are practically the same as in the present case. The company did not, however, indorse the change on the policy. The provision in the policy as to a change in the beneficiary was substantially like that in the policy in this case. In that case the insurer was the New York Life Insurance Company of New York. The statute of New York in force when the policy was issued, and which was held to be part of the contract, provided for a change of beneficiary "at any time with the consent of such corporation." The court's decision that a change of beneficiary did not take effect was based principally on the ground that "the proof in this case shows clearly and without dispute that the company never did

give its consent to the change of the beneficiary." It was also in effect held that the provision that the change of beneficiary should "not take effect until indorsed on this policy" was a material part of the contract in providing how "evidence of the company's consent to the change" was to be secured. *O'Donnell v. Metropolitan L. Ins. Co.* (1915) — Del. Ch. —, 95 Atl. 289; *Sheppard v. Crowley*, 61 Fla. 735, 55 So. 841; *Metropolitan L. Ins. Co. v. Clanton*, 76 N. J. Eq. 4, 73 Atl. 1052, and *New York L. Ins. Co. v. Murtagh*, 137 La. 760, 69 So. 165, are cases of a similar nature in most of which the decision in *Freund v. Freund*, supra, is cited with approval.

In *Modern Woodmen v. Headle*, 88 Vt. 37, L.R.A.1915A, 580, 90 Atl. 893, it was provided that no change in beneficiary became effective until "during the lifetime of the member" the old certificate was given up and a new one issued. In that case no change was effected because the member died before the old certificate reached the home office, although after his death, but without knowledge of it, a new certificate was issued. In *Hughes v. Modern Woodmen*, 124 Minn. 458, 145 N. W. 387, by the contract the change was required to be made by the issuance of a new certificate in "the lifetime of the member." The other cases cited on the administrators' brief, so far as they are pertinent, for the most part show that the change was not effected because in some particular the insured was held to have failed to do all contractually incumbent on him in order to effect the change. We think no useful purpose would be served by discussing them in detail. And it does not seem necessary to consider separately the cases cited which hold that waiver by the insurer after the death of the insured cannot affect the vested rights of a beneficiary: for, however it may be in other cases, in a case where the insured has freedom of choice of beneficiary, makes his choice, and does everything required of him to render it effective, and there remains only the formal or ministerial act of noting the change, if he die before such notation be made, the question of waiver as to the performance of this act is not important, because equity regards the change as already effected by the act of the insured.

If, however, the right to object to the non-performance of a ministerial act does remain in the insurer, we think no one else can insist upon it, and that the company could waive it. In the present case the company, by making no attempt to recall its indorsement, and by bringing *Miss Bessett* into court by its bill of interpleader, can be held to have waived its right to object, if any it had. The form of the indorse-

ment used by the company contains no language implying its consent to be necessary, and in fact it does not profess to give consent. It simply notes the change made by the insured. On the original policy the indorsement is: "Worcester, Mass., April 25, 1916. The insured under date of April 22, 1916, nominates his estate as beneficiary under this policy. . . ."

The indorsement of the nomination of Miss Bessett as beneficiary under the new policy is in the same form. In each instance the indorsement was signed by the vice president of the company. Mr. Crone,

in making this latter change, did the same things he had done ten days before to change the beneficiary under the original policy. In both cases he did all that was required of him to make the change.

For reasons already indicated, we are of the opinion that the decision of the superior court and the final decree entered in conformity therewith were correct.

The appeal, therefore, is denied and dismissed, said decree is affirmed, and the cause is remanded to the Superior Court for further proceedings.

RHODE ISLAND SUPREME COURT.

J. SAMUELS & BROTHER, Incorporated,
v.
SUPERIOR COURT.

(— R. I. —, 102 Atl. 804.)

New trial — joint tort-feasors — separate motions.

Joint tort-feasors against whom a single verdict is rendered, but who conducted their defenses independently, may make separate motions for a new trial.

For other cases, see New Trial, V. b, in Dig. 1-52 N. S.

(February 8, 1918.)

PETITION for a writ of certiorari to review the record of the Superior Court in an action for false imprisonment brought against petitioner and another as joint tort-feasors. Record quashed in part.

The facts are stated in the opinion.

Messrs. Mumford, Huddy, & Emerson for petitioner.

Mr. John J. A. Cooney for Nazaly Aredisian.

Mr. George R. MacLeod, for respondent:

Under the statute the parties in this case were by verdict indissolubly bound together for the purpose of making this motion.

Moore v. Stillman, 28 R. I. 483, 68 Atl. 417; Bassett v. Loewenstein, 22 R. I. 468, 48 Atl. 589, 23 R. I. 25, 49 Atl. 41; Gen-carelle v. New York, N. H. & H. R. Co. 21 R. I. 217; Curry v. Stokes, 12 R. I. 52; Masterson v. Herndon (Masterson v. Howard) 10 Wall. 416, 19 L. ed. 953; Todd v. Daniel, 16 Pet. 523, 10 L. ed. 1055; Sperry v. Dickinson, 82 Ind. 132; Hunderlock v. Dundee Mortg. & Trust Invest. Co. 88 Ind.

141; Clark v. Austin, 38 Minn. 487, 38 N. W. 615; 14 Enc. Pl. & Pr. 873; 2 Tidd, Pr. p. 911; Berrington Case, 3 Salk. 362, 91 Eng. Reprint. 874; Bond v. Spark, 12 Mod. 275, 88 Eng. Reprint. 1318; Parker v. Godin. 2 Strange, 814, 93 Eng. Reprint. 866; Albright v. McTighe, 49 Fed. 817; Winsor v. Cook, 35 R. I. 472, 87 Atl. 318.

Vincent, J., delivered the opinion of the court:

This is a petition for a writ of certiorari filed for the purpose of bringing before this court for review the record of the superior court in a cause entitled Dorothy Drew v. J. Samuels & Bro., Inc., et al., Law No. 581, Washington County. A writ of certiorari was issued, and the record in question is now before us.

The cause we are asked to review is an action for false imprisonment brought by Dorothy Drew against J. Samuels & Brother, Incorporated, and Nazaly Avedisian as joint tort-feasors. The case was tried in the superior court. The trial was concluded on October 10, 1917. The jury rendered a verdict of guilty against both defendants, and assessed damages in the sum of \$1,358.

Later, on October 13, 1917, each of the defendants filed a motion asking for a new trial. The usual common-law grounds were included in both motions, but they differed as to other alleged errors. During the argument before the trial court on the motions for a new trial, counsel for Dorothy Drew, the plaintiff, moved to dismiss the motions of the defendants for a new trial on the ground "that it appears of record that the verdict undertaken to be appealed from was and is joint against all the parties defendant, whereas said petition or motion is singular and several, and fails to join all the parties defendant:" whereupon the further hearing of the matter was postponed for one week, the plaintiff in the meantime filing formal motions in writing to dismiss the several motions of the defendants for

Note. — For rights of individual tort-feasors against whom a joint verdict has been obtained, as to new trial and appeal, see annotation following this case, post, 970.

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a new trial, one of which said motions to dismiss being filed October 31 and the other November 3, 1917. The defendant J. Samuels & Brother, Incorporated, also filed a motion on November 8, 1917, asking that it might be permitted to join the defendant Avedisian in its motion for a new trial, and that it might be permitted to so amend its said motion, and in these requests the said Avedisian joined.

On November 8, 1917, a hearing appears to have been had on the motions to dismiss the motions of the several defendants for a new trial, and on the following day the superior court rendered a decision granting the motion of the plaintiff to dismiss the motion of each of the defendants.

On November 17, 1917, the superior court rendered a further decision denying the motion of the defendant J. Samuels & Brother, Incorporated, to join the defendant Avedisian in its motion for a new trial. In reviewing this record the defendants direct our attention to two questions: (1) Was the decision of the superior court dismissing the motions of the defendants for a new trial correct? and (2) Was the decision of the superior court refusing to permit the amendment of the motion of J. Samuels & Brother, Incorporated, by adding thereto the name of Nazaly Avedisian as a joint moving party, and refusing to permit Nazaly Avedisian to join in the motion of J. Samuels & Brother, Incorporated, for a new trial, proper?

In dismissing the motion of the defendants for a new trial, the superior court seems to have based its decision upon the cases of *Bassett v. Loewenstein*, 22 R. I. 468, 48 Atl. 589, and *Winsor v. Cook*, 35 R. I. 472, 87 Atl. 318, and the decision of this court on the motion for a rehearing in *Bassett v. Loewenstein*, — R. I. —, 48 Atl. 934. In examining these two cases and other cases cited therein, some important differences between them and the case at bar may be noted. In *Bassett v. Loewenstein* the suit was against copartners, and the court held that one of two defendant copartners could not take an appeal. This decision is in accord with the case of *Curry v. Stokes*, 12 R. I. 52, where the court held that one of two plaintiff copartners could not take an appeal. The correctness of these decisions cannot be denied. In the one case it is held suit must be brought, judgment entered against both defendants, and execution issued as against both. In the other case judgment must be entered in favor of both plaintiffs and execution must issue accordingly. This is not so in the case at bar, as it would have been competent for the jury to have found one of the defendants guilty and the other not guilty, or to have found both guilty or not guilty. If L.R.A.1918C.

one had been found not guilty, he would thereafter have no appealable interest, and could neither join or be joined in the appeal. It is true that in *Curry v. Stokes*, supra, the court said: "Even one of two defendants cannot, as a matter of course, appeal from a judgment rendered against both of them jointly."

As the question before the court in that case related solely to copartners, this language amounts to nothing more than a dictum, which is not even positive in its terms, but expresses some qualification, the exact nature of which is not clear.

In the case of *Gencarelle v. New York, N. H. & H. R. Co.* 21 R. I. 216, 44 Atl. 174, the plaintiffs, who were husband and wife, voluntarily joined themselves in a suit to recover compensation for services rendered by both of them to the defendant, in the nursing and care of one who had received an injury through the defendant's alleged negligence. After nonsuit the husband alone petitioned for a new trial, and the court held that the petition in such case was in the nature of an appeal, and must be joint; and it also held, the plaintiffs being husband and wife, that the evidence showed that the claim was not joint, but several, and that under the statute they must each sue alone, referring to R. I. Gen. Laws, chap. 246, § 14, which provides that "in all actions, suits, and proceedings, whether at law or in equity, by or against a married woman, she shall sue and be sued alone."

It is to be noted that in all of these cases to which we have referred the motion for a new trial or the appeal was filed by one of several plaintiffs or defendants without any action in that regard being taken by the other defendant or defendants, and in that respect they differ from the case at bar, where each of the defendants has preferred a motion for a new trial.

At the trial of the present case in the superior court, each of the defendants was represented by personal counsel, and the defense of each was conducted independently. Each counsel was entitled to propound to the witnesses such questions as he might see fit and to take such exceptions as in his judgment were best adapted to conserve and protect the interests of his client. In such a trial it cannot be reasonably expected that the two defendants would be equally interested in every portion of the testimony, and that in all respects it would bear evenly upon them. Each defendant is entitled to take an exception to the admission or rejection of testimony and to other rulings or to portions of the charge of the court as he may see fit, and in so doing he is not dependent upon the co-operation or con-

currence of another defendant with whom he has been associated.

If joint tort-feasors were bound to act together in all proceedings, it is easy to see how one defendant might be deprived of substantial rights by the action or non-action of another. If defendants were compelled to file a joint motion for a new trial, and it should appear, as it might, that one defendant had good grounds for a new trial, and that the other defendant had not, it would logically follow that such motion should be denied. In 14 Enc. Pl. & Pr. 371, it is stated that "motions for a new trial may be made jointly by all the parties plaintiff or defendant. But such practice should be avoided in all cases except where it is clear that the grounds for the motion will be sustained as to all parties joining in the motion."

It has been held in several states that, when there is a verdict against all of the defendants, a motion for a new trial made by the defendants jointly must be overruled, if the verdict was correct as against any one of them. *Scott v. Chope*, 33 Neb. 41, 92, 49 N. W. 940; *Robertson v. Garshweiler*, 81 Ind. 463; *First Nat. Bank v. Colter*, 61 Ind. 153; *Miller v. Adamson*, 45 Minn. 99, 47 N. W. 452.

We think that, inasmuch as the practice in this state permits one joint defendant to interpose a separate defense and to take exceptions without the concurrence of the other defendant or defendants, it cannot be said consistently that he should be deprived of an independent opportunity of presenting the questions arising under the exceptions in which he alone may be interested, without subjecting himself to the danger of losing his rights by joining with other defendants in a motion for a new trial, which, according to some of the authorities cited, must be denied if the verdict as to either defendant is justified.

It cannot be denied that in an action brought against several defendants as joint tort-feasors it would be competent for the jury to find all the defendants guilty, or all not guilty, or a part guilty, and the other not guilty. *Terpenning v. Gallup*, 8 Iowa, 74; *Hayden v. Woods*, 16 Neb. 306, 20 N. W. 345; *New Mexico & S. P. R. Co. v. Madden*, 7 N. M. 215, 34 Pac. 50. In our statute (chap. 298, § 12) it is provided that "any person or party entitled to except in a cause or proceeding tried by a jury in the superior court may file . . . a motion for a new trial for any reason for which a new trial is usually granted at common law. . . ."

We think that under this provision a defendant who has the right, under the practice which obtains in this state, to take an L.R.A.1918C.

exception for his individual benefit, is a person who may file his motion for a new trial, and that the language of the statute above quoted is indicative of an intent on the part of the legislature to make some distinction between persons and parties, and to afford to litigants an opportunity to proceed in motions for new trials singly or collectively, as the circumstances of the particular case might seem to require. It would be absurd for us to hold that a defendant having the right to an individual exception could not prosecute it, or that, having such right, he could only prosecute it in connection with another defendant perhaps having no interest therein.

In the case of *State v. Brown*, — R. I. —, 102 Atl. 65, *Brown*, *Spellman*, and *Healis* were jointly indicted for murder, and *Elizabeth F. Mohr* was also indicted with said defendants as accessory before the fact. *Healis* pleaded nolo, and sentence was deferred. The defendants *Brown* and *Spellman* were found guilty, and filed separate bills of exceptions. *Mrs. Mohr* was acquitted. Each of the parties was represented by a separate counsel. The counsel for *Mrs. Mohr* did not appear for or represent the other defendants, and the defenses of the several defendants were separate, and not joint. The defendant *Mrs. Mohr* filed a motion to quash the indictment on the ground that the statute under which she was indicted was unconstitutional. This motion was denied. She later moved that the constitutional question be certified to the supreme court, and that motion was also denied. The other defendants made no attempt in the superior court to raise a constitutional question. *Mrs. Mohr*, having been found not guilty, had no further interest in the matter. The defendants *Brown* and *Spellman*, in their respective bills of exception, sought to avail themselves of the exception taken by *Mrs. Mohr* to the ruling of the superior court upon her motions relating to the constitutional question. Upon that question this court said: "It is quite obvious . . . that-if these defendants here were 'aggrieved' by the ruling or decision of the superior court in denying *Mrs. Mohr's* motion to certify constitutional questions to this court, they should have taken exception thereto in the superior court. It cannot be held, as contended on behalf of these defendants, that because these defendants and *Mrs. Mohr* were tried together under one indictment, each of these defendants should be able to avail himself of exceptions taken solely on behalf of *Mrs. Mohr* at a preliminary hearing on a question which, so far as the record discloses, solely interested *Mrs. Mohr*, in which they were not interested, and in

which they took no part. If the position here taken by these defendants were tenable, it would result that, although all the defendants were separately defended, each by his own counsel, and made different and distinct defenses, counsel for each defendant should be deemed, for the purposes of subsequent procedure after trial, in the prosecution of exceptions, to have been the agents and representatives of each of the other defendants, although they had not been appointed or selected for such purpose. We think the language of the statute plainly intends that the defendant, seeking to avail himself in this court of exceptions taken in the superior court, must have taken the exceptions there on his own behalf. If these defendants had desired to raise the same constitutional questions in the superior court as were raised on behalf of Mrs. Mohr, they could have done so, just as they did raise other questions which were not raised by Mrs. Mohr, and as to which they are now prosecuting their exceptions."

This court also held that the trial court was in error in disallowing two of the in-

dividual exceptions of the defendant Spellman.

The case of *State v. Brown* presents substantially the same question which is presented in the case at bar, although approached and discussed inversely, and it upholds the proposition that a defendant joined with others, appearing by his own counsel and making his own defense, is entitled to the benefit of his own exceptions, but cannot profit by the exceptions of other defendants in which he has not primarily participated.

We think that the superior court should have heard and determined the defendants' motions for a new trial, and the record of that court so far as it relates to the dismissal of such motions is therefore quashed.

Having reached this conclusion, it follows that the motions to amend the original motions for a new trial were entirely unnecessary, and were properly denied.

The record in the case is remitted to the Superior Court.

Petition for rehearing denied.

Annotation—Rights of individual tort-feasors against whom a joint verdict has been obtained, as to new trial and appeal.

It is the purpose of the present annotation to cover both the question whether a judgment against two or more joint tort-feasors may be set aside as to some and allowed to stand as to the rest, and the question of the right of such joint tort-feasors to make separate motions for a new trial, or to take separate or individual appeals. Many of the cases dealing with the first question are treated in the note to *Sparrow v. Bromage*, 27 L.R.A.(N.S.) 209, and consequently the present annotation is merely supplementary thereto on this phase of the general question above outlined.

As to reversal of judgment on appeal or error by one joint defendant as affecting other joint defendant in whose favor judgment below was rendered, see annotation to *Chicago, R. I. & P. R. Co. v. Austin*, L.R.A.1917D, 666.

May judgment against two or more tort-feasors be set aside as to some and allowed to stand as to the rest.

Supplementing note in 27 L.R.A.(N.S.) 209.

As is pointed out in the note in 27 L.R.A.(N.S.) 209, the early or common-law rules were that a new trial could not be granted to one of several tort-feasors against whom a joint judgment

had been obtained, and that such a judgment could not be affirmed as to some defendants and reversed as to others, but the decided trend of modern opinion does not permit the artificial and technical reasoning upon which such rules were founded to preclude the granting of a new trial or the reversal of a judgment as to one of several defendant joint tort-feasors, where the furtherance of justice seems to require such action and the interests of the remaining defendants are not thereby prejudiced; and in this breaking away from the restrictions of ancient rules, the courts have been frequently aided by legislation.

Additional authority supporting the rules laid down by the early cases follows: Thus, in Illinois the well-settled rule is that an entire judgment against joint tort-feasors, if not good as to all the defendants, must be reversed as to all, and that it cannot be affirmed as to some and reversed as to the others. The following cases, in addition to those set out in the earlier note, lay down this rule: *United Breweries Co. v. Bass* (1905) 121 Ill. App. 299; *O'Donnell v. Kavanaugh* (1910) 158 Ill. App. 599; *Devine v. Illinois Teleph. Constr. Co.* (1911) 159 Ill. App. 600, holding that the appellate court cannot even reverse

the judgment as a whole and remand the cause with permission to the plaintiff to dismiss as to the defendant against whom the judgment was erroneous, and enter judgment against the other defendants on the verdict; *Fuller v. Kelso* (1911) 163 Ill. App. 576; *Pressley v. Kinloch-Bloomington Teleph. Co.* (1911) 164 Ill. App. 167. And in the following early New York cases the rule was laid down that an entire judgment against joint tort-feasors cannot be severed on writ of error so as to permit reversal as to one as to whom it was erroneous, and affirmance as to other defendants, and that, if reversed at all, it must be reversed as to all: *Cruikshank v. Gardner* (1842) 2 Hill (N. Y.) 333; *Harman v. Brotherson* (1845) 1 Denio (N. Y.) 537. And this even though it is admitted that there could have been a severance in the lower court. *Cruikshank v. Gardner* (N. Y.) supra. But this rule seems to have been superseded and changed by later decisions under the Code. See New York cases in note in 27 L.R.A. (N.S.) 209, and additional cases set out infra. And see also the following recent cases, in which it was recognized that the general common-law rule was that a reversal of a judgment against several joint tort-feasors, because erroneous as to a part of the codefendants, necessitated a reversal as to all the defendants; but in which such rule was not adhered to: *North Alabama Traction Co. v. Hays* (1913) 184 Ala. 592, 64 So. 39; *Zibbell v. Southern P. Co.* (1911) 160 Cal. 237, 116 Pac. 513; *Fearon v. Fodera* (1915) 169 Cal. 370, 148 Pac. 200, Ann. Cas. 1916D, 312; *Clark v. Torehiana* (1912) 19 Cal. App. 786, 127 Pac. 831; *Brown & Sons Lumber Co. v. Sessler* (1913) 128 Tenn. 665, 163 S. W. 812, Ann. Cas. 1915C, 103, 7 N. C. C. A. 614; *Pence v. Bryant* (1913) 73 W. Va. 126, 80 S. E. 137.

Of course, this rule will be followed where to hold otherwise would prejudice the interests of some of the defendants. Thus, in *Menton v. Lee* (1870) 30 U. C. Q. B. 281, where a general verdict was obtained against several tort-feasors which was clearly erroneous as to some, it was held that there must be a rule absolute for a new trial, and that the verdict could not be allowed to stand as to one, especially where such action might work an injustice as to him. And see *Washington Gaslight Co. v. Lansden* (1899) 172 U. S. 534, 43 L. ed. 543, 19 Sup. Ct. Rep. 296, wherein the court reversed a judgment in toto for error

as to some of the defendants, and granted a new trial to all the defendants, on the ground that it might work injustice if left intact as against one of the defendants only.

In *Miller v. United R. Co.* (1911) 155 Mo. App. 528, 134 S. W. 1045, following *Mulderig v. St. Louis, K. C. & C. R. Co.* (1906) 116 Mo. App. 655, 94 S. W. 801, which is set out in the note in 27 L.R.A. (N.S.) at p. 214, it was held that where, by virtue of a statute, contribution may be had among joint tort-feasors, a judgment against two tort-feasors must be reversed as to both, although prejudicial error intervened as to one only.

But, as stated above, the early and so-called common-law rule that, if an entire judgment against several joint tort-feasors is reversed as to one, it must be reversed as to all, in many jurisdictions, has been either relaxed by judicial decision, or modified or entirely superseded by statute. Thus, in *Angell v. Chicago, R. I. & P. R. Co.* (1916) 98 Kan. 268, 157 Pac. 1196, denying rehearing of (1916) 97 Kan. 688, 156 Pac. 763, it was held that an entire judgment against joint tort-feasors may be affirmed as to a part of them and reversed as to others where no substantial injustice will result, as, for example, where an error was committed which was prejudicial to some of the individual defendants, and not as to other defendants, the court saying that this is "the more reasonable, as well as the more modern, rule." And in *McGee v. Vanover* (1912) 148 Ky. 737, 147 S. W. 742, Ann. Cas. 1913E, 500, it was expressly held that, where several tort-feasors are sued jointly and a joint judgment obtained, there may be a reversal as to some and an affirmance as to another, without the validity of the judgment being affected as to the latter. And in Ohio the rule seems to be that a judgment against joint tort-feasors may be reversed as to some and affirmed as to other defendants. See *Reugler v. Lilly* (1875) 26 Ohio St. 48, and *Norton v. Parker* (1896) 17 Ohio C. C. 715, 8 Ohio C. D. 572, both of which are set out on p. 215 of the note in 27 L.R.A. (N.S.). But see to the contrary the earlier case of *Blanchard v. Gregory* (1846) 14 Ohio, 413, wherein it was held that a judgment against joint tort-feasors which was erroneous as to one defendant was erroneous and must be reversed as to all. And in *North Alabama Traction Co. v. Hays* (1913) 184 Ala. 592, 64 So. 39, it was said that

while, as a general rule, joint judgments are to be treated as entireties on appeal, and a reversal on the appeal of one requires a reversal as to both, such principles have no application where, on the undisputed facts, one party had no proximate or responsible connection with the wrong complained of, that in such a case a reversal of the judgment as to such party does not require a reversal of the judgment against the guilty party, and that the judgment should be affirmed as to the latter. In this case the court said that the policy of the "general rule" stated by it was that, where the rights and obligations of the parties are necessarily blended in the judgment, and are thus dependent one upon the other, though they be not strictly joint, the appellate court will render such judgment as will permit and require the entire controversy to be settled in one proceeding in which the rights and liabilities of all parties may be considered and consistently determined, and that, under the facts of the case under consideration, such policy would be adhered to by reversing as to the party obviously not responsible, and affirming as to the party clearly guilty of the wrong complained of.

And in California under a statute (Code Civ. Proc. §§ 578, 579) providing that judgment may be for or against one or more of several defendants sued as joint tort-feasors, it has been held that, where an entire judgment has been taken against several joint tort-feasors, it may be affirmed as to some and reversed as to others if the proofs justify it. *Fowden v. Pacific Coast S. S. Co.* (1906) 149 Cal. 151, 86 Pac. 178; *Zibbell v. Southern P. Co.* (1911) 160 Cal. 237, 116 Pac. 513, holding that, where an entire judgment has been taken against several joint tort-feasors consisting of a railway company and its servants, it could be affirmed as against the company and some of the servants and reversed as to another servant as to whom it was erroneous; *Clark v. Torchiana* (1912) 19 Cal. App. 786, 127 Pac. 831. This rule was again recognized in *Fearon v. Fodera* (1915) 169 Cal. 370, 148 Pac. 200, Ann. Cas. 1916D, 312.

So, in New Jersey, under the provision of the Practice Act of 1912 (Pamph. Laws 1912, p. 397) that, where a new trial is granted, "it shall only be a new trial of the question or questions with respect to which the verdict is found to be wrong, if separable," it has been held that, where a judgment has been obtained

against joint tort-feasors which is wrong as to some, but correct as to the others, the judgment, so far as it is correct, will be affirmed, and reversed only as to the others. *Hagy v. Hafner* (1914) 86 N. J. L. 502, 94 Atl. 48, holding that the statute applied to a judgment against joint tort-feasors, and that the questions concerning the liability of the different defendants were "separable" within the meaning of the act. Upon the latter question the court argued as follows: "The statute referred to is remedial in character, having for its purpose the limitation of unnecessary litigation, the 1st section declaring that it 'shall be liberally construed, to the end that legal controversies may be speedily and finally determined according to the substantive rights of the parties.' Separable, as used in the statute, means a distinct cause of action existing in the suit, on which a separate and distinct action may be brought, and complete relief afforded as to such cause of action. In joint torts the plaintiff may proceed against the persons jointly liable in one action, or against them separately; judgment against one, when satisfied, barring an action by the plaintiff against the other joint wrongdoers."

And in New York the later cases decided under the Code support the view that a judgment against joint tort-feasors may be reversed as to some and affirmed as to others. *Schultz v. United States Fidelity & G. Co.* (1911) 201 N. Y. 230, 94 N. E. 601, affirming (1909) 134 App. Div. 260, 118 N. Y. Supp. 977, holding that where, in an action for false imprisonment and malicious prosecution against two defendants, a judgment was obtained against both, such judgment, in form against both, was jointly and severally enforceable, and could be reversed as to one and enforced as to the other defendant.

And again in Tennessee, under a statute providing that no judgment shall be reversed in the supreme court unless for errors which affect the merits of the judgment complained of, it is held that the technical rule that a judgment is an entire thing and if void as to one party cannot be allowed to stand as to any of the other parties falls within the statute, so that it cannot be set up that a judgment against joint tort-feasors which is bad as to one of the defendants is bad as to all, at least, where it is not erroneous as to the party asking that it be declared bad as to all the defendants. *Smith v. Foster* (1866) 3 Coldw. (Tenn.) 147; *Brown & Sons*

Lumber Co. v. Sessler (1913) 128 (Tenn.) 665, 163 S. W. 812, Ann. Cas. 1915C, 103, 7 N. C. C. A. 614, holding that the rule that a judgment against joint tort-feasors may be reversed as to one and affirmed as to others is the more modern rule, is obviously just, and is founded on common sense. And see *Nashville Street R. Co. v. Gore* (1901) 106 Tenn. 390, 61 S. W. 777.

And where an appellate court may affirm as to a part and reverse as to the rest of the joint tort-feasors, against all of whom an entire judgment has been obtained, it naturally follows that a new trial may be granted as to one or more, and not as to the others. See *Fowden v. Pacific Coast S. S. Co.* (Cal.) supra, holding that the granting of a new trial as to one of two joint tort-feasors did not vacate the verdict and judgment as to the other; *Clark v. Torchiana* (1917) 19 Cal. App. 786, 127 Pac. 831; and *Hagy v. Hafner* (1914) 86 N. J. L. 502, 94 Atl. 48.

And where an entire verdict has been rendered against joint tort-feasors, the plaintiff may dismiss his suit as to a part of the defendants, and take judgment against the others. *Postal Telegraph Co. v. Likes* (1907) 225 Ill. 249, 80 N. E. 136; *Siltz v. Springer* (1908) 236 Ill. 276, 85 N. E. 748; *Pecararo v. Halberg* (1910) 246 Ill. 95, 92 N. E. 600; *Pence v. Bryant* (1913) 73 W. Va. 126, 80 S. E. 137, holding that this is the rule sustained by reason and by the later authorities. And in *Carper v. Risdon* (1904) 19 Colo. App. 530, 76 Pac. 744, it was said that an action based on a joint trespass and brought against the trespassers might, "at any time before judgment," have been dismissed by the plaintiff as to one defendant and continued as to the other. Also, in *Western U. Teleg. Co. v. Griffith* (1900) 111 Ga. 551, 36 S. E. 859, 8 Am. Neg. Rep. 200, it was said that, in an action brought against joint tort-feasors, the plaintiff could, after verdict, abandon his case as to some of the defendants and proceed against the others. This rule is based upon the theory that, since there is no contribution between joint wrongdoers, the defendant against whom the judgment was rendered cannot complain that such a course is irregular, even if it is so regarded. *Postal Telegraph Co. v. Likes* (Ill.) supra.

A fortiori, a plaintiff who has obtained a verdict against two joint tort-feasors may have the action dismissed as to one of them and judgment entered against the other, where all the parties

consented to such dismissal. *Dewoody v. Guertin*. (1899) 13 Colo. App. 517, 58 Pac. 794. In this connection the court said: "We can discover no basis for the contention that the judgment is irregular and void because the verdict was against Dewoody and Baker, and the judgment only against Dewoody, because prior to the entry of judgment the parties stipulated that the action might be dismissed as to Baker. We see no reason under those circumstances why, he being eliminated from the case and the verdict being against Dewoody, the judgment should not follow as against the complaining party. There might be circumstances, perhaps, under which some question might be raised respecting the regularity of such proceedings, but in this case it appears that all parties selected as defendants, if found liable, were joint tort-feasors, and any one, two, or more, or all, might be sued, and, since they are jointly and severally liable, a recovery can be had against one for all the damages, or a judgment against them all and a collection enforced as against one. We can discover no legal or insurmountable reason against the entry of judgment against Dewoody on the verdict when by his consent Baker was dismissed from the action."

And in jurisdictions where the plaintiff has a right to take judgment in an action of tort against a part only of those against whom a verdict is rendered, and dismissed as to the others, it follows that the trial court may grant a new trial to such others without dismissing. *Pecararo v. Halberg* (1910) 246 Ill. 95, 92 N. E. 600. And see to the same effect *Pence v. Bryant* (1913) 73 W. Va. 126, 80 S. E. 137, which in effect overrules *Tracy v. Cloyd* (1877) 10 W. Va. 19, wherein it was held that a verdict against joint trespassers upon a joint plea cannot be vacated as to only one of the defendants. In the *Pence* Case the court said that the early rule of entirety of verdict and judgment is a purely technical one, and is not sustained by reason or by later authorities, and that even if plaintiff made no offer to dismiss as to one against whom the verdict was erroneous, it was the duty of the trial court upon a joint motion for a new trial to grant such a new trial as to that defendant, and let the verdict stand as to the others. So, in the *Pennsylvania* case of *Crane v. Lynch* (1905) 27 Pa. Super. Ct. 565, where a verdict was obtained against joint tort-feasors, and it was then dis-

covered that one of the defendants was a minor, the court directed the plaintiff to enter a *nolle prosequi* as to such minor, and the verdict and judgment were allowed to stand as against the other defendant, the court saying that the result of such procedure was to leave the latter exactly as if he had been sued alone, and that plaintiff could have sued him alone had he so elected. And in Indiana it has been held that, upon a joint motion for a new trial after an entire verdict for wilful tort against two joint tort-feasors, the court may grant the motion as to one defendant and deny it as to the other, and such other cannot assign such action as error, at least in the absence of a separate motion for a new trial, he not being prejudiced, as he is severally liable for the whole judgment, and not entitled to contribution from his codefendants. *Kelley v. Kelley* (1893) 8 Ind. App. 606, 34 N. E. 1009, petition for rehearing overruled in (1894) — Ind. App. —, 36 N. E. 165. And in South Carolina it is held that it is within the province of a trial judge to grant a new trial in any case where several tort-feasors are sued and the verdict is against all or more than one, and if, in his opinion, the evidence does not sustain the verdict as to some, but does as to others, he may grant it as to the former and deny it as to the latter, provided it is reasonably certain that no injustice will result to the defendant or defendants against whom the verdict is allowed to stand. *Webber v. Jonesville* (1913) 94 S. C. 189, 77 S. E. 857, holding that, where punitive damages are assessed, it is better practice to grant a new trial as to all. And in Tennessee the rule is that a joint verdict against several tort-feasors may be set aside by the trial court as to those defendants as to whom it is found erroneous, and sustained and enforced against others as to whom it is found to be correct. *Nashville Street R. Co. v. Gore* (1901) 106 Tenn. 390, 61 S. W. 777. Likewise, in Washington it has been held that, where a joint verdict had been obtained against tort-feasors, the action of the trial court in setting aside the verdict as to one defendant cannot be urged as error by the other defendants, the theory being advanced that, since the defendants are separably liable, no one but the plaintiff can object to a dismissal as to one or more of the defendants condemned by a verdict. *Birkel v. Chandler* (1901) 26 Wash. 241, 66 Pac. 406. And in Kentucky where separate or joint judgments are authorized against one or more joint

defendants, as the case may require, the court may, upon motion for a new trial by joint tort-feasors against whom a joint verdict has been obtained, grant a new trial as to part of them and let the verdict stand as to the others. *Loving v. Com.* (1898) 103 Ky. 534, 45 S. W. 773.

In connection with the practice as to new trial in the English court of appeal since the Judicature Act 1890, see Order 39, r6, which in effect provides that, where a wrong or miscarriage affects some or one only of the parties, the court may give final judgment as to some or one only of the parties, and direct a new trial as to the other party or parties.

Separate motions and appeals.

The early English authorities seem to be to the effect that a verdict cannot be set aside or a new trial granted at the instance of some joint tort-feasors as to them, and allowed to stand as to the other defendants. See *Parker v. Godin* (1728) 2 Strange, 813, 93 Eng. Reprint, 866. And see also *Bond v. Spark* (1700) 12 Mod. 275, 88 Eng. Reprint, 1318, wherein it was held that a new trial could not be granted to one of three tort-feasors, even though the others had been acquitted by the verdict, but that a new trial, if granted, must be as to all; unless, perhaps, where a new trial is granted as to some with the consent of all, as was the case in *Price v. Harris* (1833) 10 Bing. 331, 131 Eng. Reprint, 932, 3 Moore & S. 838, 3 L. J. C. P. N. S. 73.

And in North Carolina the early cases ruled that one of several tort-feasors against whom a joint judgment had been obtained could not appeal therefrom, it being said that such a judgment is a joint one against all the defendants, and that an appeal by less than all the defendants must be dismissed on motion therefor. *Donnell v. Shields* (1848) 30 N. C. (8 Ired. L.) 371. This case seems to go to the extent of holding that one defendant cannot appeal if his codefendants refuse to join. However, the decision relies upon earlier ones made in actions *ex contractu*. And in North Carolina the rule has been so changed by statute that either party may now appeal. See *Clarke's Code Civ. Proc.* (N. C.) 1900, § 547.

But the rule supported by the majority of the cases, and especially of the more recent ones, is that a single joint tort-feasor may move for a new trial of an issue which resulted in a joint

judgment, although he and his codefendants were sued jointly, pleaded jointly, and defended jointly. This rule was expressly laid down in *Albright v. McTighe* (1892) 49 Fed. 817 (one of three moved for a new trial and motion was granted). And see the supporting dicta in *Fernandez v. Calaf* (1914) 7 Porto Rico Fed. Rep. 80. And that in Ohio tort-feasors against whom a joint judgment has been obtained may make separate motion for a new trial, see *Heffner v. Moyst* (1883) 40 Ohio St. 112, wherein separate motions for a new trial by judgment defendants who had been sued as joint tort-feasors, but had pleaded separately, were entertained. And see *Hayden v. Woods* (1884) 16 Neb. 306, 20 N. W. 345, wherein it was said that this rule is based upon the ground that, since the liability of joint tort-feasors is both joint and several, and the verdict may be against one, and not the other, it reasonably follows that a new trial may be granted to one, and not the other, where separate motion therefor has been made.

And similar conclusions have been reached under a number of statutes. Thus, in Connecticut, where a statute gives the right of appeal to any party aggrieved, one of two joint tort-feasors, against both of whom an entire judgment has been obtained, may, upon filing the statutory notice of appeal, take an appeal without joining his codefendant or obtaining from the court an order of severance. *Brockett v. Fair Haven & W. R. Co.* (1900) 73 Conn. 428, 47 Atl. 763, holding that a severance is made where one joint tort-feasor in pursuance of statutory authority continued the cause in another court, and the other codefendant did not appear, although he had a right to do so by virtue of the filing of the notice of appeal by the continuing defendant. And under a California statutory provision that judgment may be for or against one or more of several defendants sued as joint tort-feasors, it has been held (*Fearon v. Fodera* (1915) 169 Cal. 370, 148 Pac. 200, Ann. Cas. 1916D, 312), that one of several joint tort-feasors against all of whom a judgment has been obtained may take an appeal therefrom or move for a new trial without joining the other codefendants, or even notifying them of his intention to do so. In Rhode Island, where the practice permits one joint defendant to interpose a separate defense and to take exceptions without the concurrence of his co-

defendants, and by statute it is provided that any party entitled to except may file a motion for a new trial for any reason for which a new trial is usually granted at common law, it has been held that joint tort-feasors against whom a single verdict has been rendered, but who made separate defenses, may make separate motions for a new trial. *J. SAMUELS & BRO. v. SUPERIOR CT.* ante, 967. And in New York it has been held that a judgment in form entire against joint tort-feasors, since it is severally as well as jointly enforceable, may be appealed from or submitted to by any defendant individually. *Schultz v. United States Fidelity & G. Co.* (1911) 201 N. Y. 230, 94 N. E. 601, affirming (1909) 134 App. Div. 260, 118 N. Y. Supp. 977, holding that where one defendant only appealed his codefendant submitted to any judgment that might be rendered.

And in New Mexico it has been held, without reference to statutory provision, that where a judgment is rendered against tort-feasors jointly one may bring error to review the same without joining the other defendants and without notice of severance. *New Mexico & S. P. R. Co. v. Madden* (1893) 7 N. M. 215, 34 Pac. 50, holding that, upon review of a judgment against joint tort-feasors upon the appeal of one, the judgment need not be reversed as to the other defendant, and it being said that if such other desired a reversal he should have asked for it.

But the weight of authority, at least in the absence of statutory provision, is that where tort-feasors are sued jointly and a joint judgment obtained, one tort-feasor cannot sue out a writ of error without reference to his codefendant, or any showing that the latter had been notified to appear and failed to do so, or had refused to join in the proceedings in error (*Holbrook, C. & D. Contracting Co. v. Menard* (1906) 76 C. C. A. 258, 145 Fed. 498; *Interurban Street R. Co. v. Menard* (1906) 76 C. C. A. 260, 145 Fed. 500); or in other words, that all parties against whom a joint judgment in a tort action has been rendered are necessary parties to a review by an appellate court, and the failure to join them is generally ground for dismissal (*Kansas City v. Hart* (1899) 60 Kan. 684, 57 Pac. 938; *Palmer v. Kennedy* (1830) 7 J. J. Marsh. (Ky.) 498). It has been said that the reasons for this practice are that the successful party may be at liberty to proceed in the enforcement of his judgment against the parties who do not desire to have

it reviewed, and that the appellate tribunal shall not be required to decide a second or third time the same question on the same record. *Holbrook, C. & D. Contracting Co. v. Menard (Fed.) supra.*

But where one of the defendants refuses to join in a writ of error or an appeal, the other has a formal remedy by summons and severance, or its equivalent, which under the more modern and liberal practice is a showing by the record that the party had been notified to appear and had failed to do so, or that he appeared and refused to join, in either of which cases it has been held the court has jurisdiction to entertain the motion of the party who prayed for it as to his own interest. *Holbrook, C. & D. Contracting Co. v. Menard*

(*Fed.*) and *Palmer v. Kennedy (Ky.) supra*, holding that an appeal may be taken from a joint judgment by one of the defendants against the will of his codefendant. And it has been held that it is no objection to the jurisdiction of an appellate court that all the parties against whom a joint judgment for a tort has been obtained did not unite in bringing a single proceeding for review, where the petitioner's codefendants were made defendants in error in the proceedings for review. *Kansas City v. Hart (Kan.) supra* (both judgment defendants brought separate proceedings for review, joining the other as a defendant in error, so that all the parties were before the court in each of the proceedings). G. J. C.

TENNESSEE SUPREME COURT.

SOUTHERN RAILWAY COMPANY, Plff.
in Certiorari,
v.
LEWIS & ADCOCK COMPANY.

(— Tenn. —, 201 S. W. 131.)

Carrier — loss — agreement to pay — discrimination.

1. An agreement by a terminal carrier to pay for injury to an interstate shipment not occurring on its lines is void for discrimination where the bill of lading provides that no carrier shall be liable for loss not occurring on its own road.

For other cases, see Carriers, IV. c, 4, in Dig. 1-52 N. S.

Estoppel — to deny liability — illegal contract.

2. A terminal carrier is not estopped to deny liability under its promise to pay a loss not occurring on its own line, is void as an unlawful discrimination, by the fact that the shipper has, in reliance on the promise, lost his remedy against the carrier liable for the loss.

For other cases, see Estoppel, III. d, in Dig. 1-52 N. S.

Appeal — assignment of error — sufficiency.

3. An assignment that the trial court erred in not peremptorily instructing the jury is equivalent to an assignment that there was no evidence to support the verdict.

For other cases, see Appeal and Error, VI. p, 2, in Dig. 1-52 N. S.

(February 11, 1918.)

Note.—For waiver by carrier of contractual rights under interstate shipments as unlawful discrimination among shippers, see annotation following this case, post, 978.
L.R.A.1918C.

CERTIORARI to the Court of Civil Appeals to review a judgment affirming a judgment of the Circuit Court for Knox County in favor of plaintiff in a suit to recover, under an alleged agreement with defendant's agent, for injury to a shipment of oats. Reversed.

The facts are stated in the opinion.

Mr. Roscoe Word, for plaintiff in certiorari:

This being an interstate shipment, the only right that plaintiffs have to recover, if at all, is by virtue of the bill of lading or contract issued to the Richter Grain Company, which was transferred to plaintiffs, upon their paying the draft through the local banks; they thereby becoming the owners of the said car of oats, and parties to said bill of lading.

Georgia, F. & A. R. Co. v. Blish Mill. Co. 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. ed. 836, 36 Sup. Ct. Rep. 469; *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556; *Louisville & N. R. Co. v. Maxwell*, 237 U. S. 94, 59 L. ed. 853, L.R.A.1915E, 665, P.U.R.1915C, 300, 35 Sup. Ct. Rep. 494.

Mr. J. M. Meek also for plaintiff in certiorari.

Mr. A. C. Grimm for defendant in certiorari.

Green, J., delivered the opinion of the court:

This suit was brought by Lewis & Adcock to recover \$150, the amount of damage claimed to have been suffered by a carload

of oats. The oats were shipped from the Richter Grain Company in Cincinnati, Ohio, to the plaintiffs below at Knoxville, Tennessee, on a uniform through bill of lading. The car was routed over the Cincinnati, New Orleans, & Texas Pacific Railroad and the Southern Railway Company.

The proof showed clearly that the grain was damaged prior to its delivery to the Southern Railway Company. This fact is not controverted.

The plaintiffs below introduced proof tending to show that they had made a claim against the Southern Railway Company for damage to this shipment, and that an agent of the Southern Railway Company had agreed to pay them for this damage \$150. This was denied by the railway company.

The railway company also relied on a stipulation in the bill of lading as follows: "No carrier shall be liable for loss, damage, or injury not occurring on its own road, or its portion of the route, nor after said property has been delivered to the next carrier, except as such liability, is, or may be, imposed by law."

There was a judgment against the railway company for \$150, the amount sued for, in the court below, and this judgment was affirmed by the court of civil appeals. A petition for certiorari has been granted by this court and the case heard by us.

It may be conceded that there is sufficient evidence in the record to sustain the finding of the jury establishing the agreement between Lewis & Adcock and the claim agent of the Southern Railway Company, whereby the railway company undertook to pay \$150 for the damage sustained by this carload of oats.

Nevertheless it is contended by the railway company that if such an agreement were made, it was illegal and beyond the power of the carrier or any of its agents. We think this contention must be upheld.

Recent decisions of the Supreme Court of the United States construing the acts of Congress declare that there must be uniformity in rates, uniformity in service, and uniformity of responsibility on the part of all carriers engaged in interstate commerce. The duties and responsibilities of such carriers are defined in the contracts or bills of lading filed with the Interstate Commerce Commission and the acts of Congress, and these duties and liabilities may not be varied either by act of the carrier or the shipper, or, indeed, by state laws. *Missouri, K. & T. R. Co. v. Ward*, 244 U. S. 383, 61 L. ed. 1213, 37 Sup. Ct. Rep. 617; *Georgia, F. & A. R. Co. v. Blish Mill Co.* 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541; *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. ed. 836, 36 Sup. Ct. Rep. 469.

Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556; *Atchison, T. & S. F. R. Co. v. Harold*, 241 U. S. 371, 60 L. ed. 1050, 36 Sup. Ct. Rep. 665; *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501.

In *Chicago & A. R. Co. v. Kirby*, supra, the carrier undertook to make a contract with the consignor for an expedited shipment of horses from a point in Illinois to New York city. This was a special contract, no form of which was on file with the Interstate Commerce Commission, and by the terms of which a preference or advantage was given to the shipper. Such contract was held to be illegal.

In *Georgia, F. & A. R. Co. v. Blish Mill Co.* 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541, in discussing a provision of an interstate bill of lading, which it was urged the carrier had waived, the court said: "But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal act; nor could the carrier, by its conduct, give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed."

In *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. ed. 836, 36 Sup. Ct. Rep. 469, the court said: "It is also clear that with respect to the service governed by the Federal statute the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates [citing authorities], and the established principle applies equally to any stipulations attempting to alter the provisions as fixed by the published rules relating to any of the services within the purview of the act [citing authorities]. This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discriminations."

In *Atchison, T. & S. F. R. Co. v. Harold*, 241 U. S. 371, 60 L. ed. 1050, 36 Sup. Ct. Rep. 665, the court said that the view pointed out in the previous decisions with respect to congressional legislation upon this subject was "that its prime object was to bring about a uniform rule of responsibility as to interstate commerce and interstate commerce bills of lading."

In *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct.

Rep. 556, the court denied the power of a carrier to enter into a verbal contract for an interstate shipment different in terms from the contracts on file with the Commission.

In *Missouri, K. & T. R. Co. v. Ward*, supra, the court reannounced the rule laid down in *Georgia, F. & A. R. Co. v. Blish*, and held that the parties could not waive the terms of the contract under which shipment was made pursuant to the Federal act.

As heretofore seen, the contract in this case provided that no carrier should be liable for loss, damage, or injury not occurring on its own road, or its portion of the route, except as such liability is, or may be, imposed by law.

The Carmack Amendment was enacted to create in the initial carrier unity of responsibility for the transportation to its destination. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 31 L.R.A. (N.S.) 7, 55 L. ed. 167, 31 Sup. Ct. Rep. 164; *Missouri, K. & T. R. Co. v. Ward*, supra, and cases cited. The Carmack Amendment does not preclude a limitation of responsibility to a shipper by a connecting carrier for damage not occurring on its own line. Such limitation is good at common law.

The presumption is that the bill of lading here exhibited has been duly filed with the Interstate Commerce Commission. *Louisville & N. R. Co. v. Hobbs*, 136 Tenn. 512, 190 S. W. 461.

We must conclude, therefore, under the authorities heretofore cited, that the remedies of the shipper are confined to those prescribed in the bill of lading or contract. The shipper can demand no more than he is entitled to under such contract, nor can the carrier voluntarily assume any additional obligation in favor of a particular shipper.

The court of civil appeals was of opinion that the defendant railway company was estopped to rely on this provision of the contract in view of the fact that the plaintiffs had, by reason of the alleged promise to settle, probably lost their remedy against

the carrier or party responsible for this damage. As we have seen, however, the cases hold that the carrier cannot waive the terms of the contract, nor do we think any estoppel could arise by reason of its conduct. Estoppel is founded in equity. It can never be asserted to uphold fraud or wrong of any character. 10 R. C. L. 690; 16 Cyc. 747.

Under the acts of Congress it is unlawful for any shipper to receive any benefit or advantage to which all other shippers are not entitled at the hands of a carrier. An estoppel cannot be invoked to obtain for a shipper an unlawful preference.

It is urged on behalf of *Lewis & Adcock* that the question discussed has not been properly presented for the consideration of this court under our rules. It is said that there is no assignment of error here to the effect that there was no evidence to sustain the judgment in the lower court.

There is, however, an assignment of error in this court as follows: "The court of civil appeals was in error in holding that the circuit court was not in error in overruling defendant's motion made at the close of all the evidence to peremptorily instruct the jury to return a verdict in its favor."

An assignment to the effect that the trial court erred in not peremptorily instructing the jury is equivalent to an assignment of error that there was no evidence to support the verdict, since, under our practice, there could be no peremptory instructions unless there was no evidence to the contrary.

Such a motion is sufficiently broad to cover the questions made by the railway company in this case. *Southern Ice Co. v. Black*, 136 Tenn. 401, 189 S. W. 861, Ann. Cas. 1917E, 695; *Cincinnati N. O. & T. P. R. Co. v. Bonham*, 130 Tenn. 435, 171 S. W. 79.

It follows that the judgment of the lower courts will be reversed, and the suit dismissed.

Annotation—Waiver by carrier of contractual rights under interstate shipments as unlawful discrimination among shippers.

The opinion in *Southern R. Co. v. Lewis & A. Co.* ante, 976, shows clearly the attitude most courts have taken in respect to the question here annotated. The theory is that terms and conditions, when filed with the Interstate Commerce Commission, must be enforced by the carriers without exception, to prevent discrimination among shippers. In one or two cases the court has limited

this theory to the fixing of rates or conditions that directly influence the rate charged. See *Donohoo Horse & Mule Co. v. Missouri, K. & T. R. Co.* (1915) 95 Kan. 681, 149 Pac. 436, and *Doster v. Michigan C. R. Co.* (1915) 196 Ill. App. 49, as cited infra. But the Federal courts do not seem to place such limitation upon their holdings, and their decisions are followed by most

state courts. As a Federal question is involved, no doubt all state courts will, in the end, abandon the practice of limiting their holdings. What prevents the waiver is apparently not the fact that the parties to the particular contract have previously agreed, but that the terms of the contract constitute a universal rule which must be enforced on all shippers. It must be here assumed that the terms of the particular contract are not in conflict with the statutes, but are in the nature of supplements thereto. Otherwise, the contract would be illegal and unenforceable without a waiver. The question of waiver of time stipulation in carrier's contract for claim or suit against carrier was considered in the note to *Ray v. Missouri, K. & T. R. Co.* L.R.A.1916D, 1049, where several cases are cited tending to show that such stipulation cannot be waived on interstate shipments. Later cases of this kind are cited herein. Not many cases involving other conditions or stipulation have been reported.

In addition to the cases cited in that note, it has been directly held in recent cases that it is a discrimination contrary to the Federal statutes to permit the waiver of a clause in a carrier's contract for an interstate shipment, providing that notice of claim must be given to the carrier within a given time. *Abell v. Atchison, T. & S. F. R. Co.* (1917) 100 *Kan.* 238, 164 *Pac.* 269; *Metz Co. v. Boston & M. R. Co.* (1917) 227 *Mass.* 307, 116 *N. E.* 475; *Barton v. Louisville & N. R. Co.* (1917) — *Mo. App.* —, 196 *S. W.* 379; *Missouri, K. & T. R. Co. v. Lynn* (1916) — *Okla.* —, 161 *Pac.* 1058; *Dean v. Southern R. Co.* (1917) — *S. C.* —, 91 *S. E.* 1042.

In *Dean v. Southern R. Co.* (*S. C.*) supra, the court said: "As a defense to the action, defendant alleged and the proof showed that plaintiff had not given written notice of his claim for damages in compliance with the following stipulation in the bill of lading: 'That as a condition precedent to any right to recover any damage for loss or injury to said live stock, notice in writing of the claim therefor shall be given to the agent of the carrier actually delivering said live stock wherever such delivery may be made, and such notice shall be so given before said live stock is removed or is intermingled with other live stock.' Against objection of defendant, the court admitted testimony which plaintiff offered to show waiver of the written notice required by the stipulation, and instructed the jury that, al-

though the stipulation was valid and binding upon the parties, nevertheless it might be waived by the defendant, and submitted to them the question whether, in fact, it had been waived, and instructed them, further, that unless they found from the evidence that it had been waived, their verdict should be for the defendant. While the exceptions challenge the correctness of other rulings and instructions, we need consider only the one above stated, as that will be decisive of the case. This court held in *Crawford v. Southern R. Co.* (1915) 101 *S. C.* 522, 86 *S. E.* 19, that such a stipulation might be waived. But more recent decisions of the Supreme Court of the United States, whose decisions are controlling, show that such a stipulation in an interstate bill of lading, if valid and applicable, cannot be waived. *Southern R. C. v. Prescott* (1916) 240 *U. S.* 632, 60 *L. ed.* 836, 36 *Sup. Ct. Rep.* 469; *Northern P. R. Co. v. Wall* (1916) 241 *U. S.* 87, 60 *L. ed.* 905, 36 *Sup. Ct. Rep.* 493; *Georgia, F. & A. R. C. v. Blish Mill Co.* (1916) 241 *U. S.* 190, 60 *L. ed.* 948, 36 *Sup. Ct. Rep.* 541; *Chesapeake & O. R. Co. v. McLaughlin* (1916) 242 *U. S.* 142, 61 *L. ed.* 207, 37 *Sup. Ct. Rep.* 40."

In *Metz Co. v. Boston & M. R. Co.* (1917) 227 *Mass.* 307, 116 *N. E.* 475, supra, the court said: "The jury made an express finding, however, that the condition of the bill of lading requiring written notice of loss within four months had been waived by the defendant. This finding was warranted by the evidence. Therefore, the single question presented is whether such a condition in a bill of lading can be waived under the Federal laws relating to interstate commerce. This is a question touching which the decisions of the Supreme Court of the United States are binding. The Interstate Commerce Act supersedes all state laws as to the subject over which Congress thus has put forth its superior power. *Corbett v. Boston & M. R. Co.* (1914) 219 *Mass.* 356, 107 *N. E.* 60, 9 *N. C. C. A.* 691. This question presented in the case at bar seems to us to be set at rest by *Georgia, F. & A. R. Co. v. Blish Mill Co.* (1916) 241 *U. S.* 190, at page 197, 60 *L. ed.* 948, 36 *Sup. Ct. Rep.* 544, where it was said: 'The parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to

a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act, and open the door to the very abuses at which the act was aimed. *Chicago & A. R. Co. v. Kirby* (1912) 225 U. S. 155, 166, 56 L. ed. 1033, 1038, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501.' Those words are exactly applicable to the facts here presented. They were used in the course of a decision respecting a clause in a bill of lading in effect the same as that here involved. While the facts of that case were slightly dissimilar to those of the case at bar, they are not different in substance, and they call for the operation of the same principles of law. It cannot be presumed that the words just quoted were used inadvisedly or without a full appreciation of the natural force to be attributed to the comprehensive reference to waiver in that connection. This decision appears to mean that, when the form of the bill of lading with its numerous contractual provisions has been filed according to law with the Interstate Commerce Commission, and the interstate rate for transportation has been fixed with reference to the terms and obligations of that uniform bill of lading, then those contractual terms and obligations become a part of the rate established and neither party can depart from them. The shipper and the carrier become bound inexorably by them. This decision was foreshadowed by *Southern R. Co. v. Prescott* (1916) 240 U. S. 632, 60 L. ed. 836, 36 Sup. Ct. Rep. 469; *Kansas City Southern R. Co. v. Carl* (1913) 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; and *Chicago & A. R. Co. v. Kirby* (1912) 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; and perhaps in other decisions. Waiver by the railroad of an obligation resting on the shipper or consignee would operate to that extent to create a preference in favor of that particular shipper or consignee and a discrimination against all others to whom a like concession is not made. But it is the plain purpose of the Interstate Commerce Act and its amendments to prevent all favoritism by the carrier toward shippers and to put all shippers on the same footing. The public policy of the country has been declared to this end in no unmistakable terms in numerous decisions. *Boston & M. R. Co. v. Hooker* (1914) 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526, L.R.A.1918C.

Ann. Cas. 1915D, 593; *Louisville & N. R. Co. v. Mottley* (1911) 219 U. S. 467, 477, 55 L. ed. 297, 301, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; *Armour Packing Co. v. United States* (1908) 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; *Missouri, K. & T. R. Co. v. Harri-man* (1913) 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397. It was said in *Kansas Southern R. Co. v. Carl* (1913) 227 U. S. 639, at 649, 57 L. ed. 683, 687, 33 Sup. Ct. Rep. 391, that the Carmack Amendment of the Interstate Commerce Act 'manifested the purpose of Congress to bring contracts for interstate shipment under one uniform rule or law.'

The shipper cannot waive the stipulation in such contracts any more than the carrier can. Thus, it was held in *Missouri, K. & T. R. Co. v. Ward* (1917) 244 U. S. 383, 61 L. ed. 1213, 37 Sup. Ct. Rep. 617, that the shipper's acceptance of a bill of lading from a connecting carrier containing stipulations not in the bill of lading issued by the initial carrier, or contrary thereto, was not a waiver thereof, since the parties could not waive the conditions set out in the original bill of lading. The stipulation here involved concerned the liability of the connecting carrier under the Carmack Amendment. Of course, the decision involves the illegality of the provisions of the second bill of lading, and to that extent the case is not in point on the question of waiver.

And in *Donohoo Horse & Mule Co. v. Missouri, K. & T. R. Co.* (1915) 95 Kan. 681, 149 Pac. 436, it was held that an agreement that fixed the value of horses and the carrier's liability for loss at \$100 per head, freight rate being based upon that liability, and the carrier maintaining a higher rate on higher valuation, could not be waived by the parties; but it was also held that a stipulation for the bringing of suit or action within a specified time after the loss could be waived, since the provision did not in any way affect the rate. The court, in *Doster v. Michigan C. R. Co.* (1915) 196 Ill. App. 49, took the same position as to the waiver of the time stipulation. It there said: "We do not think that the act was intended to apply to conditions in a contract between a carrier and a shipper that are not determinative of the rate established. If the defendant is right in its present contention, it would follow that it could not waive any of the many provisions and regulations in the present contract. It is obvious that serious and injurious

consequences to shippers would result if the contention of the defendant should prevail. The act was certainly not passed for the purpose of enabling carriers to obtain advantages over shippers in the matter of conditions or regulations in contracts that are not determinative of the rate established, that they did not have before the passage of the law. The mere fact that the defendant incorporated into the 'live stock contract' form that was filed with the Interstate Commerce Commission, provisions that were not determinative of the rate established, would not, in our judgment, give to the defendant, in the matter of the said provisions, the new advantage over the shipper, of being able to evade the effect of a waiver by the carrier of the said provisions. The contract so filed expressly stated the provision that determined the lower rate, and it is reasonable to presume that all other provisions in the contract would be contained in a contract based upon the regular rate. Nor are we able to see how the fact that the carrier might accept and pay, on its merits, a claim of one shipper growing out of alleged negligence, and at the same time refuse to accept and pay, on its merits, a like claim of another shipper (neither having presented his claim within the time limited by his contract for transportation), would constitute an act of preference or discrimination within the meaning of the act, where it appeared from the contract of the party whose claim was accepted and paid, that the provision waived did not in any way affect the rate established. In support of its contention that it would be a violation of the act in question for the railroad company to waive the five-day claim limitation clause, the defendant cites *Clegg v. St. Louis & S. F. R. Co.* (1913) 122 C. C. A. 273, 203 Fed. 971; *Kidwell v. Oregon Short Line R. Co.* (1913) 125 C. C. A. 313, 208 Fed. 1; *Davenport v. Chesapeake & O. R. Co.* (1914) 87 Misc. 303, 149 N. Y. Supp. 865. We find nothing in the first two cases that supports the defendant's contention. In fact, we think that these cases, by strong inference, at least, are adverse to defendant's contention. In the third case cited, practically no facts are stated in the opinion, and it is impossible to tell whether the time-limit clause in the contract that was before the court was determinative of the rate established. If it were, an entirely different question from the one now before us was presented. The court in that case L.R.A.1918C.

decided that the facts did not establish a waiver, and it expressed a doubt as to whether the carrier had the power to waive the time-limit provision for the reason that the form of the bill of lading under which the shipment was made had been approved by the Interstate Commerce Commission. The following cases hold that it would not be a violation of the act for a carrier to waive a provision like the one in question: *Donohoo Horse & Mule Co. v. Missouri, K. & T. R. Co.* (Kan.) supra; *Crawford v. Southern R. Co.* (1915) 101 S. O. 522, 86 S. E. 19, 11 N. C. C. A. 541; *Clingan v. Cleveland, C. C. & St. L. R. Co.* (1913) 184 Ill. App. 202. The stipulation as to notice was for the sole benefit of the carrier, and before the passage of the act the courts repeatedly held that similar provisions could be waived, and as the present one was not determinative of the rate in the contract, we fail to see any good reason for holding that it would be a violation of the act for the defendant to waive the same. We think the conclusion we have reached is entirely in harmony with the reasoning of the court in *Boston & M. R. Co. v. Hooker* (1914) 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, 34 Snp. Ct. Rep. 526, Ann. Cas. 1915D, 593." But the Kansas case here cited is apparently overruled in *Abell v. Atchison, T. & S. F. R. Co.* (1917) 100 Kan. 238, 164 Pac. 269, as cited supra, where the doctrine of the earlier case is repudiated, without reference thereto. It will be observed that the earlier case was decided before the Federal courts had so thoroughly established the contrary doctrine. J. W. M.

IOWA SUPREME COURT.

HARRY L. OGG, Appt.,

v.

E. H. ROBB.

(— Iowa, —, 162 N. W. 217.)

Limitation of action — action for malpractice — when runs.

The Statute of Limitations begins to run in favor of a physician who burns a patient with an X-ray machine at the time the burn first becomes apparent, and not when a malignant sore develops therefrom, although

Note. — The question as to when the Statute of Limitations begins to run against a physician or surgeon for malpractice is discussed in the notes to *Aachen & M. F. Ins. Co. v. Morton*, 15 L.R.A.(N.S.) at page 161, and *Hahn v. Claybrook*, L.R.A.1917C, 1172.

he fraudulently minimizes the character of the injury, and the statute provides that, in case of fraud, the cause of action shall not be deemed to have accrued until the fraud is discovered, since such statute applies only to suits solely cognizable in equity.

For other cases, see Limitation of Actions, II. f, in Dig. 1-52 N. S.

(April 6, 1917.)

APPEAL by plaintiff from a judgment of the District Court for Jasper County sustaining a demurrer to a petition filed to recover damages for injuries caused by alleged negligence and malpractice of defendant. Affirmed.

Statement by Preston, J.:

As appellant states his claim, this is an action at law brought by plaintiff to recover damage for injuries caused by defendant's negligence and malpractice as a physician and surgeon and by his fraud and fraudulent deception therein in connection with electric rays, radioexposures, and use of an X-ray machine, and medical services therewith. Plaintiff sued for \$50,000. Defendant interposed a demurrer to the petition, which was sustained, and, plaintiff electing to stand upon his petition, judgment was rendered against him for costs, and he appeals. Affirmed.

Messrs. W. G. Clements and O. P. Myers, for appellant:

The cause of action is not barred by the Statute of Limitations.

Boomer v. French, 40 Iowa, 601; *Wilder v. Secor*, 72 Iowa, 161, 2 Am. St. Rep. 236, 33 N. W. 448; *Carrier v. Chicago R. I. & P. R. Co.* 79 Iowa, 80, 6 L.R.A. 799, 44 N. W. 203; *Cook v. Chicago R. I. & P. R. Co.* 81 Iowa, 551, 9 L.R.A. 764, 3 Inters. Com. Rep. 383, 25 Am. St. Rep. 512, 46 N. W. 1080; *Bradford v. McCormick*, 71 Iowa, 129, 32 N. W. 93; *Findley v. Stewart*, 46 Iowa, 655; *Cress v. Ivens*, 155 Iowa, 17, 134 N. W. 869; *Aultman, M. & Co. v. Adams*, 35 Mo. App. 503; *Mullen v. Callanan*, 167 Iowa, 367, 149 N. W. 516; *Texas C. R. Co. v. Hawkins*, — Tex. Civ. App. —, 163 S. W. 132; *Ott v. Hood*, 152 Wis. 97, 44 L.R.A. (N.S.) 524, 139 N. W. 762, Ann. Cas. 1914C, 636.

Preston, J., delivered the opinion of the court:

It is alleged that plaintiff was born September 2, 1884, and became of age in 1905. He was injured about June, 1901; he was treated and burned by defendant as hereinafter stated, in July of that year; some time in 1908 defendant moved to Wisconsin L.R.A.1918C.

and became a nonresident of Iowa; some time in the year 1912 the tissues where he had been burned broke down and became a malignant cancerous growth, necessitating the amputation of his arm, and it is alleged that this condition was first discovered in 1912. This action was brought September 20, 1915.

Complaint is made by appellant that the court erred in sustaining defendant's motion to strike parts of the petition wherein it is alleged that defendant used the X-ray machine without the knowledge of plaintiff's parents. The parents are not suing in this action, and, in the view we take of the case, the ruling on the motion to strike is not material and would not have made a case on demurrer or prevented the running of the Statute of Limitations had the motion not been sustained. The real question in the case, as conceded by appellant, is whether his claim is barred by the Statute of Limitations. We have not been favored with an argument for appellee. We prefer argument, because in its absence the court is compelled to make an independent investigation.

It is alleged in the petition, substantially: That in 1901, when plaintiff was under seventeen years of age, he accidentally broke his right wrist. It had been set by other doctors, but about June 1901, defendant used his X-ray machine in one application upon plaintiff's wrist to determine whether the bones were properly set, and found that they were. At this time and for some years prior thereto defendant had been a regular practising physician and surgeon. That thereafter and during the month of July, 1901, upon the request of defendant, and for the benefit of defendant, he called plaintiff into his office, without the knowledge or consent of plaintiff's parents, and experimented upon plaintiff with defendant's X-ray machine to secure pictures of plaintiff's hand and wrist. That he continued for ten days in said experiments, and used the X-ray machine on plaintiff's hand and wrist many times and made long and close exposures. That as a result thereof the skin on his hand and wrist became discolored. Defendant then informed plaintiff and his parents that the use of the X-ray machine caused such discoloration, and defendant then falsely and fraudulently informed plaintiff and his parents that this discoloration was of no particular consequence and would be temporary in its effects, and defendant fraudulently concealed from plaintiff and his parents the true effect of radioexposure produced by the X-ray machine. That defendant then treated said discoloration for a time and it apparently disappeared, leaving a scar, but

with usual use of the hand. That plaintiff and his parents fully relied upon the statement and advice of defendant as to the temporary effect of said X-rays, and nothing further was done in regard thereto until 1912. That the use of said machine by defendant produced a cancerous condition which was latent and dormant until 1912, and plaintiff had no knowledge of said condition until then. That at said time the tissues of the right hand where the X-rays had been applied broke down and became an epithelioma or malignant cancerous growth, causing plaintiff great pain, suffering, and mental anguish, greatly injuring his general health, and necessitating the amputation of his right forearm in order to save his life. That at great expense during and since 1912 he has advised with the most skillful physicians and surgeons and experts, and made every effort to overcome the effects of said X-rays upon him as used by defendant, but that the outcome is not fully determined. That the loss of his right arm has greatly incapacitated him from earning his livelihood. That plaintiff was guilty of no contributory negligence. That in using said machine defendant was negligent, and thereby caused said injury. That defendant by such use well knew that he had produced effects and conditions that would finally develop into a malignant cancerous growth, which he knowingly and fraudulently concealed from plaintiff. That said action and representations of defendant were a fraud upon plaintiff, which fraud was not known to plaintiff until 1912. That said fraud consisted in inducing plaintiff, then a minor, to submit his right hand to the X-ray and X-ray machine, plaintiff being wholly ignorant of the effects and use thereof; and, further, in representing to plaintiff and his parents that the discoloration produced by such use was only temporary, and, further, by knowingly and fraudulently concealing from plaintiff and his parents the real nature and effect of the negligent use of said machine, all which fraud was not known to plaintiff until the year 1912.

The demurrer was in this form: That the petition shows upon its face that the plaintiff's alleged cause of action is barred by the Statute of Limitations, in that: (a) The said cause of action did not accrue within three years prior to one year after the plaintiff attained his majority, and no sufficient facts are stated to postpone the running of the Statute of Limitations. (b) That the gist of plaintiff's action is negligence, and his cause of action, if any, accrued at the time the injury was done, whether the extent was then known or not. (c) That under the law, the right to maintain an action for negligence is distinguished from the measure of damages resulting from such negligence, and although the entire damages resulting from the alleged negligence of the defendant was not known to the plaintiff until his time of recovery was barred, yet the time in which the action may be brought was not prolonged thereby. (d) That said statute does not run from the time of the consequent injury to the plaintiff. (e) That plaintiff's cause of action is not founded on fraud, and the allegations of the petition do not defeat the bar of the statute.

Appellant has not argued the question as to whether, if a cause of action accrued at the time of the original injury, suit could have been brought by plaintiff by his guardian or next friend, or whether he would have time, after attaining his majority, to bring suit, nor is the question of the effect of defendant's removal from the state in 1908 argued; doubtless on the theory that if a cause of action accrued to plaintiff in 1901, it would be barred in any event. As bearing on the first proposition, see *Murphy v. Chicago*, M. & St. P. R. Co. 80 Iowa, 26, 45 N. W. 392; *Roelefsen v. Pella*, 121 Iowa, 153, 96 N. W. 738.

Appellant says in argument that there is only one main controlling question to present to this court in this cause; that the demurrer raises only one question, and that is the question of the Statute of Limitations; that he insists by actual fraudulent concealment by defendant this cause or right of action did not accrue until the year 1915, the time of bringing this action, and hence the action is not barred; that the main legal proposition is that where a party against whom a cause of action existed in favor of another, by fraud or actual fraudulent concealment, prevented such other from obtaining knowledge thereof, the Statute of Limitations would only commence to run from the time the right of action was discovered, or might, by the use of diligence, have been discovered. The only authorities cited are in support of this proposition. Appellant cites *Boomer v. French*, 40 Iowa, 601; *Wilder v. Secor*, 72 Iowa, 161, 2 Am. St. Rep. 236, 33 N. W. 448; *Carrier v. Chicago*, R. I. & P. R. Co. 79 Iowa, 80, 6 L.R.A. 790, 44 N. W. 203; *Cook v. Chicago*, R. I. & P. R. Co. 81 Iowa, 551, 564, 9 L.R.A. 764, 25 Am. St. Rep. 512, 46 N. W. 1080; *Bradford v. McCormick*, 71 Iowa, 129, 32 N. W. 93; *Findley v. Stewart*, 46 Iowa, 655, 657; *Cress v. Ivans*, 155 Iowa, 17, 20, 134 N. W. 869; *Aultman, M. & Co. v. Adams*, 35 Mo. App. 503; *Mullen v. Callanan*, 167 Iowa, 367, 379, 149 N. W. 516.

The gist of plaintiff's cause of action is based upon the alleged negligence of defend-

ant in 1901, and the claim that defendant fraudulently concealed some of the effects of the injury caused by the X-ray machine. It is alleged that defendant knew and fraudulently concealed from plaintiff that the burning in 1901 would result in cancer. Necessarily the statement by defendant that the injury in the first place was only temporary would be his opinion, unless cancer results in all cases from such burning, and the pleading of such fact would, to a certain extent, be pleading a conclusion. It is not specifically alleged that burnings of this character result in cancers in all cases, though one part comes very close to it.

It is not claimed by appellant, as we understand it, that his cause of action is based on fraud under § 3448 of the Code. Under that section it is provided that the cause of action shall not be deemed to have accrued until the fraud shall have been discovered by the aggrieved party, and Code, § 3447, ¶ 6, limits to five years the period within which an action may be brought in such cases.

It has been held that the fraud contemplated in § 3448 is only such as was heretofore solely cognizable in chancery, and that where the fraud is not of that character, but the plaintiff's remedy is concurrent, the exception there made does not apply. *Gebhard v. Sattler*, 40 Iowa, 152; *Brown v. Brown*, 44 Iowa, 349; *Phoenix Ins. Co. v. Dankwardt*, 47 Iowa, 432; *Relf v. Eberly*, 23 Iowa, 467; *McGinnis v. Hunt*, 47 Iowa, 668; *Carrier v. Chicago, R. I. & P. R. Co.* 79 Iowa, 80, 6 L.R.A. 799, 44 N. W. 203; *Daugherty v. Daugherty*, 116 Iowa, 245, 90 N. W. 65; *West v. Fry*, 134 Iowa, 675, 11 L.R.A.(N.S.) 1191, 112 N. W. 184; *Baird v. Omaha & C. B. R. & Bridge Co.* 111 Iowa, 627, 82 N. W. 1020.

The last two cases distinguish between fraud and mistake. In *Lougee v. Reed*, 133 Iowa, 48, 110 N. W. 165, it was held that § 3448 has no application to an action against a clerk of court for omitting to index a judgment, because such is governed by § 3447, providing that actions against officers for neglect of official duty must be brought within three years. As bearing upon this, see *Ott v. Hood*, 152 Wis. 97, 44 L.R.A.(N.S.) 524, 139 N. W. 762, Ann. Cas. 1914C, 636; *Cornell v. Edsen*, 78 Wash. 662, 51 L.R.A.(N.S.) 279, 139 Pac. 602.

Appellant's contention, as we understand it, is that his alleged cause of action itself was concealed by the alleged fraud of the defendant in stating that the original injury was but temporary. Without taking the time to review plaintiff's citations, the import of them is that the cause of action was itself concealed, as in *Mullen v. Callanan*, supra, where, at page 379 of 167 L.R.A.1918C.

Iowa, it was said: "But, conceding that it might have been brought either at law or in equity, or that a court of law alone had jurisdiction, still the action is not barred, because the cause thereof was deliberately concealed from plaintiff."

So in the *Cress Case*, where there was no knowledge by plaintiff that there were to be commissions in a land trade, and defendants falsely told plaintiffs there were to be no commissions. We said in *Cole v. Charles City Nat. Bank*, 114 Iowa, 632, at page 635, 87 N. W. 672, referring to *Cook v. Chicago, R. I. & P. R. Co.* 81 Iowa, 551, 9 L.R.A. 764, 3 Inters. Com. Rep. 383, 25 Am. St. Rep. 512, 46 N. W. 1080, one of plaintiff's citations: "It is there stated that the statute does not begin to run, where a cause of action is fraudulently concealed, until the facts are discovered by plaintiff."

In *McKay v. McCarthy*, 146 Iowa, 546, 551, 34 L.R.A.(N.S.) 911, 123 N. W. 757, we said of that case: "It is not alleged that the cause of action was concealed by defendant, and, for this reason . . . *Boomer v. French*, 40 Iowa, 601, and *Carrier v. Chicago, R. I. & P. R. Co.* 79 Iowa, 80, 6 L.R.A. 799, 44 N. W. 203, are not in point."

The last two citations are among those cited by appellant in this case. In the instant case, was the plaintiff's cause of action concealed by the statement of the defendant that the original burning was but temporary and was of no particular consequence? Plaintiff alleges that he was burned in 1901, and, as he alleges, by the negligence of the defendant, and that defendant fraudulently concealed the true effect produced by the use of the X-ray machine. This fact was known to plaintiff and his parents. All damages which subsequently developed are traceable to and based upon that act. By the original act plaintiff was injured, and, as the petition alleges, by the negligence of the defendant. He would have been entitled to some damage at that time, and, if it be true that cancer necessarily and in all cases is the result of such burning, or if cancer is the probable result, such fact could be shown as bearing upon the question of damages in an action for the original injury. If cancer is not the necessary or probable result of such burning, then, as before stated, defendant's statement would be more or less of an opinion, and in that case the fact that later and in 1912 a cancerous condition did develop and plaintiff's damages might thereby be increased, this would not constitute a new cause of action. It would seem, then, that plaintiff's cause of action accrued at the time of the original injury. In *Gustin v.*

Jefferson County, 15 Iowa, 158, it was held that the Statute of Limitations as to actions for damages resulting from injuries to the person commences to run from the time the injury is done, and not from the time the party injured becomes fully advised of the extent thereof. See also *Steel v. Bryant*, 49 Iowa, 116; *Garrett v. Bicklin*, 78 Iowa, 115, 122, 42 N. W. 621. In the *Steel Case* it was said: "The time when the action accrued on the bond is the time when it accrues for the negligent act. It is true that the negligent act had been committed before that time, but there was no immediate injury or damage, nor does the law imply there was any. The injury and damage were consequential, depending on the happening of certain things in the future."

In *Miller v. Lesser*, 71 Iowa, 147, 32 N. W. 250, it was held that an action upon an unwritten contract against one who had removed to Iowa and had lived here for five years after the cause of action had accrued was barred by the Statute of Limitations, notwithstanding the defendant had lived here under an assumed name, and plaintiff, by the exercise of diligence, was not able to discover his place of residence, on the ground that the case was not brought within any of the exceptions to the Statute of Limitations of Actions. See also *St. Paul Title & T. Co. v. Stensgaard*, 39 L.R.A. (N.S.) 741, and note (162 Cal. 178, 121 Pac. 731). In the note to *Aachen & M. F. Ins. Co. v. Morton*, 15 L.R.A. (N.S.) at page 161, are a number of cases bearing upon the question as to when the Statute of Limitations begins to run in cases involving breaches of professional duty or malpractice by physicians and surgeons. One of these is *Fronce v. Nichols*, 22 Ohio C. C. 539, 12 Ohio C. D. 472, where the damage complained of was occasioned by the malpractice of a physician, and it was held that it is the breach of duty that gives rise to the action and causes it to accrue, and not knowledge of the fact evidenced by resulting injury. Also *Miller v. Ryerson*, 22 Ont. Rep. 369, where it was held that under a statute providing that physicians should not be liable to any action for malpractice unless commenced within one year from the date of the termination of the professional services, an action against the physician for the alleged malpractice was barred within one year from the time the services were rendered, and that the Statute of Limitations began to run from that time, and not from the time the effects of the treatment developed. And in *Fadden v. Satterlee* (C. C.) 43 Fed. 568, holding that the statute as to actions for personal injuries begins to run at the time the injury is received, although its results may not be then fully developed. In *Wilcox v. Plummer*, 4 Pet. 172, 7 L. ed. 821, cited in 12 L.R.A. (N.S.) at 1005, an action against an attorney for negligence, it was said: "When the attorney was chargeable with negligence or unskilfulness, his contract was violated, and the action might have been sustained immediately. Perhaps in that event, no more than nominal damages may be proved, and no more recovered; but, on the other hand, it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear the damage is not the cause of action."

And in *Gould v. Palmer*, 96 Ga. 798, 22 S. E. 583, it was held that it was not a special damage or injury resulting from the unskilfulness of an attorney, but the breach of duty imposed by the contract of employment, which gives a right of action for damages sustained; and the Statute of Limitations in such a case, therefore, runs from the date of the breach of the duty, and not from the time when the extent of the resulting injury is ascertained. A number of other cases to the same effect are cited in the same note. In 25 Cyc. 1135 (18), we find this doctrine: "The test to determine when the Statute of Limitations begins to run against an action sounding in tort is whether the act causing the damage does or does not of itself constitute a legal injury; that is, an injury giving rise to a cause of action because it is an invasion of some right of plaintiff. If the act is of itself not unlawful in this sense, and plaintiff sues to recover damages subsequently accruing from and consequent upon the act, the cause of action accrues and the statute begins to run when and only when the damages are sustained. . . . But if the act of which the injury is the natural sequence is of itself a legal injury to plaintiff, a completed wrong, the cause of action accrues and the statute begins to run from the time the act is committed, be the actual damage however slight; and the statute will operate to bar a recovery, not only for the present damages, but for damages developing subsequently, and not ascertainable at the time of the wrong done; for in such a case the subsequent increase in the damages resulting gives no new cause of action. Nor does plaintiff's ignorance of the tort or injury, at least if there is no fraudulent concealment by defendant, postpone the running of the statute until the tort or injury is discovered. Where the doing of an act is attended immediately by resulting actual damage, the statute begins to run at once."

It is our conclusion that the plaintiff's alleged cause of action was barred by the

Statute of Limitations, and that the court was right in sustaining defendant's demurrer to the petition. The judgment is therefore affirmed.

Gaynor, Ch. J., and Evans and Ladd, JJ., concur.

Petition for rehearing denied.

KANSAS SUPREME COURT.

FIRST NATIONAL BANK OF JUNCTION CITY

v.

RODGER MOON, County Assessor, et al.
(No. 21,603.)

INTERSTATE MORTGAGE TRUST COMPANY, Appt.,

v.

FAIRFAX BARNES, County Clerk of Labette County, et al.
(No. 21,218.)

(102 Kan. 334, 170 Pac. 33.)

Tax — bank stock.

1. The tax contemplated by § 11,236 of the General Statutes of 1915, relating to taxation of national banks, state banks, and loan or investment companies, is a tax on shares of stock in the hands of stockholders, and not a tax on capital stock or assets, the property of the corporation.

For other cases, see Taxes, I. c, 2, in Dig. 1-52 N. S.

Same — mode of assessment.

2. Shares of stock are to be assessed at their true value, which may or may not coincide with their bookkeeping value.

For other cases, see Taxes, III. b, 2, in Dig. 1-52 N. S.

Same — deduction of real estate.

3. The assessed value of real estate generally, and not merely the banking house or office building, and real estate representing an investment of original capital stock, may be deducted from the value of shares of stock.

For other cases, see Taxes, III. b, 2, in Dig. 1-52 N. S.

Same — land in other states.

4. No deduction may be made for real estate in other states owned by state banks, national banks, or loan investment companies.

For other cases, see Taxes, III. b, 2, in Dig. 1-52 N. S.

Headnotes by BURCH, J.

Note. — The subject of deductions in taxation of shares of corporate stock in the hands of shareholders is considered in the note to *Re First Nat. Bank*, L.R.A.1915C, 386; and the same question in respect of taxation of the capital stock, in the note to *State ex rel. Corporation Commission v. J. K. Morrison & Sons Co.* L.R.A.1915C, 380.

The general subject of situs, as between different states or countries, of personal property for purposes of property taxation, is treated in the note to *Liverpool & L.* L.R.A.1918C.

Same — amount of deduction.

5. In the case of state banks, the deduction on account of real estate necessary for the convenient transaction of business, including furniture and fixtures, may not exceed the value of the real estate which the bank has capacity to hold for that purpose.

For other cases, see Taxes, III. b, 2, in Dig. 1-52 N. S.

Same — national banks.

6. The limitation stated in the preceding paragraph does not apply to national banks or loan or investment companies.

For other cases, see Taxes, III. b, 2, in Dig. 1-52 N. S.

Same — land acquired in business.

7. No deduction from the assessed value of shares of stock of banks can be made on account of real estate acquired in the ordinary transaction of business which is retained beyond the periods limited by the state and Federal laws for holding such real estate.

For other cases, see Taxes, III. b, 2, in Dig. 1-52 N. S.

Same — classification.

8. The classification of loan or investment companies with state and national banks for purposes of taxation is a reasonable classification, which does not infringe the constitutional requirement that taxes shall be assessed and levied at a uniform and equal rate.

For other cases, see Taxes, I. c, in Dig. 1-52 N. S.

Same — constitutional rights.

9. The prohibition upon deducting from the value of shares of stock of state banks and loan or investment companies the value of real estate situated in a foreign state does not infringe the 14th Amendment to the Constitution of the United States.

For other cases, see Constitutional Law, II. b, 3, in Dig. 1-52 N. S.

Same — double taxation.

10. The prohibition does not result in double taxation by this state.

For other cases, see Taxes, I. c, in Dig. 1-52 N. S.

G. Ins. Co. v. Board of Assessors, L.R.A. 1915C, 903, and see later case, *W. W. Kimball Co. v. Shawnee County*, L.R.A.1917B, 1282; and a similar question with regard to inheritance or succession taxes, in the note to *Re Helena*, 46 L.R.A.(N.S.) 1167, and see later cases, *State ex rel. Smith v. Probate Ct.* 50 L.R.A.(N.S.) 262; *Security Trust Co. v. Com.* 51 L.R.A.(N.S.) 232; *Re Adams*, L.R.A.1915C, 95; *People v. Union Trust Co.* L.R.A.1915D, 450; and *Re Harrow*, L.R.A. 1917D, 281.

Same — review by courts.

11. Conduct of the state tax commission in arriving at the true value of shares of stock, not fraudulent or so arbitrary or capricious as to amount to fraud, is not subject to review by the courts.

For other cases, see Courts, I. c, 2, c, in Dig. 1-52 N. 8.

(January 12, 1918.)

PETITION for a writ of mandamus to compel the allowance by defendants of plaintiff's alleged right, under the tax law, to deduct from the assessed value of the shares of stock the assessed value of all the real estate belonging to it. Writ allowed in part.

APPEAL by plaintiff from an order of the District Court for Labette County sustaining a demurrer to a petition filed to enjoin the enforcement of an order of the County Board of Equalization, which was approved by the Tax Commission. Affirmed.

The facts are stated in the opinion.

Messrs. J. V. Humphrey and Arthur S. Humphrey, for plaintiff in No. 21,803:

The statute gives the right to deduct from the assessed value of the shares of stock the assessed value of all the real estate belonging with requisite title to the bank, without regard to its quantity or the manner or purpose of its acquisition.

Goodnow v. American Writing Paper Co. 73 N. J. Eq. 692, 69 Atl. 1014; Williams v. Western U. Teleg. Co. 93 N. Y. 162; People ex rel. Wiebusch & H. Co. v. Roberts, 154 N. Y. 101, 47 N. E. 980; Henderson Bridge Co. v. Com. 99 Ky. 623, 29 L.R.A. 73, 31 S. W. 486; Pacific Hotel Co. v. Lieb, 83 Ill. 602; Batterson's Appeal, 72 Conn. 374, 44 Atl. 540; New Haven v. City Bank, 31 Conn. 106; Foster v. Stevens, 63 Vt. 175, 13 L.R.A. 166, 22 Atl. 78; State ex rel. Batz v. Lewis, 118 Wis. 432, 95 N. W. 388; Com. v. Lehigh Ave. R. Co. 129 Pa. 405, 5 L.R.A. 367, 18 Atl. 414, 498; People ex rel. Peabody v. Chicago Gas Trust Co. 130 Ill. 268, 8 L.R.A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; State Bank v. Brackenridge, 7 Blackf. 395; Harvester Bldg. Co. v. Hartley, 98 Kan. 732, 160 Pac. 971; First Trust Co. v. Lancaster County, 93 Neb. 793, 141 N. W. 1037, 142 N. W. 542; Com. v. Virginia Bank & T. Co. 110 Va. 552, 66 S. E. 853; Smith v. Stephens, 173 Ind. 564, 30 L.R.A. (N.S.) 704, 91 N. E. 107; Camden v. Camden Safe Deposit & T. Co. 84 N. J. L. 37, 85 Atl. 1026; Commercial Nat. Bank v. Chambers, 21 Utah, 324, 56 L.R.A. 346, 61 Pac. 560.

Messrs. S. M. Brewster, Attorney General, S. N. Hawkes, and J. L. Hunt, Assistant Attorneys General, for the State Tax Commission:
L.R.A. 1918C.

Shares of a bank should be assessed at their actual value.

Rosenblatt v. Johnston, 104 U. S. 462, 26 L. ed. 832; Harvester Bldg. Co. v. Hartley, 98 Kan. 732, 160 Pac. 971; Symms v. Graves, 65 Kan. 628, 70 Pac. 591; Silven v. Osage County, 76 Kan. 687, 13 L.R.A. (N.S.) 716, 92 Pac. 604, 14 Ann. Cas. 163; Board of Education v. Shepherd, 90 Kan. 628, 135 Pac. 605.

The value of real property situated in Kansas, owned by state banks other than the banking house, should not be deducted.

Re Curtis, 26 R. I. 580, 60 Atl. 240; Morse v. Equitable Life Assur. Soc. 124 App. Div. 235, 108 N. Y. Supp. 986; Fidelity & D. Co. v. Freud, 115 Md. 29, 80 Atl. 603; Desobry v. Tete, 31 La. Ann. 809, 33 Am. Rep. 232; Drake v. Crane, 127 Mo. 85, 27 L.R.A. 653, 29 S. W. 990; Stramann v. Scheeren, 7 Colo. App. 1, 42 Pac. 191; First Nat. Bank v. Douglas County, 124 Wis. 15, 102 N. W. 315, 4 Ann. Cas. 34.

The value of real property not located in Kansas may not be deducted.

Commercial Nat. Bank v. Chambers, 182 U. S. 558, 45 L. ed. 1227, 21 Sup. Ct. Rep. 863; American Coal Co. v. Allegany County, 59 Md. 185.

Messrs. W. E. Ziegler and Banks & O'Brien for the defendant banks.

Messrs. Donald Muir, L. B. Morris, H. L. McCune, R. B. Caldwell, and Blatchford Downing for other defendants.

Messrs. E. L. Burton, George F. Burton, and W. A. Disch, for appellant in No. 21,218:

Statutes will be construed, if possible, to prevent double taxation.

2 Thomp. Corp. § 5926; Fisher v. Rush County, 19 Kan. 414; East Livermore v. Livermore Falls Trust & Bkg. Co. 103 Me. 418, 15 L.R.A. (N.S.) 952, 69 Atl. 306, 13 Ann. Cas. 631; Re Indian Territory Illuminating Oil Co. 43 Okla. 307, 142 Pac. 997; New Orleans v. Houston, 119 U. S. 265, 30 L. ed. 411, 7 Sup. Ct. Rep. 198; Hempstead County v. Hempstead County Bank, 73 Ark. 515, 84 S. W. 715.

If the said section of the statute should bear the construction contended for by the tax commission, then it violates § 1, article 11, of the Constitution of the state of Kansas, and the 14th Amendment to the Constitution of the United States.

Johnson v. Wells, F. & Co. 239 U. S. 234, 60 L. ed. 243, 36 Sup. Ct. Rep. 62; Thomp. Corp. 2d ed. § 5885; Graham v. Chautauqua County, 31 Kan. 473, 2 Pac. 549; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669.

Messrs. C. E. Pile and L. E. Goodrich, for appellees:

Under the terms of taxation statutes

which have been drawn without regard to the technical meaning of words, capital stock means all the actual property of the corporation.

6 Cyc. 349; *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365; *San Francisco v. Spring Valley Waterworks*, 63 Cal. 524; *Security Co. v. Hartford*, 61 Conn. 89, 23 Atl. 699; *New Haven v. City Bank*, 31 Conn. 106; *Ohio & M. R. Co. v. Weber*, 96 Ill. 443; *Pacific Hotel Co. v. Lieb*, 83 Ill. 602; *Mutual Ins. Co. v. Erie County*, 4 N. Y. 442; *Tradesman Pub. Co. v. Knoxville Car Wheel Co.* 95 Tenn. 634, 31 L.R.A. 593, 40 Am. St. Rep. 943, 32 S. W. 1097.

The true value of the capital stock is its value for the purposes of income and sale. It is not the face value of the stock as carried on the books of the corporation for bookkeeping purposes.

Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; *Re Indian Territory Illuminating Oil Co.* 43 Okla. 307, 142 Pac. 997.

Burch, J., delivered the opinion of the court:

These actions involve controversies between state banks, national banks, and a loan company, on one side, and taxing officials on the other. The controversies relate to the assessment of shares of stock of the institutions named, and the deductions to be made from such assessments on account of investments in real estate in Kansas and other states. With the exception of some minor matters, the questions presented must be solved by an interpretation of the tax laws of the state, considered in connection with other laws, including statutes of the United States. The questions are of such character that they may be apprehended without a résumé of the pleadings. An abstract of the pertinent laws is appended to this opinion. For convenience in reference, numbers in brackets have been prefixed to each subdivision of § 11,236 of the General Statutes of 1915, which relates to a distinct subject. This section will be designated for brevity, the tax law.

The first question to be determined is, What is the precise subject of taxation reached by the tax law?

The first subdivision of the tax law provides that "stockholders" of state and national banks and of loan or investment companies shall be assessed and taxed "on the true value of their shares of stock." The second subdivision requires a return to be made, by a designated officer of the corporation, of "the amount and value of stock" held by each stockholder, together with "the value of any undivided profit or surplus." L.R.A.1918C.

The third subdivision requires the corporation to pay the tax "assessed upon said stock and undivided profits or surplus," and gives the bank a "lien thereon," but reserves a remedy against the stockholder. The fourth subdivision authorizes a deduction, on account of "capital stock" invested in real estate, to be made "from the original assessment of the paid-up capital stock." The fifth subdivision provides that bank stock and investment or loan company "stock or capital" shall not be assessed at a higher rate than other property. The sixth subdivision makes the act applicable to certain mutual insurance companies. The seventh subdivision provides that the assets, moneys, and credits of mutual insurance companies shall be subject to assessment and taxation. The first five subdivisions refer to state banks, national banks, and loan companies. The sixth and seventh subdivisions refer to mutual insurance companies, and in what follows the sixth and seventh subdivisions will be omitted from consideration, unless specifically mentioned.

It is not strange that this Joseph's coat piece of legislation should be confusing to taxing officers, especially those to whom the invisible, intangible entity called a corporation is still an enigma, and should be confusing to corporate officers and stockholders. It affords fine opportunity for legal dialectics and discursion. The fact is, the statute was the product of necessity, which limited the subject of taxation to shares of stock as the property of stockholders.

In the case of state banks, capital stock is the fund contributed by the stockholders to start the bank. It must not be less than a prescribed sum. It must be fully subscribed before a charter can be taken out, and the subscriptions must be paid in cash before a certificate authorizing the bank to engage in business can be obtained from the bank commissioner. The fund is divided into shares of \$100 each. Each stockholder's subscription is of a certain number of shares, and certificates, called "certificates of stock," are issued to stockholders to evidence ownership of their shares. The original fund, called "capital stock," can neither be increased nor diminished, except under prescribed conditions and according to prescribed formalities. When paid in by the stockholders, the money belongs to the bank. On the books of the bank the cash account is debited, and the money is the property of the corporation, the same as if the corporation were a natural person. The bank is managed and controlled by a board of directors, and the stockholders have no voice in its business affairs. When the corporation begins doing business it has no money or property except the cash paid in

on subscriptions to capital stock. The corporation buys a banking house with some of the money. The banking house is not capital stock. It is simply property purchased with money of the bank. The corporation proceeds to do a general banking business, and acquires notes and other instruments representing loans, acquires bonds, stocks, mortgages, and other securities, and acquires real estate and various other kinds of property. All this property belongs to the bank. The stockholders have no proprietorship in it or proprietary dominion over it. The property thus acquired, credits of various kinds, and cash and cash items in the vault, constitute the bank's assets or resources, sometimes spoken of in an economic way as its capital. They have all been acquired through the uses to which the original capital stock and its products have been put, but they are not capital stock. Capital stock is still and always the original fund subscribed by the stockholders at the inception of the organization, and stands as a liability on the books of the bank, instead of as an asset. The bank makes some money. Profits belong to the corporation, and can be disposed of by the board of directors only, not by the stockholders. The stockholders have no property in profits until the directors have declared a dividend. In order to create a fund to meet unforeseen contingencies and unusual losses, the bank does not distribute all the profits among the stockholders, but retains some of them. The fund so created is designated surplus. Profits not set aside as surplus or distributed in dividends are undivided profits. Surplus and undivided profits are the property of the bank. As the names indicate, they are not capital stock, but are something besides capital stock. After paying for the number of shares of capital stock which he has subscribed, the stockholder's right to claim money or property from the bank and its business is limited to sharing in such dividends as may be declared by the board of directors out of profits, and to sharing in the distribution of the assets of the bank when it winds up its affairs, after depositors and all other creditors have been satisfied. This right attaches to and is proportionate to the number of shares of capital stock which the stockholder owns. His shares are his personal property, and they may be bought and sold as other personal property, by the observance of certain formalities. They may be willed away, and in case of intestacy pass to his administrator as a part of his personal estate. He cannot sell or will away any part of the money or property which belongs to the corporation.

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The foregoing explanation will serve quite as well for national banks and loan companies as for state banks. It is as simple and as elementary as it can be made,—so much so that it seems extraneous to a judicial opinion. It may be helpful, however, to inexperienced assessors, county clerks, and county boards of equalization, and perhaps others. There are indications that the legislative mind was not perfectly clear on the subject.

The state was admitted into the Union before the National Bank Act was passed by Congress. Article 11 of the state Constitution was devoted to finance and taxation, and § 2 of that article provided that the property of a bank, its notes, bills discounted or purchased, moneys loaned, and all other property, effects, or dues of every description, without deduction, should be taxed. The first tax law was framed according to that theory. Laws of 1860, chap. 114, Comp. Laws 1862, chap. 197. The exigencies of the Civil War led to the creation of the national banking system. The purpose was to supply a market for government bonds and provide a safe and elastic system of national currency issued on the security of such bonds. Government bonds were not taxable, the national banks were Federal agencies, exempt from taxation except so far as Congress waived the exemption, and the first act, passed on February 25, 1863 (Act Cong. Feb. 25, 1863, chap. 58, 12 Stat. at L. 665), contained no provision for state taxation. Such a provision was added by Congress in 1864, and appears as § 5219 of the Revised Statutes of the United States (Comp. Stat. 1916, § 9784). Concerning this act the Supreme Court of the United States has said (*italics added*): "This section, then, of the Revised Statutes, is the measure of the power of a state to tax national banks, their property or their franchises. By its unambiguous provisions the power is confined to a taxation of the *shares of stock in the names of the shareholders* and to an assessment of the *real estate of the bank*. Any state tax, therefore, which is in excess of and not in conformity to these requirements, is void." *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 669, 43 L. ed. 850, 852, 19 Sup. Ct. Rep. 539.

The result of the congressional legislation was to prevent application to national banks of state legislation taxing bank property other than real estate. In New York, state banks were taxed on their capital. An act was passed taxing shares of national bank stock to the stockholders. The act did not, however, tax the shares of state banks to the stockholders. The act was held void because it discriminated in favor of stock-

holders of state banks, notwithstanding the fact that state banks were taxed on their capital. In the opinion the Supreme Court of the United States said:

"The banks of the state are taxed upon their capital; and although the act provides that the tax on the shares of the national banks shall not exceed the par value, yet, inasmuch as the capital of the state banks may consist of the bonds of the United States, which are exempt from state taxation, it is easy to see that this tax on the capital is not an equivalent for a tax on the shares of the stockholders.

"The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal, and, within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations. A striking exemplification may be seen in the case of *Reg. v. Arnaud*, 9 Q. B. 806, 115 Eng. Reprint, 1485. The question related to the registry of a ship owned by a corporation. Lord Denman observed: 'It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation are no doubt interested in one sense in the property of the corporation, as they may derive individual benefits from its increase, or loss from its decrease; but in no legal sense are the individual members the owners.'

"The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to taxation by the states, under the limitations prescribed." *Van Allen v. Assessors* (*Churchill v. Utica*) 3 Wall. 573, 581, 583, 584, 18 L. ed. 229, 233, 234.

The result in Kansas was that the legislature was obliged to conform the bank tax law to the Federal law, in order to avoid taxing the state's own banks out of existence. They could not compete with national banks, if stockholders were taxed on the full value of their shares, and, in L.R.A.1918C.

addition, the bank was taxed on all its property. Full equality between state and national banks was finally accomplished by the tax-law revision of 1876. (*Laws 1876*, chap. 34, § 22). The law was given its present form by the inclusion of loan companies and certain mutual insurance companies in 1891 (*Laws 1891*, chap. 84, § 1).

The distinction between the class of property owned by stockholders, known as "shares of stock," and the class of property owned by the corporation, called "capital stock," and sometimes called "capital," has always been recognized and enforced by the Supreme Court of the United States. Its decisions are authoritative because of the legislative purpose to conform the tax law to the requirements of the Federal law. A specious argument frequently advanced is that the shares of stock represent the capital stock, which in turn represents the property of the corporation, so that a tax return of shares by the stockholders, or the corporation for them, and a return of capital stock or property by the corporation, accomplish the same end, but by different methods. The fallacy of this argument is exposed by the decision in the case of *New York v. Tax & A. Comrs.* 4 Wall. 244, 18 L. ed. 344. The capital of a national bank consisted of \$100,000, which was all invested in United States securities, exempt from taxation. In assessing the shares of stock to stockholders the assessor valued them at par, and made no deduction on account of the exempt character of the securities in which the bank had invested all its capital. A stockholder contested the assessment. The assessment was sustained on the authority of the decision in the case of *Van Allen v. Assessors*, supra. If the bank itself had been taxed, the exemption would have been allowed.

In the case of *Bank of Commerce v. Tennessee*, 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. Rep. 456, the ownership of surplus was considered. The charter of a state bank provided for a tax on each share of capital stock, in lieu of all other taxes. A subsequent statute undertook to tax the banks' surplus. It was contended the statute violated the obligation of the contract expressed in the charter. In the opinion it was said:

"In *Tennessee v. Whitworth*, 117 U. S. 129, at page 136, 29 L. ed. 830, 832, 6 Sup. Ct. Rep. 647, Mr. Chief Justice Waite, in delivering the opinion of the court, says: 'That in corporations four elements of taxable value are sometimes found: First, the franchise; second, the capital stock in the hands of the corporation; third, the corporate property; and, fourth, the shares of

capital stock in the hands of the individual stockholders.'

"The surplus belonging to this bank is 'corporate property,' and is distinct from the capital stock in the hands of the corporation. . . . Recognizing, as we do, that there is a different property in that which is described as capital stock from that which is described as corporate property other than capital stock, and remembering the necessity there is for a clear expression of the intention to exempt before the exemption will be granted, we must hold that the surplus has not been granted exemption by the clause contained in the charter under discussion. The very name of surplus implies a difference. There is capital stock, and there is a surplus over, above, and beyond the capital stock, which surplus is the property of the bank until it is divided among stockholders." 161 U. S. 147.

Considered in the light of its origin, and of its clear purpose to place state banks and loan companies on the same basis for taxation as national banks, the tax law becomes easy of interpretation, notwithstanding the loose phraseology employed. It would not be possible to levy a valid tax on the capital stock, the surplus, the undivided profits, or other property of a national bank, because of the restrictions contained in the Federal law. Consequently an intention to tax property of that character to state banks or loan companies cannot be imputed to the legislature. Neither may stockholders be taxed on property which belongs to the bank, and not to them; and the result is, the subject of taxation stated in the first subdivision of the tax law is, shares of stock belonging to stockholders.

The purpose of the list of stockholders required by the second subdivision of the tax law is obvious. The stockholders are the persons taxed, not the bank or loan company. The statement of the amount and value of stock held by each stockholder, together with the value of any undivided profits or surplus, is designed to facilitate the work of the taxing officers. The third subdivision makes the bank or loan company a responsible agent for the collection of the taxes due from the shareholders. The "tax assessed upon said stock and undivided profits or surplus," which the corporation is required to pay, is not any tax on stock, undivided profits, or surplus, because no such tax has been assessed. The tax is a tax on shares of stock, the personal property of the stockholders. The "lien thereon" given the corporation to reimburse it for payment of the tax is not a lien on stock, surplus, and undivided profits. The corporation already owns these

in its own right. The lien is on the property of the shareholders, their shares of stock. This method of collecting taxes due from stockholders was discussed in the case of *First Nat. Bank v. Kentucky*, 9 Wall. 353, 19 L. ed. 701, where the court said: "A very nice criticism of the proviso to the 41st section of the National Bank Act, which permits the states to tax the shares of such bank, is made to us to show that the tax must be collected of the shareholder directly, and that the mode we have been considering is, by implication, forbidden. But we are of opinion that while Congress intended to limit state taxation to the shares of the bank, as distinguished from its capital, and to provide against a discrimination in taxing such bank shares unfavorable to them, as compared with the shares of other corporations, and with other moneyed capital, it did not intend to prescribe to the states the mode in which the tax should be collected. The mode under consideration is the one which Congress itself has adopted in collecting its tax on dividends, and on the income arising from bonds of corporations. It is the only mode which, certainly and without loss, secures the payment of the tax on all the shares, resident or nonresident; and, as we have already stated, it is the mode which experience has justified in the New England states as the most convenient and proper, in regard to the numerous wealthy corporations of those states. It is not to be readily inferred, therefore, that Congress intended to prohibit this mode of collecting a tax which they expressly permitted the states to levy." 9 Wall. page 363.

The next question is, By what standard shall stockholders be assessed and taxed on their shares of stock?

The first subdivision of the tax law states that standard,—“the true value.” The president, cashier, or managing officer of the corporation submits a list of the stockholders. Annexed to the names is a statement of the amount of stock, number of shares, and value of the stock held by each. That accounts for the capital stock. A further statement is made of the amount carried to surplus and the amount of undivided profits, shown by the books of the bank. If capital stock should be \$100,000, surplus \$45,000, and undivided profits \$5,000, the book value of each share of \$100 would be \$150. That might or might not be the true value. There may be two banks on opposite sides of the same street, with the same capital stock and the same surplus. The true value of a share of the stock of one may be \$200, while the true value of a share of stock of the other may be less than par. The value of all tangible

assets of every kind, including the value of all real estate owned, should be considered. Intangible elements of value,—rights, privileges, good will, capacity and opportunity to achieve financial success, results of past business and the outlook for the future,—should be considered. In a word, the entire potentiality of the corporation to profit by the exercise of its corporate franchises should be taken into account.

The next question is, From what assessed value shall a deduction be made on account of investments in real estate?

The tax law says the deduction shall be "from the original assessment of the paid-up capital stock of said corporation." This is an impossibility. No assessment, original or otherwise, of the paid-up capital stock, is provided for, and no such assessment is made. For the reasons stated above, the meaning is, the deduction is to be made from the total valuation of all the shares of stock belonging to all the stockholders. To ascertain the personal liability of an individual stockholder, the remainder should be divided by the whole number of shares, and the quotient multiplied by the number of shares which he owns.

The next question is. What deductions on account of investments in real estate may be made? This is a compound question.

The tax law specifies real estate held by fee-simple title. This means full and unconditional ownership in fact. Should real estate be taken in satisfaction of a debt, it would make no difference that title was taken, for convenience, in the name of some officer or employee of the corporation. If a deed should be given the corporation in payment of a debt, it would make no difference that the deed was withheld from record, and the debt carried on the books of the bank as an obligation of the debtor. The real estate would belong to the bank by title in fee simple within the meaning of the law. Real estate deeded to the bank by warranty deed, but in fact for security only, would not be held by title in fee simple.

The Bank Act (Gen. Stat. 1915, §§ 514 and 568, with their amendments) limits the value of the banking house, furniture, and fixtures which a state bank may own to not more than one third of its capital stock, now one third of its capital stock and surplus. The purpose of the limitation was to put a stop to the expenditure of bank funds in the erection and extravagant furnishing of Grecian temples for the housing of state banks. The court is of the opinion the tax law should be construed in connection with this limitation on the L.R.A.1918C.

capacity of state banks to hold real estate, and that no deduction should be made on account of banking house furniture and fixtures in excess of the limited value. The Federal statute (Rev. Stat. § 5137, Comp. Stat. 1916, § 9674) contains no such limitation on the capacity of national banks, and the Corporation Law contains no such limitation on the capacity of loan companies. The disability imposed on state banks does not affect them, and they are at liberty to deduct the full value of real estate of the character under consideration.

The state and Federal bank acts limit the length of time that real estate acquired in the ordinary transaction of business may be held. No deduction can be made on account of real estate held beyond the prescribed period. At the expiration of such period real estate should have been either converted into assets which may not be deducted, or else charged off.

An ingenious argument is made to the effect that under the provisions of subdivision 4 of the tax law the value of no real estate may be deducted except that into which the original fund derived from payments of subscriptions to capital stock has gone. The argument assumes that the term "capital stock" was used by the legislature according to its true signification. It has already been shown that the same term used in the concluding portion of the same sentence cannot bear that signification. Since the term was not used with technical accuracy in one part of the sentence, it is not likely the strict meaning was intended in another part. *Harvester Bldg. Co. v. Hartley*, 98 Kan. 732, 734, 160 Pac. 971. There are two general classes of property reached by taxation,—personalty and real estate. These classes are recognized by the tax law. An essentially different system of procedure is employed in the assessment and collection of taxes on each. In valuing the personal property taxed to the stockholder, that is, his shares of stock, the value of all real estate, from whatever funds derived, would necessarily be included. Preferring to tax real estate as real estate, to its owner, the corporation, according to the appropriate method of procedure, and not desiring to tax the same value twice, provision was made for deducting from the value of the personalty the included value of real estate.

The People's State Bank of Coffeyville, joined as a defendant in case No. 21,603, but in fact interested on the side of the plaintiff, claims the right to a deduction on account of real estate not located in Kansas. The statute does not provide for such a deduction. The object of the law

is to provide revenue to meet the needs of the state government. The command of the law is that real estate, the value of which is deducted from the value of stockholders' shares, "shall be assessed as other lands or lots." This can apply to no real estate except that subject to the tax laws of the state. If the value of real estate outside the state were to be deducted, shares of stock would be taxed at less than their true value, without opportunity to recoup the abatement by taxation of real estate. The value of real estate in another state, owned by a national bank, may not be deducted from the value of shares of stock, unless the deduction be permitted to state banks. In a case which arose in Utah, it appeared that a deduction was allowed on account of real estate situated in that state, but not on account of real estate situated in other states. The Supreme Court of the United States, in disposing of the complaint of a national bank, said: "While real estate of a bank situated outside of the state of domicile is taxed in the state of its situs, yet the value of such real estate necessarily enters into and is considered in estimating the value of the shares of stock, and to deduct the value of the real estate would, to the extent of such deduction, reduce the real value of the shares, without a compensatory equivalent." *Commercial Nat. Bank v. Chambers*, 182 U. S. 556, 561, 45 L. ed. 1227, 1229, 21 Sup. Ct. Rep. 813.

It is insisted that the state bank should be accorded the same privileges as those corporations which are embraced within the provisions of § 11,164 of the General Statutes of 1915. Under that section capital stock is regarded as the equivalent of all the shares of capital stock issued and outstanding (*Harvester Bldg. Co. v. Hartley*, 98 Kan. 732, 160 Pac. 971), and is valued just as shares of stock in banks are valued. Capital stock value is considered as representative of all value-producing elements attending the corporate enterprise. *Wyandotte County Gas Co. v. Spaeth*, 83 Kan. 191, 109 Pac. 785. The value necessarily includes real estate and chattels which, if the property of an individual, would be listed and taxed in the usual way. If, when the corporation lists its capital stock, it specifies particularly the real estate and the chattels which it owns, and returns such property for taxation in the usual way, the value of such property may be deducted from the value of capital stock, except that real estate mortgages and chattel mortgages may not be deducted. If it be shown that real estate and personal property situated in another state have been duly listed for taxation there, such prop-

erty may be deducted. The remainder is the value of the capital stock, for purposes of taxation. Stockholders are not taxed on their shares, and capital stock, valued in the manner described, is taxed as personal property to its owner, the corporation. It has already been shown that this method of taxation is not possible in the case of state banks, because of the necessity to conform the taxation of state banks to the taxation of national banks, and banks and loan or investment companies are expressly excluded from the operation of the section by the provision, "except such companies and corporations as are specially provided for by the statute."

The Interstate Mortgage Trust Company, the appellant in case No. 21,218, also claims the benefit of the privileges conferred by § 11,164 of the General Statutes of 1915. The appeal is from an order of the district court of Labette county, in which the company has its principal office, sustaining a demurrer to its petition praying for an injunction against the enforcement of an order of the county board of equalization which was approved by the tax commission. In its petition the company described itself as a loan company, so that it is embraced within the provision of the tax law placing state banks, national banks, and loan or investment companies in the same class. The provision of the state Constitution, requiring a uniform and equal rate of assessment and taxation (Gen. Stat. 1915, § 228), does not forbid the employment of different methods of assessment and taxation for different classes of property. The method of assessing and collecting railroad taxes is radically different from the methods employed in assessing and collecting taxes on every other species of property in the state. *Missouri River, Ft. S. & G. R. Co. v. Morris*, 7 Kan. 210. Shares of stock in domestic corporations are taxed in one way, and shares of stock in foreign corporations in another. *Hunt v. Allen County*, 82 Kan. 824, 109 Pac. 106. In the opinion in the case last cited it was said: "The inequality in this case grows out of the different method provided by the statute for listing and assessing shares in the two kinds of corporations. Of necessity the legislature has adopted several different methods for the assessment of property of different classes and used in different kinds of business. The same rate of taxation was levied upon the plaintiff's property, and the same method of assessment was applied thereto, as is applied to the property of all other citizens similarly situated. So far no Solon has appeared in this or any other state of the Union who could devise a method, or any number of methods, of assessment and

taxation for all the various kinds of property which would result in equal taxation in every individual case. As has been said, if absolute equality of taxation is required, there can be no taxation." 82 Kan. page 828.

This being true, the claim under consideration reduces to this: Is the classification of loan companies with state and national banks a reasonable classification? The question is answered by the company's petition, in which it stated that its sole and exclusive business is that of making loans on real estate securities, selling the same, issuing bonds and depositing real estate securities as collateral therefor, and receiving moneys and securities on deposit for the purchase of real estate mortgages. It is therefore purely a financial institution, dealing in money, obligations for the payment of money, and securities for such obligations, and as such is clearly in affinity with banks. Although not material to the decision, presumably the institution is within the jurisdiction of the banking department of the state, because of the use of the word "trust" as a part of its corporate name. Gen. Stat. 1915, § 2403.

The loan company asserts that double taxation will result unless the value of its real estate situated in the state of Oklahoma be deducted from the value of its shares of stock. The assertion is predicated on a misconception of the tax law. It is said that the tax law provides for the assessment of the capital stock of banks and loan companies. It has been demonstrated above that the tax is not on capital stock, but on shares of stock in the hands of stockholders, and that the two classes of property are distinct in fact, and dissimilar for purposes of taxation. In the opinion in the case of *Bank of Commerce v. Tennessee*, 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. Rep. 456, it was said: "The capital stock of a corporation and the shares into which such stock may be divided and held by individual shareholders are two distinct pieces of property. The capital stock and the shares of stock in the hands of the shareholders may both be taxed, and it is not double taxation. . . . This statement has been reiterated many times in various decisions by this court, and is not now disputed by anyone." 161 U. S. 146.

It is said that taxation of the Oklahoma real estate and taxation of the shares is double taxation. The statute does not tax the Oklahoma real estate. The shares of stock are property of the individual stockholder, which the law requires shall be taxed at their true value. This value includes the value of whatever real estate the corporation owns, the situs of which is wholly L.R.A.1918C.

immaterial. The loan company is in the situation of a Maryland corporation which desired to deduct the value of New Jersey real estate from the value of the shares of capital stock assessed and taxed to its stockholders. The court of appeals of Maryland disposed of the subject in an opinion which has received universal approval, and from which the following extracts are taken: "The separate shares of the capital stock of the corporation are authorized to be issued by the charter derived from the state, and are subject to its control in respect to the right of taxation; and every person taking such shares, whether resident or nonresident of the state, must take them subject to such state power and jurisdiction over them. Hence the state may give the shares of stock held by individual stockholders, a special or particular situs for purposes of taxation, and may provide special modes for the collection of the tax levied thereon. *State v. Mayhew*, 2 Gill, 487; *First Nat. Bank v. Kentucky*, 9 Wall. 353, 19 L. ed. 701. And while it is true that the shares of the capital stock of the corporation represent the capital stock, and everything of which the capital stock is composed, whether invested in real estate or other kind of property, the situs of the investment (other than the real estate of the company situated in this state) is wholly immaterial. . . . The true criterion, as fixed by the statute, is the true value of the stock, without reference to the question where, or in what manner or nature of property or security, the capital stock may be invested. Whether that be invested in real estate, or other property, beyond the jurisdiction of this state, the latter having control over the shares and their true value, the peculiar nature and value of the investment of the capital stock of the corporation, beyond the limits of the state, can form no proper subject for specific deduction or abatement from the true value of the shares of stock, when presented to be assessed for purposes of taxation. . . . Nor is there anything novel in the principle of such taxation." *American Coal Co. v. Allegany County*, 59 Md. 185, 193.

The loan company misconceives the meaning and application of the expression, "double taxation." It is not double taxation to tax taxable property within the state once. Shares of stock are taxable property. Real estate in Kansas is taxable property. Real estate in Oklahoma is not taxable property, and is not taxed. Shares of the loan company's stock, reduced in value by the value of the Kansas real estate, are taxed, and the Kansas real estate is taxed. That covers the taxable property within

the state just once, and covers nothing more. "We say that the state in taxing stock may take into account the fact that the property and franchises of the corporation are untaxed, whereas in other cases they are taxed, and we say untaxed because they are not taxed by the state in question. The real grievance in a case like the present is that, more than probably, they are taxed elsewhere. But with that the state of Alabama is not concerned." *Kidd v. Alabama*, 188 U. S. 730, 732, 47 L. ed. 669, 672, 23 Sup. Ct. Rep. 401.

If the value of the untaxed Oklahoma property were deducted from the value of the shares of stock, a portion of this state's taxable property would escape taxation. Besides this, in this instance all taxable value not derived from tangible property would be wiped out. The loan company listed its capital stock, surplus, and undivided profits at par, \$135,015.42. From this sum it deducted the value of its real estate in Kansas, \$48,980, and claimed the right to deduct, to the extent necessary to cancel capital stock, surplus, and undivided profits, the value of its Oklahoma real estate, \$206,882. With all its faults, the tax law is not so paradoxical.

Because the property taxed by the state of Kansas and the property taxed by the state of Oklahoma are of different kinds and belong to different owners, there is no double taxation, in the invidious sense. It is true that taxes on the corporate property in Oklahoma must be paid from funds which constitute a potential source of dividends to stockholders, and in that sense such taxes are an indirect burden on the stockholders. The burden, however, is not imposed by the laws of the state of Kansas, and is an incidental consequence of the voluntary election of the corporate managers to extend the business of the company beyond the jurisdiction of the state. This corporation derives its life and all its capacities and powers, including its capacity to employ capital stock, from the state of Kansas. Its shares of stock are valuable personal property, having a lawful situs within the borders of the state, and there is no more occasion for the state to forego taxes on such property than there is for the state of Oklahoma to forego taxes on property situated within its borders.

The loan company argues that if the tax law does not permit deduction of the Oklahoma real estate, it infringes the 14th Amendment of the Constitution of the United States. The argument is predicated on the decision of the Supreme Court of the United States in the case of *Delaware, L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669. L.R.A.1918C.

The state of Pennsylvania taxed corporations on the value of their capital stock, and the question was whether or not the value of coal, having its situs in another state, could be included in the taxable value of the capital stock of a Pennsylvania corporation. It was held that the value of the coal should be excluded. The supreme court of Pennsylvania recognizes the distinction between property in shares of stock owned by stockholders, and property in capital stock, owned by the corporation and representing its assets, but declares the legislature of Pennsylvania has made no such distinction. Before the case arose the supreme court of Pennsylvania had held that a tax on the value of capital stock is simply a tax on the property of the corporation. Some of the decisions to that effect are cited in the opinion of the Supreme Court of the United States, and there are many others. The Supreme Court of the United States was bound by the interpretation which the state court had given the state law, and the question was simply one of situs. The tax being a tax laid directly on property, it could not lawfully extend to tangible property outside the jurisdiction of the taxing state. The Supreme Court of the United States took care to guard its decision from misapplication to cases of the kind presented by the loan company's appeal by inserting the following discriminatory observation in its opinion: "Of course, the distinction between the capital stock of a corporation, and the shares into which it may be divided and held by individual shareholders, is borne in mind and recognized, and nothing herein affects that distinction. The question here is simply as to the value of the capital stock with reference to the assessment and taxation upon the corporation itself which issues it, and has nothing to do with the individual shareholder. *Van Allen v. Assessors*, (Churchill v. Utica) 3 Wall. 573, 18 L. ed. 229; *Bank of Commerce v. Tennessee*, 161 U. S. 134, 146, 40 L. ed. 645, 649, 16 Sup. Ct. Rep. 456; *Delaware L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 354, 49 L. ed. 1077, 1082, 25 Sup. Ct. Rep. 673.

The legislature of this state has recognized the distinction here made. The tax law was framed to comply with the decision in the *Van Allen Case* and others of like character, and the tax is not a tax levied against the corporation on account of property which it owns.

Questions are presented by the *Dearing State Bank* and the *Citizens' National Bank of Independence* with reference to the course pursued in arriving at the sums on which their shares of stock should be taxed.

No fraud, or conduct so arbitrary or capricious as to amount to fraud, is made to appear, and the result of the conduct criticized may not be disturbed.

In case No. 21,603 the writ is allowed in part and denied in part. Issuance of the writ will be withheld. In case No. 21,218 the judgment of the District Court is affirmed.

Abstract of Laws.

Sections 1 and 2 of article 11 of the state Constitution read as follows:

"Section 1. The legislature shall provide for a uniform and equal rate of assessment and taxation; but all property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and personal property to the amount of at least \$200 for each family, shall be exempted from taxation.

"Sec. 2. The legislature shall provide for taxing the notes and bills discounted or purchased, moneys loaned, and other property, effects, or dues of every description [without deduction], of all banks now existing, or hereafter created, and of all bankers; so that all property employed in banking shall always bear a burden of taxation equal to that imposed upon the property of individuals."

Section 11,149 of the General Statutes of 1915 reads as follows:

"That all property in this state, real and personal, not expressly exempt therefrom, shall be subject to taxation in the manner prescribed by this act."

Section 11,236 of the General Statutes of 1915 reads as follows:

"(1) Stockholders in banks and banking associations and loan and investment companies organized under the laws of this state or the United States shall be assessed and taxed on the true value of their shares of stock in the city or township where such banks, banking associations, loan or investment companies are located.

"(2) And the president, cashier or other managing officer thereof shall under oath return to the assessor on demand a list of the names of the stockholders and amount and value of stock held by each, together with the value of any undivided profit or surplus.

"(3) And said banks, banking associations, loan or investment companies shall pay the tax assessed upon said stock and undivided profits or surplus, and shall have a lien thereon until the same is satisfied: Provided, that if from any causes the taxes levied upon the stock of any banking association, loan or investment company shall not be paid by said corporation, the property of the individual stockholders shall be held liable therefor.

"(4) Provided further, that if any portion of the capital stock of any bank or banking association or loan or investment L.R.A.1918C.

company shall be invested in real estate and said corporation shall hold a title in fee simple thereto, the assessed value of said real estate shall be deducted from the original assessment of the paid-up capital stock of said corporation, and said real estate shall be assessed as other lands or lots.

"(5) And provided further, that banking stock or loan and investment company stock or capital shall not be assessed at any higher rate than other property.

"(6) And provided further, that the provisions of this act shall apply to all mutual fire and life insurance companies or associations having assets, accumulations, money or credits, and doing business under the laws of this state.

"(7) And provided further, that such assets, money and credits held and under the control of such mutual fire and life insurance companies or associations shall be subject to assessment and taxation."

Section 514 of the General Statutes of 1915 reads as follows:

"Any five or more persons may organize themselves into a banking corporation, and shall be permitted to carry on the business of receiving money on deposit and to allow interest thereon, giving to the person depositing credit therefor; and of buying and selling exchange, gold, silver, foreign coin, bullion, uncurrent money, bonds of the United States and of the state of Kansas, and bonds and warrants of cities, counties, and school districts in the state of Kansas: of loaning money on real estate, chattel and personal security, at a rate of interest not to exceed the legal rate allowed by law: of discounting negotiable notes and of notes not negotiable, and to own a suitable building, furniture and fixtures for the transaction of its business, of the value not to exceed one third of the capital [stock] of such bank: Provided, that nothing in this section shall prohibit such bank from holding and disposing of such real estate as it may acquire through the collection of debts due to it."

This section was amended by chapter 79 of the Laws of 1917, in particulars not material here.

Section 568 of the General Statutes of 1915 reads as follows:

"Any bank may purchase, hold and convey real estate for the following purposes, but no other: First, such as shall be necessary for the convenient transaction of its business, including its furniture and fixtures, but which shall not exceed one third of the paid-in capital; second, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its business; third, such as it shall purchase at sale under judgment, decrees or mortgage foreclosure under securities held by it: but a bank shall not bid, at any such sale, a larger amount than to satisfy its debts and costs. Real estate shall be conveyed under the corporate seal of the bank and the hand of its president or vice president, and cashier or treasurer. No real estate acquired in the cases contemplated in the

second and third subsection above shall be held for a longer time than five years. If not sold before the expiration of said five years, it must be sold at private or public sale within thirty days thereafter, or charged off out of the earnings or surplus of said bank."

By chapter 76 of the Laws of 1917 the first subdivision of this section was amended to read:

"First, such as shall be necessary for the convenient transaction of its business, including its furniture and fixtures, but which shall not exceed one third of the paid-in capital and surplus."

Section 569 of the General Statutes of 1915, which went into effect March 11, 1907, reads as follows:

"Any bank now doing business in this state which owns real estate in excess of 50 per cent of its capital shall reduce its holdings by converting same into cash or other good assets, to an amount not exceeding 50 per cent of its paid-up capital, within one year after the passage of this act."

Section 11,164 of the General Statutes of 1915 reads as follows:

"That no person shall be required to include in the list of personal property any portion of the capital stock of any company or corporation which is required to be listed by such company or corporation; but all incorporated companies, except such companies and corporations as are specially provided for by statute, shall be required to list by their designated agent in the township or state [city] where the principal office of said company is kept, the full amount of stock paid in and remaining as capital stock, at its true value in money, and such stock shall be taxed as other personal property: Provided, that such amount of stock of such companies as may be invested in real or personal property which, at the time of listing said capital stock, shall be particularly specified and given to the assessors for taxation, shall be deducted from the amount of said capital stock: Provided, that mortgages owned by any such company on property, real or personal, in any other state, shall not be deducted: Provided further, that real or personal property in any other state, or county in this state shall be deducted if it be made to ap-

pear that the same has been duly listed for taxation in such other state or county in this state."

Section 5219 of the Revised Statutes of the United States (Comp. Stat. 1916, § 9784) reads as follows:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

Section 5137 of the Revised Statutes of the United States (Comp. Stat. 1916, § 9674) reads as follows:

"A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

"First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

"Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

"Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

"Fourth. Such as it, shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

"But no such associations shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

KANSAS SUPREME COURT.

AUGUST BURZIO, by Next Friend,
v.

JOPLIN & PITTSBURG RAILWAY COMPANY, Appt.

(— Kan. —, 171 Pac. 351.)

Trial — findings — effect.

1. Where a jury has been properly in-

Headnotes by MARSHALL, J.

Note. — As to requisites of special verdict, see note to State v. Hanner, 24 L.R.A. (N.S.) 1. For later cases, see the L.R.A. L.R.A.1918C.

structed concerning negligence and reasonable and ordinary care and diligence, the answers to special questions which depend for their interpretation on the definition of those terms state facts, and not conclusions of law.

For other cases, see Trial, V. o, 1, in Dig. 1-52 N. S.

Negligence — imputed — parent to child.

2. The negligence of a father in driving an automobile across a railroad track without stopping, looking, or listening cannot

Digests under the title "Trial," subtitle "Special verdict or findings."

The subject of imputed or contributory

be imputed to his ten-year-old son, who is riding with him.

For other cases, see Negligence, II. c, 2, in Dig. 1-52 N. S.

Railroad — obstructed view of track — negligence.

3. Liability of a railway company for injuries to those riding in an automobile, sustained in a collision with a train at a highway crossing, may be founded on the company's negligence in allowing weeds, grass, and brush to grow on its right of way so as to obstruct the vision of those riding in the automobile while they are approaching the railway track.

For other cases, see Railroads, II. d, 3, a, in Dig. 1-52 N. S.

Trial — general and special verdicts.

4. The general verdict must stand where the answers to special questions, when properly interpreted so as to support that verdict, are consistent therewith, and do not contradict each other.

For other cases, see Trial, V. c, 1, in Dig. 1-52 N. S.

(January 12, 1918.)

A PPEAL by defendant from a judgment of the District Court for Cherokee County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. John P. Curran and S. L. Walker, for appellant:

The court erred in overruling the motion to disregard the general verdict and to enter judgment in favor of the defendant and against the plaintiff on the special findings of the jury.

Atchison, T. & S. F. R. Co. v. Plunkett, 25 Kan. 188; Missouri, K. & T. R. Co. v. Bussey, 66 Kan. 735, 71 Pac. 261; Chicago, B. & Q. R. Co. v. Laughlin, 74 Kan. 567, 87 Pac. 749; Williams v. Atchison, T. & S. F. R. Co. 100 Kan. 336, 164 Pac. 260; Moler v. Chicago, R. I. & P. R. Co. 101 Kan. 280, 166 Pac. 488; Bunton v. Atchison, T. & S. F. R. Co. 100 Kan. 165, 163 Pac. 801; Shelton v. Union Traction Co. 99 Kan. 34, 160 Pac. 977.

negligence of a passenger riding in an automobile driven by another, precluding recovery against a third person for injury, is treated in the note to *Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co.* L.R.A.1915B, 953; and see references therein to notes on related questions. Later cases in this series on the subject indicated are *Lynn v. Goodwin, L.R.A.1915E, 588; Anthony v. Kiefner, L.R.A.1916F, 876; Knoxville R. & Light Co. v. Vangilder, L.R.A.1916A, 1111; St. Louis & S. F. R. Co. v. Bell, L.R.A.1917A, 543; Jacobs v. Jacobs, L.R.A.1917F, 253; Hardie v. Barrett, L.R.A.1917F, 444; and Farmers' Bank & T. Co. v. Henderson, ante, 646. L.R.A.1918C.*

Messrs. C. A. McNeill and Maurice McNeill, for appellee:

The findings of the jury should be so interpreted as to support the general verdict rather than give an interpretation which would overturn and destroy it.

Solomon R. Co. v. Jones, 34 Kan. 443, 8 Pac. 730; Union P. R. Co. v. Fray, 43 Kan. 750, 23 Pac. 1039; Jackson v. Linnington, 47 Kan. 390, 27 Am. St. Rep. 300, 28 Pac. 173; Kansas City v. Slangstrom, 53 Kan. 431, 36 Pac. 706; MacElree v. Wolfensberger, 59 Kan. 105, 52 Pac. 69; Missouri, K. & T. R. Co. v. Bussey, 66 Kan. 735, 71 Pac. 261; Jeffersonville v. Gray, 165 Ind. 28, 74 N. E. 611; Miller v. Shackelford, 4 Dana, 274; Equitable Acci. Ins. Co. v. Stout, 135 Ind. 444, 33 N. E. 623; Corley v. Atchison, T. & S. F. R. Co. 90 Kan. 70, 133 Pac. 555, Ann. Cas. 1915B, 764; Angell v. Chicago, R. I. & P. R. Co. 97 Kan. 685, 156 Pac. 763.

Marshall, J., delivered the opinion of the court:

The defendant appeals from a judgment rendered in favor of the plaintiff for injuries sustained by him in a railroad crossing accident.

The plaintiff, a boy ten years old, was riding with his mother in the rear seat of an automobile driven by his father. The father attempted to drive the automobile across the railway track in front of an approaching electric car. At the place of the accident, the track ran in a straight line for some distance north and south, and ran parallel with a public road near the railroad right of way. John Burzio, the plaintiff's father, with the plaintiff and the plaintiff's mother, left his home to go to Pittsburg, and, for some distance going north, traveled along the side of the defendant's railroad and saw the car with which the automobile collided, going north. The electric car and the automobile passed each other once or twice during the trip. At the place of the accident, a road running east and west crossed the railroad track. About 5½ feet west of the track and for 200

The negligence of a railroad company in permitting obstructions on its right of way which obscure the view of the track from a highway crossing is discussed in the note to *Cowles v. New York, N. H. & H. R. Co.* 12 L.R.A.(N.S.) 1067; and see later cases. *Cherry v. Louisiana & A. R. Co.* 17 L.R.A.(N.S.) 505, and *Danskinn v. Pennsylvania R. Co.* 22 L.R.A.(N.S.) 232. The duty of a railroad to remove obstructions on right of way interfering with lookout from trains is treated in the annotation following *Chesapeake & O. R. Co. v. Mason, L.R.A. 1916F, 130; and see later case, Barber v. Louisiana R. & Nav. Co. L.R.A.1917F, 802.*

feet south of the east and west road there was a hedge which prevented a view of the railroad, and between the hedge and the railroad there was a growth of brush, weeds, and grass which, for a portion of the distance, prevented a view of the railroad from the public road running east and west. After turning east from the road running north and south, to cross the railroad track, and for about 15 feet from the railroad track, there was an unobstructed view of the track to the south for 200 feet or more. John Burzio turned east and attempted to cross the railroad. He did not see the car coming until he was on the track. He slowed down his car before he crossed the track. The electric car struck the automobile and injured the plaintiff. To recover for that injury, he brought this action.

The plaintiff alleged that the defendant negligently permitted the growth of vegetation, hedge, weeds, and underbrush; that the defendant, on the occasion of the accident, did not give any warning of the approach of the electric car; and that the defendant failed to provide the electric car with good and sufficient brakes so that it could be quickly stopped, and failed to provide the electric car with a good and sufficient whistle or other signal with which to warn persons of danger. The jury, on questions requested by the plaintiff, made special findings of fact as follows:

"No. 1. Was there a growth of hedge or grass or weeds or underbrush on defendant's right of way, that obstructed the view to the south of one traveling past in an automobile on the road plaintiff was injured on, if injured, to that extent that an occupant of the automobile could not, with reasonable and ordinary care and diligence, have seen the approaching car until too near the crossing to avoid injury? Answer: Yes.

"No. 2. Was the defendant negligent in failing to keep its right of way and the approach to the track reasonably free from weeds, grass, and underbrush, thereby obstructing the view of cars coming from the south by persons going east in an automobile, until practically upon the track? Answer: Yes.

"No. 3. If you answer questions Nos. 1 and 2 in the affirmative, state whether or not such conditions contributed to plaintiff's injury, if any. Answer: Yes.

"No. 4. Was the defendant negligent in failing to give reasonable notice, alarm, and warning of the approach of its line car to the crossing in question? Answer: Yes.

"No. 5. Did the defendant's agents and employees in charge of the line car have notice and knowledge of the fact that an automobile with occupants was approaching the crossing in question? Answer: No.
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"No. 6. Was the line car of the defendant equipped with a whistle for giving warning or alarm? Answer: No.

"No. 7. Was the line car equipped with air brakes? Answer: No.

"No. 8. Did the plaintiff, August Burzio, do anything that was careless or negligent at or prior to the time of his injury which contributed thereto? Answer: No."

On questions requested by the defendant, the jury answered as follows:

"Question 1. How fast was the automobile going [miles per hour] as it turned east and approached the railroad track? Answer: Eight miles per hour.

"Question 2. How many feet west of the west line of the railroad right of way was the hedgerow which plaintiff claims obstructed the view of the driver of the automobile? Answer: Five feet 5 inches.

"Question 3. How far south down the railroad track could the driver of the automobile have seen the approaching electric car after he turned the corner and just before he drove from a place of safety onto the railroad track, had he stopped the automobile and looked or listened for a car? Answer: Fifteen feet west of track. See 200 feet.

"Question 4. Was the bell or gong on the electric car rung or sounded as the car approached the road crossing? Answer: Yes.

"Question 5. How fast was the electric car going [miles per hour] when the motorman saw that the driver of the automobile intended to try to cross the railroad track in front of the electric car? Answer: Twenty miles.

"Question 6. What caution, if any, did the driver of the automobile exercise after the turn east was made and as he approached the railroad crossing to avoid a collision with the electric car? Answer: Slowed down.

"Question 7. What notice or warning, if any, did the motorman on the electric car have that the automobile was going to be turned at the corner and go east across the railroad before the automobile went around the corner and onto the railroad track in front of the electric car? Answer: Didn't have any.

"Question 8. What was the negligence, if any that caused the plaintiff's injuries? Answer: Not properly equipped.

"Question 9. How far south was the railroad car from the road crossing and point of collision when the motorman saw and realized that the driver of the automobile was attempting to cross the railroad in front of the electric car? Answer: Forty feet.

"Question 10. What did the defendant fail to do that it should have done that caused

plaintiff's injuries? Answer: Didn't have car properly equipped with air brakes and whistle."

1. The defendant argues that the special findings of the jury show that the verdict should have been for the defendant, and that the plaintiff was not entitled to judgment, and further argues that the answers to questions numbered 1, 2, 3, and 4 of those requested by the plaintiff are conclusions of law. This argument is not good.

The instructions of the court are not set out in the abstract. In the absence of the instructions, it is presumed that they properly covered the legal propositions embraced in each of these questions, and it is further presumed that the jury followed the instructions in answering these questions. Under proper instructions, these answers state facts, and not conclusions of law.

2. Under the evidence and under the findings of the jury, John Burzio was guilty of such contributory negligence as would prevent him from recovering any damages sustained by him in the accident, for the reason that he attempted to cross a railroad track without stopping, looking, or listening, although there was a place of safety from which his view of the track was unobstructed, and from which he could see the approaching car for a distance of 200 feet. *Jacobs v. Atchison, T. & S. F. R. Co.* 97 Kan. 247, L.R.A.1918D, 783, 154 Pac. 1023; *Wehe v. Atchison, T. & S. F. R. Co.* 97 Kan. 794, L.R.A.1916E, 455, 156 Pac. 742; *Bunton v. Atchison, T. & S. F. R. Co.* 100 Kan. 165, 163 Pac. 801; *Williams v. Atchison, T. & S. F. R. Co.* 100 Kan. 336, 164 Pac. 260; *Moler v. Chicago, R. I. & P. R. Co.* 101 Kan. 280, 166 Pac. 488.

But, can the negligence of John Burzio be imputed to the plaintiff? The evidence does not show that the plaintiff exercised or attempted to exercise any control over his father while he was driving the automobile. A clear statement of the rule of law governing the recovery of damages under such circumstances is found in *Corley v. Atchison, T. & S. F. R. Co.* 90 Kan. 70, 133 Pac. 555, Ann. Cas. 1915B, 764, as follows: "The question presented is whether he is to be deemed chargeable with the negligence of the driver. The doctrine that one who voluntarily becomes a passenger in a conveyance thereby so far identifies himself with the driver that he cannot recover for an injury negligently inflicted by a third person, if the driver's negligence was a contributing cause, never gained much of a foothold in this country, and is now repudiated in England, where it originated. The history of its rise and decline is traced in a note in 8 L.R.A.(N.S.) 597, where cases are gathered illustrating all phases L.R.A.1918C.

of the subject. Save in a few jurisdictions the negligence of a driver cannot be imputed to a passenger who in fact has no control over him. Notes in 9 Ann. Cas. 408; 19 Ann. Cas. 1225; and Ann. Cas. 1913B, 684. See also *Denton v. Missouri, K. & T. R. Co.* 90 Kan. 51, 47 L.R.A.(N.S.) 820, 133 Pac. 558, Ann. Cas. 1915B, 639. This rule applies in the case of a guest who is riding with the driver for their mutual pleasure. 29 Cyc. 548-550; note in 8 L.R.A.(N.S.) 648; 7 Am. & Eng. Enc. Law, 447, 448. Where two persons are engaged in a common enterprise, using a conveyance for their purpose, each is said to be responsible for the acts of the other, but for this situation to arise each must have an equal right of control. 29 Cyc. 543; note in 8 L.R.A.(N.S.) 628. In the present case the jury found that the deceased was riding with the owner of the automobile as an invited guest on a pleasure trip. The defendant therefore cannot successfully invoke the doctrine of imputed negligence." 90 Kan. 73, 74.

In the *Corley Case* an automobile was negligently driven onto a railroad track and was struck by a passing train. In that case the plaintiff's husband was a guest of the driver of the automobile, and was killed in the accident. See also *Leavenworth v. Hatch*, 57 Kan. 57, 57 Am. St. Rep. 309, 45 Pac. 65; *Reading Twp. v. Telfer*, 57 Kan. 798, 57 Am. St. Rep. 355, 48 Pac. 134, 2 Am. Neg. Rep. 138; *Williams v. Withington*, 88 Kan. 809, 129 Pac. 1148; *Denton v. Missouri, K. & T. R. Co.* 90 Kan. 51, 47 L.R.A.(N.S.) 820, 133 Pac. 558, Ann. Cas. 1915B, 639; *Anthony v. Kieffer*, 96 Kan. 194, 198, L.R.A.1915F, 876, 150 Pac. 524, Ann. Cas. 1916E, 264; *Denton v. Missouri, K. & T. R. Co.* 97 Kan. 498, 155 Pac. 812; *Angell v. Chicago, R. I. & P. R. Co.* 97 Kan. 688, 156 Pac. 763.

The negligence of John Burzio cannot be imputed to the plaintiff.

3. The defendant contends that it was not negligent, and that, therefore, it is not liable to the plaintiff for the damages sustained by him. This contention is good if the defendant was not negligent, but the contention is not good if the defendant was negligent. The petition charged that the defendant was negligent in permitting vegetation, hedge, weeds, and underbrush to grow on its right of way so as to obstruct the view of the railroad track from anyone traveling on the road running east and west. The jury found that the defendant was negligent in failing to keep its right of way free from weeds, grass, and underbrush. In *Corley v. Atchison, T. & S. F. R. Co.* supra, this court said: "Liability of a railway company for injuries occa-

sioned by a collision at a highway crossing may be founded upon its negligence in allowing unnecessary obstructions to vision to exist upon the right of way." Syl. ¶ 1.

In the Corley Case, this court carefully examined the question now under discussion and reached the conclusion just stated.

4. It is urged that the findings of the jury were contradictory to each other and to the general verdict, and it is also urged that judgment should have been for the defendant. The special questions should be interpreted so as to support the general verdict rather than so as to overturn and destroy it. *Solomon R. Co. v. Jones*, 34 Kan. 443, 8 Pac. 730; *Union P. R. Co. v. Fray*, 43 Kan. 750, 23 Pac. 1039; *Jackson v. Linnington*, 47 Kan. 396, 27 Am. St. Rep. 300, 28 Pac. 173; *Kansas City v. Slangstrom*, 53 Kan. 431, 36 Pac. 706; *Atchison, T. & S. F. R. Co. v. Swarts*, 58 Kan. 235, 244, 48 Pac. 953, 2 Am. Neg. Rep. 540; *MacElree v.*

Wolfersberger, 59 Kan. 105, 52 Pac. 69; *Osburn v. Atchison, T. & S. F. R. Co.* 75 Kan. 746, 90 Pac. 289; *Lewellen v. Kansas Natural Gas Co.* 85 Kan. 117, 121, 116 Pac. 221; *McClain v. Chicago, R. I. & P. R. Co.* 89 Kan. 24, 28, 130 Pac. 646, Ann. Cas. 1914E, 699; *Orr v. Missouri P. R. Co.* 98 Kan. 120, 123, 157 Pac. 421; *Tarin v. Atchison, T. & S. F. R. Co.* 98 Kan. 605, 608, 158 Pac. 874.

None of the special findings contradict, but all are consistent with, the finding that the defendant was negligent in allowing weeds, grass, and brush to grow on its right of way. That finding supports the verdict. The judgment is affirmed.

All the Justices concur.

Petition for rehearing denied March 9, 1918.

OREGON SUPREME COURT. (Department No. 2.)

DEPOT REALTY SYNDICATE, Respt.,
v.
ENTERPRISE BREWING COMPANY,
Appt.

(— Or. —, 170 Pac. 294.)

Corporation — guaranty of rent — ultra vires.

1. A contract by a brewing corporation to guarantee the rent of a customer who undertakes to handle its products exclusively is not ultra vires.

For other cases, see Corporations, IV. d, 1, in Dig. 1-52 N. S.

Landlord and tenant — guaranty of rent — action against guarantor.

2. Under an undertaking to guarantee the faithful performance by a lessee of his obligations under the lease, an action will lie against the guarantor as soon as rent is in arrears, without the necessity of attempting to collect from the lessee.

For other cases, see Guaranty, II. in Dig. 1-52 N. S.

Principal and agent — ratification — failure to repudiate act.

3. One whose agent with authority to sign agreements and leases with saloon keepers has placed a guaranty of rent on such lease cannot avoid liability on such guaranty for rent thereafter accruing, if without objection he receives notification by the lessor of the guaranty and an inten-

Note. — As to power of corporation organized for the manufacture and sale of liquor to enter into contracts of guaranty or suretyship on behalf of its customers or prospective customers, see annotation following this case, post, 1008.
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tion to hold him liable thereon if the lessee fails to pay.

For other cases, see Principal and Agent, II. d, in Dig. 1-52 N. S.

Corporation — authority of officers.

4. The managing officers of a brewing corporation may, without a resolution of the board of directors, authorize a sales agent to guarantee the rents of customers. *For other cases, see Corporations, IV. g, 2, in Dig. 1-52 N. S.*

(January 22, 1918.)

APPEAL by defendant from a judgment of the Circuit Court for Multnomah County in favor of plaintiff in an action brought to recover rent due and unpaid on a lease, payment of which was alleged to have been guaranteed by defendant. Modified.

Statement by Moore, J.:

This is an action by the Depot Realty Syndicate, an Oregon corporation, against the Enterprise Brewing Company, a California corporation doing business in this state, to recover \$1,450 as arrears of rent reserved in a lease executed by the plaintiff to John Ralson, the payment of which sum is alleged to have been guaranteed by the defendant. A demurrer to the initiatory pleading, on the ground that it did not state facts sufficient to constitute a cause of action, having been overruled, an answer was filed denying the material averments of the complaint. The cause was tried without the intervention of a jury, and, when the plaintiff had introduced its evidence and rested, a motion for a judgment of nonsuit was interposed and denied. The defendant's

counsel then declined to offer any evidence, whereupon findings of fact and law were made in conformity with the averments of the complaint, and based thereon a judgment was rendered as demanded therein, and the defendant appeals.

Messrs. Dolph, Mallory, Simon, & Gearin, for appellant:

Whether agents of a corporation have power to make certain contracts depends entirely upon the powers given them by it. When one of them makes a contract, the corporation is bound only when the making of the contract was within the power of the agent, or when the contract has been, with full knowledge of the facts, ratified by the corporation.

Luse v. Isthmus Transit R. Co. 6 Or. 125, 25 Am. Rep. 506; *Savannah, F. & W. R. Co. v. Humphreys*, 114 Ga. 681, 40 S. E. 711; *Northwestern Packing Co. v. Whitney*, 5 Cal. App. 105, 80 Pac. 981; *Read v. Buffum*, 79 Cal. 77, 12 Am. St. Rep. 131, 21 Pac. 555; *Titus v. Cairo & F. R. Co.* 37 N. J. L. 98; *Lucas v. White Line Transfer Co.* 70 Iowa, 541, 59 Am. Rep. 449, 30 N. W. 771; *Dobson v. More*, 164 Ill. 110, 56 Am. St. Rep. 184, 45 N. E. 243.

One who deals with officers or agents of a corporation is bound to know their powers and the extent of their authority. The corporation is bound only by their acts and contracts which are within the scope of their authority.

Alexander v. Cauldwell, 83 N. Y. 480, 5 Mor. Min. Rep. 650; *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 140, 9 L.R.A. 708, 19 Am. St. Rep. 482, 25 N. E. 264; 2 *Thomp. Corp.* 2d ed. §§ 1600, 1605-1607.

Corporations cannot become guarantors. This prohibition against contracts of guaranty applies even where the corporation is benefited by the contract.

7 Am. & Eng. Enc. Law, 2d ed. 788, 789; 2 *Thomp. Corp.* 2d ed. § 2215; *Carney v. Duniway*, 35 Or. 131, 57 Pac. 192, 58 Pac. 105; *Davis v. Old Colony R. Co.* 131 Mass. 258, 41 Am. Rep. 221; *Humboldt Min. Co. v. American Mfg. Min. & Mill. Co.* 10 C. C. A. 415, 22 U. S. App. 334, 62 Fed. 356; *Germania Safety-Vault & T. Co. v. Boynton*, 19 C. C. A. 118, 37 U. S. App. 602, 71 Fed. 797.

To constitute estoppel by conduct, there must be a false representation made with knowledge of the facts, and with the intent that it should be acted on by the other party, who was ignorant of the truth and who was induced to act on the representation.

State v. Portland General Electric Co. 52 Or. 502, 95 Pac. 722, 98 Pac. 160; *Page v. Smith*, 13 Or. 410, 10 Pac. 833; *Falls L.R.A.* 1918C.

City Lumber Co. v. Watkins, 53 Or. 212, 99 Pac. 884; *Columbia Land & Invest. Co. v. Van Dusen Invest. Co.* 50 Or. 59, 11 L.R.A.(N.S.) 287, 91 Pac. 469.

A contract which a corporation has no power to make, it has no power to ratify, and no power to estop itself from denying.

California Nat. Bank v. Kennedy, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478.

The undertaking or guaranty sued on, even though binding upon the brewery company, is not a guaranty of payment, but is in effect a guaranty of solvency and consequent indemnity; therefore the obligation is collateral, and not direct, and the liability of the surety cannot be enforced until an effort has been made to realize from the principal.

Henry v. Hand, 36 Or. 492, 59 Pac. 330; *Smeidel v. Lewellyn*, 3 Phila. 70; 20 Cyc. 1449.

Messrs. Wood, Montague, Hunt. & Cookingham and Donald M. Graham, for respondent:

Corporations by virtue of their nature, that of an artificial entity, are compelled to act by their agents.

7 R. C. L. 616; *Fink v. Canyon Road Co.* 5 Or. 307; *Moll v. Roth Co.* 77 Or. 593, 152 Pac. 235.

A principal who, after knowledge of the facts, fails to disavow promptly the act of an agent who has exceeded his authority, makes such acts his own, and such acquiescence is equivalent to previous authority.

Finnegan v. Pacific Vinegar Co. 26 Or. 152, 37 Pac. 457; *Calvert v. Idaho Stage Co.* 25 Or. 412, 36 Pac. 24; *Currie v. Bowman*, 25 Or. 364, 35 Pac. 848; *Silby v. Strong*, 38 Or. 42, 62 Pac. 633; *Schreyer v. Turner Flouring Co.* 29 Or. 1, 43 Pac. 719; *Wehrung v. Portland Country Club & Live Stock Assn.* 61 Or. 48, 120 Pac. 747; *Moll v. Roth Co.* 77 Or. 593, 152 Pac. 235; *Cranston v. West Coast L. Ins. Co.* 72 Or. 117, 142 Pac. 762.

Corporations have implied power to make all contracts which will further the objects of their incorporation. A corporation engaged in the business of brewing beer may guarantee a saloon keeper's obligations for rent or license.

10 Cyc. 1110; *Clark & M. Priv. Corp.* p. 491; 7 R. C. L. 599, 601; *Wintfield v. Cream City Brewing Co.* 96 Wis. 239, 71 N. W. 101; *Holm v. Claus Lipsius Brewing Co.* 21 App. Div. 204, 47 N. Y. Supp. 520; *Timm v. Grand Rapids Brewing Co.* 169 Mich. 371, 27 L.R.A.(N.S.) 186, 125 N. W. 357; *Wheeler v. Everett Land Co.* 14 Wash. 630, 45 Pac. 316; *Blue Island Brewing Co.*

v. Fraatz, 123 Ill. App. 26; Horst v. Lewis, 71 Neb. 365, 98 N. W. 1046, 103 N. W. 460; Hall v. Ochs, 34 App. Div. 103, 54 N. Y. Supp. 4; H. Koehler & Co. v. Reinheimer, 26 App. Div. 1, 49 N. Y. Supp. 758.

A guaranty like the one in suit is an absolute undertaking to pay a debt, and is not discharged by failure of the guarantor to exhaust his remedy against the principal debtor.

Weiler v. Henarie, 15 Or. 28, 13 Pac. 614; Delaman v. Friedlander, 40 Or. 34, 66 Pac. 297; Gile Grocery Co. v. Lachmund, 75 Or. 122, 146 Pac. 519; Brandt, Suretyship & Guaranty, § 170.

Moore, J., delivered the opinion of the court:

It is contended that, though the defendant may have been benefited by the contract which forms the basis of this action, a corporation cannot legally guarantee the performance of any condition, and for that reason an error was committed in overruling the demurrer. It is conceded that the defendant is engaged at San Francisco, California, in manufacturing beer, which product is disposed of at wholesale to saloon keepers, the payment of whose rent has, in some instances, been guaranteed by the officers of the corporation. The general rule that an ordinary corporation cannot become a surety is subject to the well-recognized exception that such legal entity has implied power and may encourage legitimate undertakings by advancing money, extending credit, or becoming surety for any of its independent agencies, when by doing so it is reasonably expected that the business in which the corporation is engaged will be advanced by such appropriate means. 3 Thomp. Corp. 2d ed. § 2207. Thus, in Winterfield v. Cream City Brewing Co. 96 Wis. 239, 71 N. W. 101, a headnote reads: "It is not ultra vires for a corporation organized to make and sell beer to guarantee the rent of a customer."

To the same effect, see Timm v. Grand Rapids Brewing Co. 160 Mich. 371, 27 L.R.A. (N.S.) 186, 125 N. W. 357; Blue Island Brewing Co. v. Fraatz, 123 Ill. App. 26; Holm v. Claus Lipaius Brewing Co. 21 App. Div. 204, 47 N. Y. Supp. 518; H. Koehler & Co. v. Reinheimer, 26 App. Div. 1, 49 N. Y. Supp. 755; Horst v. Lewis, 71 Neb. 365, 98 N. W. 1046, 103 N. W. 460.

The securing of saloon keepers who would stipulate exclusively to sell the defendant's beer tended to expand its competition and enhance the scope of its business, and, this being so, the corporation could lawfully guarantee the payment of rent of buildings occupied by its customers while keeping the terms of such agreement. No error L.R.A.1918C.

was committed as to the rule invoked in this particular.

It is maintained that the alleged guaranty is not an undertaking for the payment of another's debt, but is, in effect, a contract for indemnity merely, which obligation is collateral, and no liability attaches until an effort has been made to collect from the principal, and, since the complaint contains no averments in respect to such matter, an error was committed in overruling the demurrer. A text-writer in discussing this subject remarks: "When, by the terms of the contract, the obligation of the surety or guarantor is the same as that of the principal, then, as soon as the principal is in default, the surety or guarantor is likewise in default, and may be sued immediately and before any proceedings are had against the principal." Brandt, Suretyship & Guaranty, 3d ed. § 110.

Thus, in Redfield v. Haight, 27 Conn. 31, the defendant's son signed a writing as follows: "And the said Joseph Haight hereby further agrees, in consideration of the premises, to assume, and does hereby assume, the payment of the liabilities and debts of the firm of Redfield & Haight; that is, the liabilities of the said firm contracted for goods, wares, and merchandise for said business, and the liabilities and debts of the said Edwin Redfield, contracted and incurred for goods for the said business so conducted by him alone, a schedule of which debts and liabilities is hereto annexed."

To this contract was appended, upon the same paper, a memorandum upon which the suit was brought, as follows:

In consideration of one dollar, to me in hand paid, I hereby guarantee the full and fair performance of the covenants and agreements mentioned in the foregoing instrument on the part of Joseph Haight.

Dated August 8, 1854.

Desire W. Haight.

It was held that the defendant's contract was not a mere indemnity, but an absolute guaranty, and that upon the breach of the principal's agreement the obligee could immediately maintain an action against the guarantor.

In Garey v. Hignutt, 32 Md. 552, it was ruled that a creditor was not required to exhaust his remedies against a principal before resorting to the surety for payment of a debt for which both principal and surety were equally bound.

In Geddis v. Hawk, 1 Watts, 280, it was decided that a creditor was not bound to resort to the principal for the collection of his debt in the first instance, but that he might sue and recover from a surety.

"Where a contract of suretyship is joint and not several, all the obligors must be joined as parties defendant. Where it is joint and several, all or less than all may be sued as plaintiff elects." Brandt, Suretyship & Guaranty, 3d ed. § 829.

It will be seen from an inspection of the undertaking hereinafter set forth that the person signing the writing stipulated that Ralson would faithfully perform all the conditions of the lease, thereby making the engagement of the guarantor the same as that of the principal. One of these obligations was to pay the rent reserved. The guaranty is therefore a joint and several express engagement to pay monthly in advance the sums of money specified. Thus, in *Gile Grocery Co. v. Lachmund*, 75 Or. 122, 146 Pac. 519, a headnote reads: "A guaranty is an absolute undertaking to pay the debt when due, and is not discharged by the failure of the creditor to exhaust his remedy against the principal debtor."

To the same effect, see also *Weiler v. Henarie*, 15 Or. 28, 13 Pac. 614; *Delsman v. Friedlander*, 40 Or. 33, 66 Pac. 297.

No error was committed in this particular.

The remaining question to be considered is whether any evidence was received at the trial tending to show that the defendant's agent was authorized to guarantee the payment of the rent in such a manner as to bind his principal, or whether it, by any act or omission of its officers, is liable for the payment of any part of the rent. It appears from a transcript of the testimony that the defendant on January 1, 1906, entered into contract with Henry Meister whereby the latter was appointed its agent and given the exclusive right to sell in Oregon the manufactured product of that corporation. Meister in March, 1906, with the defendant's consent, sold all his interest in such agency to C. B. Williams. Alex Sweek, an attorney of Portland, Oregon, testified as plaintiff's witness that he was present when such bargain was concluded; that U. Remensperger and P. Windeler, respectively the president and secretary of the defendant, were also there on that occasion and advised that it was not necessary to write a new contract, but that a transfer of Meister's agreement with slight modifications was sufficient; that thereupon the witness made on such writing the notations "O K," which is identified as indicating some of the clauses of the contract that were continued in force. In referring to the writing Mr. Sweek testified: "It was delivered to Mr. Williams as his evidence of authority, and the agreement between all of us was that the contract was to be handed to Mr. Williams, and he would have all L.R.A.1918C.

of the authority disclosed by that contract, but no greater."

The original agreement was received in evidence and has been sent up with the transcript. An examination of the writing shows that clauses thereof numbered, 1, 2, 4, 5, and 6 have written at the left of each on the margin of the paper the letters "O K." The remaining paragraphs of the writing are not thus marked, but words and figures have been substituted in some instances instead of others as originally employed. The third clause has two crossed lines indicating that such paragraphs had been set aside so far as it related to Williams's authority. A red line is drawn through each word of the ninth clause, which was originally as follows: "It also authorizes and empowers its said agent to expend not to exceed the sum of \$350 in fitting up a saloon for a person who will sell its beer for a term of years, upon the condition that, if the person so agreeing shall fail or neglect so to sell said beer to the exclusion of all beer for the time agreed, that is, keg beer, then the sum expended to become immediately due and payable."

The paragraph formerly numbered 7 has written at the left the figures 10, while the clause previously marked 10 is now numbered 11. A part of that paragraph, referring to the defendant and to Meister, conferring a right assigned to and intended to be exercised by Williams, reads: "And it further authorizes him to sign agreements and leases with saloon keepers and others buying said beer, for it and on its behalf, as its said agent and manager, hereby ratifying and confirming all that its said agent and manager for said territory may and shall lawfully do under this agreement."

The plaintiff herein, being the owner of storerooms in a building in Portland, Oregon, executed a lease thereof to Crane & Dewey at a monthly rental of \$175 to November 1, 1910, \$250 a month for the second year, \$300 a month for the third year, and \$325 a month for the fourth year, to expire November 1, 1913. This lease, with the plaintiff's consent, was assigned August 17, 1911, to John Ralson, who was to operate a saloon on the premises and sell exclusively the beer manufactured by the defendant. There was indorsed upon the assigned lease a memorandum which reads:

Portland, Oregon. For valuable consideration we hereby guarantee the faithful performance by the above lessees of all their obligations under the within lease.

[Signed] Enterprise Brewing Co.,

U. Remensperger, Pres.

P. Windeler, Sec.

The plaintiff executed to Ralson another lease of the premises for a term of two years commencing November 1, 1913, at the expiration of the original lease, at a monthly rental of \$200. There was indorsed on this second lease the following:

Portland, Oregon, May 27, 1913. For valuable consideration we hereby guarantee the faithful performance by the within lessee of all his obligation under the within lease.

[Signed] Enterprise Brewing Co.,
by C. B. Williams, Agt.

Ralson, on January 1, 1915, was indebted to the plaintiff to the extent of \$400 for the use of the premises during the two preceding months, and upon his promise to pay that sum in instalments the rent was, by agreement of the landlord, reduced to \$125 a month from January 1, 1915, to May 1st of that year, while \$150 a month was stipulated to be paid until December 31, 1915, thereby extending the term of the second lease two months. In a letter written by the plaintiff January 11, 1915, to the defendant and C. B. Williams, its agent, Portland, Oregon, the following language is found: "In the matter of the lease to John Ralson, which you have guaranteed, we desire to confirm by this letter the agreement which was arrived at in the interview a few days since between Mr. Ralson, your Mr. Williams, and the writer" (James D. Hart, the plaintiff's secretary), setting forth the terms hereinbefore stated. "By this reduction the opportunity to the tenant to make the payment without calling upon you is enhanced, and we have made the modification with the understanding that your guaranty will hold until said December 31, 1915, for any portion of the above total of \$2,100 [the amount of the rent due and to accrue] that Mr. Ralson fails to pay."

A carbon copy of this note, accompanied by a letter written at the same time by Mr. Hart for the plaintiff, was mailed to and received by the defendant at San Francisco, California, January 13, 1915, but no response thereto was ever made.

Ralson paid the rent from January 1, 1915, to June 1st of that year. It is fair to infer, however, that he vacated the premises, for on July 2, 1915, the plaintiff wrote the defendant saying in part "that Mr. Ralson's place of business is closed, and that he is now in arrears in rent for No. 120 North Sixth street in the amount of \$675," a demand for the payment of which was made. A carbon copy of this notification and a letter of similar import and demand were also mailed to the defend-

ant at San Francisco, California. No response, however, was made thereto. Replying to a letter from plaintiff's counsel relating to the payment of the rent demanded, the defendant, on July 14, 1915, wrote that the matter had been referred to their attorney at Portland, Oregon, and to Mr. Williams, its agent, saying inter alia: "We are somewhat in the dark regarding the entire affair, and naturally wish to have some particulars, which will take up some time owing to the distance between us."

C. B. Williams, as plaintiff's witness, in answer to the inquiry, "What were the circumstances under which you signed the name of the Enterprise Brewing Company to the Ralson lease, Mr. Williams?" testified over objection and exception as follows:

Mr. Ralson was complaining continually about his rental of the premises down there being too high, and after a conference or two with Mr. Hart, and between Mr. Ralson and myself and Mr. Hart, the question came up about an additional lease, and the former rental was \$325, and he agreed to reduce the rental from that time on to \$200, and give us a new lease for an additional two years, and Mr. Ralson was going to close up right then if he didn't get something of that sort, some concession on the rent there, so in order to get the thing off as soon as possible, I signed the indorsement (referring to the guaranty of May 27, 1913) believing that I had authority.

Q. Did you notify the Enterprise Brewing Company of your action in indorsing this lease?

A. I think so. . . .

Q. Did you ever receive from the Enterprise Brewing Company any objection of any sort to your action in that matter?

A. No, sir. . . .

Q. What is the fact, Mr. Williams, as to whether or not it is necessary in selling beer for breweries in this district to guarantee leases, in order to hold the trade?

Over objection and exception, the witness answered, Yes, sir.

Q. Did you do that in other instances than this one?

A. Yes, sir.

Q. Did the brewery execute other guarantees?

A. Yes, sir.

On cross-examination Mr. Williams testified that, having purchased Meister's agency, he continued the business in the name of the Enterprise Beer Agency, a corporation, that became the selling agent for the defendant, from which he received a salary and a commission, and that the defendant's beer was sold in Oregon only to the Enterprise Beer Agency. In answer to the question,

"And you were practically the Enterprise Beer Agency? the witness replied, "Yes, sir." Williams also testified that without the defendant's express authority he executed on its behalf a promissory note for \$900, to evidence the purchase price of material that was used in erecting a building on a lot which he owned in Washington county, Oregon, and upon his conveyance of such premises to the defendant it paid off the note. This witness further stated upon oath that without consulting the defendant he signed attachment bonds on its behalf in actions to recover from saloon keepers sums of money due from them for the purchase of beer.

The defendant's counsel introduced in evidence the depositions of U. Remensperger and P. Windeler, from which sworn statements it appears that neither the defendant corporation nor its board of directors ever adopted a resolution authorizing Williams to guarantee a performance of the conditions of Ralson's lease, nor did such officers or the corporation which they represented own any stock in the Enterprise Beer Agency, and that while the deponents personally signed such leases no person was authorized to do so for them.

The foregoing is deemed to be a fair summary of all the material evidence received at the trial. It will be remembered that the clause in the contract which was assigned to Williams empowered him to sign agreements and leases with saloon keepers and others buying the defendant's beer. This language probably could not be construed as expressly authorizing the guaranty of payment of rent of a building which was used by a saloon keeper who exclusively sold the defendant's beer. Mr. Sweek, however, interpreted that provision of the agreement as conferring such authority and so advised Williams, who, as agent, signed the guaranty indorsed upon Ralson's lease and testified that he thought he notified the defendant of his action in the matter, and that no objection thereto was made by his principal. The uncertainty of Williams's testimony in this particular renders it problematical as to whether or not the defendant ever obtained such information.

But, however this may be, it did receive the letter written by Mr. Hart, January 11, 1915, for the plaintiff in relation to the guaranty, and made no objection thereto. A sense of fair dealing demanded of the defendant a prompt denial of Williams's asserted right to indorse Ralson's lease, if the authority had not been conferred and the corporation desired to evade the legal consequences of its agent's act. The defendant should not be permitted by its silence to

speculate upon the possibility of Ralson's success in operating a saloon and his resulting ability to pay the rent reserved, but if he failed in this particular then to deny Williams's authority to indorse the lease. *Currie v. Bowman*, 25 Or. 364, 377, 35 Pac. 848; *Finnegan v. Pacific Vinegar Co.* 26 Or. 152, 155, 37 Pac. 457; *Schreyer v. Turner Flouring Co.* 29 Or. 1, 16, 43 Pac. 719; *Silsby v. Strong*, 38 Or. 36, 42, 62 Pac. 633; *Cranston v. West Coast L. Ins. Co.* 72 Or. 116, 130, 142 Pac. 762.

As a corporation acts by its agents, the powers of its managing officers are coextensive with those of their principal, except in relation to matters over which the stockholders alone have control. 21 Am. & Eng. Enc. Law, 2d ed. 852. The defendant's president and secretary necessarily had sufficient power to adopt any reasonable means that might tend to advance the interests of the corporation, even without a resolution of the board of directors to that effect, and hence such managing officers could authorize Williams to indorse a lease or ratify his act in that particular. *Calvert v. Idaho Stage Co.* 25 Or. 412, 414, 36 Pac. 24; *Moll v. Roth Co.* 77 Or. 593, 601, 152 Pac. 235.

A careful examination of all the evidence convinces us that no testimony was received tending to show Williams was ever empowered to guarantee the payment of rent of buildings even when occupied by saloon keepers who had agreed to sell the defendant's beer exclusively. The fact that a red line was drawn through each word of the 9th paragraph of the Meister contract which was assigned to Williams shows that his authority was intended to be restricted. It appears from the depositions of the president and secretary of the defendant that neither of them knew, until about eight months prior to giving their testimony, and probably when they received Mr. Hart's letter of January 11, 1915, that Williams had undertaken to guarantee the payment of Ralson's rent. These sworn statements are not seriously controverted by the testimony of Williams, who "thinks" only that he notified these officers of his indorsement of the lease.

We conclude therefore that the defendant is not responsible for any part of the rent which was due January 1, 1915, for the preceding months of November and December, but that it is liable for the rent thereafter accruing and remaining unpaid, by reason of its failure to deny Williams's authority when notified by Mr. Hart.

The judgment will be modified by remitting the sum of \$400, and the cause will be remanded, with directions to enter a re-

covery against the defendant and in favor of the plaintiff for \$1,050.

McBride, Ch. J., and McCamant and Bean, JJ., concur.

A petition for rehearing having been filed, **Moore, J.**, on March 5, 1918, handed down the following additional opinion (— Or. —, 171 Pac. 224):

In a petition for rehearing it is insisted that the defendant was under no legal obligation to reply to the plaintiff's letter of January 11, 1915, containing the information that the term of the lease had been extended two months from November 1st of that year, and the monthly rent of \$200 reduced to \$125 to May 1, 1915, and to \$150 for the remainder of the term, which modification was made pursuant to an agreement with C. B. Williams, the agent of the defendant, with the understanding that its guaranty would continue until December 31, 1915, and that, when this court concluded the defendant's failure to answer such communication constituted on acceptance of the condition stated therein, the plaintiff was thus permitted to introduce evidence which had been manufactured for the occasion, whereby an error was committed.

When oral declarations are made by a party in the presence and hearing of his adversary, who is under no restraint and conscious of the charge thus imputed, asserting against him an obligation which might be enforceable or his commission of an offense, or limiting his title to property, or affecting him injuriously, it is reasonable to suppose he would promptly deny such positive declarations, if he desired to escape unfavorable inferences which might be deduced from his silence, and hence he is usually required hastily to refute such charges. 16 Cyc. 958. This rule, however, does not generally apply to written communications containing statements of facts, a failure to deny which is not construed as a tacit admission of the truth of the writing, and no unfavorable inference arises from such silence, except in cases when the party receiving the letter has invited it, or where there is reason to believe he has acted upon the information thus received, or when there has been sent with the letter bills showing a shipment of goods, which invoices have been retained without objection, or where money has been sent upon a condition stated in the letter and the sum has not been returned. Id. 960. As sustaining the legal principle thus stated, see *State v. MacFarland*, 83 N. J. L. 474, 83 Atl. 993, Ann. Cas. 1914B, 782; L.R.A.1918C.

Seevers v. Cleveland Coal Co. 158 Iowa, 574, 138 N. W. 793, Ann. Cas. 1915D, 188.

These rules, however, have no application to the law governing the relation of agency. If a principal, when fully notified thereof, neglects promptly to disavow an act or contract of his agent in excess of his authority, such silence will usually be interpreted as an implied ratification, and particularly so if the failure speedily to repudiate such conduct or agreement might impose upon the other party loss or injury. 31 Cyc. 1276; 2 C. J. 505; *Curtze v. Iron Dyke Min. Co.* 40 Or. 601, 606, 81 Pac. 815:

"The rule," says Mr. Justice Bean in *Reid v. Alaska Packing Co.* 47 Or. 215, 220, 83 Pac. 141, "is elementary that when an agent, in contracting for his principal, exceeds his authority, the principal, upon being fully informed of the facts, must, within a reasonable time, disavow or disaffirm the act of his agent, especially in cases where his silence might operate to the prejudice of innocent parties; or he will be held to have ratified and affirmed such unauthorized act, and such ratification will be equivalent to a precedent authority."

To the same effect, see also 2 C. J. 504, § 124, and exhaustive notes on this subject.

Ratification by a principal of an unauthorized act of his agent has occasionally been grounded upon the doctrine of an equitable estoppel. A clear distinction, however, exists between an estoppel in pais and ratification.

"The substance of ratification is confirmation of the unauthorized act or contract after it has been done or made, whereas the substance of estoppel is the principal's inducement to another to act to his prejudice. Acts and conduct amounting to an estoppel in pais may in some instances amount to a ratification; but on the other hand ratification may be complete without any of the elements of an estoppel." 2 C. J. 469; 31 Cyc. 1247.

In the case at bar, it is possible the extension of the term of the lease and the reduction of the monthly rent might be regarded as creating an equitable estoppel, but however that may be, we rest our decision upon an implied ratification by the defendant of its agent's unauthorized assumption of authority, by failing, when fully notified thereof, promptly to deny his power to consummate the agreement.

We therefore adhere to the former opinion, and the petition for a rehearing is denied.

McBride, Ch. J., and McCamant and Bean, JJ., concur.

Annotation—Power of corporation organized for the manufacture and sale of liquor to enter into contracts of guaranty or suretyship on behalf of its customers or prospective customers.

Earlier cases considering the same question will be found in the note to *Timm v. Grand Rapids Brewing Co.* 27 L.R.A.(N.S.) 186.

In upholding the contract of the brewing company guaranteeing the rent of its customer, *DEPOT REALTY SYNDICATE v. ENTERPRISE BREWING Co.* ante, 1001, adhered to the general rule, as evidenced by the cases collated in the earlier note, that such a contract is not ultra vires, since it is in furtherance of the guarantor's authorized business by inducing custom.

This rule was further adhered to in *Halloran v. Jacob Schimdt Brewing Co.* (1917) — *Minn.* —, L.R.A.1917E, 777, 162 N. W. 1082, which held that a guaranty of rent of one of its customers by a brewing company was not prohibited by the laws of the state. The prohibition, the court stated, goes only to an interest in the instrumentalities used and acquired in the conduct of the business as such by the retailer, and to an interest in the profits derived by him, and the brewing company in this case was not interested in the business which the lessees would conduct on the premises, and did not pay or guarantee their license bond.

And in *Miller v. Northern Brewing Co.* (1917) 242 Fed. 164, it was held, citing as authority *Timm v. Grand Rapids Brewing Co.* (1910) 160 Mich. 371, 27 L.R.A.(N.S.) 186, 125 N. W. 357, that a guaranty of rent of one of its customers by a brewing company was within its corporate powers "to do all things incident to or convenient in carrying out the foregoing purposes," that is, to manufacture, produce, buy, sell, and deal in and with beer, ale, malt liquors, malt, ice, and other similar products, etc.

Where a brewing company has power to guarantee the obligation of others for a valuable consideration moving to it, it is not ultra vires of the authority of the president and manager of the brewery to guarantee the purchase price of a business in consideration of the purchaser's agreement to sell the brewing company's beer exclusively. *Hagerstown Brewing Co. v. Gates* (1912) 117 Md. 348, 83 Atl. 570.

Notes given to a bank for a loan, to a hotel company which maintained a

bar, payment of which was guaranteed by a brewing company which sold beer to the hotel company and recommended the loan to the bank, were held, in *First & City Nat. Bank v. McCrossin* (1916) 145 C. C. A. 177, 230 Fed. 983, not to be invalid under the provisions of a statute "that all agreements or obligations of any person to buy or sell exclusively a product or output of beer or other malt or spirituous liquors of any particular person or corporation in any licensed place of business shall be null and void. Nor shall any person engaged in the manufacture or sale of spirituous, vinuous, or malt liquors be allowed to conduct a business for the retail of said liquors in his own name or in any other person's name, or to furnish money or fixtures for that purpose, and any agreement, lease, or mortgage made for such purpose shall be null and void," there being no dispute of the testimony of the president of the bank that the bank was in no manner a party to any agreement for the sale of any portion of the beer products of the brewing company; that he knew nothing of any such agreement, and that the loan was made regardless of the sale of beer. The court stated that the bank had the right to lend money to the hotel company notwithstanding it conducted a bar in connection with the hotel business, and the brewing company had, under the Alabama statute, the right to sell its beer provided it did not violate the exclusive provision.

On the other hand, in *Lewer v. Cornelius* (1913) 72 Wash. 124, 129 Pac. 911, it was held that, under a statute prohibiting a brewing company "to pay, advance, or loan or become surety for the payment for any other person of the license fee required by any state law, city charter, or ordinance," a note of a retail dealer payable to a bank, given to a brewing company for the purpose of soliciting a loan thereon to pay the retail dealer's license, will be void as against public policy, where "the payee knew the purpose for which the loan was desired; that it allowed its name to be used as payee of the notes 'with the view to and for the purpose of aiding and assisting said brewing company, and did so aid and assist said brewing company in evading and circumventing the

law; that said promissory notes were taken by said bank as a cloak under which to hide the fact that said brewing company had, contrary to law, paid the license fee of defendant; and that

the notes when signed were not delivered to the bank by the appellant, but were delivered to the brewing company, who delivered them to the bank."

J. H. B.

MISSOURI SUPREME COURT.
(Division No. 2.)

OTTO F. STIFEL'S UNION BREWING
COMPANY, Appt.,
v.

EDWARD SAXY and Wife, Respts.

(— Mo. —, 201 S. W. 67.)

Execution — effect on estate by entirety.

A man has no interest in land held by entirety with his wife, which can be sold under execution for his debts, even since the passage of the Married Women's Acts. For other cases, see *Levy and Seizure, I. a*, in *Dig. 1-52 N. S.*

(January 5, 1918.)

APPEAL by plaintiff from a decree of the Circuit Court of the City of St. Louis in favor of defendants in a suit to subject an alleged interest of the defendant husband in real estate standing in the name of the defendant wife, to the payment of a judgment debt due to it from the husband. Affirmed.

Statement by Roy, C.:

The plaintiff seeks herein to subject an alleged interest of defendant Edward Saxy in real estate standing in the name of his wife, the defendant Mary M. Saxy, to the payment of a judgement debt due to him from the husband. There was a decree for defendants, and plaintiff has appealed.

On September 3, 1891, certain real estate in St. Louis was conveyed to the defendants, they being then as now husband and wife, and taking said property as tenants by the entireties. In 1905, while the property was so held, the husband became indebted to the plaintiff. Thereafter, through an intermediary, the title was placed in the wife alone; and, still later, the property was sold, and the net proceeds were used in the purchase of the real estate now in controversy. The petition alleges that the title to both of said tracts was so placed in the wife alone in fraud of plaintiff's rights as such creditor, and prays that the husband's interest in the last-mentioned tract be subjected to the payment of plaintiff's judgment.

Note. — For judgment against individual as lien on interest of tenant by entirety, see annotation following this case, post, 1015. L.R.A.1918C.

Messrs. Henry E. Haas and John A. Gilliam, for appellant:

A wife who permits her husband to hold the record title to her realty is estopped to assert her title thereto as against one extending credit to the husband in reliance on his apparent ownership.

Goldberg v. Parker, 87 Conn. 99, 46 L.R.A.(N.S.) 1097, 87 Atl. 555, Ann. Cas. 1914C, 1066; *Goldberg v. Parker*, 87 Conn. 99, 46 L.R.A.(N.S.) 1097, 87 Atl. 555, Ann. Cas. 1914C, 1059; *Riley v. Vaughan*, 116 Mo. 169, 38 Am. St. Rep. 586, 22 S. W. 707; *McClain v. Abshire*, 63 Mo. App. 333; *Rieschick v. Klingelhoefer*, 91 Mo. App. 430; *Cottrell v. Spiess*, 23 Mo. App. 35; *Million v. Commercial Bank*, 159 Mo. App. 601, 141 S. W. 453; *Singer Mfg. Co. v. Stephens*, 169 Mo. 1, 68 S. W. 903; *Balz v. Nelson*, 171 Mo. 682, 72 S. W. 527; *Zehnder v. Stark*, 248 Mo. 55, 154 S. W. 92; 1 *Moore*, *Fraud. Conv.* pp. 372, 404; 14 *Am. & Eng. Enc. Law*, 2d ed. 259.

The interest of the defendant, Edward Saxy, in and to the Theodosia avenue property, as tenant by the entirety, was subject to sale under execution, but the title of the purchaser was liable to be defeated by the survivorship of the wife.

Hall v. Stephens, 65 Mo. 670, 27 Am. Rep. 302; *Morrow v. Zane*, 185 Mo. App. 111, 170 S. W. 918; *Johnston v. Johnston*, 173 Mo. 114, 61 L.R.A. 166, 96 Am. St. Rep. 486, 73 S. W. 202; *Nold v. Ozenberger*, 152 Mo. App. 444, 133 S. W. 349; *Atkinson v. Henry*, 80 Mo. 153; *Hoffman v. Nolte*, 127 Mo. 136, 29 S. W. 1006; *Wilson v. Albert*, 89 Mo. 542, 1 S. W. 209; *Russell v. Russell*, 122 Mo. 237, 43 Am. St. Rep. 581, 26 S. W. 677; *Hume v. Hopkins*, 140 Mo. 74, 41 S. W. 784; *Brockett Cement Co. v. Logan*, 187 Mo. App. 325, 173 S. W. 727; *Laird v. Perry*, 74 Vt. 462, 59 L.R.A. 340, 52 Atl. 1040.

Exemption is a personal privilege that cannot be exercised until the officer comes to seize the property under a writ of execution or attachment. Hence, the question of homestead and exemption rights was only collaterally, and not directly, involved.

Caldwell v. Ryan, 210 Mo. 17, 16 L.R.A. 494, 124 Am. St. Rep. 717, 108 S. W. 533, 14 Ann. Cas. 314; *State ex rel. Hinde v. United States Fidelity & G. Co.* 135 Mo. App. 160, 115 S. W. 1081; *Garrett v. Wagner*, 125 Mo. 450, 28 S. W. 762; *Weinrich*

v. Koelling, 21 Mo. App. 133; Thompson, Homesteads, § 702; 10 Enc. Pl. & Pr. 81; 15 Am. & Eng. Enc. Law, 2d ed. 638; Furlong v. Thomssen, 19 Mo. App. 364; Storms v. White, 23 Mo. App. 31; Northrup v. Mississippi Valley Ins. Co. 47 Mo. 443, 4 Am. Rep. 337; Paddock v. Lance, 94 Mo. 283, 6 S. W. 241.

A homestead must not exceed, either in value or quantity, the limits prescribed by statute. If it does, the overplus is subject to execution.

White v. Spencer, 217 Mo. 242, 129 Am. St. Rep. 547, 117 S. W. 20, 16 Ann. Cas. 598; Houf v. Brown, 171 Mo. 207, 71 S. W. 125; Beckner v. Rule, 91 Mo. 62, 3 S. W. 490; Rogers v. Marsh, 73 Mo. 64; Blandy v. Asher, 72 Mo. 27; Perkins v. Quigley, 62 Mo. 498; Waples, Homestead & Exemption, p. 208; 15 Am. & Eng. Enc. Law, 2d ed. 605; Slattry v. Jones, 96 Mo. 216, 9 Am. St. Rep. 344, 8 S. W. 554.

So long as the right to have execution upon a judgment continues, a creditor may institute his suit to set aside a fraudulent conveyance made by his debtor, and subject the land to the payment of his debt.

Rogers v. Brown, 61 Mo. 187; Zoll v. Soper, 75 Mo. 460; Hughes v. Littrell, 75 Mo. 573; Hudson v. Cahoon, 193 Mo. 559, 91 S. W. 72; Kelly v. Hurt, 61 Mo. 463; Henrioid v. Neusbaumer, 69 Mo. 96; Reed v. Painter, 145 Mo. 341, 46 S. W. 1089.

While the plaintiff might have sold all the right, title, and interest of the defendant Edward Saxy, in and to the Garfield avenue property, under execution, and left it to the purchaser to test the title, the better practice is said to be to settle the title in a court of equity first.

Welch v. Mann, 193 Mo. 304, 92 S. W. 98; Central Nat. Bank v. Doran, 109 Mo. 40, 18 S. W. 836; State ex rel. Mastin v. McBride, 105 Mo. 285, 15 S. W. 72; Lionberger v. Baker, 88 Mo. 447; Bobb v. Woodward, 50 Mo. 95.

Messrs. John B. Dempsey and Rozier G. Meigs for respondents.

Roy, C., filed the following opinion:

The question as to whether an execution against the husband alone can reach any interest of any kind in property held by the husband and wife as tenants by the entirety has never been before this court. There are some dicta on the subject, which we will consider after a review of the common law and the decisions of other jurisdictions. The conflicting opinions in the decided cases, and the various reasons given therefor, convince us that no safe conclusion can be reached without a clear perception of what such an estate was at common law, and the effect of the statutes known L.R.A.1918C.

as the "Married Women's Acts" on such estates.

We will first endeavor to ascertain what an estate by the entirety was at common law, leaving out of view the effect on such estate of the power of the husband in the right of the wife (*jure uxoris*) to dominate her property. The estate was peculiar (*Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302), and partook, in many respects, of the nature of the marriage relation. Husband and wife took and held it not as separate individuals and by moieties, but as one person, each holding the whole of it. *Stewart, Husb. & W.* § 303; 4 Kent, Com. 362. The English court of chancery, in *Jupp v. Buckwell*, L. R. 39 Ch. Div. 148, 57 L. J. Ch. N. S. 774, 59 L. T. N. S. 129, 36 Week. Rep. 712, quotes Coke and Bracton as saying that in such an estate, "*vir et uxor sunt quasi unica persona, quia caro una et sanguis unus.*" That is a plain statement that they are one person because "they are one flesh and one blood." 2 Blackstone's Commentaries, p. 182, says: "And, therefore, if an estate in fee be given to a man and his wife, they are neither properly joint tenants, nor tenants in common, for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, per tout, et non per my; the consequence of which is that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor."

Warvelle on Real Property, § 111, says: "It differs from the estate of joint tenancy in that joint tenants take by moieties and at the same time are each seised of an undivided part of the whole. In the estate by entirety neither tenant is seised of a part, or moiety, but both of them have the entire estate; and as this involves in itself a physical impossibility in the case of ordinary individuals it necessarily follows that effect can only be given to the grant by regarding both tenants as constituting but one person. But this, in fact, is just what the law does, and as this unity of person is never recognized save in the case of husband and wife, the estate by entirety is confined exclusively to persons within the marriage relation."

There was incident to this estate the right of survivorship. But such survivorship was very different from survivorship in case of joint tenancy. 2 Blackstone, p. 184, speaking of joint tenancy, says: "This right of survivorship is called by our ancient authors the *jus accrescendi*, because the right upon the death of one joint tenant accumulates and increases to the survivors."

Warvelle, *supra*, speaking of tenancy by

the entirety, says (§ 111): "Both would therefore be seised of the entire estate; neither could dispose of any part of same without the assent of the other, and upon the death of either the whole estate would remain in the survivor. In this latter respect while the right of survivorship gives to the estate an apparent resemblance to joint tenancy, it yet differs materially from joint tenancy, for the survivor succeeds to the whole not by the right of survivorship simply, as is the case with joint tenants, but by virtue of the grant which vested the entire estate in each grantee, or, in contemplation of law, in one person with a dual body and consciousness."

Stewart says (§ 306): "On the death of either, the other has the whole estate, continuing alone his or her former holding, and not taking by survivorship in the sense that a surviving joint tenant does."

In *Garner v. Jones*, 52 Mo. 68, it was said: "At common law a conveyance in fee to husband and wife, of real estate, created a tenancy by the entirety. Being but one person in law, they took the estate as one person, each being the owner of the entire estate, neither of whom had any separate or joint interest, but a unity or entirety of the whole. So if either died the estate continued in the survivor, as it had existed before,—an undivided unity or entirety. There was no survivorship as in joint tenancies, but a continuance of the estate in the survivor as it originally stood. The only change by death was in the person, not in the estate. Before death they both constituted one person, holding the entire estate, and after the death of either the survivor remained as the only holder of the estate."

In *Thornton v. Thornton*, 3 Rand. (Va.) 179, it was said: "But husband and wife have the whole from the moment of the conveyance to them; and the death of either cannot give the survivor more."

See also *Cole Mfg. Co. v. Collier*, 95 Tenn. 115, 30 L.R.A. 315, 49 Am. St. Rep. 921, 31 S. W. 1000; *Kunz v. Kurtz*, 8 Del. Ch. loc. cit. 414, 68 Atl. 450.

There could be no partition of such estate. *Warvelle*, Real Prop. § 111; *Stewart*, *Husb. & W.* § 306; 4 Kent, Com. p. 362; 1 Washb. Real Prop. § 913; *Russell v. Russell*, 122 Mo. 235, 43 Am. St. Rep. 581, 26 S. W. 677.

Neither could dispose of any interest in the estate without the other. Blackstone's language above cited is: "Neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor."

Warvelle, as above quoted, says: "Neither could dispose of any part of the same without the assent of the other."
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4 Kent, 362, says: "Neither of them can alien so as to bind the other."

Upon being divorced the parties cease to occupy the relation of tenants by the entirety. The dissolution of the marriage relation dissolves the tenancy by the entirety. *Russell v. Russell*, 122 Mo. 235, 43 Am. St. Rep. 581, 26 S. W. 677. It will be noticed that such an estate was based on the unity of husband and wife, they being considered in all respects as equals so far as that estate was concerned.

We will now consider the estate or right, which the husband acquired *jure uxoris* in the property of the wife, and its effect on the estate by the entirety. 1 Bishop on *Laws of Married Women* says: "Thus, as we have seen, the wife's money and chattels in possession pass by the marital right to the husband."

2 Kent, 130, says: "If the wife, at the time of marriage, be seised of an estate of inheritance in land, the husband, upon the marriage, becomes seised of the freehold *jure uxoris*, and he takes the rents and profits during their joint lives."

Platt on Property Rights of Married Women, § 2, says: "The husband was entitled to the use during coverture of all the real estate acquired by the wife before and after marriage."

Stewart, in his work above cited (§ 146), says: "At common law a husband holds during coverture in right of his wife, she being merged in him, all her lands in possession, and owns the rents and profits thereof absolutely. This is called his freehold estate *jure uxoris*; it is often said to be an estate for the joint lives of the husband and wife, but this is a mistake, as it terminates with absolute divorce. It differs from curtesy initiate in that it is a vested estate in possession, while curtesy initiate is a contingent future estate, it is independent of birth of issue, is held in right of the wife, and is not added to or diminished when curtesy initiate arises."

And in § 306, speaking of estates by the entirety, he says: "During coverture, the husband has at common law his estate *jure uxoris*, with the right to the rents and profits; he holds the property subject to his control, use, and possession; only this estate for their joint lives can be aliened by him, or taken for his debts, or charged by him with a mechanic's lien."

In *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302, it was said concerning estates by the entirety: "If, as already seen, the husband and wife became seised in entirety of the undivided one seventh of the devised premises, the plaintiff is clearly entitled to a corresponding recovery of possession, if the husband had at the time of the sale any

interest therein susceptible to execution. The great current of authority affirms such susceptibility; going only so far as this, however, that if the wife survive her husband, she, as such survivor, will be entitled to the whole. This theory, that the husband is possessed of a vendible interest, has for its basis that the husband, *jure mariti*, is entitled to the possession and usufruct of the wife's real estate during marriage, which right suffers no diminution or abatement by reason of his own interest in land whereof both his wife and himself are jointly seised. *Ames v. Norman*, 4 Sneed, 692, 70 Am. Dec. 269; *French v. Mehan*, 56 Pa. 286; *Bennett v. Child*, 19 Wis. 362, 88 Am. Dec. 692; *Freeman, Cotenancy & Partition*, §§ 73, 74; 1 Washb. Real Prop. 4th ed. 672; *Bishop, Married Women*, 622; *Steebler v. Knerr*, 5 Watts, 181."

In that case the estate vested prior to the taking effect of the statute which destroyed the right of the husband to the exclusive possession and control of the land.

The proposition that the husband's right to control during his life the entire estate held by the entirety was by reason of the *jus mariti* was announced by the English court in *Jupp v. Buckwell*, L. R. 39 Ch. Div. 148, 57 L. J. Ch. N. S. 774, 59 L. T. N. S. 129, 36 Week. Rep. 712, and that case is cited with approval by the Canadian court in *Re Wilson*, 20 Ont. Rep. 397. As is said by Stewart, *supra*, this interest of the husband *jure uxoris* in the wife's property is different from the curtesy estate. The one is enjoyed during the life of the wife, in her right (or wrong), and terminates with her death; the other is enjoyed in possession only after her death. It, like dower, is held by right of the marriage, but not in the right of the spouse. We thus see that it was the marital right, and it alone, which gave the husband the power to appropriate absolutely the personal chattels of the wife, and gave him a freehold estate for their joint lives in her lands, including those held by them as tenants by the entireties. Independent of that marital right he had no interest in her property that he could himself dispose of, or that was vendible under an execution against him alone, except his curtesy estate, concerning which we will say nothing further. This freehold estate of the husband in the lands of the wife and in estates held by the entireties was based on the idea of the unity of husband and wife, but a very different kind of unity from that unity of equals above described. The estate of the husband *jure uxoris* had for its very foundation the idea that husband and wife were one because she was merged in him, and

he held the rights of both, and could act for both, regardless of her wishes.

We will now consider the effect of the legislation which is spoken of as the "Married Women's Acts." The verbiage of those acts varies in different states, in Canada and in England. Doubtless the results reached in some of the cases are by reason of some peculiar provision of the statute under consideration. For the purpose of this case we shall treat them all as being the same as ours, unless some reason to the contrary appears. In some states the estate by the entirety has been judicially repudiated. *Whittlesey v. Fuller*, 11 Conn. 337; *Miles v. Fisher*, 10 Ohio, 1, 36 Am. Dec. 61; *Wilson v. Fleming*, 13 Ohio, 68; *Kerner v. McDonald*, 60 Neb. 663, 83 Am. St. Rep. 550, 84 N. W. 92. In two states there are statutes which destroy the rule that a conveyance of land to husband and wife, of itself and without further provision, creates an estate by the entireties. *Bassler v. Rewodlinski*, 130 Wis. 26, 7 L.R.A.(N.S.) 701, 109 N. W. 1032; *Wilson v. Wilson*, 43 Minn. 398, 45 N. W. 710. In the following states it is held that the "Married Women's Acts" have in effect abolished such estates: *Donegan v. Donegan*, 103 Ala. 488, 49 Am. St. Rep. 53, 15 So. 823; *Re Robinson*, 88 Me. 17, 30 L.R.A. 331, 51 Am. St. Rep. 367, 33 Atl. 652; *Green v. Cannady*, 77 S. C. 193, 57 S. E. 832; also in England, *Jupp v. Buckwell*, *supra*; and in Canada, *Griffin v. Paterson*, 45 U. C. Q. B. 536 (loc. cit. 554). In others it is held that those acts have made husband and wife tenants in common with right of survivorship. *Schulz v. Ziegler*, 80 N. J. Eq. 199, 42 L.R.A.(N.S.) 98, 83 Atl. 968; *Hiles v. Fisher*, 144 N. Y. 306, 30 L.R.A. 305, 43 Am. St. Rep. 762, 39 N. E. 337. Some states hold that such acts have had no effect on the husband's right in lands held by the entireties. *Pray v. Stebbins*, 141 Mass. 219, 55 Am. Rep. 462, 4 N. E. 824; *Morrill v. Morrill*, 138 Mich. 112, 110 Am. St. Rep. 306, 101 N. W. 209, 4 Ann. Cas. 1100. In two states it is held that those acts have resulted in depriving the husband's creditors of the right to affect the interest of the wife during the existence of the marriage relation; but they intimate that the right of the survivorship of the husband can be sold for his debts. *Cole Mfg. Co. v. Collier*, 95 Tenn. 115, 30 L.R.A. 315, 49 Am. St. Rep. 921, 31 S. W. 1000; *Simpson v. Biffle*, 63 Ark. 289, 38 S. W. 345. All those cases which hold that such legislation has destroyed or changed estates by the entireties proceed on the theory that it has destroyed the unity of husband and wife. They overlook the plain fact that such acts are meant to destroy the unity of

unequals, the foundation of the *jus mariti*, and to thereby restore to its full vigor the unity made up of equals, the foundation of the estate by *entireties*.

The doctrine most numerous supported by the decided cases is best expressed in *Diver v. Diver*, 56 Pa. 106, by Strong, J., who was afterwards a Justice of the Supreme Court of the United States. He there says: "But it is said the Act of 1848, by destroying the legal unity of the husband and wife, has converted such an estate into a tenancy in common; that is, that such a deed conveys a different estate from that which the same deed would have created, if made prior to the passage of the act. To this we cannot assent. It mistakes alike the letter and spirit of the statute, imputing to it a purpose never intended. The design of the legislature was single. It was not to destroy the oneness of husband and wife, but to protect the wife's property, by removing it from under the dominion of the husband. To effectuate this object, she was enabled to own, use, and enjoy her property, if hers before marriage, as fully after marriage as before. And the act declared that if her property accrued to her after marriage, it should be owned, used, and enjoyed by her, as her own separate property, exempt from liability for the debts and engagements of her husband. All this had in view the enjoyment of that which is hers, not the force and effect of the instrument by which an estate may be granted to her. It has nothing to do with the nature of the estate. The act does not operate upon rights accruing to her until after they have accrued. It take such rights of property as it finds them, and regulates the enjoyment; that is, the enjoyment of the estate after it has vested in the wife. And the mode of authorized enjoyment is significant. It is to be as her separate property is enjoyed, as property settled to her separate use. The act, therefore, no more destroys her union with her husband than does a settlement of property for her separate use. To a certain extent she is enabled, but no more than is necessary, to protect her property after it has been acquired. We have held that she can convey her lands only by joining in a deed with her husband. *Pettit v. Fretz*, 33 Pa. 118. This is a clear recognition of the existing unity of the two. It need not be repeated that no greater effect is to be given to the Act of 1848 than its language and spirit demand. It is a remedial statute, and we construe it so as to suppress the mischief against which it was aimed, but not as altering the common law any further than is necessary to remove that mischief. To hold it as operating upon the deed conveying land to a wife,

making such deed assure a different estate from what it would have assured without the act, is to lose sight of the legislative purpose. Were we to do so, it would become in many cases a means of divesting her of her property, instead of an instrument of protection. In the present case, if it has converted the estate granted to Diver and his wife into a tenancy in common, it has taken from her her ownership and enjoyment of the entirety during her husband's life and her right of survivorship to the whole. On this subject the remarks of Chief Justice Lewis in *Stuckey v. Keefe*, 26 Pa. 401, are worthy of attention."

That language is a clear and irrefutable statement of the conclusion that the Married Women's Acts are not intended to weaken or destroy that unity of husband and wife which treats them as equals, but that they do destroy that unity of the two which considers the wife as merged in the husband. In other words, the purpose of such acts is to destroy the *jus mariti*, without affecting, in any other way, the estates granted to the wife alone, or to the husband and wife as tenants by the *entireties*. That doctrine has been indorsed in *Kunz v. Kurtz*, 8 Del. Ch. 405, 68 Atl. 450; *Patton v. Rankin*, 68 Ind. 245, 34 Am. Rep. 254; *Baker v. Stewart*, 40 Kan. 442, 2 L.R.A. 434, 10 Am. St. Rep. 213, 19 Pac. 904; *Masterman v. Masterman*, 129 Md. 167, 98 Atl. 537; *Hood v. Mercer*, 150 N. C. 699, 64 S. E. 897; *Corinth v. Emery*, 63 Vt. 505, 25 Am. St. Rep. 780, 22 Atl. 618. Thus we have seen that, at common law, and independently of the *jus mariti*, neither husband nor wife could, without the concurrence of the other, bind or dispose of any interest in the estate. They could not have partition. On the death of one, the other continued to own the whole estate. There was no increase of the estate as in case of the survivorship of a joint tenant. In *Jordan v. Reynolds*, 105 Md. 288, 9 L.R.A.(N.S.) 1026, 121 Am. St. Rep. 578, 66 Atl. 37, 12 Ann. Cas. 51, it was said: "To hold the judgment to be a lien at all against this property, and the right of execution suspended during the life of the wife, and to be enforced on the death of the wife, would, we think, likewise encumber her estate, and be in contravention of the constitutional provision heretofore mentioned, protecting the wife's property from the husband's debts. It is clear, we think, if the judgment here is declared a lien, but suspended during the life of the wife, and not enforceable until her death, if the husband should survive the wife, it will defeat the sale here made, by the husband and wife to the purchaser, and thereby make

the wife's property liable for the debts of her husband."

Leaving out of view for the present the decisions of the courts of this state, we conclude that where a judgment and execution thereon are against a husband alone, not including the wife, such judgment and execution cannot affect in any way property held by them by the entirety, nor can it affect any supposed separate interest of the husband therein, for he has no separate interest.

We will now consider the decisions in this state. In *Gibson v. Zimmerman*, 12 Mo. 385, 51 Am. Dec. 168, it was said: "They are each owner of the whole, but not of the half. They must both join in a conveyance. They are both necessary to make one grantor."

It was also there said: "And it is difficult to assign any good reason why survivorship between husband and wife is prejudicial to the commonwealth, or repugnant to the genius of republics."

The legislature, by § 2878 of our Revised Statutes, expressly excepts a conveyance to husband and wife from the provision that a conveyance to two or more persons shall be a tenancy in common, unless expressly declared to be a joint tenancy. In *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302, above cited, it was said that the power of the husband over land held by him and his wife by the entirety was not affected by the Married Women's Acts. The only authority there cited was *Ames v. Norman*, 4 Sneed, 692, 70 Am. Dec. 269. There are three things to be said about *Hall v. Stephens*: (1) As we have above stated, only two states hold to that opinion, Massachusetts and Michigan. All the other courts of this country and of Canada and England, wherever they have spoken, have held that the Married Women's Acts have destroyed the *ius mariti* in estates by the entirety. (2) The opinion in *Hall v. Stephens* was a pure dictum, as the estate there vested before the date of the Married Woman's Acts. (3) The only case there cited has been repudiated as a dictum by the court of that state. *Cole Mfg. Co. v. Collier*, 95 Tenn. loc. cit. 123, 30 L.R.A. 315, 49 Am. St. Rep. 921, 31 S. W. 1000. The following cases were like *Hall v. Stephens*, in that the estate vested before the statutes affecting the husband's right went into effect: *Atkison v. Henry*, 80 Mo. 151; *Moses v. St. Louis Sectional Dock Co.* 84 Mo. 242; *Wilson v. Albert*, 89 Mo. 537, 1 S. W. 209; *First Nat. Bank v. Fry*, 168 Mo. 492, 68 S. W. 348. In *Johnston v. Johnston*, 173 Mo. loc. cit. 114, 61 L.R.A. 166, 96 Am. St. Rep. 486, 73 S. W. 202, attention was called to the fact that *Hall v. Stephens* was obiter dictum on the point here involved. L.R.A.1918C.

In *Bains v. Bullock*, 129 Mo. 117, 31 S. W. 342, it was held that the Married Women's Act of 1889 (§§ 6864 and 6869) did affect the wife's right in the estate by the entirety, and that it enabled the wife, without joining the husband, to sue any person other than the husband for the possession of the land. That case did not determine what effect the statute had on the rights of the husband and wife as between themselves. But it does say (129 Mo. loc. cit. 120): "But it is also true that the grant vests in each grantee the entire estate. The statute abolishes the legal unity between husband and wife, which gave rise to estates by the entirety, but the estate itself has not been abolished."

The question here involved was not in issue in that case, and the authorities were not there reviewed. We respectfully submit that if there had been such a review, it would not have been there said that "the statute abolishes the legal unity between husband and wife, which gave rise to the estate by the entirety." However, we have no special quarrel with that case. It holds, in effect, at least, that such estate still exists, freed by the statute from the *ius mariti*. *Valliant, J.*, in *Frost v. Frost*, 200 Mo. 474, loc. cit. 483, 118 Am. St. Rep. 689, 98 S. W. 527, 528, said: "Under the facts of the case at bar it is not necessary for us to decide whether or not, under our Married Women's Statutes, the husband has been shorn of the exclusive right to the possession and control of the property held as an estate in entirety; it is sufficient to say, as we do say, that the title in such an estate is as it was at common law; neither husband nor wife has an interest in the property, to the exclusion of the other; each owns the whole while both live, and at the death of either the other continues to own the whole, freed from the claim of anyone claiming under or through the deceased."

We hold that, as a result of the Married Women's Acts, the husband, during their joint lives, has no interest in land held as tenants by the entirety that can be sold under execution for the sole debt of the husband.

The decree of the trial court is affirmed.

White, C., concurs.

Per Curiam:

The foregoing opinion of *Roy, C.*, is adopted as the opinion of the court.

All the Judges concur.

Petition for rehearing denied February 16, 1918.

Annotation—Judgment against individual as lien on interest of tenant by entirety.

The note supplements notes on the same subject appended to *Jordan v. Reynolds*, 9 L.R.A.(N.S.) 1026; *Beihl v. Martin* (1912) 42 L.R.A.(N.S.) 555.

As shown in the notes referred to, it is the general rule that a judgment against one of the tenants to an estate by the entirety is not a lien upon any part of the estate, and gives to the judgment creditor no interest therein where the so-called Married Women's Statutes gives to married women the right to possession and enjoyment of their separate property, and hence, since estates by entirety exist only as to husband and wife, the entire property during their joint lives is free from judgment or execution liens against either of them. To the same effect are the following cases in addition to those cited in the earlier notes: *Simmons v. Parker* (1916) 61 Ind. App. 403, 112 N. E. 31; *Masterman*

v. Masterman (1916) 129 Md. 167, 98 Atl. 537; *OTTO F. STIFEL'S UNION BREWING CO. v. SAXY*, ante, 1009; *Ashbaugh v. Ashbaugh* (1918) — Mo. —, 201 S. W. 72; *Harris v. Carolina Distributing Co.* (1916) 172 N. C. 14, 89 S. E. 789; *Meyer's Estate* (1911) 232 Pa. 89, 36 L.R.A.(N.S.) 205, 81 Atl. 145, Ann. Cas. 1912C, 1240; *Citizens' Sav. Bank & T. Co. v. Jenkins* (1916) — Vt. —, 99 Atl. 250.

In *Ades v. Caplan* (1918) — Md. —, L.R.A. —, —, 103 Atl. 95, citing the note in 9 L.R.A.(N.S.) 1029, the rule is stated that as the interest of the estate by entirety forbids or prevents the sale or disposal of it or any part of it by the husband or wife without the consent of the other, the husband cannot encumber or at all prejudice such estate to any greater extent than he could if it rested in the wife exclusively in her own right. A. G. S.

NEW MEXICO SUPREME COURT.

GEORGE H. BUSS
v.

KEMP LUMBER COMPANY, Appt.

(— N. M. —, 170 Pac. 54.)

Limitation of actions — suit on note.

1. The Statute of Limitations commences to run against a cause of action on a note upon default of payment of interest, where the note provides that "in case of a default in the payment of any interest payment, then the whole principal sum shall become due and collectable."

For other cases, see *Limitation of Actions*, II. b, in *Dig. 1-52 N. S.*

Same — who may plead.

2. A judgment creditor, having a general lien upon the property of the mortgagor, may plead the Statute of Limitations against the cause of action of the mortgagee on a note and mortgage.

For other cases, see *Action or Suit*, I. a, in *Dig. 1-52 N. S.*

Headnotes by PARKER, J.

Note. — As to right of lien creditor to set up Statute of Limitations against other creditors of his debtor, see annotation following this case, post, 1020.

On the effect of acceleration provision in mortgage or note to start the Statute of Limitations running, see notes to *Hall v. Jamieson*, 12 L.R.A.(N.S.) 1190; *Lovell v. Goss*, 22 L.R.A.(N.S.) 1110; and *Central Trust Co. v. Meridian Light & R. Co.* 51 L.R.A.(N.S.) 151. L.R.A.1918C.

Same — mortgage — possession by mortgagee.

3. Possession of mortgaged land by mortgagee, with consent of mortgagor, does not toll the Statute of Limitations. No such exception is provided by statute, and the court will not create an exception not provided by law.

For other cases, see *Limitation of Actions*, IV. a, in *Dig. 1-52 N. S.*

(Hanna, Ch. J., dissents in part.)

(January 7, 1918.)

APPPEAL by defendant from a judgment of the District Court for Eddy County in favor of plaintiff in a suit to foreclose a mortgage. Reversed.

The facts are stated in the opinion.

Mr. R. C. Reid, for appellant:

The cause of action accrues and the Statute of Limitations begins to run on a mortgage given to secure a note, upon default of a payment of interest, where, by the terms of the note and mortgage, the principal sum becomes due and collectable upon such default.

Dan. Neg. Inst. Calvert's ed. 1215; Angell, Limitations, 6th ed. 103; *Douthitt v. Farrell*, 60 Kan. 196, 56 Pac. 9; *Manitoba Mortg. & Invest. Co. v. Daly*, 10 Manitoba L. R. 425; *Dodge v. Signor*, 18 Tex. Civ. App. 45, 44 S. W. 926; *San Antonio Real Estate Bldg. & L. Asso. v. Stewart*, 94 Tex. 441, 86 Am. St. Rep. 864, 61 S. W. 386; *McFadden v. Branden*, 8 Ont. L. Rep. 610,

2 Ann. Cas. 853; *Spesard v. Spesard*, 75 Kan. 87, 88 Pac. 576; *Snyder v. Miller*, 71 Kan. 410, 69 L.R.A. 250, 114 Am. St. Rep. 489, 80 Pac. 970; *Reeves v. Butcher* [1891] 2 Q. B. 509, 60 L. J. Q. B. N. S. 619, 65 L. T. N. S. 329, 39 Week. Rep. 626; *First Nat. Bank v. Peck*, 8 Kan. 662; *Ryan v. Caldwell*, 106 Ky. 543, 50 S. W. 966; *Parks v. Cooke*, 3 Bush, 168; *Wheeler & W. Mfg. Co. v. Howard*, 28 Fed. 741; *Central Trust Co. v. Meridian Light & R. Co.* 106 Miss. 431, 51 L.R.A.(N.S.) 151, 63 So. 575, 64 So. 216; *Green v. Frick*, 25 S. D. 342, 126 N. W. 579; *Hodge v. Wallace*, 129 Wis. 84, 116 Am. St. Rep. 938, 108 N. W. 212; *Joyce*, *Defenses to Commercial Paper*, § 424.

The holder of a judgment lien against mortgaged land may plead the Statute of Limitations against the mortgage.

Brandenstein v. Johnson, 140 Cal. 29, 73 Pac. 744; *Wood v. Goodfellow*, 43 Cal. 185; *Watt v. Wright*, 66 Cal. 202, 5 Pac. 91; *California Bank v. Brooks*, 126 Cal. 198, 59 Pac. 302; *Filipini v. Trobeck*, 134 Cal. 441, 66 Pac. 587; *De Voe v. Rundle*, 33 Wash. 604, 74 Pac. 836.

Messrs. Gibbany & Epstein, for appellee:

The Statute of Limitations, being a purely personal right, can be pleaded only by the person who will be benefited by the statute, the maker of the note and mortgage, or his heirs and assigns.

13 Pl. & Pr. 180; *Miller v. Houston City Street R. Co.* 5 C. C. A. 134, 13 U. S. App. 57, 55 Fed. 366; *Hopkins v. Clyde*, 104 Am. St. Rep. 737, and note, 71 Ohio St. 141, 72 N. E. 846, 1 Ann. Cas. 1000; *Hall v. Jameson*, 151 Cal. 606, 12 L.R.A.(N.S.) 1190, 121 Am. St. Rep. 137, 91 Pac. 518; *Lovell v. Goss*, 45 Colo. 304, 22 L.R.A.(N.S.) 1110, 132 Am. St. Rep. 184, 101 Pac. 72; *Grafton Bank v. Doe*, 19 Vt. 463, 47 Am. Dec. 697; *Watts v. Creighton*, 85 Iowa, 154, 52 N. W. 12; *Nebraska City Nat. Bank v. Nebraska City Hydraulic Gaslight & Coke Co.* 4 McCrary, 319, 14 Fed. 763; 2 Jones, *Mortg.* §§ 715, 716, 1209a; *First Nat. Bank v. Park*, 37 Colo. 303, 86 Pac. 106; *Fletcher v. Daugherty*, 13 Neb. 224, 13 N. W. 207; *Core v. Smith*, 23 Okla. 909, 102 Pac. 114; *Bryan v. Brasius*, 3 Ariz. 433, 31 Pac. 519.

Parker, J., delivered the opinion of the court:

This is a suit by George H. Buss, appellee, against John H. Fox, E. F. Hardwick, and the Kemp Lumber Company, to recover a personal judgment against Fox, obtain a foreclosure of a mortgage executed by Fox, and determine the priority of claims between the appellee and Hardwick and the Kemp Lumber Company. The Kemp Lumber Company has perfected this appeal from L.R.A.1918C.

a judgment rendered by the trial court in favor of the appellee. The facts, as gathered from the pleadings, are:

That on March 16, 1909, John H. Fox executed his note for \$8,000, and to secure the payment thereof executed a mortgage and delivered same to Buss. The note contained the usual provisions, with this addition: "In case of a default in the payment of any interest payment, then the whole principal sum shall become due and collectable."

The note provided that the principal sum should be paid on or before March 16, 1912. On June 11, 1909, the Wagnon Lumber Company recovered a money judgment against Fox. It was assigned to the appellant, the Kemp Lumber Company, on June 29, 1910, and a transcript of the judgment was docketed in the office of the county clerk on December 14, 1911. The mortgage was not filed for record until the 22d day of April, 1915. On May 3, 1916, the appellant filed a suit to revive its judgment in the district court, and that suit was pending when the case at bar was instituted.

1. The trial court determined this case upon the demurrer of appellee to the answer of appellant. The first question is whether the Statute of Limitations had run against the note and mortgage at the time this suit was instituted. The appellant contends that the Statute of Limitations began to run from the date of the default in the payment of the interest specified in the note,—September 17, 1909,—and not on March 16, 1912, the time specified for the payment of the principal. The appellee contends that the acceleration clause in the note implies that the holder is vested with the option of declaring the note due and payable in the event of a default in the payment of the interest, and, the option not having been exercised, the statute did not begin to run until March 16, 1912. The trial court agreed with this contention. The question is one of first impression here. An examination of the cases discloses that such clauses have not been uniformly construed by the courts. The following statement appears in 17 R. C. L. "Limitation of Actions," § 161: "Where a mortgage is given to secure several notes which fall due at different dates, the Statute of Limitations commences to run as to each note at maturity, and is not postponed until the maturing of the last note. But according to some authorities, where a mortgage contains an acceleration clause to the effect that if there shall be a default of the payment of interest the principal sum secured shall forthwith become due and payable, the right of action to recover the principal ac-

crues at once upon such a default, and the Statute of Limitations then begins to run against that right; it being said that such a clause is not a one-sided affair vesting a mere option in the mortgagee, but confers a right upon the mortgagor, equal with that given to the mortgagee, to insist upon it and receive whatever advantage he can from its enforcement."

In the same section it is also said that other authorities hold that such a provision merely gives the option to the holder to declare the principal sum due and payable upon a default in the payment of interest; the theory of such cases being that the clause is inserted for the benefit of the mortgagee, the option of such a character being a mere penalty. A collection of most of the cases on this subject will be found in the note to the case of *Hall v. Jameson*, reported in 12 L.R.A.(N.S.) 1190. See also *Central Trust Co. v. Meridian Light & R. Co.* 51 L.R.A.(N.S.) 151. A well-discussed case holding that the clause is in the nature of an option is *Core v. Smith*, 23 Okla. 909, 102 Pac. 114. It is apparent that the reason for the adoption of that rule by that court is predicated upon the objection that the other rule makes it necessary for the holder of negotiable instruments containing such an acceleration clause to look elsewhere than to the instrument itself to determine when the same matures. We do not deem that such an objection warrants the court in making a contract for the parties. We prefer to hold with the rule announced by the court in the well-considered case of *Snyder v. Miller*, 71 Kan. 410, 69 L.R.A. 250, 114 Am. St. Rep. 489, 80 Pac. 970. The apparent reason for the adoption of that rule in that case was on account of the logic of the following statement contained in a case cited by that court: "But a more fundamental consideration is that the parties made the contract. . . . Its language excludes the idea that the creditor may or may not 'treat the debt as due.' It becomes due in fact. If an election were all that the parties intended, words appropriate to that purpose should have been used."

The same quoted case also contained this statement: "The question at last is one of construction of the language used, and that which makes it mean just what it says is not without reason or good authority to support it."

In *Green v. Frick*, 25 S. D. 342, 126 N. W. 579, the same doctrine was followed. The court said: "But to hold that a contract is optional which by its express terms is plainly absolute is unwarranted by any known rule governing the construction of contracts."

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Our conclusion, therefore, is that the Statute of Limitations began to run in the case at bar upon the default in the payment of the interest instalment.

2. The second question presented is whether a judgment creditor of a mortgagor may plead the Statute of Limitations against a cause of action by a mortgagee against the mortgagor, the judgment debtor, the suit being on the note and to foreclose the mortgage. The trial court held that the defense of the statute was personal to the mortgagor, and not having pleaded it for himself the judgment creditor was in no position to plead it for him. In 17 R. C. L. "Limitations of Actions," § 331, it is said: "Although it is generally true that the Statute of Limitations is a plea personal to the debtor, which he may use or waive, as he pleases, and which one who is a stranger to him, standing in no relation of privity of estate with him, cannot use, yet where there is a privity between the party who could, if sued, plead the statute, and the party offering to plead it, the latter may plead it to save his property. Such is the case with heirs, vendees, unless the grant is fraudulent, and mortgagees. Broadly speaking, any person who claims title to or interest in any real estate may invoke the aid of the Statute of Limitations as against a claimant whose claim is prior in time to the person invoking the aid of the statute, where the prior claim has been barred by the Statute of Limitations."

A general statement of the doctrine will also be found in 25 Cyc. 1004, and in 19 Am. & Eng. Enc. Law, 2d ed. 184. In the last-mentioned work it is said that the rule is grounded upon privity of interest, and does not obtain with reference to strangers, although the latter, by being denied the right to plead the statute, may be seriously affected by the failure of the common debtor to plead the statute for himself. A majority of the cases sustain the view that a judgment creditor, in cases like that at bar, is in privity of estate with the mortgagor, his judgment debtor, and that he may plead the Statute of Limitations. In such cases it would seem on principle that no distinction can be made between the right of a judgment creditor to plead the statute and the right of a junior mortgagee. In the note to the case of *Hopkins v. Clyde*, reported in 104 Am. St. Rep. 737, the subject is fully discussed and most of the authorities cited. In *Wood v. Goodfellow*, 43 Cal. 185, 188, it was held that, when third persons have subsequently acquired interests in the mortgaged property, they may invoke the aid of the Statute of Limitations against the mortgagor, even though

the mortgagor may have elected to waive its benefits. See also *Watt v. Wright*, 66 Cal. 202, 5 Pac. 91; *California Bank v. Brooks*, 126 Cal. 198, 59 Pac. 302; *Wild v. Stephens*, 1 Wyo. 366. *Brandenstein v. Johnson*, 140 Cal. 29, 73 Pac. 744, and *De Voe v. Rundle*, 33 Wash. 604, 74 Pac. 830, hold that a judgment creditor may plead the Statute of Limitations in cases like the one at bar. North Dakota follows the California and Washington courts. *Colonial & U. S. Mortg. Co. v. Northwest Thresher Co.* 14 N. D. 147, 70 L.R.A. 814, 116 Am. St. Rep. 642, 103 N. W. 919, 8 Ann. Cas. 1160. On the contrary, in *Columbia Ave. Sav. Fund S. D. Title & T. Co. v. Strawn*, 93 Tex. 48, 53 S. W. 342, it was held that the holder of a vendor's lien could not plead the Statute of Limitations in an action by the holder of another vendor's lien to foreclose the same; it being said that the liens were of equal dignity, and that the privilege of the plea of the statute belonged to the vendee, and not to either of the lien holders. The same conclusion was reached in *Welton v. Boggs*, 45 W. Va. 620, 72 Am. St. Rep. 833, 32 S. E. 232, under similar facts. In *Lamon v. Gold*, 72 W. Va. 618, 620, 51 L.R.A.(N.S.) 883, 79 S. E. 728, the court said that strong argument had been presented to show that the doctrine of *Welton v. Boggs*, supra, was erroneous and contrary to the weight of authority, but a decision of the question was not made.

In a strict and technical sense a judgment creditor does not occupy such a relation to his debtor—the mortgagor—as to fall within the meaning of the word “privity,” for there is no succession to the property of the debtor until a sale under execution is had and the judgment creditor has become vested with the title thereof. But a majority of the courts have enlarged the meaning of the word, and consequently have held that there is privity between the two before there is an actual devolution of the title of the property owned by the debtor, who happens here to be a mortgagor. The extent to which some courts have gone in enlarging the meaning of privity is shown by the following statement in *Lord v. Morris*, 18 Cal. 482: “But it is said that the plea of the statute is a personal privilege of the party, and cannot be set up by a stranger. This, as a general rule, is undoubtedly correct with respect to personal obligations, which concern only the party himself, or with respect to property which the party possesses the power to charge or dispose of. But with respect to property placed by him beyond his control, or subjected by him to liens, he has no such personal privilege. He cannot at his pleasure affect the interests L.R.A.1918C.

of other parties. His grantees or mortgagees, with respect to the property, stand in his shoes, and can set up any defense which he might himself have set up to the action, either to defeat a recovery of the property or its sale.”

We believe that the appellant occupied such a relation to the mortgagor that he was entitled to plead the Statute of Limitations in the case at bar.

3. The complaint alleges that the appellee is in possession of the land described in the mortgage, and is renting the same and applying the proceeds thereof to the payment of the mortgage debt, with the consent of the mortgagor. The appellee argues that this takes the case out of the statute. He cites 2 *Jones, Mortg.* § 715. That citation is to the general effect that neither the mortgagor nor one claiming under him can divest the mortgagee of possession, by ejectment or otherwise, until the debt is paid. The doctrine proceeds upon the equitable principle that “he who seeks equity must do equity.” A number of cases holding that the Statute of Limitations does not run against a mortgagee in possession, a doctrine closely allied to the proposition that is cited in the work of *Jones on Mortgages*, supra, will be found in the note to the case of *Pettit v. Louis*, reported in 34 L.R.A.(N.S.) 356. The case itself held, among other things, that a mortgage, where the mortgagee is in possession, never becomes barred in the sense that the mortgagor or his grantee can ask a court of equity to quiet his title against the mortgagee without himself doing equity by paying it. In 17 R. C. L. “Limitation of Actions,” § 359, it is said that the reason for the rule is that possession itself is *prima facie* evidence that the debt is not paid. Treating only the question as to whether the possession of the mortgaged land by the mortgagee, with the consent of the mortgagor, tolled the statute, we are forced to the conclusion that it did not. The reasoning upon which this conclusion is reached is that our Statutes of Limitations make no exception on this account. Section 3348, Code 1915, provides: “Those [suits or actions] founded upon any bond, promissory note, bill of exchange or other contract in writing, . . . within six years.”

Section 3356, Code 1915, provides: “Causes of action founded upon contract shall be revived by an admission that the debt is unpaid, as well as by a new promise to pay the same; but such admission or new promise must be in writing, signed by the party to be charged therewith.”

While the doctrine announced in some of the cases heretofore cited, viz., that possession by the mortgagee, with the consent

of the mortgagor, is *prima facie* evidence that the debt is not paid, may be construed to go to the extent of holding impliedly that the consent of the mortgagor to the mortgagee's possession may constitute an admission that the debt is not paid, still under the circumstances of this case such an admission would not fall within the terms of § 3356, *supra*. The admission would not be in writing signed by the party to be charged therewith. The same thing may be said so far as reviving the debt by a new promise is concerned. But admitting all this, should we hold that the mortgagee's possession, with the consent of the mortgagor, tolled the statute, notwithstanding that the statute itself makes no such exception? In 17 R. C. L. "Limitations of Actions," § 33, appears the following: "In the early years after their enactment, an inhospitable reception was accorded by the courts to the legislative policies embodied in Statutes of Limitations. Among other means of evading the letter of the law, the courts were in the habit of implying exceptions at every opportunity. The courts in later years, while not inclined to deny or question the authority of the precedents importing into the statute certain exceptions, are usually unwilling to continue the practice of adding other exceptions which might be deemed wise, but which the legislature has not seen fit to make. The general principle recognized to-day for the construction of Statutes of Limitation is that unless some good ground can be found in the statute for restraining or enlarging the meaning of its general words, they must receive a general construction, and that the courts cannot arbitrarily subtract from or add thereto, and cannot create an exception where none exists, even when the exception would be an equitable one."

At § 190 of the same work, it is said: "As a general rule the courts are without power to read into these statutes exceptions which have not been embodied therein, however reasonable they may seem. It is not for judicial tribunals to extend the law to all cases coming within the reason of it, so long as they are not within the letter."

The doctrine is supported by numerous cases. In *Bank of Alabama v. Dalton*, 9 How. 522, 529, 13 L. ed. 242, 245, the court said: "The legislature having made no exception, the courts of justice can make none, as this would be legislating. In the language of this court in the case of *M'Iver v. Ragan*, 2 Wheat. 29, 4 L. ed. 176: 'Wherever the situation of the party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made

the exception, and it would be going far for this court to add to those exceptions.' The rule is established beyond controversy."

In *Butler v. Craig*, 27 Miss. 628, 61 Am. Dec. 527, it was held that "no equitable exceptions are to be ingrafted upon the Statutes of Limitation, and that where there is not an express exception the court cannot create one."

In *Tynan v. Walker*, 35 Cal. 634, 95 Am. Dec. 152, it was contended by one party that the fact that no person was in existence competent to sue did not prevent the operation of the Statute of Limitations. The court said: "We have thus glanced at the condition of the law for the purpose of showing that the rule which the plaintiff has invoked has its foundation in judicial construction, and not in the language or general purpose and design of the statute, and that it is opposed to all the well-established rules by which courts should be guided in ascertaining and giving effect to the will of the legislature, and for the further purpose of justifying ourselves, if any justification be required, in adopting the same rule of construction in relation to the Statute of Limitations which we uniformly apply to all other statutes,—that is to say, to read it as it is written, without any arbitrary subtraction or addition to its meaning. The violation of this rule, as we consider, which we have noticed, can be accounted for only by referring it to the well-known hostility of the courts, at an early day, to Statutes of Limitations. That hostility no longer exists, and with it, in our judgment, its effects also should be allowed to pass away."

As the statute itself creates no exception to the running of the statute in favor of a mortgagee in possession, none exists.

The judgment of the trial court will therefore be reversed, with directions to overrule the demurrer to the appellant's answer, and it is so ordered.

Roberts, J., concura.

Hanna, Ch. J., dissenting:

I dissent from the conclusions reached on the second point by a majority of the court. I grant that a majority of the cases on the subject sustain the view that there is sufficient privity between a judgment creditor and his debtor to permit the former to plead the Statute of Limitations in an action by a mortgagee to foreclose a mortgage given by the judgment debtor. Those cases, however, have extended the meaning to be given the word "privity" beyond its strict and proper meaning, and are in conflict with this court's definition of the word as laid down in *Smith v. Hill Bros.* 17 N. M. 415, 134 Pac. 243, where we said: "It is more

generally defined as a mutual or successive relationship to the same right of property."

The appellant in the case at bar, being a mere judgment creditor, who acquired a general lien on the property of his debtor, the mortgagor, occupied no mutual or successive relationship to the mortgaged property. His only right in the premises was to subject the property to a sale under his

execution. He never stood in the shoes of his debtor, and I am unable to agree that he stood in privity with the debtor so as to be enabled to plead the statute in the stead of the debtor. The doctrine extended to its logical end will permit a second mortgagee to plead the statute against the first mortgagee, even though the debtor does not elect to plead it for himself. Therefore I dissent.

Annotation—Right of lien creditor to set up Statute of Limitations against other creditors of his debtor.

In general.

The questions whether a creditor may attack a conveyance by his debtor in payment of the claims of other creditors on the ground that their debts were barred by the Statute of Limitations, and whether the grantee in a conveyance attacked as fraudulent may plead the Statute of Limitations against the claim of the attacking creditor, are not within the scope of this note.

Cases like *Callaway v. Saunders* (1901) 99 Va. 350, 38 S. E. 182, in which creditors were permitted to plead the Statute of Limitations against other creditors on the ground that the estate of the debtor was being distributed in equity, are not included in this annotation, even though the creditors who plead the statute may have been lien creditors, for the reason that the decisions do not turn upon the incidental fact that the claims were secured by liens. The annotation deals only with the right of lien creditors, as such, to plead the statute against other creditors.

The general rules quoted from 17 R. C. L. by the court in *Buss v. Kemp Lumber Co.* ante, 1015, seem to have been adopted by all the courts that have passed upon the question here annotated. While all courts are agreed that, where there is privity between the debtor and the pleader, the latter has the right to set up the Statute of Limitations against other creditors of the debtors, there is not complete harmony on the right of a judgment creditor to so plead. The weight of authority holds that he has the right; that is, most courts regard a judgment creditor within the rule as stated.

By a mortgagee.

A junior mortgagee may plead the Statute of Limitations against the senior mortgagee, thus giving his junior mortgage the priority. *Lord v. Morris* (1861) 18 Cal. 482; *Lent v. Shear* (1864) L.R.A.1918C.

26 Cal. 361; *Wood v. Goodfellow* (1872) 43 Cal. 185; *California Bank v. Brooks* (1899) 126 Cal. 198, 59 Pac. 362; *Hill v. Hilliard* (1889) 103 N. C. 34, 9 S. E. 639; *Scott v. Sloan* (1893) 3 Tex. Civ. App. 302, 23 S. W. 42; *McClagherty v. Croft* (1897) 43 W. Va. 270, 27 S. E. 246.

And it has been held that a mortgagee of land belonging to the estate of a decedent may plead the Statute of Limitations against other creditors of the estate, whether the estate is solvent or insolvent. *Dunford v. Clarke* (1831) 3 La. 199.

Where a first mortgagee satisfies her mortgage of record, and many years later attempts to establish the fact that her mortgage was satisfied by mistake and that the second mortgagee had notice of the mistake, the latter, though not claiming that the mortgage debt was barred, has the right to plead the Statute of Limitations against her right to repudiate the discharge. *Perry v. Fries* (1904) 90 App. Div. 484, 85 N. Y. Supp. 1064.

The holder of a tax sale deed in possession of the property, even though it be assumed that his deed, because of imperfections, is merely a lien on the land, and not a title, can plead the Statute of Limitations against a prior mortgage on the premises, when the mortgagee is attempting to foreclose, even though the mortgagor has waived his right to plead the statute. *Graves v. Seifried* (1906) 31 Utah, 203, 87 Pac. 674. And the same rule will be applied where a personal judgment on the note secured by the mortgage is not barred by reason of the mortgagor's absence from the state. *Boucofski v. Jacobsen* (1909) 36 Utah, 165, 26 L.R.A.(N.S.) 898, 104 Pac. 117. In such situation a personal judgment should be entered against the maker of the note if he is in court, and the suit to foreclose the mortgage should be dismissed. On effect of mortgagor's absence from the

state to toll the Statute of Limitations as against foreclosure proceedings against his grantee, see L.R.A. note to the Jacobsen Case.

While the facts before the court in *Sanger v. Nightingale* (1887) 122 U. S. 176, 30 L. ed. 1105, 7 Sup. Ct. Rep. 1109, were not such as to actually require so broad a holding, since the prior mortgage had been foreclosed and the land sold at foreclosure sale, the court said: "The mortgagee of real estate in Georgia does not take the title to the property. The mortgage is only a security for the debt for which it is made. The title remains in the mortgagor. The cases in that state, as already intimated, go no further than to hold that a purchaser of the legal title, or possibly a mortgagee in possession, may, when sued, plead the Statute of Limitation as a defense to a prior debt or mortgage or encumbrance, made by the holder of the legal title."

The holder of two notes secured by a vendor's lien, and not barred by the Statute of Limitations, cannot plead the statute against the holder of another note secured in same way, but open to such plea if made by the debtor. *Columbia Ave. Sav. Fund, S. D. Title & T. Co. v. Strawn* (1899) 93 Tex. 48, 53 S. W. 342.

A first mortgagee who, in an action to foreclose his mortgage, has brought in the second mortgagee, cannot plead the Statute of Limitations against the latter, if the latter has not controverted the priority of the plaintiff's lien or any of his allegations, but has merely set up his own mortgage asking that it be foreclosed in the same suit as a subsequent lien. *Tinsley v. Lombard* (1904) 46 Or. 9, 114 Am. St. Rep. 844, 78 Pac. 895.

The holder of a tax sale certificate issued against mortgaged property, in a suit to foreclose the mortgage, cannot plead the Statute of Limitations against the mortgagee, if the mortgagee has asked permission to pay the amount due to such holder. *Neill v. Burke* (1908) 81 Neb. 125, 115 N. W. 321.

By an attachment lien holder.

Likewise, the holder of a lien acquired by attachment may avail himself of the benefit of the statute against a previously acquired mortgage. *Watt v. Wright* (1884) 66 Cal. 202, 5 Pac. 91.

And it has been held that an attaching creditor who has been given leave to defend the debtor against a prior attachment may plead the Statute of Limitations. *Sawyer v. Sawyer* (1883) 74 Me. 579. The court treated this situation as L.R.A.1918C.

analogous to that arising in insolvency proceedings. It also argued that since the court had taken from the debtor the right to defend, the one who had been given that right should be allowed to defend as fully as the debtor could have defended.

But an attaching creditor of a legatee cannot avail himself of the Statute of Limitations to bar a bona fide debt owed by the legatee to the testator in his lifetime, where the legatee confessed judgment to the executor of the estate after the latter had been served with the process in the attachment. *Sheppard's Estate* (1897) 180 Pa. 57, 36 Atl. 422.

One who has no enforceable right or lien against property at the time it is placed in trust cannot plead the Statute of Limitations against the debt for which the trust was created, although he subsequently acquires a lien against the trust property. *Ward v. Waterman* (1890) 85 Cal. 488, 24 Pac. 930.

By a judgment creditor.

A judgment creditor can plead the Statute of Limitations against a prior lien acquired by mortgage with the result that the judgment lien is given the priority. *Brandenstein v. Johnson* (1903) 140 Cal. 29, 73 Pac. 744; *Buss v. KEMP LUMBER CO.* ante, 1015, *De Voe v. Rundle* (1903) 33 Wash. 604, 74 Pac. 836. Contra: *Welton v. Boggs* (W. Va.) *infra*.

The syllabus to *Wild v. Stephens* (1877) 1 Wyo. 366, indicates that a judgment creditor will not be permitted to plead the statute so as to bar a prior encumbrance of property against which the judgment constitutes a lien; but the decision turned upon the fact that the judgment was recovered against a partnership firm of which the mortgagor was a member, the court stating that "a judgment creditor undoubtedly has the right to plead the Statute of Limitations so as to defeat a prior encumbrance, if he is placed in a position to do so." It then holds that, since the judgment was not against the mortgagor individually, the judgment creditor was not in position to plead the statute, or rather that he was not a judgment creditor of the debtor. Aside from the syllabus the decision would seem to be slight authority for the proposition that a judgment creditor may plead the statute against a prior encumbrance.

And the judgment creditors of tutors may plead the statute that prescribes actions of minors against their tutors when four years have elapsed after the

minors have reached their majority, even though the tutors do not plead it. *McGill's Succession* (1851) 6 *La. Ann.* 327; *Viala v. Burguières* (1867) 19 *La. Ann.* 149.

But in *McClaugherty v. Croft* (1897) 43 *W. Va.* 270, 27 *S. E.* 246, the court distinguished between a general lienor—such as a judgment creditor—and a mortgagee who has a lien on the particular property in dispute, and held that the latter could plead limitations against a prior lien creditor, but refuses to decide as to the general lienor's right to do so. However, the court in *Welton v. Boggs* (1898) 45 *W. Va.* 620, 72 *Am. St. Rep.* 833, 32 *S. E.* 232, answered the query in the negative. In a note in the official report, the *Croft* Case is referred to and briefly discussed.

Pleadings.

In a suit to foreclose a mortgage, an allegation that a third party claims some interest in the mortgaged property or some claim upon said premises or some part thereof, which claim or interest is unknown to the plaintiff, made for the purpose of compelling said third party to answer and have his claim adjudicated, does not show sufficient title to enable such third party to avail himself of the benefit of the Statute of Limitations against the mortgagee by way of demurrer, the mortgagor having

made no claim in that respect. *Blair v. Silver Peak Mines* (1898) 84 *Fed.* 737.

And in the same kind of action a plea of the Statute of Limitations cannot be considered unless the pleader sets out also just what he claims his interest to be, so that the court may be able to judge as to the availability of the limitation plea. *Corbey v. Rogers* (1899) 152 *Ind.* 169, 52 *N. E.* 748.

And the same principle underlies the holding in *Lincoln Mortg. & T. Co. v. Parker* (1902) 65 *Kan.* 819, 70 *Pac.* 892, where the plaintiff alleged "that the defendant, the Lincoln Mortgage & Trust Company, is a corporation duly organized, existing and doing business under the laws of the state of Kansas, and that said the Lincoln Mortgage & Trust Company is or claims to be the owner of the fee simple title to real estate herein described, or has or claims to have an interest in or lien upon said mortgaged premises, the exact nature of which is to this plaintiff unknown, but plaintiff alleges that the said title, estate, lien, or interest of the defendant, the Lincoln Mortgage & Trust Company, whatever the same may be, is subsequent, inferior, and junior to the mortgage lien of this plaintiff."

And in *Neill v. Burke* (1908) 81 *Neb.* 125, 115 *N. W.* 321, the court acted upon the same principle. J. W. M.

NEW MEXICO SUPREME COURT.

W. R. FCCLES, Artesian Well Supervisor
of Chaves County, Plff. in Err.,

v.

O. A. WILL.

(— *N. M.* —, 170 *Pac.* 748.)

Mortgage — lien for work — priority.

The lien authorized by § 266, Code 1915, for the expense incurred for repairs and work upon an artesian well, in preventing the waste of water by such well, does not take precedence over a prior recorded mortgage: the statute being silent upon the question. Such a lien is not a tax, based upon the theory of benefits, but is for the cost and expense of doing an act which it was the legal duty of the owner to do, and

Headnote by ROBERTS, J.

Note. — As to priority over mortgage of statutory lien for work not beneficial to the property, done in the exercise of the police power, see annotation following this case, post, 1024.
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which he failed to do, and is referable to the police power.

For other cases, see Mortgage, II. b, in Dig.
1—52 *N. S.*

(January 21, 1918.)

ERROR to the District Court for Chaves County to review a judgment giving defendant's mortgage precedence over a statutory lien for expenses incurred for repairs and work upon an artesian well. Affirmed.

The facts are stated in the opinion.

Messrs. C. O. Thompson and K. K. Scott for plaintiff in error.

Messrs. L. O. Fullen and W. A. Dunn, for defendant in error:

Even though plaintiff has a lien on the premises in controversy, such lien is inferior and subject to the prior mortgage of the defendant.

Williams v. Santa Clara Min. Asso. 66 *Cal.* 193, 5 *Pac.* 85; *Stearns-Roger Mfg. Co. v. Aztec Gold Min. & Mill Co.* 14 *N. M.* 300, 93 *Pac.* 706; *Cleveland v. Bateman*, 21 *N. M.* 675, 158 *Pac.* 648; *State ex rel. Ely*

v. *Ætna L. Ins. Co.* 117 Ind. 251, 20 N. E. 144; *Cook v. State*, 101 Ind. 446; *Killian v. Andrews*, 130 Ind. 579, 30 N. E. 700.

Roberts, J., delivered the opinion of the court:

This writ of error was sued out for the purpose of reviewing the action of the trial court in holding that defendant in error's mortgage was superior to the lien authorized by § 266, Code 1915. This section of the statutes is a part of a chapter which regulates artesian wells, and authorizes the artesian well supervisor, therein provided for, to make repairs upon artesian wells, or to plug the same in certain cases. The section reads: "The expenses incurred for the repairs of work aforesaid shall become a lien on the land, where such well or reservoirs are situated, and upon such well or reservoir, and the artesian well supervisor within twenty days after the completion of said repairs or work upon any well or reservoir, shall file for record with the county clerk of the county in which said land, well or reservoir is situated, a statement of the expenses or the amount thereof, the name of the owner or the reputed owner of the land, well or reservoir, and a description of the land, well or reservoir, to be charged with the lien, sufficient for the identification, which claim must be verified by the oath of the artesian well supervisor."

The next section provides for the recording of the lien by the county clerk, and § 268 authorizes the well supervisor to foreclose the lien, and provides: "And the procedure therefor shall be the same as provided by law for the sale of real estate under foreclosure of mortgage."

The statute was construed by this court in the case of *Eccles v. Ditto*, — N. M. —, L.R.A.1918B, 126, 167 Pac. 726, and this writ of error is prosecuted by the well supervisor to review the action of the district court in that case in giving precedence to the lien of defendant in error's mortgage over the statutory lien. The mortgage was executed and recorded prior to the making of the repairs. In this state it is well settled that a mortgage is merely a lien on, and passes no estate or interest in, the mortgaged premises. *Stearns-Roger Co. v. Aztec Gold Min. & Mill. Mfg. Co.* 14 N. M. 300, 93 Pac. 706; *Cleveland v. Bateman*, 21 N. M. 675, 158 Pac. 648. The priorities of statutory liens are generally regulated by the statutes creating them (25 Cyc. 679), and where the statute authorizes the lien, and provides for its filing in the office of the county recorder, but is silent as to its priority, it takes effect from the date it is so filed, unless the statute makes it effective L.R.A.1918C.

from the time the work is commenced, or other act done; and it does not take precedence over a prior recorded mortgage or other lien, unless so provided by statute. A statutory lien cannot be given priority over a mortgage existing and of record before the enactment of the statute creating the lien. 25 Cyc. 679.

Some courts place the lien of an assessment, imposed by proper authority in return for special benefits conferred upon property by an improvement of a public character for the expense of making such improvement, in the same class as an ordinary statutory lien, such, for example, as a mechanic's lien, and hold that such a lien has only such priority as the statute gives to it. *State ex rel. Ely v. Ætna L. Ins. Co.* 117 Ind. 251, 20 N. E. 144; *Killian v. Andrews*, 130 Ind. 579, 30 N. E. 700; *Pierce v. Ætna L. Ins. Co.* 131 Ind. 284, 31 N. E. 68; *State ex rel. Vawter v. Loveless*, 133 Ind. 600, 33 N. E. 622; *Morey v. Duluth*, 75 Minn. 221, 77 N. W. 829; *Shaler v. McAlcese*, 73 N. J. Eq. 536, 68 Atl. 416; and note to case of *Baldwin v. Moroney*, 30 L.R.A.(N.S.) 762. Other courts hold, however, that an assessment for local improvements is in the nature of a tax, and, when duly and properly made, is superior in dignity to all other liens on the land on which it is assessed. *Richmond v. Williams*, 102 Va. 733, 47 S. E. 844; *Lybass v. Ft. Myers*, 56 Fla. 817, 47 So. 346; and see note to *Morey Engineering & Constr. Co. v. St. Louis Artificial Ice Rink Co.* Ann. Cas. 1913C, 1200.

A special assessment for benefits is a form of tax, and is referable to the power of taxation (Page & J. Taxn. by Assessment, § 5), while an assessment (so-called for want of a better name) levied to reimburse the public corporation for the cost of performing some act which the owner of the realty assessed is bound by law to perform, but which he omits or refuses to do, does not rest upon any theory of benefits conferred, and is not necessarily a form of taxation. It constitutes an exercise by the legislature of the police power as distinct from the taxing power. Page & J. Taxn. by Assessment, §§ 9 and 89.

An assessment levied upon property in return for benefits, presumptively the property assessed to the extent of the tax, does not impair the security of the prior mortgage which the tax supplants; but an assessment laid, or a lien created, under the police power, in favor of a public agency, for doing something for the owner which he fails and refuses to do, and which the law makes it his duty to do, may not benefit the property upon which the assessment is laid or the lien created; and hence the lien should not be construed as having

precedence over a prior recorded mortgage, unless the statute clearly gives to it such priority. The reason for the rule is obvious. Section 5504, Code 1915, gives to the mortgagee of real estate the right to pay the taxes on the real estate, where the owner fails and refuses to do so, and the taxes so paid may be recovered by the mortgagee under the lien of his mortgage. The assessment here levied not being a tax, the mortgagee would not be protected by his mortgage lien should he pay it off. Again, the holder of the prior mortgage is given no notice of the intended improvements upon the well, and has therefore no opportunity

of protecting his security by making the repairs or plugging the well, nor would any such expense become a part of his mortgage debt.

We therefore hold that the lien authorized by § 266, Code 1915, for the expense incurred for repairs and work upon an artesian well, in preventing the waste of water by such well, does not take precedence over a prior recorded mortgage; the statute being silent upon the question.

The judgment of the District Court will therefore be affirmed, and it is so ordered.

Hanna, Ch. J., and Parker, J., concur.

Annotation—Priority over mortgage of statutory lien for work not beneficial to the property, done in the exercise of the police power.

A search has disclosed no case exactly in point on the question considered in *ECCLES v. WILL*, ante, 1022. It will be observed that in that case the court took the position that, where the statute imposing the lien for repairs made in the exercise of the police power was silent on the question of priority, the mortgage retained its superiority over the lien; and that it was not necessary to determine whether the legislature might expressly have provided that the lien should have priority over an existing mortgage.

The view taken in the *ECCLES CASE*, that where the statute creating the lien is silent on the question the lien does not take priority over an existing mortgage is in accord with the general rule declared in such cases as *Sullivan v. Clifton* (1893) 55 N. J. L. 324, 20 L.R.A. 719, 39 Am. St. Rep. 652, 26 Atl. 964; *Easter v. Goyne* (1888) 51 Ark. 222, 11 S. W. 212; *Peter Barrett Mfg. Co. v. Van Ronk* (1914) 212 N. Y. 90, 105 N. E. 811; and *Parker-Harris Co. v. Tate* (1916) 135 Tenn. 509, L.R.A.1916F, 935, 188 S. W. 54. In the *Goyne Case* it was said: "The statute under consideration does not evince the intention to give preference to the statutory lien, and, in the absence of a legislative intent to that effect, the courts have not, unless in exceptional instances, permitted the lien created by the statute to become paramount to a prior recorded mortgage." In the *Van Ronk Case* the court said that "it is one of the characteristics of contractual or statutory liens that they are subordinate to all prior existing rights in the property, while common-law liens which arise, upon consideration of justice and policy, by operation of law, attach, as a general rule, to the property itself without any reference to ownership, and override all L.R.A.1918C.

other rights in the property." And to the same effect is *Sullivan v. Clifton* (N. J.) supra.

In *Parker-Harris Co. v. Tate* (Tenn.) supra, it was held that a lien given by statute upon an automobile for injury done by it did not have precedence over the rights of a conditional vendor of the machine. In this case the vendor's rights had attached prior to the infliction of the injuries but subsequent to the enactment of the statute, which did not expressly cover the question of priority. And on the general question of priority of statutory liens the court said: "By a long line of decisions, where a statute creates a lien, that lien, as contradistinguished from a common-law lien, is held not to take precedence of a prior contractual lien, where the creating statute does not clearly show or declare an intention to cause the statutory lien to override the earlier one. This is true even where the statutory lien is one that arises for work done on, and to the betterment of, the property in question. . . . The act creating the lien should be specific in declaring the fact, as well as the nature and extent, of the lien, and not leave the superseding or subordinating of an earlier lien to inference. . . . Particularly should this be true where, as in this case, the lien is not awarded for any service that adds value, or that preserves the property on which the earlier lien rests, and where it may be held that there was a benefit accruing."

There seems to be ground for a distinction as is pointed out in the quotation in the last case and in *ECCLES v. WILL*, respecting the power of the legislature and the interpretation of statutes, where the lien created by the statute is in the nature of an assessment for benefits (see notes in

35 L.R.A. 372, and 30 L.R.A.(N.S.) 761, on the question of superiority of lien of local assessment over prior lien), and where no special benefit is conferred on the property by the work or material forming the basis of the lien. And it seems clear that, at least, in the absence of an express declaration of the legislative will to that effect, such a statute as that in the *ECCLES CASE*, enacted in the exercise of the police power, should not be construed as having priority over an existing mortgage.

Cases such as *Yeatman v. King* (1892) 2 N. D. 421, 33 Am. St. Rep. 797, 51 N. W. 721, in which it was held that a statute, in so far as it attempted to make a lien for seed grain furnished thereunder superior to the lien of a mortgage executed prior to the enactment of the statute, violated the provision of the Federal Constitution forbidding the impairment of the obligation of a contract, are of value on the present question.

And perusal of the cases in the note to *Reeves & Co. v. Russell*, L.R.A.1915D, 1149, on the general question of priority of lien for services on personal property

over prior chattel mortgage will be found helpful.

As bearing on the question under discussion, attention is called also to the case of *Howard v. Burke* (1916) 176 Iowa, 123, L.R.A.1916E, 524, 157 N. W. 744, on the question whether the lien of a chattel mortgage on animals may constitutionally be subordinated to the claim of one who takes them damage feasant, and whether the statute subordinated the mortgage lien although it did not create a lien or expressly provide for priority. The question of priority as between the lien of a chattel mortgage and the claim of one taking animals damage feasant is treated in a note to this case in L.R.A. 1916E, on p. 528.

In *Eccles v. Ditto* (1917) — N. M. —, L.R.A.1918B, 126, 167 Pac. 726, which is cited in *Eccles v. Will*, ante, 1022, the court sustained the constitutionality of the statute creating the lien for work on artesian wells. And the question of the constitutionality of statutes to prevent waste of subterranean waters, natural gas, or oil is treated in notes in L.R.A. 1918B, 126, and 23 L.R.A.(N.S.) 436.

R. E. H.

VERMONT SUPREME COURT.

TICHNOR BROTHERS

v.

JOSEPH EVANS.

(— Vt. —, 102 Atl. 1031.)

Sale — refusal to pay price — breach of agreement.

1. A retailer cannot defeat recovery of the price of goods purchased for sale by the fact that his vendor broke his agreement not to furnish the goods to other merchants in the same town.

For other cases, see *Sale*, III. a, in *Dig.* 1-52 N. S.

Contract — partial breach of performance — effect.

2. When a contract has been partly performed by one party and the other has derived a substantial benefit therefrom, the latter cannot refuse compliance with its terms simply because the former failed of complete performance.

For other cases, see *Contracts*, IV. e, in *Dig.* 1-52 N. S.

(February 25, 1918.)

Note. — For breach of agreement to give exclusive right of sale as affecting the remedies of the parties, see annotation following this case, post, 1027.

L.R.A.1918C.

EXCEPTIONS by defendant to rulings of the Bennington County Court, made during the trial of an action brought to recover the balance alleged to be due on goods sold by plaintiffs to defendant, which resulted in a verdict for plaintiffs. **Affirmed.**

The facts are stated in the opinion.

Messrs. **Holden & Healy**, for defendant:

The plaintiffs have not performed, and should not be allowed to recover, in view of their nonperformance. They are as much in default as if they had not delivered the cards.

Benjamin, Sales, 4th ed. ¶ 600; *Chanter v. Hopkins*, 4 Mees. & W. 399, 150 Eng. Reprint, 1484, 1 Horn & H. 377, 8 L. J. Exch. N. S. 14, 3 Jur. 58.

When the breach of a contract goes to its essence, it operates as a discharge.

Rioux v. Ryegate Brick Co. 72 Vt. 148, 47 Atl. 406; 35 Cyc. 135; *Koerner v. Henn*, 8 App. Div. 602, 40 N. Y. Supp. 1021.

No recovery can be had upon a contract by a party who has not performed the conditions precedent on his part to be performed.

3 Page, Contr. ¶ 1454; *Sherk v. Holmes*, 125 Mich. 118, 83 N. W. 1016; *Lyndon Granite Co. v. Farrar*, 53 Vt. 585.

Mr. **Collins M. Graves**, for plaintiffs:
Breach of an oral promise by plaintiffs'

agent not to sell his wares to merchants in the same town, other than defendant, will not justify defendant in rescinding a contract of purchase made through such agent.

Tufts v. Weinfeld, 88 Wis. 647, 60 N. W. 992.

Where, for any reason, whether for breach of warranty, misrepresentation, or, fraud, the purchaser has a right to rescind, he must notify the seller of his intention to do so, and take the active steps necessary to the consummation of the rescission within a reasonable time after the discovery of fraud in the sale, or other fact which entitled him to rescind.

35 Cyc. 151; Boughton v. Standish, 48 Vt. 594; Downer v. Smith, 32 Vt. 1, 76 Am. Dec. 148; Estey v. Read, 29 Vt. 278; Tilton Safe Co. v. Tisdale, 48 Vt. 83; Matteson v. Holt, 45 Vt. 336; Whitcomb v. Denio, 52 Vt. 382; Cobb v. Hatfield, 46 N. Y. 533.

A contract cannot be rescinded by one party for the default of the other, unless both parties can be placed in statu quo.

9 Cyc. 437-439; Curtiss v. Howell, 39 N. Y. 211; Handforth v. Jackson, 150 Mass. 149, 22 N. E. 634; Manahan v. Noyes, 52 N. H. 232; Hammond v. Buckmaster, 22 Vt. 375; Smith v. Smith, 30 Vt. 139.

An agreement procured by fraud is voidable, not void.

9 Cyc. 431; Brown v. Pierce, 97 Mass. 46, 93 Am. Dec. 57; Concord Bank v. Gregg, 14 N. H. 331; Baird v. New York, 96 N. Y. 567.

The party seeking to avoid a contract for false representation must have been injured by the fraud.

9 Cyc. 431; Johnson v. Seymour, 79 Mich. 156, 44 N. W. 344; Alden v. Wright, 47 Minn. 225, 49 N. W. 767.

Powers, J., delivered the opinion of the court:

In the spring of 1914, the plaintiffs, through their traveling salesman, Pierce, sold the defendant a bill of goods which included the post card sets here in controversy. At the time of the sale, Pierce told the defendant that if he would buy the sets at the price named, he (Pierce) would not sell like sets to anyone else in the town. Upon this assurance, the defendant made the purchase. The plaintiffs did not keep this agreement, but at some time during the following winter they sold similar sets to one of the defendant's competitors doing business on the same street. The defendant learned of this about the 1st of June, 1915, but said or did nothing about it until some two years later and just before the trial below. The suit is brought to recover the balance due on the goods sold, and is defended on the ground that the plain-

tiffs, having broken the contract in the particular named, are not entitled to recover anything under it.

The trial below was by the court, and it is recited in the findings that there was no evidence from which a determination could be made as to the amount of damage the defendant had suffered by reason of the above-mentioned breach of the contract by the plaintiffs. Therefore the court assessed such damage at \$1, deducted it from the amount due the plaintiffs, and rendered judgment for the latter for the balance, with interest thereon. To this the defendant excepted. So the only question before us is, Were the plaintiffs entitled to recover anything on the facts found?

The defense is predicated upon the doctrine, frequently approved by this court, that a breach that goes to the essence of the contract operates as a discharge of it. This rule will not avail the defendant. It is not every breach that goes to the essence. It gives rise to an action for damages, but it does not necessarily justify a refusal to perform. Where, as here, the stipulation goes only to a part of the consideration, and may be compensated for in damages, its breach does not relieve the other party from performance. In such cases, the broken promise is an independent undertaking, and not a condition precedent. Kauffman v. Raeder, 54 L.R.A. 247, 47 C. C. A. 278, 108 Fed. 171; Lowber v. Bangs, 2 Wall. 728, 17 L. ed. 768. See Rioux v. Ryegate Brick Co. 72 Vt. at p. 155, 47 Atl. 406. In order to operate as a discharge or give rise to a right of rescission, the partial failure to perform must go to the very root of the contract. Chamberlin v. Booth, 135 Ga. 719, 35 L.R.A. (N.S.) 1223, 70 S. E. 569. Keenan v. Brown, 21 Vt. 86, is a case of partial failure of performance, and it was held that the defendant therein was not absolved thereby, and was only entitled to recover his damages.

Moreover, when a contract has been partly performed by one party, and the other has derived a substantial benefit therefrom, the latter cannot refuse to comply with its terms simply because the former fails of complete performance. Kauffman v. Raeder, supra; 13 C. J. 659. "Where a person has received a part of the consideration for which he entered into the agreement," says Mr. Serjt. Williams, "it would be unjust that, because he has not had the whole, he should therefore be permitted to enjoy that part without either paying or doing anything for it." Pordage v. Cole, 1 Wms. Saund. 320d, 85 Eng. Reprint, 453. Hammond v. Buckmaster, 22 Vt. 375, is a case of this class, and it was therein held that, inasmuch as each party had received a par-

tial benefit from the contract, and could not be placed in statu quo, the defendant would have to perform the contract, seeking his damages for the plaintiff's breach by cross action. These holdings are decisive of the case in hand. The stipulation in question was only a part of the consideration of the defendant's undertaking;

was subordinate and incidental to its main purpose; its breach is compensable in damages; and the defendant obtained and now holds a substantial benefit under the contract. Other questions argued need not be considered.

The judgment below is without error, and is affirmed.

Annotation—Breach of agreement in contract of sale to give the purchaser the exclusive right of sale, as affecting the remedies of the parties.

A stipulation in a contract for the sale of an article, giving the buyer the exclusive right to sell such article within a designated territory, is not ordinarily of the essence of the contract, so as to preclude the seller from recovering the purchase price on the ground of the breach of the stipulation. *TICHNOR BROS. v. EVANS*, ante, 1025.

And it has been held that a stipulation in a contract for the sale of seeds, giving the purchaser the exclusive sale of seeds in a certain territory, is not a dependent covenant or a condition precedent which the seller is bound to prove he has performed in order to recover the purchase price, since it does not go to or constitute the entire consideration moving the buyer to purchase. Whatever loss the latter sustains by the breach of the agreement constitutes an injury for which he may seek compensation by a separate action, or by a counterclaim in an action for the purchase price. But the bare fact of the breach of the agreement will not excuse him from paying the purchase price. *Springfield Seed Co. v. Walt* (1902) 94 Mo. App. 76, 67 S. W. 938; and see, to the same effect, *Turner v. Mellier* (1875) 59 Mo. 529.

Where the stipulated time for payment expired before that within which the seller was required by the terms of the contract to observe a stipulation not to sell to any person in a certain place, the latter condition or provision cannot be treated as a condition precedent to a right of action to recover the purchase price; but the agreement being executory and entire, and the seller's breach being a substantial one, the buyer may rescind the contract on account thereof if the parties can be put in statu quo. *Koerner v. Henn* (1896) 8 App. Div. 602, 40 N. Y. Supp. 1021.

And in general it may be said that the breach of a contract for the sale of an article, giving a purchaser the exclusive right to sell in a certain territory, is substantial, and entitles the purchaser to rescind the contract. *Freet v. American Electrical Supply Co.* (1913) 257 Ill. 248, 100 N. E. 933.

And see *Bride v. Riffe* (1913) 93 Neb. 355, 140 N. W. 639, holding that the purchaser of merchandise for resale under a contract giving him the exclusive sale thereof in a certain territory, may, upon the breach of this provision, rescind the contract, return the merchandise, and thereby avoid liability for the purchase price. A. G. S.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

RE MILWAUKEE MOTOR COMPANY,
Bankrupt.

A. J. FARMER, Appt.,
v.

FIRST TRUST COMPANY, Trustee, etc.,
of Milwaukee Motor Company, Bankrupt.

(246 Fed. 671.)

Master and servant — right to dismiss superintendent for absence.

1. A general superintendent of a factory may be dismissed for wilful absence on L.R.A.1918C.

his own affairs at a time when the shop is being rearranged, the deliveries are far behind orders, with customers clamoring for them, with trouble in the shop, and things generally going awry.

For other cases, see *Master and Servant*, I. e, in *Dig. 1-52 N. S.*

Same — assigning unjustifiable cause — effect.

2. The dismissal of an employee for which just cause exists is not wrongful, although the master does not know of it at

Note. — As to grounds or justification for discharge of one employed in executive or supervisory capacity, see annotation following this case, post, 1030, and references therein to annotations on related questions.

the time of the dismissal and assigns another cause therefor.

For other cases, see Master and Servant, I. c., in Dig. 1-52 N. S.

(September 4, 1917.)

APPEAL by claimant from an order of the District Court of the United States for the Eastern District of Wisconsin (Geiger, District Judge) disallowing his claim for damages sustained by reason of his alleged unlawful dismissal from employment. Affirmed.

Statement by Alschuler, Circuit Judge:

Appellant Farmer, a mechanical engineer, was employed as superintendent of the bankrupt's gas engine shops at Milwaukee. After serving about two months in such capacity, a contract for a year's service, beginning August 1, 1912, was entered into, under which Farmer was to superintend and manage the shops, devoting his entire time thereto, and to receive for such service a salary of \$6,500 and a bonus of \$3 per engine if, with the equipment of the factory and such further equipment as had theretofore been specified by Farmer, 3,000 engines were produced within the year at prescribed factory costs, to fill contracts therefor which were extant. Provision was made for renewal of the contract for another year if Farmer "has made good his guaranty to make the said 3,000 engines now sold within this contract year, and within the above schedule cost of manufacture."

Under date of July 26th, the bankrupt had entered into a contract with the Imperial Automobile Company of Jackson, Michigan, to supply it 2,200 motors, with option for 1,000 more, during the entire year; the contracted deliveries for 1912 being August 100, September 130, October 260, November 260, and December 300.

The work of installing the new equipment was being carried on, and the manufacture of the engines proceeded, but in the months indicated only 190 engines were completed for delivery, and some, if not all of these, proved unsatisfactory. Demands for overdue deliveries were being made, as well as complaints respecting engines delivered. In response to the complaints the bankrupt's vice president, on December 18th, went to Jackson, taking Farmer with him. The next day Farmer started back home by way of Chicago. The vice president urged him to be back to the shops as soon as possible, and Farmer said he would reach Milwaukee the same day, as he intended stopping in Chicago but a short time to buy his wife a Christmas present. Upon reaching Chicago he did not return to Milwaukee, but remained at Chicago until L.R.A.1918C.

the 22d, indulging himself in diversion strictly personal. Coming to Milwaukee on the 22d, he did not go to the shop because of a severe cold he had contracted. On the 24th he was dismissed from his employment. Within six months thereafter the company became bankrupt. Farmer filed his claim for \$13,062.45 for damage accruing to him by reason of his alleged unlawful dismissal.

The referee found that the absence from duty was in no manner on account of his own necessities or of the employer's business, but because of Farmer's own self-indulgence during that time. He found further that this absence and the failure to return to his employment were not such a breach of his contract of employment as to justify his dismissal, and that his conduct during such time was not such as was inconsistent with the nature of his employment, or rendered him unfit to continue it. He allowed the claim to the extent of \$3,862.50 for the balance of the full year's salary, and disallowed it for the rest of the claim, which was based upon the bonus. Both parties petitioned for review, and the district court reversed the referee's order of allowance, and directed that the entire claim be disallowed. Farmer appeals.

Argued before Baker, Alschuler, and Evans, Circuit Judges.

Mr. Lyman G. Wheeler for appellant.

Mr. Arthur W. Fairchild, for appellee:

Where the question at issue is whether good ground for discharge exists, the motive for such discharge is entirely immaterial.

Development Co. v. King, 24 L.R.A. (N.S.) 812, 88 C. C. A. 255, 161 Fed. 91; Pape v. Lathrop, 18 Ind. App. 633, 46 N. E. 154; Von Heyne v. Tompkins, 89 Minn. 77, 5 L.R.A. (N.S.) 524, 93 N. W. 901; Crescent Horse-Shoe & Iron Co. v. Eynon, 95 Va. 151, 27 S. E. 935.

An employer has the right to give all lawful and reasonable commands deemed by him necessary for the proper management of his business, and the employee's duty is to obey such commands where there is nothing in the contract of employment to relieve him from such duty; and inexcusable substantial insubordination on the part of the employee, or wilful refusal to obey such commands, amounting to insubordination, is good ground for discharge.

Green v. Somers, 163 Wis. 96, 157 N. W. 529; Thomas v. Beaver Dam Mfg. Co. 157 Wis. 427, 147 N. W. 364, Ann. Cas. 1916A, 1020; Jerome v. Queen City Cycle Co. 163 N. Y. 351, 57 N. E. 485; Carpenter Steel Co. v. Norcross, 123 C. C. A. 63, 204 Fed. 537, Ann. Cas. 1916A, 1035; Parker v. Farlinger, 122 Ga. 315, 50 S. E. 98;

Kendall v. West, 196 Ill. 221, 89 Am. St. Rep. 317, 63 N. E. 683; Kenner v. Southwestern Oil Co. 113 La. 80, 36 So. 895; Degen v. Manistee F. C. & E. L. R. Co. 113 Mich. 66, 71 N. W. 459; Development Co. v. King, 24 L.R.A.(N.S.) 815, note; Shields v. Carson, 102 Ill. App. 38; Peniston v. John Y. Huber Co. 196 Pa. 580, 46 Atl. 934; Parker v. School Dist. 5 Lea, 525; Webster v. Grand Trunk R. Co. 1 Lower Can. Jur. 223; The Bertha, 111 Fed. 550; Thomas v. Houston, S. & G. Co. 37 L.R.A.(N.S.) 950, note; Atlantic Compress Co. v. Young, 118 Ga. 868, 45 S. E. 877.

In order to justify the dismissal of a servant on the ground of disobedience, the master is not required to show that the act in question was actually injurious to him.

Development Co. v. King, 24 L.R.A.(N.S.) 823, note; Milligan v. Sligh Furniture Co. 111 Mich. 632, 70 N. W. 133; McCain v. Desnoyers, 64 Mo. App. 66; Green v. Somers, 163 Wis. 96, 157 N. W. 529; Beckman v. Garrett, 66 Ohio St. 136, 64 N. E. 62.

Where, at the time of the discharge, an uncondoned justification for the discharge exists, regardless of whether it was then known to the master or whether it was assigned as a reason for the discharge, it justifies the discharge.

Thomas v. Beaver Dam Mfg. Co. 157 Wis. 427, 147 N. W. 364, Ann. Cas. 1916A, 1020; Loos v. George Walter Brewing Co. 145 Wis. 1, 140 Am. St. Rep. 1052, 129 N. W. 645; Von Heyne v. Tompkins, 89 Minn. 77, 5 L.R.A.(N.S.) 524, 93 N. W. 901; Carpenter Steel Co. v. Norcross, 123 C. C. A. 63, 204 Fed. 537, Ann. Cas. 1916A, 1035; Wood, Mast. & S. 2d ed. § 121.

Damages, to be recoverable, must be certain, both in their nature and in respect to the clause from which they proceed,—not speculative and contingent.

Sigafus v. Porter, 179 U. S. 116, 45 L. ed. 113, 21 Sup. Ct. Rep. 34; Smith v. Bolles, 132 U. S. 125, 33 L. ed. 279, 10 Sup. Ct. Rep. 30, 16 Mor. Min. Rep. 159; Richmond & D. R. Co. v. Elliott, 149 U. S. 266, 37 L. ed. 728, 13 Sup. Ct. Rep. 837; Hetzel v. Baltimore & O. R. Co. 169 U. S. 26, 42 L. ed. 648, 18 Sup. Ct. Rep. 255; Eckington & Soldiers' Home R. Co. v. McDevitt, 191 U. S. 103, 48 L. ed. 112, 24 Sup. Ct. Rep. 36; Sixta v. Ontonagon Valley Land Co. 157 Wis. 293, 147 N. W. 1042; Altschuler v. Atchison, T. & S. F. R. Co. 155 Wis. 146, 49 L.R.A.(N.S.) 491, 144 N. W. 294.

Alschuler, Circuit Judge, delivered the opinion of the court:

It is maintained for appellant that one L.R.A.1918C.

serving in a supervisory capacity is not so strictly accountable to the employer for his time as is a clerk or workman, and that Farmer's absence of two or three days without permission was not such a breach of the contract as warranted its termination. The legal proposition, as generally stated, is sustained by the authorities cited from Wisconsin, the state where this contract was made, as well as elsewhere. Moody v. Streissguth Clothing Co. 96 Wis. 202, 71 N. W. 99; Schumaker v. Heinemann, 99 Wis. 251, 74 N. W. 785; Loos v. George Walter Brewing Co. 145 Wis. 1, 140 Am. St. Rep. 1052, 129 N. W. 645; Green v. Somers, 163 Wis. 96, 157 N. W. 529; Beach, Contr. § 584.

But the applicability of such rule must depend on the facts of particular cases. Conditions may be readily imagined where in a well-organized, smoothly running, and successful business a day's or even a month's absence of a general superintendent, who has the business well in hand, might be wholly consistent with its continued uneventful and successful operation. Upon the other hand, the business may be in condition so critical that a single hour's wilful absence of such an officer at such a time might well be regarded as rank disloyalty and gross insubordination. Nearly five months of the new contract period had passed. Instead of deliveries of 1,050 engines required during that time under a single contract, to say nothing of other outstanding contracts, but 190 all told had in fact been delivered, and these more or less defective. Purchasers were clamoring for deliveries and complaining of defects in those delivered; materials were delayed; there was more or less trouble in the shop; and things generally seemed to be going awry. Added to this, the new equipment was in process of installation; old machines were being moved and changed; and the shop was undergoing radical rearrangement and reconstruction. The responsible head was Farmer. He had various foremen under him, but he was the only mechanical engineer connected with the plant, and while in authority it was upon his designing, planning, and direction that success or failure depended. This high-priced man faced obstacles, to surmount which would manifestly require his fullest capacity and undivided attention. Surely this was not a situation wherein the man at the helm might needlessly and with impunity abandon his post that he may tread "the primrose path of dalliance."

It is urged that the evidence shows no harm to the business resulting from these days of absence of its mechanical head. The sentry sleeping at his post is not less dere-

lict in duty if, haply, disaster does not follow; nor is the responsible employee's disloyalty or insubordination measured by the extent of the resultant harm to the employer, nor minimized if none happens to follow.

It is insisted that even if, while at Chicago, appellant did transgress the canons of propriety and right living, this of itself would not warrant his dismissal. The authorities support the proposition that if the transgression does not injure the employer, nor unfit the transgressor for the employment, termination of a contract of employment for such cause alone would not be justified. *Wood, Mast. & S. § 110*; *Child v. Boyd & C. Boot & Shoe Mfg. Co.* 175 Mass. 493, 56 N. E. 608; *Brownell v. Ehrich*, 43 App. Div. 369, 60 N. Y. Supp. 112. But the dismissal here is not justified on the ground of the employee's personal transgression at Chicago. The fact of the transgression affords evidence that the absence from duty was not necessitated by any of such causes as might excuse it, and emphasizes the conclusion that it was wilful and deliberate, and under conditions which gave to the conduct strong color of disloyalty and insubordination.

Nor is it material that at the time of the dismissal the employer did not know of his conduct at Chicago, and did not assign it as a cause of dismissal. Even if the

cause assigned for dismissal was not in itself sufficient, if it appears that sufficient cause therefor did in fact exist, the dismissal was justified. *Wood, Mast. & S. § 121*; *Labatt, Mast. & S. § 189*; *Carpenter Steel Co. v. Norcross*, 123 C. C. A. 63, 204 Fed. 537, Ann. Cas. 1916A, 1035; *Thomas v. Beaver Dam Mfg. Co.* 157 Wis. 427, 147 N. W. 364, Ann. Cas. 1916A, 1020; *Loos v. George Walter Brewing Co.* 145 Wis. 1, 140 Am. St. Rep. 1052, 129 N. W. 645; *Von Heyne v. Tompkins*, 89 Minn. 77, 5 L.R.A. (N.S.) 524, 93 N. W. 901. But the employer did then know the desperate condition of things at home; did know that appellant's place was there, and his presence there much needed; did know appellant had been asked at Jackson to return at once to the shop, and had stated he would do so after a short stay at Chicago for buying a present; and did know that for several days he did not put in appearance at his place of duty. Without any excuse appearing for the absence, such as illness or other unavoidable cause might afford, the employer was warranted in attributing it to a wilful disregard of the master's interest, and to insubordination, which, in our judgment, upon this record, justified his dismissal.

The order of the District Court is therefore affirmed.

Annotation—Grounds or justification for discharge of one employed in executive or supervisory capacity.

Introduction.

Other questions arising out of the discharge of a servant are treated in notes cited in the L.R.A. Indexes under the title, "Master and Servant," subtitle, "Termination of relation; discharge; enticing."

In the present note it is aimed to cover the cases involving the discharge of persons holding executive or supervisory positions with special references to the effect of the grade of employment upon the sufficiency of the grounds for discharge, the cases being set out when, from the discussion of the court or the circumstances of the case, it appears that the grade of employment was important. In a number of cases involving the lawfulness of the discharge of persons in executive or supervisory employment, there is nothing in the circumstances or in the statements of the court giving any special significance to the fact that the person held a supervisory or executive position, but such cases have been included in brief form under the various headings for the sake of completeness. L.R.A.1918C.

Neglect of duties.

The courts recognize, as was done in *RE MILWAUKEE MOTOR CO.* ante, 1027, that one holding a supervisory position has more latitude in the performance of his duties than does a mere clerk or workman; but, of course, the extent of his discretion in such matters depends upon the particular circumstances.

Thus, in *Moody v. Streissguth Clothing Co.* (1897) 96 Wis. 202, 71 N. W. 99, it was held that one who agreed to assume charge of and manage his employer's business and store in a certain city, and had some discretion in the matter of the discharge of his duties and the employment of his time, might properly be absent from the store at times when, according to his judgment, the interests of his employment demanded him to be, and such absences would not be ground for his discharge. The court said: "Of course, the general manager of a business must have a discretion as to the manner of its conduct and the most advantageous use of his own time. . . . If they [absences] were actually occa-

anion by and employed in good faith in what the plaintiff deemed to be the furtherance of the interests of the defendant's business, they could afford no ground for plaintiff's discharge."

And in the above case, where one of the grounds given for plaintiff's discharge was that on one occasion he failed to lock the store at night, which he explained by saying that he left another to lock the store, the court said: "It would seem that the general manager of a business would have power to delegate to some other servant the performance of so simple an office."

A contract by which plaintiff agreed to act as foreman and landscape gardener, and take charge of the property of defendant and give his whole time and attention to the work, with a stipulation that he would keep in perfect repair the premises and the roads and highways on the premises, was a contract for personal services, and not a general contract to perform certain work according to specifications or designs, and the allegation of performance on the part of plaintiff related to his having devoted his skill and attention to the work, and he was entitled to show that, where the results hoped for and promised were not attained, the failure might be explained by showing that he was prevented from fulfilling his agreement by defendant's acts in requiring the performance of work and labor outside his employment, which so occupied his time that he was not able fully to keep the premises and roads in perfect repair, and that to keep the premises in perfect repair required work and labor in addition to that possible by plaintiff's personal efforts. *Sexton v. Richardson* (1907) 6 Cal. App. 459, 92 Pac. 395.

Absence of the manager of a hotel for considerable portions of the day, but explained by him on the ground that most of this time was used in the necessary conduct of the hotel business, such as collecting and soliciting trade, did not show sufficient neglect of duty to warrant his discharge. *Wyatt v. Brown* (1897) — Tenn. —, 42 S. W. 478.

But where such manager having sole charge of the hotel, the owners being absent most of the time, had agreed to give his undivided attention to the business, though not precluded by such agreement from taking reasonable time for recreation, he was not justified in taking the hours from 8 to 12 every evening, at which time the majority of the transient guests arrived at the hotel, and during which time the hotel

was left in charge of the elevator boy, who was not competent to take care of the business properly; and such neglect of duty was sufficient ground for the manager's discharge. *Ibid.*

And neglect of duty by persons holding executive positions has been held to be sufficient ground for discharge without special reference to the character of plaintiff's employment, in *Hendrickson v. Anderson* (1858) 50 N. C. (5 Jones, L.) 246 (overseer and manager of slaves; absence from farm, disorderly conduct in a sleeping apartment, intoxication, and neglect of duty); *Glasgow v. Hood* (1900) — Tenn. —, 57 S. W. 162 (business manager of college under contract for fifteen years for one third of the profits; failure through incompetence or otherwise to perform his duties properly; detailed facts not being given); *Wright v. Lake* (1908) 48 Wash. 469, 93 Pac. 1072, (manager of dairy business; negligence in permitting team to run away twice, endangering employer's property and other persons); *Nash v. Kreling* (1899) 6 Cal. Unrep. 233, 56 Pac. 260 (whether plaintiff neglected duties as stage manager left to jury; verdict for defendant; facts of neglect not being given); *Johnson v. Walker* (1892) 155 Mass. 253, 31 Am. St. Rep. 550, 29 N. E. 522 (foreman in shoe factory absent seven weeks though because of illness); *Smith v. Allen* (1862) 3 Fost. & F. (Eng.) 157 (superintendent of chemical factory; left to jury whether his hours at factory showed neglect of duty).

Incompetence.

Where one employed as manager of a turpentine plant was ordered by his employer to do work which properly was the work of a mechanic, and not contemplated by the contract to be that of the manager, his unskilful manner of doing it will not afford grounds for discharging him, in the absence of proof that he was guilty of gross negligence. *Pringle v. Producers' Turpentine Co.* (1910) 126 La. 1095, 53 So. 359.

The fact that one employed as superintendent of a mill is not an expert in all the operations under his charge is not necessarily a sufficient ground for his discharge; but, to constitute such ground, it must appear that it was necessary, to enable the superintendent to successfully operate the mill, that he understand such operations in order to intelligently direct those under him in those departments. *Eubanks v. Alspaugh* (1905) 139 N. C. 520, 52 S. E. 207.

In *Carroll v. Cohen* (1914) 5 *Boyce* (Del.) 233, 91 Atl. 1001, a suit for the recovery of salary due on a written contract for the employment of plaintiff as manager of the retail department of defendant's business, in which plaintiff agreed to devote his entire time, attention, and energy to the performance of his duties as such manager, and in which defendant was given the right to terminate the agreement if plaintiff should manage the business under his supervision badly or in any improper way, or should misconduct himself,—the court said that, although plaintiff neither insured nor guaranteed the results of his work as manager of the business, he must show substantial compliance with all the provisions of the contract, and although an occasional mistake which might have been made by any competent manager of such business would not be inconsistent with a substantial compliance, yet, on the other hand, mistakes of a nature that would substantially affect the business would be evidence justifying his dismissal.

Insubordination.

As to discharge of employees generally for disobedience of regulations, see *Thomas v. Houston, S. & G. Co.* 37 L.R.A.(N.S.) 950, and note.

And as to the duty of servants generally to obey the master's orders, see *Development Co. v. King*, 24 L.R.A.(N.S.) 812, and the note thereto.

It is recognized that one holding a position of responsibility requiring the exercise of executive powers is not bound to as strict adherence to directions of superiors as one in an employment involving the exercise of less responsibility and discretion.

So, in *Cook v. Stabb* (1888) *New Foundl. Rep.* 246, the refusal by the superintendent of a lobster factory, who had control of preparing and canning the lobsters and the people engaged thereat as well as of the lobster fishermen, to cease taking count of lobsters upon their arrival, which defendant ordered left to another, and to confine himself to the factory, was held to be justified, and not ground for peremptory discharge, inasmuch as he was not an ordinary servant, but was invested with such supervisory powers and had such peculiar fitness and stood so high in the business that his name was used on the labels as a guaranty of superiority, he testifying that it was necessary for him to keep tally of the lobsters to properly manage the business, and that his reputation was dependent on his success, and he regarded an interference with him in these matters as a breach of defendant's agreement with him.

tation was dependent on his success, and he regarded an interference with him in these matters as a breach of defendant's agreement with him.

In *Park Bros. & Co. v. Bushnell* (1894) 9 C. C. A. 138, 20 U. S. App. 425, 60 Fed. 583, an action involving the discharge of one employed by a large manufacturer of steel as superintendent of agencies for the sale of steel, because of alleged disobedience to general orders regarding his conduct of the business, the court said that it was manifest that the relations of plaintiff to defendant were not those of a menial or domestic servant, but that he had been the superintendent of a large and important business for a long time, was constantly obliged to be the representative of defendant in different states, and to attend with promptness, resoluteness, and good judgment to its large pecuniary interests; and apparently approved of a charge of the trial judge to the effect that what would justify the rescission of a contract for employment in the case of a mere workman or clerk might not justify it in the case of a person whose duties were of such a character as those which were intrusted to plaintiff.

In *Carpenter Steel Co. v. Norcross* (1913) 123 C. C. A. 63, 204 Fed. 537, Ann. Cas. 1916A, 1035, involving the discharge of one employed as manager of a warehouse and as salesman, on the ground, so far as it affected his duty as manager, that he had been guilty of insubordination in failing to obey directions contained in a letter of embezzlement in appropriating portions of a fund furnished for expenses to his own use, and of untruthfulness in stating that he had certain balances on hand which he did not in fact have, the court, in determining that under the evidence these matters were questions for the jury, took into consideration the fact that plaintiff's position was one of high grade, that much was left to his discretion and judgment, and that he was but slightly hampered by directions, citing *Park Bros. & Co. v. Bushnell* (Fed.) supra.

In *Schaub v. Arc Welding Co.* (1900) 123 Mich. 487, 82 N. W. 235, an action by one who had been employed as general superintendent of defendant's plant, who was discharged for insubordination toward the president of the corporation. the court said: "It is true the language of plaintiff might be deemed disrespectful, but we are not prepared to say that the language of Mr. Coffin [the president] was altogether respectful, when it

is considered that the plaintiff occupied a position of great responsibility."

While presumably it is the duty of an ordinary factory superintendent upon reasonable notice to attend a meeting of the board of directors at which his presence is necessary for the proper conduct of the business, whether the refusal to obey such an order will amount to such insubordination as would justify his discharge may depend upon the reasonableness and importance of the order when given, the degree of discretion intrusted to him or required by the nature of his work, the urgent necessity for giving his personal attention to some other part of his work at the time, or other circumstances of the particular case. So, where the meeting was called at another city and there was no evidence of any rule or custom requiring him to attend meetings at such place, and the meeting was not held in the office of defendant, but in the law office of its counsel, and was apparently not called for an ordinary business conference between directors and superintendents, but to subject the superintendent to an examination by the defendant's attorney, it was not error to refuse to charge that such refusal was a sufficient ground for his discharge. *Crabtree v. Bay State Felt Co.* (1917) 227 *Mass.* 68, 116 N. E. 535.

In *Shaver v. Ingham* (1886) 58 *Mich.* 649, 55 *Am. Rep.* 712, 26 N. W. 162, the court held that it was a question for the jury whether the insubordination of plaintiff, a foreman, in taking part of a day to attend to his own business against the orders of his employer, where apparently no actual harm resulted to the employer from such absence, was so unreasonable as to be grounds for a dismissal, the court apparently recognizing a distinction between menial domestic servants and skilled mechanics or other employees as to what insubordination would be grounds for dismissal, but making no special distinction as to employees holding supervisory positions.

In *Lehigh Valley R. Co. v. Snyder* (1893) 56 *N. J. L.* 326, 28 *Atl.* 376, it was held that the fact that a captain of a boat refused to obey an order of his superior which the superior had no legal power to give was not ground for his dismissal.

The exercise, with greater freedom than contemplated by the employer, of a discretion given to the manager of a store as to the extension of credit, is not disobedience. *Watson v. Ross* (1874) 5 *L.R.A.* 1918C.

Austr. Jur. (Viet.) 69, *Labatt, Mast. & S.* p. 837.

One employed in a supervisory capacity may be justified in refusing to do the work of an ordinary employee.

So, in *Wright v. C. S. Graves Land Co.* (1898) 100 *Wis.* 269, 75 N. W. 1000, where plaintiff was employed by a concern engaged in developing a tract of land and establishing a village, "to perform such labor as may be necessary in the superintending the clearing of land, building of roads, constructing of buildings, or any other labor that may be required of him by the party of the first part," it was held that the term in the contract, "or any other labor that may be required of him," meant also to superintend any other labor the defendant might have done there, especially in view of the fact that the parties had given the contract a practical construction by their acts, and that no claim seems to have been made that plaintiff should do any work other than superintending until it became evident that the scheme to build the city was not developing as expected; and refusal of plaintiff to use his team and himself engage in common labor was not sufficient ground for his discharge.

And a woman employed "to take charge of the dressmaking department as manager and dressmaker," with power to employ and discharge the employees, and to have entire management and control of the department, was not employed as a dressmaker, and had a right to refuse to do the work of a seamstress, and such refusal was not a sufficient ground for her discharge. *Marx v. Miller* (1901) 134 *Ala.* 347, 32 *So.* 765.

Where a superintendent of a salt plant was told by those in charge that he would, if necessary, be required to perform work and services of a nature subordinate to that of superintendent, and that, if necessary, he would be required to paint the smokestack and pull ashes out of the boiler, the court was authorized to submit to the jury the charge that, if they believed defendant required plaintiff to do other work than that embraced within the scope of his employment, they might find for plaintiff. *Lone Star Salt Co. v. Wilderspin* (1904) — *Tex. Civ. App.* —, 81 *S. W.* 327.

One employed as general manager of all his employer's stores in a certain city was justified in refusing to be transferred to a minor store where his duties would be those of a salesman and porter, and was entitled to recover for his discharge because of such refusal. *Wolf*

Cigar Stores Co. v. Kramer (1908) 50 Tex. Civ. App. 411, 109 S. W. 990.

In *Stuart v. Richardson* (1806) Hume, 390, 3 Scots' Dig. 1800-1873, col. 243, it was held that a person hired to manage a farm was not bound to officiate as a servant of all work.

And in *Fairie v. M'Vicar* (1771) 2 Hutch. (Scot.) 168, note, Labatt, Mast. & S. p. 884, it was held that an overseer of a coal works could not be forced to assist at the windlass wheel and click the coals at the pit.

And an overseer who was subordinate to the general manager of a farm was held entitled to refuse to do manual work. *Cobban v. Lawson* (1868) 6 Scot. L. R. 60, 3 Scots' Dig. 1800-1873, col. 225.

But the fact that an employee holds a position of authority over others, involving the exercise of executive and supervisory powers, does not relieve him from all duty of obedience to the orders of his superiors.

So, in *Jerome v. Queen City Cycle Co.* (1900) 163 N. Y. 351, 57 N. E. 485, where it appeared that plaintiff, who was superintendent of a factory under a contract in which he agreed to give his services to the employer and devote his best efforts to the faithful and efficient discharge of the duties of superintendent, had been absent from duty on several occasions, and had been warned by his employer not to again absent himself without first receiving permission from the president, but, notwithstanding this, absented himself for one day to attend to business of his own after informing his employer that he was going to be absent and being refused permission to be absent on that day, the court held that such absence was sufficient ground for his discharge. "The plaintiff was in law a servant, although of a high grade, with full control and discretion as to hiring and dismissing all the other servants. In other respects he was subject to the reasonable orders of his master, for there was nothing in the contract to relieve him from the duty of obedience required by law. He had charge of an extensive manufactory where 600 men were at work. The defendant had the right to manage its own business and to decide whether the services of the plaintiff were necessary at the factory on the day in question. It did so decide, and he had no power to overrule the decision, for that would make the master and servant change places. He did not ask leave to go some other day, and was not told that he could not go some other

day when the situation of the business in the master's judgment would permit it. It was unreasonable for the plaintiff, when employed to superintend extensive operations and many men, to take a day off at will for a private purpose regardless of the condition of the business or the wishes of his employer." The court said further that whether his absence resulted in actual injury to the business of defendant was not the question, for it had a tendency to have, and would naturally have, that effect in a large factory where something was liable to occur at any moment which would require the presence of the superintendent.

Abusive language and threats of personal violence to the son and acting agent of the employer are sufficient ground for the discharge of an overseer. *Youngblood v. Dodd* (1847) 2 La. Ann. 187.

In *Degen v. Manistee, F. C. & E. L. R. Co.* (1897) 113 Mich. 66, 71 N. W. 459, it was held that the refusal of a superintendent of a street railway to carry out the orders of the president as to reinstating a man whom the superintendent had taken off a run was sufficient ground for his discharge, the president having direct charge of all the affairs of the street railway company, and plaintiff being under contract "to perform such duties as may be required of him."

Where the captain of a boat declined further to serve in such capacity because of the employment of a new engineer for the boat against his objection that such engineer was incompetent and that, as master of the steamer, plaintiff would regard himself and the vessel as being unsafe if such person acted as engineer, on account of threats made by him against the life and person of the plaintiff, plaintiff was properly discharged, in the absence of any arrangement giving him the right to select his engineer or any other member of the crew. *Green v. Watson* (1891) 60 Hun, 582, 14 N. Y. Supp. 820.

In *Townsley v. Bankers' L. Ins. Co.* (1900) 56 App. Div. 232, 67 N. Y. Supp. 664, it was held that one employed as general manager, having entire control of the agency force of an incorporated assessment insurance company, the stockholders of which consisted of the policy holders, was guilty of a distinct violation of his duty when he, acting as an employee or officer of the company, obtained from the policy holders proxies to vote at a meeting of the members of

the corporation, under an implied representation that such proxies were to be used to continue the present officers, when in fact he intended to use and did use them for the purpose of ousting the officers of the company and selecting others in their place, and that such conduct was a sufficient ground for his discharge.

An attempt by an overseer of slaves to control them contrary to the positive commands of the owner is sufficient ground for his discharge. *Lane v. Phillips* (1859) 51 N. C. (6 Jones, L.) 455.

One employed as manager of a publishing department "with reasonable and proper authority to conduct it," who was to receive as compensation a proportion of the profits of the business and at the expiration of the contract one third of the value of the stock, copyright, and trade, to be paid in a sum of money equal to such value, was, in exercising authority in his department, subordinate to his employer, the corporation defendant, and was subject to discharge for insubordination in refusing to move his office from one floor to another of the building. *Peniston v. John Y. Huber Co.* (1900) 196 Pa. 580, 46 Atl. 934.

In *Green v. Somers* (1916) 163 Wis. 96, 157 N. W. 529, it was held that refusal by one who was employed as general manager of a hotel with no definition of his duties except as embraced in the term "general manager," to comply with orders of his superior to appoint an assistant manager, to have the storekeeper make all the purchases, to close the hotel laundry, and to discharge help employed for the personal benefit of the manager and his family, was sufficient insubordination to warrant his discharge.

That a superintendent of a railroad sent someone else to investigate an accident resulting in death, which occurred on the road, instead of investigating it personally as directed, though perhaps no disrespect was intended, together with errors in his accounts, was sufficient ground for his discharge. *Webster v. Grand Trunk R. Co.* (1857) 1 Lower Can. Jur. 223.

In *Dick v. Canada Jute Co.* (1886) 30 Lower Can. Jur. 185, it was held that an insolent manner toward the director and president of a factory, and disobedience of and noncompliance with orders, were grounds for the discharge of the manager of the plant.

The fact that an overseer of slaves used abusive language toward his employer and threatened him with violence L.R.A.1918C.

because the employer changed the employment of slaves without consulting the overseer was sufficient ground for his discharge. *Boone v. Lyde* (1848) 3 Strobb. L. (S. C.) 77.

A claim by one employed as clerk and manager to superintend and conduct a business, he being paid a salary and sometimes a share of the profits, that he was a partner in the business, was sufficient ground for his discharge. *Amor v. Fearon* (1839) 1 Peary & D. 398, 9 Ad. & El. 548, 112 Eng. Reprint, 1320, 2 W. W. & H. 81, 8 L. J. Q. B. N. S. 95.

In *Cussons v. Skinner* (1843) 11 Mees. & W. 161, 152 Eng. Reprint, 758, 12 L. J. Exch. N. S. 347, an action for the wrongful discharge of plaintiff as manager of defendant's manufactory, it was held, under a plea that plaintiff so wrongfully, disobediently, and unskillfully conducted himself that defendant suffered loss, that, in order to support such plea, it was necessary to show not only disobedience, but such disobedience as occasioned a loss.

And disobedience of orders was held to be sufficient grounds for discharge, without any apparent importance attaching to the fact that the party held a supervisory position, in *Kenner v. Southwestern Oil Co.* (1904) 113 La. 80, 36 So. 895 (local manager of oil sales; refusal to make reports as ordered); *Kessee v. Mayfield* (1859) 14 La. Ann. 90 (overseer of plantation; disobedience of instructions); *Von Heyne v. Tompkins* (1903) 89 Minn. 77, 5 L.R.A. (N.S.) 524, 93 N. W. 901 (manager of farm; disobedience of orders regarding sale of stock); *Smith v. Herring-Hall-Marvin Safe Co.* (1909) 115 N. Y. Supp. 204 (sales manager under general contract of employment without specifications as to duties or place; refusal to go to another city to work); *Voelckel v. Banner Brewing Co.* (1895) 9 Ohio C. C. 318, 6 Ohio C. D. 80, 2 Ohio Dec. 168 (general manager and superintendent of business; failure to turn over money collected as directed, but instead applying part of it to his salary); *Gallagher v. Wayne Steam Co.* (1898) 188 Pa. 95, 41 Atl. 296 (manager of plant; obstinate refusal to comply with orders of employer as to method of installing appliances for customers).

Conduct toward or relations with subordinates.

The infliction of cruel and unusual punishment upon a male slave of a plantation, and immoral conduct with the female slaves, were held, in *Dwyer v.*

Cane (1851) 6 La. Ann. 707, to be sufficient ground for the discharge of an overseer, although he was not guilty of such mismanagement of the plantation as would have authorized his dismissal.

Rules for the government of a plantation under which the manager was enjoined not to abuse or whip tenants, and under which he was not permitted to carry a pistol, it being the owner's purpose to avoid all manner of disturbances and encounters between the manager and tenants, and to secure quiet and orderly conduct of his property, were reasonable and commendable, and a manager who refused to comply with such rules was properly discharged. *Corley v. Rivers* (1914) 107 Miss. 67, 64 So. 964.

Where an overseer of slaves knocked a slave down with a handspike because of disobedience, and continued to beat him until the blows resulted in his death, the employer not only had a right to discharge him, but it was his duty to do so. *Posey v. Garth* (1821) 7 Mo. 94, 37 Am. Dec. 183.

In *Boone v. Lyde* (1848) 3 Strobb. L. (S. C.) 77, it was held that the fact that an overseer of slaves, employed under a written contract stipulating that he was to govern the slaves with humanity and kindness, snapped a gun at a slave who ran away from a flogging, and would probably have killed the slave had not the gun failed to explode, was sufficient ground for his discharge.

Miskeeping the time of employees by an overseer of a plantation, causing constant dissatisfaction among such employees and danger of losing them, together with the fact that the overseer was sick for a considerable period of the time, was sufficient ground for terminating his employment. *Miller v. Gidiere* (1884) 36 La. Ann. 201.

In *Lindner v. Cape Brewery & Ice Co.* (1908) 131 Mo. App. 680, 111 S. W. 600, where it appeared that plaintiff was employed as brew master and superintendent of the bottling department of a brewery, and upon the manager reinstating an employee of the bottling department whom plaintiff had discharged for a trivial offense, plaintiff refused to continue his work in the bottling department unless such employee would agree to obey him, it was held that such refusal was sufficient ground for his discharge.

If an overseer, either negligently or for want of capacity, makes mistakes about his master's business detrimental to his master's interest, he may be discharged; but if he is competent to dis-

charge the duties of his employment, and not negligent in the performance of his duty, it is no ground to discharge him merely that he is unable to control some of the laborers whom he is employed to superintend. *Hattaway v. Sanderlin* (1916) 145 Ga. 219, 88 S. E. 941.

One employed as superintendent of printing at a time when a strike was on in the printing establishment, who fulfilled his duties efficiently, was improperly discharged where the reason given by defendant's manager for plaintiff's discharge was that the men would not work with plaintiff. *Sun Printing & Pub. Asso. v. Edwards* (1905) 69 C. C. A. 365, 136 Fed. 591.

Receipt by a foreman of money from an employee under him, with knowledge that it was given for the purpose of securing a preference in giving out work, was sufficient reason for his discharge. *Engel v. Schoolherr* (1884) 12 Daly (N. Y.) 417.

Engaging in other business.

Generally, as to interest in or connection with other business as ground for discharge of an employee, see *Myers v. Roger J. Sullivan Co.* 34 L.R.A.(N.S.) 1217, and note.

As to right of principal or employer to earnings by agent or servant who undertakes extraneous work, see notes to *Barber v. National Carbon Co.* 5 L.R.A.(N.S.) 1154, and *Ogallah Elevator Co. v. Harrison*, L.R.A.1916D, 782.

One employed to superintend the lumber yard of his employer, with which was connected the business of purchasing and shipping wood, was properly discharged for engaging in the wood business so that he came in competition with his employer, both at the buying and selling points, even though he conducted such business entirely by agents and gave his whole time and attention to the business of his employer. *Dieringer v. Meyer* (1877) 42 Wis. 311, 24 Am. Rep. 415.

The fact that a foreman of a certain part of the work of a dairy entered into a partnership for the sale and distribution of milk, thus coming in competition with his employer not only generally, but in the same locality, seeking and inducing numerous customers of his employer to take milk from him instead of from the employer, was sufficient ground for his discharge, notwithstanding the fact that the part of the dairy business over which he was foreman had no direct connection with the selling and

distribution of milk. *Hibbard v. Wood* (1912) 49 Pa. Super. Ct. 513.

In *Atlantic Compress Co. v. Young* (1903) 118 Ga. 868, 45 S. E. 677, a suit by one who was discharged from service in conducting the business of a cotton compress and warehouse, under which employment it was his duty to devote all his time to the service of defendant, he being discharged because, although defendant was engaged in the business of loading cotton on railroad cars, he engaged in loading cotton for another mill and used the appliances and employees of defendant for that purpose without its knowledge or consent and received the compensation therefor, the court said: "Such a privilege, under any circumstances, and especially when the employee is a superintendent, would tend to induce the employee to prefer his personal interest to that of his employer, and to make excuses for neglecting the business of his employer, and to avail himself of opportunities to pursue his own advantage. If the evidence had shown satisfactorily that the employee in this case was not, during regular working hours, constantly occupied with duties he owed to his employer, a due regard for the obligations imposed upon him by his contract of employment would have required him to obtain the consent of his employer before he should undertake, for his own benefit, duties outside of his regular business."

Where a territorial sales manager for a manufacturing corporation contracted to give his "whole time and attention and best endeavors to the business of the company," it was error, in an action for his discharge, for the court to instruct the jury that the manager might give some of his time to the business of another concern, provided such attention did not interfere with his duty to defendant. *Hughes v. Toledo Scale & Cash Register Co.* (1905) 112 Mo. App. 91, 86 S. W. 895.

But in *Brownell v. Ehrich* (1899) 43 App. Div. 369, 60 N. Y. Supp. 112, leave to appeal denied in (1899) 44 App. Div. 630, 60 N. Y. Supp. 1134, it was held that the fact that plaintiff, who was employed as buyer and manager of a department of defendant's store in New York, formed a corporation for the sale of bicycles in Brooklyn, was not sufficient ground for his discharge so long as it did not interfere with his employer's business and the contract of employment did not exclude him from engaging in other business.

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Dissatisfaction.

Generally, as to discharge under a contract of employment which requires work to be satisfactory, see *Beissel v. Vermillion Farmers' Elevator Co.* 12 L.R.A.(N.S.) 403; *Mackenzie v. Minis*, 23 L.R.A.(N.S.) 1003; *Schmand v. Jandorf*, 44 L.R.A.(N.S.) 680; and *American Music Stores v. Kussel*, L.R.A.1916F, 882, and the notes thereto.

In *Snyder v. Greenhut* (1911) 71 Misc. 117, 127 N. Y. Supp. 1068, an action for wrongful discharge of plaintiff from his position as manager of and buyer for the shoe department of defendant's business, under a contract by which he covenanted to "give satisfactory service" to defendant, the court held that it was erroneous to leave it to the jury, under instructions, to determine whether plaintiff's services were executed with such skill and care as a reasonable man might be satisfied with, or whether or not his services were of such a character that defendant was justified in discharging him, making a distinction between such a position as that held by plaintiff, which required considerable executive ability and sound judgment, and that of an ordinary employee in this respect, the position which plaintiff contracted to fill being one of trust and confidence, and not within the rule requiring that the employer's dissatisfaction be based on reasonable grounds.

And the legality of the discharge of persons employed in supervisory capacities was sustained on the ground of dissatisfaction on the part of the employer, apparently without any special significance attaching to the grade of the employment, in *American Music Stores v. Kussel* (1916) L.R.A.1916F, 882, 146 C. C. A. 354, 232 Fed. 306 (western manager of defendant's stores contracting to serve "to the satisfaction of" defendant; good faith in dissatisfaction being sufficient); *Mackenzie v. Minis* (1909) 132 Ga. 323, 23 L.R.A.(N.S.) 1003, 63 S. E. 900, 16 Ann. Cas. 723, (gardener and manager of farm; the contract providing for services "to the satisfaction of the employer, good faith in dissatisfaction only being required); *Teichner v. Pope Mfg. Co.* (1900) 125 Mich. 91, 83 N. E. 1033 (manager of local business employed with power in employer to terminate employment for conduct unsatisfactory to the employer or for other cause, the discharge being because defendant had an opportunity to place in charge a manager having had more experience, which it bona fide believed would be to its benefit); *Schmand v. Jan-*

dorf (1913) 175 Mich. 88, 44 L.R.A. (N.S.) 680, 140 N. W. 996, Ann. Cas. 1915A, 746 (candy maker and manager of retail store with two or three assistants to "serve to the satisfaction" of the employer; Diggle v. Ogston Motor Co. [1915] W. N. (Eng.) 37, 12 L. T. N. S. 1029, 84 L. J. K. B. N. S. 2165 (superintendent of motor works to perform duties "to the satisfaction of the directors," dissatisfaction being genuine though not well founded); Corgan v. George F. Lee Coal Co. (1907) 218 Pa. 386, 120 Am. St. Rep. 891, 67 Atl. 655, 11 Ann. Cas. 838 (mine foreman employed so long as he satisfactorily performed his duties as foreman; the dissatisfaction being genuine though, perhaps, not well founded).

But the employer may be liable if the alleged dissatisfaction is not bona fide. Farmer v. Golde Clothes Shop (1916) 225 Mass. 260, 114 N. E. 330 (manager of store); Diamond v. Mendelsohn (1913) 156 App. Div. 636, 141 N. Y. Supp. 775 (foreman of a factory engaged to serve "to best of his ability and complete satisfaction of his employer," where alleged dissatisfaction was an evident afterthought, cutting expense being given at the time of discharge as the reason therefor); Beissel v. Vermillion Farmers' Elevator Co. (1907) 102 Minn. 229, 12 L.R.A.(N.S.) 403, 113 N. W. 575 (manager of elevator).

So, under a contract providing for the employment of plaintiff as foreman of defendants' molding shop "for a term of three years, or as long as he performs his duty in a successful or satisfactory manner," defendants were liable for damages in discharging plaintiff during the three-year period, since his duties as foreman were performed in a good, efficient, and workmanlike manner. Bridgeford & Co. v. Meagher (1911) 144 Ky. 479, 139 S. W. 750.

And a mere recital in a contract of employment, that the employee (a manager of a sales department) was desirous of filling such position to the satisfaction of the parties of the first part, was a mere statement of an obvious state of mind of the employee at the time, and was not sufficient to authorize his discharge because of dissatisfaction, the employment being for a definite period. Heller v. Bodensiek (1913) 81 Misc. 222, 142 N. Y. Supp. 496.

Immoral or intemperate conduct.

The question of intoxication as ground for discharge of a servant or agent is L.R.A.1918C.

discussed generally in a note to Willis v. Lowery, 38 L.R.A.(N.S.) 339.

In Armour-Cudahy Packing Co. v. Hart (1893) 36 Neb. 166, 54 N. W. 262, where the manager of defendant's packing establishment was discharged for neglect of his duties, it appeared that plaintiff constantly used intoxicating liquors in considerable quantities and permitted the foreman immediately under him to use such liquors. The court said: "It is clearly shown that liquor for the use of the defendant in error and others was constantly kept at hand and was continually drank; thus the influence of the manager was given in favor of its use by subordinates and employees. The offense is much more serious when committed by one in authority than by a mere laborer, as the example and influence of the manager is thus placed in favor of its use. With the amount of liquor shown to have been consumed by the defendant in error and his subordinates, it is not a matter of surprise that duties were neglected and the plaintiff in error sustained loss."

In Physioc v. Shea (1885) 75 Ga. 466, it was held that the discharge of a foreman of a tailor shop was justified because he went on a spree for from one to several days, thus neglecting his business as foreman.

One engaged as a choir master of a church was properly dismissed for being drunk upon his first appearance for duty. Martin v. Lane (1885) 3 Manitoba L. R. 314.

One who contracted to superintend two farms was bound thereby for reasonable attention to his employer's farm hands and for ordinary skill in conducting the operations of the farms, both of which required his personal service on the farms and with the farm hands at the usual and accustomed times for work; and where it was shown that he was often seen at grogshops and at a bowling alley at the depot in the working hours of the day and on Sundays, and at one time was seen engaged in playing cards in the forenoon of a week day, and was frequently excited with spirits, but not drunk, it was not necessary, to justify his discharge, to show that any special injury resulted therefrom to his employer, as his conduct had a tendency to damage the employer, and the employer was not bound to wait until his crop was ruined before he removed the cause of the impending evil. Fly v. Armstrong (1858) 50 N. C. (5 Jones, L.) 339.

And the use of intoxicating liquors

was held sufficient ground for discharge without special reference to the grade of the employment, in *Marshall v. Central Ontario R. Co.* (1897) 28 Ont. Rep. 241 (roadmaster using liquor while on duty, though it did not actually interfere with his work); *Clouston & Co. v. Corry* [1906] A. C. (Eng.) 122, 75 L. J. P. C. N. S. 20, 54 Week. Rep. 382, 93 L. T. N. S. 706, 22 Times L. R. 107 (manager of grain and produce department, drunk and disorderly in street, for which he was fined); *Nolan v. Danks* (1842) 1 Rob. (La.) 332 (drunkenness of overseer of plantation sufficient even without the stipulation against drinking embodied in the contract of hiring).

In *Brownell v. Ehrich* (1899) 43 App. Div. 369, 60 N. Y. Supp. 112, leave to appeal denied in (1899) 44 App. Div. 630, 60 N. Y. Supp. 1134, where one of the grounds for the discharge of plaintiff, who was employed as a buyer and manager of a department of defendant's store, was the alleged immoral relation with a woman not connected with the store, the court held that such relation was not a sufficient ground for his discharge in the absence of evidence tending to show that the master's business was or was likely to be injuriously affected thereby. But the court says obiter: "Even in an employment of this character, we are clear that, if a superintendent or foreman used his position to debauch or corrupt the morals of a female employee, his discharge by the master would be not only justifiable, but an imperative duty."

One contracting to superintend mining property impliedly contracts that he

will conduct himself in and around the premises with ordinary decency, and if he kept dissolute women on the premises and was guilty of immoral conduct with them, it was sufficient ground for his discharge. *Moynahan v. Interstate Min. Mill. & Development Co.* (1903) 31 Wash. 417, 72 Pac. 81.

One employed as manager of a manufacturing drug business was properly discharged upon its being ascertained that he was manufacturing and selling drugs for illegal purposes. *Kidd v. American Pill & Medicine Co.* (1894) 91 Iowa, 261, 59 N. W. 41.

Proof of several acts of deception, misrepresentation, and fraud on the part of one employed as sales manager, a position requiring uprightness and personal integrity, was sufficient to warrant his discharge. *London v. G. A. Kelly Plow Co.* (1913) — Tex. Civ. App. —, 155 S. W. 556.

Introduction of gambling into a hotel by the manager thereof was sufficient ground for his discharge. *Wyatt v. Brown* (1897) — Tenn. —, 42 S. W. 478.

One employed as manager in certain cities of the business of a commercial rating agency, having charge of ratings and oversight over employees, and being intrusted with a power of attorney enabling him to have command of all the funds of the company passing through his hands, was properly discharged for refusing to give up speculating on margins in the stock and grain exchanges, by which he had lost his private fortune and incurred debts. *Priestman v. Bradstreet* (1889) 15 Ont. Rep. 558.

R. L. S.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

AUNT JEMIMA MILLS COMPANY, Appt.,
v.
RIGNEY & COMPANY.

(247 Fed. 407.)

Estoppel — acquiescence — use of trademark.

1. A written statement by an owner of a trademark that he supposed the mark might be used on other classes of goods without violating any law does not amount to an acquiescence in such use of the mark which will amount to an estoppel to object thereto. For other cases, see *Estoppel*, III. g, 1, in *Dig. 1-52 N. S.*

Note. — As to use of tradename or trademark on articles other than those to which it is applied by the owner, see annotation following this case, post, 1044.
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Trademark — use on other articles.

2. A trademark adopted for use on pancake flour cannot be used by another person for a different but correlated article, such as syrup or sugar cream.

For other cases, see *Trademarks*, IV. in *Dig. 1-52 N. S.*

Same — delay — effect.

3. A delay of eight years in applying for relief from the wrongful use of a trademark will not prevent the issuance of an injunction against further use, but will defeat a right to an accounting for damages and profits.

For other cases, see *Limitation of Actions*, I. b, 3, in *Dig. 1-52 N. S.*

(Learned Hand, District Judge, dissents.)

(December 11, 1917.)

APPEAL by complainant from a decree of the District Court of the United

States for the Eastern District of New York (Veeder, District Judge), dismissing a bill filed to enjoin the use of its trademark. Reversed.

The facts are stated in the opinion.

Argued before Ward and Rogers, Circuit Judges, Learned Hand, District Judge.

Messrs. Homer C. Underwood, Frank F. Reed, and Edward S. Rogers, for appellant:

No one has a right to represent his goods as the goods of another person.

Burgess v. Burgess, 3 De G. M. & G. 896, 43 Eng. Reprint, 351, 22 L. J. Ch. N. S. 675, 17 Jur. 292, 25 Eng. Rul. Cas. 186; Reddaway v. Banham [1896] A. C. 199, 13 Rep. Pat. Cas. 218, 65 L. J. Q. B. N. S. 381, 74 L. T. N. S. 289, 44 Week. Rep. 638, 25 Eng. Rul. Cas. 193; Howe Scale Co. v. Wyckoff, 198 U. S. 118, 137, 49 L. ed. 972, 985, 25 Sup. Ct. Rep. 609; Spalding v. A. W. Gamage [1915] W. N. 151, 32 Rep. Pat. Cas. 273, 84 L. J. Ch. N. S. 449, 113 L. T. N. S. 198, 31 Times L. R. 328; Delaware & H. Canal Co. v. Clark, 13 Wall. 322, 20 L. ed. 583; Hanover Star Mill. Co. v. Metcalf, 240 U. S. 403, 412, 60 L. ed. 713, 717, 38 Sup. Ct. Rep. 357; Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537, 546, 34 L. ed. 997, 1003, 11 Sup. Ct. Rep. 396.

Defendant's false representation as to the origin of its goods benefits it and injures complainant.

Hilson v. Foster, 80 Fed. 897; Avery v. Meikle, 81 Ky. 73; Taylor v. Carpenter, 2 Sandf. Ch. 603, 11 Paige, 292, 42 Am. Dec. 114; Amoskeag Mfg. Co. v. Spear, 2 Sandf. 599; Gillott v. Esterbrook, 47 Barb. 455; Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51, 25 L. ed. 993; Benkert v. Feder, 34 Fed. 534; Walter Baker & Co. v. Slack, 65 C. C. A. 138, 130 Fed. 514; Sawyer v. Kellogg, 9 Fed. 601; Hamilton-Brown Shoe Co. v. Wolf Bros. & Co. 240 U. S. 251, 259, 60 L. ed. 629, 634, 36 Sup. Ct. Rep. 269; Lampert v. Judge & D. Drug Co. 238 Mo. 409, 37 L.R.A.(N.S.) 533, 141 S. W. 1095, Ann. Cas. 1913A, 351; Warner v. Roehr, Fed. Cas. No. 17,189a; Gillott v. Kettle, 3 Duer, 624; Washburn & M. Mfg. Co. v. Haish, 4 Fed. 900.

Defendant's conduct is unfair, deceptive, and unlawful, and should be enjoined.

Reddaway v. Banham [1896] A. C. 199, 13 Rep. Pat. Cas. 219, 65 L. J. Q. B. N. S. 381, 74 L. T. N. S. 289, 44 Week. Rep. 638, 25 Eng. Rul. Cas. 193; Weinstock, L. & Co. v. Marks, 109 Cal. 529, 30 L.R.A. 182, 50 Am. St. Rep. 57, 42 Pac. 142; Church & D. Co. v. Russ, 99 Fed. 276; Layton Pure Food Co. v. Church & D. Co. 32 L.R.A. (N.S.) 274, 104 C. C. A. 475, 182 Fed. 35; Godillot v. American Grocery Co. 71 Fed. L.R.A.1918C.

873; Re Dun's Trade-Mark, 7 Rep. Pat. Cas. 311, affirming 6 Rep. Pat. Cas. 314; Re Turney & Sons, Trade Mark, 11 Rep. Pat. Cas. 37; Eastman Co. v. Kodak Cycle Co. 15 Rep. Pat. Cas. 105; Van Zile v. Norub Mfg. Co. 228 Fed. 829; Dunlop Pneumatic Tyre Co. v. Dunlop Lubricant Co. 16 Rep. Pat. Cas. 12; Re Guttapercha Co. 26 Rep. Pat. Cas. 428; Valentine Meat Juice Co. v. Valentine Extract Co. 17 Rep. Pat. Cas. 673; Northwestern Knitting Co. v. Garon, 112 Minn. 321, 128 N. W. 289; Kinsley v. Jacoby, 28 Abb. N. C. 451, 20 N. Y. Supp. 46; Swift v. Groff, 114 Fed. 605; Walter Baker & Co. v. Harrison, 32 App. D. C. 272; N. Wolf & Sons v. Lord, 41 App. D. C. 514; Hildreth v. Sparks Mfg. Co. 99 Fed. 484; Carroll v. Ertheiler, 1 Fed. 688; Collins Co. v. Oliver Ames & Sons Corp. 18 Fed. 561; Bass, Ratcliff & Gretton v. Feigenspan, 96 Fed. 206; Amoskeag Mfg. Co. v. Garner, 54 How. Pr. 297; Wamsutta Mills v. Fox, 49 Fed. 141; White v. Miller, 50 Fed. 277; Omega Oil Co. v. Weschler, 35 Misc. 441, 71 N. Y. Supp. 983; Dunlop Pneumatic Tyre Co. v. Dunlop-Truffault Cycle & Tube Mfg. Co. 12 Times L. R. 434; Premier Cycle Co. v. Premier Tube Co. 12 Times L. R. 481; Boord v. Huddart, 21 Rep. Pat. Cas. 149; Finlay v. Shamrock Co. 22 Rep. Pat. Cas. 301; Enoch Morgan's Sons Co. v. Ward, 12 L.R.A.(N.S.) 729, 81 C. C. A. 616, 152 Fed. 690; Walter Baker & Co. v. Dalapenha, 160 Fed. 746; Beymer & Bros. v. Huyler's, 190 Fed. 83; Elgin Nat. Watch Co. v. Loveland, 132 Fed. 341; American Tobacco Co. v. Polacek, 170 Fed. 117; Edison Storage Battery Co. v. Edison Automobile Co. 67 N. J. Eq. 44, 56 Atl. 861; Re Webendorfers Trade-Mark, 18 Austr. L. T. 229, 22 Vict. L. R. 636.

Mr. F. F. Crampton for appellees.

Ward, Circuit Judge, delivered the opinion of the court:

This is an appeal from a decree of the United States district court for the eastern district of New York dismissing the complainant's bill for infringement of trademark and for unfair competition, on the ground that the goods manufactured by the parties respectively are different: viz., self-rising flour by the complainant and pancake syrup by the defendants.

The Davis Milling Company, of St. Joseph, Missouri, originated the trademark, which consists of the words "Aunt Jemima's," accompanying the picture of a negress laughing, in 1899, as we infer from the statement and declaration accompanying the registered trademark taken out in the United States Patent Office April 3, 1906, for self-rising flour. February 1, 1914, the milling company sold out its business,

trademarks, and good will to the Aunt Jemima Mills Company, the complainant in this case.

Since February 15, 1908, Rigney & Company, the defendants, have used the trademark precisely like the complainant's, which was registered December 29, 1908, in the Patent Office on an application filed March 6, 1908, for certain syrups and sugar creams. March 14, 1908, as soon as the application came to its attention, the milling company wrote to Rigney & Company as follows:

St. Joseph, Mo.
March 14, 1908.

Rigney & Co.,
Brooklyn, N. Y.

Gentlemen:—

We have your letter of the 5th. We are surprised to have you use the name "Aunt Jemima" for your syrup, but presume you can do so without violating any law in the matter. Mr. Jackson wrote us about this, but we did not know that you were going to do it right "hot off the pan" as one might say. We thought you were going to wait to hear from us. We note you say you have copyrighted "Aunt Jemima." Were you able to obtain a copyright of "Aunt Jemima" for maple syrup, or did you simply register it as a trademark? The sample which you sent us has been received, and it is, as far as we can see, a very fine article. The looks of the Aunt Jemima Pancake Cream, as you call it, is not as good as the taste. The looks we think could be improved perhaps. Do you make this in a syrup as well as in the cream? Do you work the trade entirely through brokers, or do you handle it with salesmen working the retail trade? Would you be interested (sic) in taking on a pancake flour proposition along with your maple syrup and other lines? If so, we might have something of interest for you.

Yours truly,
The Davis Milling Co.,
Robert R. Clark.

It is perfectly clear that Rigney & Company adopted the trademark (though with full knowledge of the complainant's prior use) upon the advice of counsel and in full belief that they had a right to use it for their specific products. They brought it to the attention of the milling company, the complainant's predecessor, a little over two weeks after they had selected it, and one day before they filed their application for registration in the Patent Office.

The above letter is obviously no evidence of abandonment or of nonuser by the complainant, but the defendants say it is an L.R.A.1918C.

acquiescence in their use of the trademark for syrups. We do not so construe it. The complainant was speaking of a matter of law, and said it "presumed" that the defendants could do so without violating any law. But if, as matter of law, the defendants had no right to use the trademark, this expression of opinion by the complainant does not make the law other than it is, nor estop it from relying on the law as it really is. Bigelow on Estoppel, p. 834. Indeed, the complainant seems, in addition to have been misled by the defendants as to the facts, because the letter goes on to say that the defendants had written they had copyrighted the trademark, and to ask whether they meant that they had registered it in the Patent Office. No reply to this letter was ever received. If the complainant had authorized the defendants to use the mark, or even had said it did not object to their doing so, mistake of law would not save it. When, however, it merely expressed a legal opinion, it did nothing to mislead the defendants, and they took the risk of acting on that opinion if it were erroneous. The bill was filed in December, 1915.

This brings us to inquire what the law on the subject really is. We find no case entirely like the present. In *Hanover Star Mill. Co. v. Allen & W. Co.* L.R.A.1916D, 136, 125 C. C. A. 515, 208 Fed. 513, affirmed in *Hanover Star Mill. Co. v. Metcalf*, 240 U. S. 403, 60 L. ed. 713, 36 Sup. Ct. Rep. 357, which was also said by Mr. Justice Pitney to be a most unusual case, it was held that a trademark is not a subject of property, and that even a technical trademark like the one under consideration will be protected only in markets where it has been established; that is, where it has come to indicate the origin or ownership of the goods it marks. In that case the trademark was adopted without any knowledge whatever of the prior use. The right to a trademark, though strictly appurtenant to the trade, becomes a property right as soon as it identifies the trade. When it gets this far, it is a mere question of words whether we say that the trade or the trademark is protected. Mr. Justice Pitney, in affirming this judgment, recognized an exception when he said: "In the ordinary case of parties competing under the same mark in the same market, it is correct to say that prior appropriation settles the question. But where two parties independently are employing the same mark upon goods of the same class, but in separate markets wholly remote the one from the other, the question of prior appropriation is legally insignificant, unless at least it appears that the second adopter has selected

the mark with some design inimical to the interests of the first user, such as to take the benefit of the reputation of his goods, to forestall the extension of his trade, or the like."

To use precisely the same mark, as the defendants have done, is, in our opinion, evidence of intention to make something out of it,— either to get the benefit of the complainant's reputation or of its advertisement, or to forestall the extension of its trade. There is no other conceivable reason why they should have appropriated this precise mark. The taking being wrongful, we think the defendants have no equity to protect them against an injunction, unless they get it from a consideration now to be examined.

It is said that even a technical trademark may be appropriated by anyone in any market for goods not in competition with those of the prior user. This was the view of the court below in saying that no one wanting syrup could possibly be made to take flour. But we think that goods, though different, may be so related as to fall within the mischief which equity should prevent. Syrup and flour are both food products, and food products commonly used together. Obviously the public, or a large part of it, seeing this trademark on a syrup, would conclude that it was made by the complainant. Perhaps they might not do so if it were used for flatirons. In this way the complainant's reputation is put in the hands of the defendants. It will enable them to get the benefit of the complainant's reputation and advertisement. These, we think, are property rights, which should be protected in equity. We have held in *Florence Mfg. Co. v. Dowd*, 101 C. C. A. 565, 178 Fed. 73, that a manufacturer of hair brushes under the trademark "Keepclean," who did not make toothbrushes, is entitled to be protected against the unfair competition of one who manufactures toothbrushes under the trademark "Sta-Kleen." So, in *Collins Co. v. Oliver Ames & Sons Corp.* (C. C.) 18 Fed. 561, a manufacturer of metal articles, which had never made shovels, was granted an injunction preventing the defendant from putting the complainant's trademark on its shovels.

The defendants are a partnership, and did not incorporate the words "Aunt Jemima's" into their firm name; but the complainant seems to think that appropriation of a trademark is to be treated in exactly the same way as appropriation of a trade-name. The latter is a trespass of the same nature as is committed by one who applies another man's name to his own goods. This is a wrong which equity will enjoin without reference to the character of the article, or to the question of competition, L.R.A.1918C.

or of prior occupation of the market in any particular territory. No one has a right to apply another's name to his own goods. If, for instance, one were to publish a book on banking under the name of a firm of bankers, it would be no answer to say that there was no competition between banking and publishing, or that the bankers had sustained no pecuniary damage, or that the book was a good book. The act would still be a trespass, for which the bankers would be entitled to at least nominal damages at law, and, that remedy being inadequate and the trespass being a continuing one, they would be entitled to relief in equity. Such is our decision in *British American Tobacco Co. v. British American Cigar Stores Co.* 128 C. C. A. 431, 211 Fed. 933, Ann Cas. 1915B, 363, in which a company engaged solely in the wholesale tobacco business was protected against the use of a similar corporate name by a retailer of cigars, although there was no competition between them.

There are many decisions of the English courts to the same effect. In *Eastman Co. v. Kodak Cycle Co.* 15 Rep. Pat. Cas. 105, the complainant was a manufacturer of cameras under the name "Kodak." Defendant, under the name "Kodak Cycle Company," began the manufacture of bicycles, calling them "Kodak" cycles, and registered the name as a trademark for bicycles and other vehicles. The Eastman Company brought suit to restrain the use of the word "Kodak" and to rectify the register. The motion for injunction and the motion to rectify the register came on to be heard together. The motion to rectify was sustained, and the defendant's mark expunged, and an injunction was granted. Mr. Justice Romer said: "Then I have to deal with the application for an injunction against the defendants in respect of what they are doing. They have just started business practically, and it appears to me that to allow them to use the word 'Kodak' as part of the title of the Kodak Cycle Company, Limited, would be to give them the benefit of what, in my opinion, substantially amounts to an improper dealing on their part. It would be to allow this company certainly to cause confusion between it and the plaintiff company. I think it would injure the plaintiff company, and would cause the defendant company to be identified with the plaintiff company, or to be recognized by the public as being connected with it, and I think, accordingly, the defendant, the Kodak Cycle Company, Limited, ought to be restrained from carrying on business under that name. Moreover, it appears to me that they ought not to be permitted to sell

their cycles under the name of the 'Kodak Cycles' for similar reasons. I think it would lead to confusion, I think it would lead to deception, and I think it would be injurious to the plaintiff company. I therefore grant an injunction to restrain the defendant companies, or either of them, from carrying on business under the name 'Kodak Cycle Company, Limited,' or under any name comprising the word 'Kodak' likely to mislead or deceive the public into the belief that the defendant company is the same company as, or is connected with, either of the plaintiff companies, or that the business of the said companies, or either of them, is the same as, or is in any way connected with, the business of the plaintiffs, the Eastman Photographic Materials Company, Limited. I also grant an injunction to restrain the defendant companies, and each of them, from selling, or offering to sell, any of their cycles or goods as 'Kodak.' I think that will sufficiently protect the plaintiffs. Of course the respondents, the defendants, must pay the costs, including the costs of the comptroller."

Dunlop Pneumatic Tyre Co. v. Dunlop Lubricant Co. 16 Rep. Pat. Cas. 12: In 1888 the word "Dunlop" was first used by complainant's predecessors to designate goods manufactured by them. Complainant made bicycle tires, rims, pumps, etc. One Funt started in business as the "Dunlop Lubricant Company," and dealt in oils and lubricants for bicycles, which he sold in packages bearing the word "Dunlop" in large letters. Complainant had never dealt in oils or lubricants. Held, that the use of the word "Dunlop" by defendant was deceptive, and it was enjoined.

In **Valentine Meat Juice Co. v. Valentine Extract Co.** 17 Rep. Pat. Cas. 673, the complainant used the word "Valentine" upon liquid meat extracts for medicine. Defendant used the word "Valentine" on beef extract used for food. An injunction was granted.

Dunlop Pneumatic Tyre Co. v. Dunlop Truffault Cycle & Tube Mfg. Co. 12 Times L. R. 434: This was a motion for a preliminary injunction to restrain the defendant from using the name "Dunlop" as a part of its corporate style. Complainant was the manufacturer of pneumatic tires, defendant the manufacture of bicycles and steel tubes used in the manufacture of bicycles. An injunction was granted. Mr. Justice Chitty holding that the name "Dunlop" had been chosen by the defendants to create confusion in the minds of the public and make them think that the defendant company was connected with that of the plaintiffs.
L.R.A.1918C.

Premier Cycle Co. v. Premier Tube Co. 12 Times L. R. 481: This was a motion for a preliminary injunction to restrain the defendants from using the word "Premier" as a part of their business style. Complainant was a manufacturer of bicycles and tubes used in their construction. The defendants stated that they were tube manufacturers and had no intention of competing with the complainant in the making of bicycles. An injunction was granted.

We do not think these authorities apply to the appropriation of a trademark.

As the defendants' conduct was wrongful, the complainant is entitled to an injunction notwithstanding the delay of some eight years in asserting its rights (*Molean v. Fleming*, 96 U. S. 245, 24 L. ed. 828), but is not entitled to an accounting for damages and profits.

The decree is reversed.

Learned Hand, District Judge, dissenting:

The plaintiff's letter of March 14, 1908, does not seem to me an expression of an opinion on the law; the plaintiff does not profess to have examined its rights in the case, but to allow them to pass as between the parties, whatever they may be. Nor is there the least reason to suppose that, if there was a mistake of law, it was mutual. The defendant consulted the plaintiff as to its position, and the most that can be said of the reply is that the plaintiff explained its intention not to assert any rights upon the ground that it probably had none. If anything could better indicate that they meant not to examine the matter fully, I confess I cannot see what it was. Furthermore, I find in the letter not only complete acquiescence, but in substance an invitation to co-operate with the defendant in the very infringement itself. The plaintiff's subsequent letter of retraction of May 1, 1908, further corroborates this conclusion: at least it shows that it thought the defendant might interpret the earlier letter as I interpret it. This letter, after saying that the plaintiff had received no answer, added that the defendant had overstepped the bounds of "business courtesy" in getting the benefit of their years of advertising. Therefore they formally protested against any continuance and asked for advices that the defendant would discontinue so that they might take up the matter legally and find out what their rights were. I cannot see how, in the face of this, it can be said that they were misled as to those rights. Of course, if this letter had been received, there could be no claim of acquiescence; but the proof is only that it was regularly

mailed, and not received in due course. This does not make proof if its receipt.

Therefore, when the defendant after communicating with the plaintiff and getting their consent, as I believe, for nearly eight years built up a substantial business, the injustice is apparent of allowing the plaintiff now to assert its rights. *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828, and *Menendez v. Holt*, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143, do not support a contrary doctrine, even though they were not modified by *Saxlehner v. Eisner & M. Co.* 179 U. S. 19, 39, 40, 45 L. ed. 60, 76, 21

Sup. Ct. Rep. 7. Assuming that the theory of those cases is that 'time will never run against a fraud, surely it is wrong to say that, when the plaintiff on original inquiry as to its position acquiesces in the infringement, the defendant commits a fraud in going on. *Creswill v. Grand Lodge*, K. P. 225 U. S. 246, 261, 56 L. ed. 1074, 1081, 32 Sup. Ct. Rep. 822, seems to me a weaker case on the facts, yet the defendant succeeded.

I vote to affirm on the ground of acquiescence without expressing any opinion upon the plaintiff's original right.

Annotation—Use of tradename or trademark on articles other than those to which it is applied by the owner.

This note supplements notes on the same subject appended to *Virginia Baking Co. v. Southern Biscuit Works*, 30 L.R.A.(N.S.) 167, and *Atlas Mfg. Co. v. Smith*, 47 L.R.A.(N.S.) 1002.

In these notes the general rule is stated that the owner of a trademark or tradename will be protected therein as against the use thereof by others upon articles which, in their general characteristics, construction, or use, are so closely allied with products to which the owner applies the same, as to render it probable or at least possible that the general public may be deceived thereby as to the manufacturer or producer of the article. As shown in the notes referred to and as appears from the later cases, the courts are not in harmony in applying this rule. Thus in *AUNT JEMIMA MILLS Co. v. RIGNEY*, ante, 1039, it is held that a syrup is sufficiently related to a pancake flour so that the manufacturer of the syrup cannot adopt as his trademark therefor the trademark previously adopted and established by another to designate pancake flour.

On the other hand, in *Virginia Baking Co. v. Southern Biscuit Works*, supra, it is held that a trademark to designate crackers and small cakes may be adopted by another manufacturer to designate ginger snaps and larger cakes of a different class.

And it has been held that a moving picture film designated as presenting "Nick Carter the Great American Detective" in a detective story does not infringe the name "Nick Carter" as used to designate a series of detective stories. *Atlas Mfg. Co. v. Street* (*Atlas Mfg. Co. v. Smith*) (1913) 47 L.R.A.(N.S.) 1002, 122 C. C. A. 568, 204 Fed. 398, appeal dismissed in (1913) 231 U. S. 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

348, 58 L. ed. 262, 34 Sup. Ct. Rep. 73, writ of certiorari denied in (1913) 231 U. S. 755, 58 L. ed. 468, 34 Sup. Ct. Rep. 323, and (1914) 232 U. S. 724, 58 L. ed. 815, 34 Sup. Ct. Rep. 602.

Compare with *Selig Polyscope Co. v. Unicorn Film Service Co.* (1917) 163 N. Y. Supp. 62, holding that the phrase "The Rosary" having acquired a secondary meaning in the identification of a dramatic composition, and having become associated with the good will of the business established in the production of the play, it cannot be adopted by another to designate a motion picture film.

It has been asserted that, before it can be held that a similarity of marks will raise a confusion in trade, it must appear that the marks are to be applied to goods of the same general class and of the same descriptive parts; for the law places no inhibition upon the use of the same mark by different persons so long as the goods to which it is applied are so distinctive in class and quality as to forbid the probability of confusion in trade. *G. & J. Tire Co. v. G. J. G. Motor Car Co.* (1913) 39 App. D. C. 508, holding that rubber tires are essentially so different from automobiles that the trademark used to designate the latter may properly be adopted to designate the former.

In *Florence Mfg. Co. v. Dowd* (1910) 101 C. C. A. 565, 178 Fed. 73, a case referred to in *AUNT JEMIMA MILLS Co. v. RIGNEY*, it was held that the use of the term "Stakleen" to designate toothbrushes constituted unfair competition as to the manufacturer of toilet brushes who used the term "Keepclean" as his trademark to designate the same.

It is to be noted in this connection that cases are not included herein where the term or name complained of is not the same as that used by the complainant, even though it may be held that the name is sufficiently similar to preclude its use by a competitor on articles of the same class. A. G. S.

TENNESSEE SUPREME COURT.

H. N. FINE et al., Pliffs. in Certiorari,
v.

J. W. LAWLESS et al.

and

MRS. A. A. STRONG.

(— Tenn. —, 201 S. W. 180.)

Injunction — against securing renewal of lease.

1. Injunction lies to prevent one who, in selling a business, sells the good will and assigns the leasehold of the premises where the business is conducted, from securing a renewal of the lease at the expiration of the term to the injury of the assignee.

For other cases, see *Injunction*, I. b, in *Dig. 1-52 N. S.*

Trust — renewing assigned lease.

2. One who, in selling a business, includes the good will and assigns the leasehold of the premises on which the business is conducted, will, in case he secures a renewal of the lease, be decreed to hold in trust for his assignee, although his lease provides that it shall not be assigned by the lessee or by operation of law without written consent of the lessor.

For other cases, see *Trusts*, I. d, in *Dig. 1-52 N. S.*

Landlord and tenant — assignment of lease — effect on lessor.

3. One assigning the leasehold of the premises on which a business is carried on, which he sells, together with its good will, cannot bind the property owner to renew the lease in favor of the assignee.

For other cases, see *Landlord and Tenant*, I. c and e, in *Dig. 1-52 N. S.*

Same — refusal to vacate — proceedings to dispossess.

4. The execution of a lease in reversion does not prevent the landlord from maintaining an action to dispossess the former tenant, who refuses to vacate at the expiration of his term.

For other cases, see *Forcible Entry and Detainer*, in *Dig. 1-52 N. S.*

(February 11, 1918.)

CERTIORARI to the Court of Civil Appeals to review a decree affirming a decree of the chancellor in favor of the defendant firm, and sustaining a demurrer of defendant Strong, in a suit to enjoin in-

terference with complainant Fine in the enjoyment of the good will of the business sold to him and to restrain a lease of the building in which the business was conducted. Modified and affirmed as to defendant Strong; reversed as to the other defendants.

The facts are stated in the opinion.

Messrs. J. L. Levine and Thompson, Williams, & Thompson, for plaintiffs in certiorari:

If one willfully interferes with contractual relations existing between other and third parties, such person is liable in damages.

Donnelly v. Jackson Bro. 2 Tenn. C. C. A. 408; Dr. Miles Medical Co. v. D. Park & Sons Co. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376.

Mrs. Strong had no power to institute and maintain the forcible detainer suit before a justice of the peace, but such suit could be maintained alone by the new lessees, Lawless Brothers, provided they could otherwise maintain such suit.

Allen v. Webster, 56 Ill. 393; L'Hussier v. Zallee, 24 Mo. 13; McDonald v. Hanlon, 79 Cal. 442, 21 Pac. 861; Harris v. Halverson, 23 Wash. 779, 63 Pac. 549; Capital Brewing Co. v. Crosbie, 22 Wash. 269, 60 Pac. 652.

Lawless Brothers should be bound by the strict letter of their obligation, and should not now be permitted to come back into this store building and operate therein the same kind of business which they had sold, with the good will, to complainants. If they should be permitted to do so, it would be an absolute destruction of complainants' business, and would make nugatory the effect of the sale of the good will.

East Tennessee Nat. Bank v. First Nat. Bank, 7 Lea, 422; Slack v. Suddoth, 102 Tenn. 378, 45 L.R.A. 589, 73 Am. St. Rep. 881, 52 S. W. 180; Foss v. Roby, 195 Mass. 292, 10 L.R.A. (N.S.) 1200, 81 N. E. 199, 11 Ann. Cas. 571; Story, Partn. p. 69; Hopkins, Unfair Trade, p. 133; Knoedler v. Boussod, 47 Fed. 465; Washburn v. National Wall Paper Co. 26 C. C. A. 312, 51 U. S. App. 380, 81 Fed. 17; Jackson v. Byrnes, 103 Tenn. 698, 54 S. W. 984; Knoedler v. Glaenzer, 20 L.R.A. 733, 5 C. C. A. 305, 14 U. S. App. 336, 55 Fed. 895; Williams v. Farrand, 88 Mich. 473, 14 L.R.A. 161, 50 N. W. 446; Brooklyn Trust Co. v. McCutchen, 189 Fed. 273; Hall Mfg. Co. v. Western Steel & I. Works. L.R.A.

Note. — For right of assignor of lease, as against the assignee, to the renewal of the lease upon the expiration of the term, see annotation following this case, post. 1051. L.R.A.1918C.

1916C, 620, 142 C. C. A. 220, 227 Fed. 588; *Menendez v. Holt*, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143.

The parol contract made in 1913 to become effective January 1, 1917, for lease of the premises to petitioners, was not void.

Hayes v. Arrington, 108 Tenn. 494, 68 S. W. 44.

Petitioners, having had this contract and assurance from both Mrs. Strong and Lawless in relation to removal of the contract, and said Lawless having conveyed the good will attending the location and the business, were and are entitled to be subrogated to the rights of said Lawless under the new lease.

Thomas v. Zumbalen, 48 Mo. 471; *Jones v. Kearney*, 1 Drury & War. 134, 1 Connor & L. 34, 4 Ir. Eq. Rep. 74; *Clark v. Martin*, 49 Pa. 303.

Messrs. Cooke & Noll and T. S. Myers, for defendants in certiorari:

The alleged agreement to renew the lease is null and void and unenforceable, because too indefinite and uncertain to make a binding contract and enforceable at law or equity.

American Lead Pencil Co. v. Nashville, C. & St. L. R. Co. 124 Tenn. 57, 32 L.R.A. (N.S.) 323, 134 S. W. 613; *Hardwick v. American Can Co.* 113 Tenn. 657, 88 S. W. 797; *Marshall v. White's Creek Turnp. Co.* 7 Coldw. 252; *Levering v. Memphis*, 7 Humph. 553; *Louisville & N. R. Co. v. United States Iron Co.* 118 Tenn. 194, 101 S. W. 414; *Gillespie v. Edmonston*, 11 Humph. 553.

A mere executory lease is void and ineffectual on behalf of either party. It is only where the tenant holds over by the consent of the landlord, or enters by consent of the landlord, that he becomes a tenant from year to year.

4 Kent, Com. *112; *Larkin v. Avery*, 23 Conn. 304; 29 Am. & Eng. Enc. Law, 2d ed. 819.

Defendant Strong had the right to maintain the unlawful detainer suit.

McNairy v. Hicks, 3 Baxt. 378; *Shepperson v. Burnette*, 116 Tenn. 117, 92 S. W. 762.

Complainant had no interest in the good will of the location after the expiration of the lease December 31, 1916.

Chittenden v. Witbeck, 50 Mich. 401, 15 N. W. 526; *Thackray's Appeal*, 75 Pa. 132; *Musselman's Appeal*, 62 Pa. 81, 1 Am. Rep. 382; *Rawson v. Pratt*, 91 Ind. 9.

The sale of the good will of a business does not imply an agreement not to re-engage in the same business. The two are entirely distinct.

Mordeau v. Edwards, 2 Tenn. Ch. 347; L.R.A.1918C.

Miner v. Brantly, 22 Pick. 457; *Jackson v. Byrnes*, 103 Tenn. 698, 54 S. W. 984.

The good will of the location is separate and distinct from the good will of the business. An agreement not to re-enter the same business must be based upon a separate consideration.

Bradford v. Montgomery Furniture Co. 115 Tenn. 610, 9 L.R.A.(N.S.) 979, 92 S. W. 1104; *Jackson v. Byrnes*, 103 Tenn. 698, 54 S. W. 984; *Rawson v. Pratt*, 91 Ind. 9; *Kramer v. Old*, 119 N. C. 1, 34 L.R.A. 389, 56 Am. St. Rep. 650, 25 S. E. 813; 20 Cyc. 1281; *Gibson*, Suits in Ch. § 811.

Williams, J., delivered the opinion of the court:

The bill was filed by Fine (and by his former partner for Fine's use) against Lawless Brothers, a copartnership, to restrain by injunction the defendant firm's interference with complainant Fine in the enjoyment of the good will of a business sold to him along with the stock of goods, which business for many years had been conducted by Lawless Brothers, at 222 Main street in the city of Chattanooga; and praying to be protected by injunctive process in the matter of a lease of the storehouse which at the same time was transferred to Fine and partner as purchasers of the stock of goods then in the building. Fine, by purchase of his partner, is now the sole owner of the property so acquired.

It appears that Lawless Brothers, in January, 1911, entered into a lease contract with the owner of the property, Mrs. A. A. Strong, for a term of five years. Before its expiration, January 1, 1916, to wit, on August 11, 1913, this lease was assigned to Fine and his associate; but the last named will not be referred to in the subsequent statement and discussion for the reason noted above.

Lawless Brothers opened up in the same line of business at 252 Main street, without objection or complaint on the part of complainant Fine.

The contract of sale by Lawless Brothers contained these conveying clauses which follow recitations as to the transfer of the stock of merchandise and fixtures:

"2. The lease which the said Lawless Brothers now have on the lot and store building at No. 222 East Main street, together with all rights thereunder.

"3. The name, 'the Wonder Store,' under which the business has been and is now being conducted, together with the good will of that name and the business."

Mrs. Strong assented in writing to the transfer of the lease to Fine, who, it was recited, was "to have the same rights under the original lease as are granted to Law-

less Brothers," and the firm made a formal transfer of the lease.

On June 12, 1916, Fine wrote a letter to Lawless Brothers, stating that he had learned of negotiations on their part for a lease of the Strong premises, and protesting against the effort to "upset" him notwithstanding a promise made to aid the writer to get a renewal of the lease; and he stated that the effort to defeat him was an outrage.

Lawless Brothers proceeded, notwithstanding, to close a lease in August, 1916, identical as to terms with the old one. On October 18, 1916, while Fine's term was yet running under the assigned lease, the defendant firm announced to the public in a full page advertisement of a "removal sale" in the Daily News: "We're going back to our old home!" Incorporated in the advertisement as an "indisputable fact" was the statement that the firm was going to change their location of business to 222 Main street,—“the old stand they occupied for years,”—and “submarine prices on everything” were quoted.

Mrs. Strong was also made a defendant, and a suit, brought by her to dispossess Fine after January 1, 1916, was sought to be enjoined as one intended to aid Lawless Brothers in getting possession of the storehouse in violation of their contract with Fine.

The chancellor sustained a demurrer of Mrs. Strong, and that ruling was affirmed by the court of civil appeals.

The further rulings and the assignment of error in this court, so far as they are material, are sufficiently indicated in the discussion which follows. We shall not detail them otherwise.

I. As to the rights of Fine against Lawless Brothers:

The doctrine of "good will" has proved to be so salutary in effecting just results that it has been constantly expanding, with the result that the definition of the word itself has been broadened as the doctrine has developed. This was noted in *Slack v. Suddoth*, 102 Tenn. 378, 45 L.R.A. 589, 73 Am. St. Rep. 881, 52 S. W. 180, where it was said: "It is difficult to define what 'good will' is. Lord Eldon said that it was simply 'the possibility that the old customers will resort to the old place.' *Crutwell v. Lye*, 17 Ves. Jr. 335, 34 Eng. Reprint, 129; *Moreau v. Edwards*, 2 Tenn. Ch. 349. But in *Churton v. Douglas, Johns*, V. C. 174, 70 Eng. Reprint, 385, it was said that this was too narrow a view to take of it, and there it was said that it was every positive advantage acquired, arising out of the business of the old firm, whether connected with the premises where it was carried on, with the name of the late firm, or with any other matter carrying with it the benefit of the business of the old firm."

All definitions incorporate as one of the chief elements of good will the advantage accruing to a vendee from the old business stand,—the feature we have here to deal with. It does not appear that Lawless Brothers made any effort to use the old name, "the Wonder Store," after selling to Fine.

"Good will" is property in the sense of being a thing subject to be damaged and entitled to the protection of the law (*Sanford-Day Iron Works v. Enterprise Foundry & Mach. Co.* 138 Tenn. 437, 108 S. W. 258); and an injunction will lie to protect it when the seller of the good will thereafter wrongfully interferes with it or the property conveyed to which the good will is incident. 12 R. C. L. p. 995, and cases cited; *Bradford v. Montgomery Furniture Co.* 115 Tenn. 610, 633, 9 L.R.A. (N.S.) 979, 92 S. W. 1104.

When Lawless Brothers sold the good will of the business and transferred their current lease of the business stand, good faith required that they should not thereafter do anything which should tend to deprive their vendee of the benefits and advantages incident thereto.

A distinction may here be noted which will aid in the determination of the rights of the parties litigant.

Upon a sale of the good will of a business, without more, the selling party is not precluded from setting up a precisely similar business at another business stand in the same city, or even in the vicinity. If the purchaser desired to forestall such a step, he must expressly stipulate against it in the contract. *Jackson v. Byrnes*, 103 Tenn. 698, 54 S. W. 984; 20 Cyc. 1279.

But, without such a stipulation, the seller of a business and its good will is precluded from interfering with the purchaser in the enjoyment of the particular business stand which is transferred by him to the purchaser. There is implied in the contract of sale the agreement that the purchaser will not be disturbed by the seller in his right to enjoy all advantages that inhere in the premises used as the place of business. By implication of law the contract binds the seller not to do any act that would prevent the vendee's use of the stand, and all advantages incident to it, to the same extent and in the same way the vendor himself might have done but for the sale.

Decisions which deal with interference by the seller with business locations passing without such a stipulation, but as a part of the good will, are by no means numerous. The few, however, clearly make the distinction we have adverted to,—that it does not

require express terms to prevent the seller from derogating from his grant of good will incident to business premises.

Munsey v. Butterfield, 133 Mass. 492, involved a contract for the sale of a milk route. It was there said: "A material part of the property to be delivered was, as stated in the agreement, 'the good will of said Munsey's milk route lying in West Somerville, East Somerville, North Somerville, and Charlestown.' This contract, called a sale of the good will of Munsey's milk route, was really, like a sale of the good will of any business, an agreement by the plaintiff that he would retire from it, and would allow the defendant to enjoy the benefits and advantages of it, and would do nothing to impair or injure it. This agreement was implied in the transaction, and in fact constituted the contract of sale of the good will of the milk route on the part of the plaintiff."

In *Wentzel v. Barbin*, 189 Pa. 502, 42 Atl. 44, where a paper route was sold and the vendor went over the route soliciting patronage which was formerly his, it was said: "When the defendant agreed to sell to the plaintiff 'all his right, title, and good will to the Oakland paper route, until now controlled by the said R. M. Barbin,' he became bound in honor and in law to carry out his contract in good faith. He was certainly not at liberty, especially after receiving a large part of the purchase money, to filch away from the plaintiff the veritable substance of that which he had sold. It was not like the setting up of another business of the same kind, but it was the taking away of the very thing he had sold that was complained of by the plaintiff."

The firm of Lawless Brothers was therefore under the implied obligation not to interfere with Fine as the vendee of their good will, in his use of business house and control of the lease during the period and the entire period of time covered by the assigned lease. But this does not mean that they had a right to negotiate for themselves, during that time, a renewal which would be valid simply because it should take effect at the expiration of the assigned lease.

One of the incidents and advantages of the good will of the business sold to Fine, as well as of the lease transferred to him, was that of the opportunity or chance to obtain for himself, as tenant in possession, a renewal of the lease covering such future term. It is true that the original lease contained no stipulation for a privilege of renewal in favor of the tenant, and it is furthermore true that neither Lawless Brothers nor Fine had any legal right to demand of the landlord a renewal on expiration.

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However, courts of equity have long been accustomed to treat the tenant in possession as having an advantage or quasi right, called "tenant right," in respect of the renewal of his lease. He has an interest, less than an estate or legal right, which equity recognizes as having substance and value and which it will protect. This principle was contended for in an able argument by Sir Francis Hargrave in *Lee v. Vernon*, 5 Bro. P. C. 14 [10th ed. 1803] 2 Eng. Reprint, 503, which was followed by the court. He said:

It has long "been an established practice to consider those who are in possession of lands under leases . . . as having an interest beyond the subsisting term, and this interest is usually denominated the tenant right of renewal, which, though according to language and ideas strictly legal, is not any certain, or even contingent, estate, but only a chance, there being no means of compelling a renewal, yet is so adverted to in all transactions relative to lease hold property, that it influences the price in sales, and is often an inducement to accept of it in mortgages and settlements

"This 'tenant right' of renewal, as it is termed, however imperfect and contingent in its nature, being still a thing of value, ought to be protected by the courts of justice, and when those who are entitled to its incidental advantages, whether by purchase or other derivation, are disappointed of them by fraud, imposition, misrepresentation, or unfair practice of any kind it is fit and reasonable that this injury . . . should have redress."

In *McCourt v. Singers-Bigger*, 76 C. C. A. 73, 145 Fed. 103, 7 Ann. Cas. 287, it was said: "The likelihood of being able to secure such an extension under like circumstances is so great that it has come to be recognized as a valuable incident to the tenant's estate, a species of property which the law protects."

The modern cases which enforce this doctrine are collated, and the principle incorporated in the text, in 16 R. C. L. p. 903.

Sometimes the same equitable end has been reached, and protection to the quasi right of the tenant afforded, on the concept that the old lease in a sense gives birth to the new one, and that therefore the holder of the original lease has a claim to such protection by the courts.

Thus, Lord Chancellor Cottenham, in *Clegg v. Fishwick*, 1 Macn. & G. 294, 41 Eng. Reprint, 1278, says that "the old lease was the foundation of the new lease, the tenant right of renewal arising out of the old lease giving the partners the benefit of this new lease."

And in *Spieess v. Rosawog*, 63 How. Pr. 401, affirmed in 96 N. Y. 651, it was said that the so-called expectation of renewal is a part of the value of a lease. "This is deemed so actual and vital that when a new lease is had it is considered to be a graft upon the old."

Possessed as Fine was of this measure of right in the eyes of equity, has the defendant firm disregarded and invaded it so as to call for equitable intervention?

The chancellor thought not, and in his final decree so held, but expressed dissatisfaction that he could not rule to the contrary and be justified by authority. He expressed in distinct terms the view that Lawless Brothers were not "morally right in getting for themselves a renewal of the lease." The court of civil appeals in its opinion states that "it is inequitable for Lawless Brothers to retake that which they sold."

The decrees of the lower courts in dissolving the injunction originally issued and allowing that firm to take the benefits of the renewal lease and use the storehouse are based upon a misconception. The arm of equity is not too weak to reach to and remedy that which is inequitable and more,—a fraud upon the rights of Fine. If precedents were lacking, the time is ripe for the making of one; but they are not lacking.

Since the expectancy or chance of renewal in favor of Fine as the holder of the current term is regarded in equity as a valuable interest, the doctrine from an early date has been that Lawless Brothers, standing in at least a quasi fiduciary relation to him (under obligation not to interfere with him in the exercise of the "tenant right"), may not secure for that firm and hold against him a renewal. The new lease will be treated as held in trust for Fine, as the person having the beneficial interest in the foundation lease upon which the renewal might have been grafted.

This doctrine of so holding in trust was first announced in 1670 in the case of *Holt v. Holt*, 1 Ch. Cas. 190, 22 Eng. Reprint, 756, 2 Vern. 322, 23 Eng. Reprint, 808, and it has been consistently followed both in England and in this country. 16 R. C. L. p. 904, and cases cited. Referring to the fairly analogous instance of renewal of a lease by one partner for his own benefit of a lease held by his firm, it is said in this recent work: "The lease so taken inures to the benefit of the firm, the partner taking it holding as a constructive trustee. When the lease is held by a partnership, the chance or opportunity of renewal is in itself a distinct asset of the partnership in which all the partners have an interest; and where the partnership is for a limited L.R.A.1918C.

time it is nevertheless held that one partner has no right as against his copartner to take a new lease to commence after the expiration of the partnership by its own limitations." [p. 906.]

As expressed in *Mitchell v. Reed*, 61 N. Y. 123, 19 Am. Rep. 252: "The defendant was in possession as a member of the firm, and the firm *owned the good will for a renewal*, which ordinarily attaches to the possession. . . . He must hold them for the firm." (Italics ours.)

The doctrine is not confined to cases where leases are renewed by persons occupying fiduciary relations, in the strict sense. We have been cited, and our investigation has discovered, no case decided by a court of last resort in which it has been applied to a lessee who in similar circumstances has assigned for the balance of his unexpired term.

In *Bennett v. Vansyckel*, 4 Duer, 462, it was held that, where a lessee sublets with an express agreement that the sublessees should have the benefit of the good will of the lease, a secret renewal by the original lessee (the sublessor) taken from the landlord inures to the benefit of the sublessees; and in *Crook v. Crook*, 20 Abb. N. C. 249, it was ruled that, where a lessee assigned his lease to another who conducted his business on the demised premises, a renewal taken by the original lessee in his own name prior to the expiration of the lease must be held as in trust for his assignee.

It cannot be, on considerations of common honesty, that a transfer of the good will, embracing an assignment of the lease, will admit of the seller's "running under" him whose money he has taken, and ousting him of a substantial part of that which was conveyed. The chance or opportunity to procure a renewal may not be taken away from such a purchaser at any time pending the transferred term. During the whole of that term Fine's tenant right to renew was not to be subverted by the sellers. As said in *Bennett v. Vansyckel*, *supra*, in speaking of the assignor: "In respect of the good will, he was, in the full sense of the term, their [the assignee's] trustee; nor could he strip himself, without their assent, of the relation and its duties. It is true, he was not bound to take a new lease in his own name, for their benefit, but, without their consent, it was only for their benefit that he could take it at all." "It was a breach of good faith, and of the trust and confidence which the plaintiffs reposed in him, and was therefore, according to the established doctrine of equity, a fraud the fruits of which he cannot be permitted to retain."

Even the refusal of the landlord to renew the lease to or for the benefit of such cestui

que trust does not, necessarily or ordinarily, entitle the assignor to take a renewal for himself.

If the rule were otherwise, ample room would be left for collusion which it might be difficult for the cestui que trust to expose. No such burden should be placed on the cestui que. It was said by Lord Chancellor King, in *Keech v. Sanford*, Cas. t. King 61, 25 Eng. Reprint, 223, 15 Eng. Rul. Cas. 455: "If a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to cestui que use; though I do not say there is a fraud in this case, yet he should rather have let it run out than to have had the lease to himself. This may seem hard that the trustee is the only person of all mankind who might not have the lease, but it is very proper that rule should be strictly pursued and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease on refusal to renew to cestui que use."

Chancellor Kent, in the case of *Davoue v. Fanning*, 2 Johns. Ch. 252, says of the decision in *Keech v. Sanford*, supra: "If we go through all the cases, I doubt whether we shall find the rule and the policy of it laid down with more clearness, strictness, and good sense. This decision has never been questioned."

Both cases, *Keech v. Sanford* and *Davoue v. Fanning* were cited with approval by this court in *Neal v. Cox*, Peck (Tenn.) 443.

The lower courts were in error, therefore, in holding that since the landlord, Mrs. Strong could not be restrained or prevented from renewing the lease to Lawless Brothers, by reason of that fact or by parity of reasoning the latter could hold under it for themselves and as against their vendee and assignee. This is a non sequitur.

The fact that both of the leases contained a provision that they should "not be assigned or transferred by the lessees or by operation of law without the written consent of the owner" cannot operate to affect the right of Fine to have Lawless Brothers decreed to hold the demised premises in trust. The trust relationship is forced on the firm from considerations of public policy,—to prevent persons in like situations from taking a benefit for themselves to the detriment of others to whom they are pledged not to do so. *Mitchell v. Reed*, supra. The quoted provision was meant to safeguard the right of the landlord. That right is a thing wholly distinct from the disability or liability of Lawless Brothers.

As already indicated, we are of opinion and hold, with both of the lower courts, that Fine may not through the medium of the trust relationship thrust by law on Lawless

Brothers, or of any assignment by that firm of its rights in the renewal, compelled by equity, force himself as tenant for the new term on Mrs. Strong. Her volition and her discretion as to the selection of a tenant, in view of the above stipulation in her contract, are not to be denied or overridden, further than is involved in the disqualification of Lawless Brothers to enjoy the fruits of their grossly inequitable conduct.

It appears that prior to the filing of the bill of complaint Mrs. Strong had brought a suit before a justice of the peace against Fine to dispossess him. That suit was enjoined. It is contended by Fine that the injunction should be perpetuated, the position advanced being that she was without status to maintain an action of unlawful detainer after she executed the lease in reversion, covering the new term, to Lawless Brothers. A lease in reversion is one which becomes effective only at the expiration of the term of the prior lease. The authorities in other jurisdictions are not in accord on the point whether, notwithstanding the execution of a second lease, the landlord remains clothed with such a right to the possession of the premises as that she may maintain a proceeding against the first tenant, who refuses to surrender. The conflicting authorities are collected in notes 120 Am. St. Rep. 36, L.R.A.1915C, 199. The rule, independent of any statute making special provisions to the contrary, appears by the weight of authority to be that, generally, the proceeding to dispossess may be maintained by the original landlord, on the theory that the lessee under a lease in reversion has no interest to that end until he gets possession; the duty remaining the landlord's to place his second lessee in possession. For the purpose of discharging the duty he may maintain a proceeding to dispossess the original tenant.

This court has not ruled the point, but the above view was indicated to be the true one in *McNairy v. Hicks*, 3 Baxt. 378, if the first tenant is holding under a claim of right. The intimation in *Marley v. Rodgers*, 5 Yerg. 217, is in favor of the landlord's right of action. We agree with the lower courts in holding that Mrs. Strong had the right to maintain the action of unlawful detainer under Thompson's Shannon's Code, § 5093.

The legal attitude of Lawless Brothers in this case—disqualification to take as against or to dispossess Fine—is itself a potent argument in favor of this right being yet in the landlord.

We do not find it necessary to discuss other assignments of error. The material rulings of the court of civil appeals, except

as above modified, are affirmed. A decree will pass accordingly; but should Mrs. Strong deem it proper, in view of Fine's claim to consideration at her hands, to yet insist upon her legal remedy to dispossess,

her right to have a writ to that end will be stayed for ninety days following entry of final decree herein. The injunction against Lawless Brothers will be made perpetual, and they will pay all costs of the cause.

Annotation—Right of assignor of lease as against the assignee to the renewal of the lease upon the expiration of the term.

"It has been a practice, particularly in leases from the Crown, from the Church, and from other corporations, to grant a further term to the old tenants in preference to strangers; and, as the expectation of renewal is rarely disappointed, such tenants are considered as having an ulterior interest beyond their subsisting term. This interest is generally, but improperly, called their tenant right of renewal; for a mere preference thus voluntarily given, in any individual instance, can never grow up into a compulsory obligation. A right to renewal can be founded only on the custom of the country in which the land lies, or upon express contract. Indeed a very great judge has said that an agreement by man having an estate of inheritance to make leases with covenant for perpetual renewal, each lease to contain the same covenant forever, is a species of contract not to be executed; a doctrine, however, which that learned judge never brought himself up to act upon, and which cannot possibly be admitted; for it has been so long held that such a covenant ought to be carried into execution, that, whether the judgment was originally right or wrong, it is so covered and sanctioned by decision that it would be infinitely too dangerous not to interpose a new rule in such cases. But, though independently of contract or custom, and merely as between landlord and tenant, there be no obligation upon the former to renew with the latter; yet the almost invariable recurrence of the grant to the same objects has begotten an idea of something like property, and men have been so far from treating this ulterior interest as precarious, that they have acted upon it, as if it were fixed and certain. Hence, leases of this sort are become a fund for settlements of every kind, for mortgages and other securities; and are subjected to the same limitations, and applied to the same provisions with the most permanent interests. This tenant right, as it is called, is recognized and protected by courts of equity in many instances. Hence, where a trustee, executor, or guardian avails himself of his situation,

and gets a renewal of a lease for his own benefit, the courts will direct it to be for the use of the cestui que trusts, or persons beneficially interested in the old lease. So, where a person who has only a partial interest as tenant for life, mortgagee, or mortgagor, from the circumstance of being in possession, takes the opportunity of renewing, such renewal shall be for the benefit of the person entitled to the reversion. And according to the broad principles of equity, it should seem that wherever a grant of a reversionary term is obtained to the prejudice of the old tenant, by undue means, whether by *suggestio falsi* or *suppressio veri*, the party so obtaining it, though an entire stranger, shall not be permitted to hold it to his own use." 5 Bacon, Abr. Leases (U) pp. 676, 677.

This tenant right of renewal has frequently been protected where one partner secures a renewal in his own name of a partnership lease; it being held that the new term inures to the benefit of the old tenant, the partnership. See note to Knapp v. Reed, 32 L.R.A.(N.S.) 869.

In *Phyfe v. Wardell* (1835) 5 Paige (N. Y.) 268, 28 Am. Dec. 430, this tenant right of renewal was recognized and used as the basis for protecting the rights of the assignor and his subtenant against the assignee, who had secured a renewal and then refused to recognize the subtenant under the renewal. It was held that, for the purpose of protecting these interests, the renewal was but a continuance of the old lease. This case, of course, like many others that recognize and protect the tenant right of renewal, is not within the scope of the present note. It is cited here as illustrative of the general principle, the soundness of which has never been questioned. The rule is particularly applicable in cases in which the person who secures the renewal for himself is prior thereto in some position of trust respecting the lessee. A prior position of trust, however, is not the determining factor. The rule will be applied in any case in which the person securing the

renewal is enabled to do so because of his connection with the lease, if such connection was such as to create a fiduciary relation between him and the tenant who seeks to renew. Or, as was the case in *Lee v. Vernon* (1776) 5 Bro. P. C. 10, 2 Eng. Reprint, 500, where the renewal was secured by fraud or misrepresentation, the rule will be applied.

But no case has been found in which the lessee's assignee has been protected in his tenant right to renew as against the lessee who has secured the renewal for himself, unless some other element or circumstance entered creating more of a fiduciary relation between the parties than exists by virtue of the assignment. Thus in *FINE v. LAWLESS*, ante, 1045, the assignee was also the vendee of the assignor's business carried on in the premises, together with its good will. Whether the right would have been protected in the absence of this added element is at least problematical.

In *Bennett v. Vansyckel* (1855) 4 Duer (N. Y.) 462 (appeal dismissed in (1859) 18 N. Y. 481) there was a supplementary agreement, which the court treated as part of the sublease, in which the lessee agreed to give to the sublessee "all the advantages of being your [lessor's] tenants, as regards future renting, etc." The court held that this could refer to nothing else than the tenant right, so that the lessee was in equity obliged to transfer the new lease in accord with his expressed agreement. It also pointed out the fact that the plaintiffs were undertenants of defendant, and not assignees. In *McDonald v. Fiss* (1900) 54 App. Div. 489, 67 N. Y. Supp. 34, the court explained the *Bennett* Case as follows: "In the case of *Bennett v. Vansyckel* (1855) 4 Duer (N. Y.) 462, the good will of a lease or the tenant right was recognized as an interest of value which a court of equity would protect; and the assignor of a lease, who had, before its expiration, taken out a renewal in his own name, was decreed to hold it as trustee for his assignee; but the relief was granted in that case solely upon the ground that at the time of the assignment of the lease *Vansyckel*, the assignor, had contracted with his assignee that he would give him all the advantage of being the tenant of the lessor as regarding future renting. The court held that the transfer of the good will of the lease was an essential part of the contract of the parties, founded on a valuable consideration, and relating to an interest which, although

in reality no more than a reasonable expectation, courts of equity had long been accustomed to recognize and protect. It was a valid contract necessarily implying that no act should be done by the defendant to deprive the plaintiffs of the advantages it was designed to secure to them, and one which a court of equity was bound to enforce in the only manner in which, in consequence of the wrongful acts of the defendant, it was capable of being executed. The court said that the conduct of the defendant in secretly obtaining a renewal of the lease was a plain violation of the contract, and was, therefore, a fraud, the fruits of which he could not be permitted to retain. An appeal was taken by the defendant, but the judgment was affirmed upon the single ground that the defendant, by his contract, with respect to the good will of the lease, had placed himself in a situation similar to that of a trustee."

In *McDonald v. Fiss* (N. Y.) supra, some of the language used by the court would support the plain proposition that the assignee of a leasehold would not be protected against his assignor who has secured a renewal for himself, even though the assignor at the time of the assignment truthfully represented that the landlord was accustomed to renew the lease; but the actual basis for the holding was the fact that the renewal was not secured by the assignor, but by a company that had had no prior dealings concerning the lease, and the plaintiff utterly failed to show any collusion between it and his assignor. J. W. M.

NORTH CAROLINA SUPREME COURT.

B. R. RAINES, Admr., etc., of Bub Raines,
Deceased, Appt.,

v.

SOUTHERN RAILWAY COMPANY.

(169 N. C. 189, 85 S. E. 294.)

Master and servant — injury to minor — contributory negligence.

1. An inexperienced fifteen-year-old boy sent by a railroad company to flag a train, and not given the means of giving the signal with due regard to his own safety, is not guilty of contributory negligence which will prevent recovery in case he is hit by the train, if he exercises the degree

Note. — For presumption and burden of proof as to pecuniary loss in death action, see annotation following this case, post,

of care for his own protection which a person of his age, intelligence, and experience would reasonably have used under the circumstances.

For other cases, see Master and Servant, II. c, 1, in Dig. 1-52 N. S.

Appeal — alternative instructions — curing error.

2. An erroneous instruction is not cured by an alternative one which is correct.

For other cases, see Appeal and Error, VII. k, 4, in Dig. 1-52 N. S.

Proximate cause — negligent injury — failure to stop train.

3. Failure of those in charge of a railroad engine to stop if they were able to do so by the exercise of proper care after discovering a youth asleep on the track, and becoming aware of his perilous position, is the proximate cause of the injury inflicted upon him by the train.

For other cases, see Proximate Cause, III. in Dig. 1-52 N. S.

Master and servant — Federal Employers' Liability Act — contributory negligence.

4. Under the Federal Employers' Liability Act contributory negligence merely reduces the amount of damages.

For other cases, see Master and Servant, II. c, 1, in Dig. 1-52 N. S.

Death — adult — recovery by parent.

5. A reasonable expectation by a parent of receiving pecuniary aid from his son after he becomes of age will justify an award of damages under the Federal Employers' Liability Act for the loss of such aid in case of the death of the son during minority.

For other cases, see Death, II. b, in Dig. 1-52 N. S.

(May 19, 1915.)

A PPEAL by plaintiff from a judgment of the Superior Court for Buncombe County, in defendant's favor, in an action brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence. New trial granted.

Statement by Walker, J.:

The son of the plaintiff, who was named Bub Raines, was employed by the defend-

ant as a member of the section crew on its line between Asheville, North Carolina, and Spartanburg, South Carolina, and at the time of the accident he had been sent out to flag an approaching train. In attempting to do so he was struck by the train and killed. At the time he was between fifteen and sixteen years old. With reference to his contributory negligence, the court instructed the jury as follows: "If he sat down near the track in a dangerous position, if you find he thought that he was far enough away, if he put himself in a perilous position on the railroad track, and he was killed, the court charges you that he would be guilty of contributory negligence, and it would be your duty to answer the second issue, 'Yes.'"

Upon the third issue, as to damages, the court charged the jury as follows: "There is no presumption in law that Bub Raines would have contributed to the support of his father after he arrived at the age of twenty-one years, and the burden is on the plaintiff to satisfy the jury by the greater weight of the testimony that he would have continued to contribute to the support of his father after he arrived at the age of twenty-one years; and the burden is also upon the plaintiff to satisfy the jury as to the amount of the contribution he would have made to his father after arriving at the age of twenty-one years, and, unless the jury are satisfied by the greater weight of the testimony that he would have contributed to the support of his father after reaching the age of twenty-one years, then the jury could only award in this case, if they come to the issue of damages, the present value of such contributions as you find from the evidence Bub Raines would have made to his father from the time he was killed until he reached the age of twenty-one years."

Exceptions were duly taken to these instructions and each of them. The jury returned the following verdict:

"(1) Was the plaintiff's intestate, Bub Raines, killed by the negligence of the defendant, Southern Railway Company, as alleged in the complaint? Answer: Yes.

1056; and references therein to annotation on related questions. Generally as to questions distinctive to the action for death, see L.R.A. Indexes under the titles, "Death" and "Damages," subtitles, "Measure of compensation—Death."

The general subject of contributory negligence of children is discussed in the annotation following Jacobs v. Koehler Sporting Goods Co. L.R.A.1917F, 10.

Various phases of the doctrine of last clear chance which was involved in the above case upon the assumption that the deceased was originally guilty of negligence

are discussed in the note to Bourrett v. Chicago & N. W. R. Co. 36 L.R.A.(N.S.) 957, and other notes there referred to. For later notes and cases on this subject, see L.R.A. Indexes under the title, "Negligence."

The Federal Employers' Liability Act forms the subject of extensive notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 47. For later annotation and cases on questions arising under this act, see L.R.A. Indexes under the title, "Master and Servant."

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"(2) Did the plaintiff's intestate, Bub Raines, by his own negligence contribute to his death, as alleged in the answer? Answer: Yes.

"(3) What amount, if any, is the plaintiff entitled to recover? Answer: \$192."

Judgment was entered thereon, and plaintiff appealed.

Messrs. Jones & Williams for appellant.

Messrs. Martin, Rollins, & Wright for appellee.

Walker, J., delivered the opinion of the court:

The charge as to contributory negligence and damages was erroneous. If the plaintiff was young and inexperienced, and was not provided with the means of giving the signal, with due regard to his own safety, and by reason thereof he was killed while in the exercise of that degree of care for his own protection which a person of his age, intelligence, and experience would ordinarily have given under the circumstances, he would not be guilty of contributory negligence. *Ensley v. Sylva Lumber & Mfg. Co.* 165 N. C. 687, 81 S. E. 1010; *Alexander v. Statesville*, 165 N. C. 527, 81 S. E. 763. In the case last cited, we said: "The rule of law in regard to the negligence of an adult and the rule in regard to that of an infant of tender years is quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly, and cannot be visited upon another. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than of one of seven; and of a child of seven less than of one of twelve or fifteen. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case,"—citing *Murray v. Richmond & D. R. Co.* 93 N. C. 92; *Bottons v. Seaboard & R. Co.* 114 N. C. 699, 25 L.R.A. 784, 41 Am. St. Rep. 799, 19 S. E. 730; *Washington & D. R. Co. v. Gladmon*, 15 Wall. 401, 21 L. ed. 114; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Mangam v. Brooklyn R. Co.* 38 N. Y. 455, 98 Am. Dec. 66; *Shearm. & Redf. Neg.* § 49, and other authorities.

All that is required of an infant is that he exercise care and prudence equal to his capacity. *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67.

Examined in the light of this rule, the instruction as to contributory negligence L.R.A.1918C.

was too broad, and should have been restricted to its proper limits. If the decedent was standing too near the track, or at a place near the track which brought him within the zone of danger, and his exposure to injury was not the result of any failure to exercise that degree of care which one of his age and knowledge would have taken for his safety under the circumstances, his act would not necessarily be contributory negligence. He was not an intruder or "licensee," within the rule of some of the cases cited by appellee. If a person places himself on a track in front of a moving train, or too near thereto for safety, and does so wilfully or designedly or negligently, he must take the consequences; but, where the act was not wilful, and it was not so in this case, it must have been negligent, in order to authorize a finding of contributory fault on his part, and the negligence must have been the proximate cause of the injury. The court excluded this question of negligence from the consideration of the jury, when it gave the instruction that "if he sat near the track in a dangerous position, if you find that he thought that he was far enough away, . . . it would be your duty to answer the second issue, 'Yes.'"

The alternative proposition, that "if he put himself in a perilous position on the railroad track," it would be contributory negligence, if it was correct, did not cure the error, as we cannot tell by which branch of the instruction the jury were guided to their verdict. *Tillett v. Lynchburg & D. R. Co.* 115 N. C. 662, 20 S. E. 480, 6 Am. Neg. Cas. 121; *Williams v. Haid*, 118 N. C. 481, 24 S. E. 217; *Edwards v. Atlantic Coast Line R. Co.* 132 N. C. 99, 43 S. E. 585. An error in the charge must be eliminated by a retraction of it, or a proper explanation, which will remove the wrong impression made by it; and the giving of another correct, but conflicting, instruction, does not answer the purpose, as it does not produce the desired result. If the deceased had fallen asleep on the track, his negligence in doing so would not be contributory, in a legal sense, unless it was the proximate cause of the injury to him, and yet the court charged the jury, in effect, that it would be. If, notwithstanding his negligence in sleeping on the track, the defendant's engineer, after he saw him lying there and became aware of his perilous situation, could, by exercising the proper care, have stopped the train in time to avoid the injury, and failed to do so, his negligence in not doing so would be considered as the proximate cause of intestate's death.

The Federal Employers' Liability Act does not, as we understand it, change the rule

of law as to what is contributory negligence, except as to its legal effect upon the issue as to damages, an affirmative finding in respect of such negligence reducing the amount of damages as indicated in the act.

We are also of the opinion that there was error in the instruction of the court in regard to the measure of damages, and, as the question may be again raised, we will now decide it. The intestate, at the time of his death, was employed in interstate commerce, and the case was therefore properly tried under the Federal Employers' Liability Act. With respect to damages the court instructed the jury that the burden was on the plaintiff to satisfy the jury that the intestate would have continued to contribute to the support of his father after he arrived at the age of twenty-one years, and, further, that he must satisfy them as to the amount of such contribution as he would have made after his maturity. This could hardly be the rule intended by Congress, as such facts would be incapable of anything like accurate or even approximate proof. They depend so much upon contingencies as to be beyond the human ken. We cannot foretell what a man will do with his estate in the future, and therefore Congress, aware of this difficulty in making proof, required that the amount of recovery should be measured by the reasonable expectation of benefit which would accrue to the parent, or a dependent, by the continuance of the life in question. We think this part of the charge, in its general scope and tendency, was not in accordance with the correct principle to be gathered from the evident meaning and purpose of the act, and we have already so decided. Here the intestate was under no obligation to support and maintain his father. 29 Cyc. 1619. What he might do for him, in that way, would be voluntary on his part,—a mere gift or gratuity,—prompted, it is true, by filial devotion or duty, but nevertheless a moral, and not a legal, obligation. *Dooley v. Seaboard Air Line R. Co.* 163 N. C. 454, L.R.A.1916E, 185, 79 S. E. 970. We said in that case, quoting from and approving the language of Justice Pollock in *Franklin v. Southeastern R. Co.* 3 Hurlst. & N. 211, 157 Eng. Reprint, 448, 8 Eng. Rul. Cas. 419: "If, then, the damages are not to be calculated on either of these principles, nothing remains except that they should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life. Whether the plaintiff had any such reasonable expectation of benefit from the continuance of his son's life, and, if so, to what extent, were the questions left in this case to the jury. The proper question, L.R.A.1918C.

then, was left, if there was any evidence in support of the affirmative of it. We think there was. The plaintiff was old and getting infirm; the son was young, earning good wages, and apparently well disposed to assist his father, and, in fact, he had so assisted him to the value of 3s. 6d. a week. We do not say that it was necessary that actual benefit should have been derived; a reasonable expectation is enough, and such reasonable expectation might well exist, though, from the father not being in need, the son had never done anything for him."

Again this court says in the *Dooley Case*: "A person entitled to the benefit of the action may recover damages for the loss of a pecuniary benefit to which he was not legally entitled, but which it is reasonably probable he would have received except for the death."—citing *Tiffany, Death by Wrongful Act*, 2d ed. § 159.

Mr. Tiffany has classified the losses which may be considered in assessing the damages, and the persons entitled to be compensated therefor. The first description of loss is principally confined to a husband's loss of his wife's services, a wife's loss of her husband's support and services, a parent's loss of the services of a minor child, and a minor child's loss of the support of a parent. But the statutes do not confine the benefit of the action to husbands, wives, minor children, and parents of minor children. The second description of loss includes the loss by the beneficiary of any pecuniary benefit which he might reasonably have expected to receive during the lifetime of the deceased by gift, and also the loss of any accumulations which it is probable that the deceased would have added to his estate had he lived out his natural life, and which the beneficiary would probably have received by inheritance. He then proceeds to say: "Thus the second description of loss may be divided into (1) losses of prospective gifts; and (2) losses of prospective inheritance. The loss sustained by a husband, wife, minor child, and a parent of a minor child may be of both descriptions. The loss sustained by an adult child, parent of an adult child, or collateral relative, can only be of the latter description."

We approved this elucidation of the act in *Dooley's Case*, in which Justice Allen so fully and clearly explains this new law, and cited in support of Mr. Tiffany's statement the following cases: *Greenwood v. King*, 82 Neb. 22, 116 N. W. 1128; *Hillebrand v. Stans Biscuit Co.* 139 Cal. 236, 73 Pac. 163, 14 Am. Neg. Rep. 520; *Dukeman v. Cleveland, C. C. & St. L. R. Co.* 237 Ill. 108, 86 N. E. 712; *International & G. N.*

R. Co. v. Kindred, 57 Tex. 498; Hopper v. Denver & R. G. R. Co. 84 C. C. A. 21, 155 Fed. 277. The case last cited was much like this one. The action was there brought by a father for loss by the death of his daughter, who was killed by the negligence of the defendant in that case. She had not contributed anything to her father's support, nor had she rendered any appreciable service to him. He had, on the contrary, been at considerable expense in supporting, maintaining, and educating her. Judge Van Devanter, then circuit judge, now a Justice of the Supreme Court of the United States, said in regard to the father's right to damages: "Considering this evidence in the light of the natural influence or prompting of filial ties, we think it would have sustained a finding that there was a reasonable expectation of substantial, though not large, pecuniary benefit to the father from a continuance of the life of the daughter,"—citing several cases to sustain his view.

It may here be remarked that the Dooley Case presents facts in almost exact analogy to those we are now considering, as it was an action by the father for loss sustained by the death of his son. In this case it appears that the intestate was a boy of good health, earning \$1.10 per day, and was contributing regularly to the support of his father. He was sober, industrious, and of average intelligence for his age. His conduct towards his parent tended to show that he was, in mind and disposition, imbued with a proper conception of his filial duty and entertained the proper affection for his father. The evidence in this case of a reasonable expectation by the father of benefit or pecuniary aid or other advantage of gift or inheritance, if the life of his son had been spared to him, was sufficient for submission to the jury. Before closing this opinion, we must advert to the recent case of Irvin v. Southern R.

Co. 164 N. C. 5, 80 S. E. 78, where it is said: "We held in Dooley v. Seaboard Air Line R. Co. supra, that an action may be maintained under the Federal statute in behalf of a parent when there is a reasonable expectation of pecuniary benefit from the continuance of the life of the child, although the child has not contributed to the support of the parent, and the authorities which support this principle also hold that evidence of contributions by the child to the support of the parent is material and important in determining whether such reasonable expectation exists, and in the assessment of damages which may be recovered, and, if such evidence is material and competent for the parent, the defendant may prove the contrary."

That case sustains our conclusion that the instruction as to damages was erroneous, and was in harmony with what is thus said in American R. Co. v. Didricksen, 227 U. S. 143, 57 L. ed. 456, 33 Sup. Ct. Rep. 224: "The cause of action which was created in behalf of the injured employee did not survive his death, nor pass to his representatives. But the act, in case of the death of such an employee from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee. The damage is limited strictly to the financial loss thus sustained."

And the case of Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 175, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806, is to the same effect. We think that the law is unquestionably settled by those decisions as to the measure of damages under the Federal act.

New trial.

Annotation—Presumption and burden of proof as to pecuniary loss in death action.

Actions to recover damages for negligently killing a person are statutory. As a rule, these statutes authorize the recovery of damages for negligently causing the death of a person in amount sufficient to compensate for the pecuniary loss either to the estate of the deceased or to the statutory beneficiaries, due to the destruction of the decedent's life. In a note in L.R.A.1916E, 142, it is pointed out that the term "pecuniary loss" is used in a broad sense to preclude the recovery of sentimental damages, I. R.A.1918C.

and that it is not so limited as to confine it to an immediate loss of money or property, but it includes the loss of prospective advantages of a pecuniary nature of which there was a reasonable expectation, and which were cut off by the premature death. As pointed out in the present note, the burden of proof rests upon the plaintiff in an action of the character under consideration to show the pecuniary loss to the estate or to the decedent's statutory beneficiaries. The requirement in this regard, how-

ever, is satisfied by vague and indefinite evidence in cases of the negligent killing of infants, since there is a presumption of pecuniary loss arising in favor of the parents. Generally such a presumption also arises in favor of a surviving widow and minor children. This presumption avoids the necessity at least of producing direct evidence of pecuniary loss, and, as pointed out in this note, in many instances it relieves the family of the deceased, whom he was supporting at the time of his death, of the necessity of introducing evidence as to many matters which would ordinarily be regarded as essential to show pecuniary loss.

One of the essential facts to be shown in order to establish pecuniary loss to the estate of the deceased or to his statutory beneficiaries is the decedent's age and life expectancy, and also that of his statutory beneficiaries where the action is in their behalf. As a rule, the life expectancy may be shown by the use of approved mortality or life expectancy tables. The admissibility of such tables in evidence, as well as the necessity for their use, is discussed in a note appended to *Buehl v. Lidgerwood Rural Teleph. Co.* post, 1071.

As a rule, pecuniary loss is based upon contributions by the deceased to his statutory beneficiaries. These are generally made either from some business in which the deceased was engaged, or from his earnings in a gainful employment; hence the earnings of the deceased in an employment which he was following at the time of his death is a material question, and evidence relative thereto is admissible. For the development of this question with reference to the admissibility of evidence of the decedent's earnings in other occupations than the one he was pursuing at the time of his death, or of the earnings of others, and the right to have such earnings considered as bearing upon the decedent's earning capacity, see note appended to *West Salem v. Industrial Commission*, post, 1080.

The rule as to the admissibility of evidence as to the decedent's profits from his business is not as clearly settled as is the rule relative to evidence as to the wages which the deceased was receiving at the time of his death. Such evidence is very generally held admissible if the labor of the deceased was the chief element of the income; in other words, if the business did not require the investment of much, if any, capital. Where, however, capital entered largely into the

business, it is denied that evidence is admissible as to the decedent's profits from the business to show his earning capacity. Although the rule is broadly stated in *Spreen v. Erie R. Co.* post, 1086, that evidence is admissible as to the contributions made by the deceased from a business for the support of his family, as distinguished from evidence as to the profits of the business, as a matter of fact, however, in this case the business of the deceased did not require the investment of very much capital, his labor being the chief element. For a consideration of the question, see note appended to this case.

In some cases the earnings of the deceased cannot be directly shown, and it becomes a somewhat important matter as to whether or not opinion evidence is admissible to show the value of the decedent's services. This matter is considered in a note appended to *Sceba v. Manistee R. Co.* post, 1096, from which it appears that the general rule authorizing the receipt of opinion evidence as to value has been applied in cases of the character under consideration, and opinion evidence has been received as to the value of the decedent's services.

As heretofore indicated, the relation existing between the deceased and his statutory beneficiaries very largely affects questions as to the character and sufficiency of evidence of pecuniary loss. This question, where the action is in behalf of the decedent's estate, is covered in a note appended to *Nicoll v. Sweet*, post, 1111; where the action is by, or in behalf of, the parents, in a note appended to *Pittsburgh, C. C. & St. L. R. Co. v. Collard*, L.R.A. —, —; and where the action is in behalf of other beneficiaries, the matter is covered in a note appended to *Nashville, C. & St. L. R. Co. v. Anderson*, post, 1122.

Collateral kindred.

Statutes authorizing the recovery of damages resulting to designated persons from the negligent killing of a relative are generally construed to limit the recovery to compensation for the pecuniary loss suffered by such beneficiaries. To be entitled to recover substantial damages under these statutes where the beneficiaries are collateral kindred of the decedent, it is essential to produce evidence of pecuniary loss, for there is no presumption of pecuniary loss to collateral kindred by the death of a relative.¹ It has, however, been held that

¹ *Thompson v. Chicago, M. & St. P. R. Co.* (1900) 104 Fed. 845; *Re California Nav.*

recovery may be had of substantial damages in behalf of collateral kindred without proof of specific pecuniary loss, and that from the general evidence in the case relative to the age, health, occupation, earnings, etc., of the deceased, the question of whether or not collateral kindred suffered pecuniary loss by the death of a relative is for the jury.²

& Improv. Co. (1901) 110 Fed. 678; Central of Georgia R. Co. v. Alexander (1906) 144 Ala. 257, 40 So. 424; Burk v. Arcata & M. River R. Co. (1899) 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065; Raiser v. Chicago & A. R. Co. (1905) 215 Ill. 47, 106 Am. St. Rep. 153, 74 N. E. 69, 2 Ann. Cas. 802; Chicago Terminal Transfer R. Co. v. O'Donnell (1904) 213 Ill. 545, 72 N. E. 1133, 17 Am. Neg. Rep. 481; Holton v. Daly (1883) 106 Ill. 131; Chicago v. Scholten (1874) 75 Ill. 468; Huddleston v. Henderson (1913) 181 Ill. App. 176; Romeo v. Western Coal & Min. Co. (1910) 167 Ill. App. 67; Chicago Bridge & I. Co. v. La Mantia (1904) 112 Ill. App. 43; Locher v. Kluga (1901) 97 Ill. App. 518; Falkenau v. Rowland (1897) 70 Ill. App. 20, 3 Am. Neg. Rep. 530; Standard Forgings Co. v. Holmstrom (1914) 58 Ind. App. 306, 104 N. E. 872, 7 N. C. C. A. 713; Cleveland, C. C. & St. L. R. Co. v. Drumm (1906) 32 Ind. App. 547, 70 N. E. 286; Wabash R. Co. v. Cregan (1899) 23 Ind. App. 1, 54 N. E. 767; Diebold v. Sharp (1898) 19 Ind. App. 474, 49 N. E. 837; Morgan v. Orange Circle Min. Co. (1911) 160 Mo. App. 99, 141 S. W. 735; Grogan v. Broadway Foundry Co. (1884) 14 Mo. App. 588; Jones v. Charleston & W. C. R. Co. (1914) 98 S. C. 197, 82 S. E. 415.

Chicago v. Scholten (1874) 75 Ill. 468, holding that where the next of kin are collateral kindred, and have never received pecuniary aid from the deceased, proof of such kindredship will warrant the recovery of nominal damages; but where the deceased is a minor and leaves a father entitled to his services, the law presumes there has been a pecuniary loss for which compensation under the statute may be given.

And see Hillebrand v. Standard Biscuit Co. (1903) 139 Cal. 233, 73 Pac. 163, 14 Am. Neg. Rep. 520, holding that the rule that collateral heirs must show pecuniary loss does not apply to the parents of the deceased.

Compare with *McClagherty v. Rogue River Electric Co.* (1914) 73 Or. 135, 140 Pac. 64, 144 Pac. 569, holding that pecuniary loss to the statutory beneficiaries may be proved as an element of damages, but such proof is not essential to a recovery.

* *Kelly v. Twenty-third Street R. Co.* (1888) 14 Daly (N. Y.) 418, affirmed in (1899) 113 N. Y. 628, 20 N. E. 878; *Dickens v. New York C. R. Co.* (1864) 1 Abb. App. Dec. (N. Y.) 504, 5 Am. Neg. Cas. 54; but compare with *Mitchell v. New York C. & H. R. Co.* (1874) 2 Hun. (N. Y.) 535, 5 Thomp. & C. 122, subsequent appeal in 1. R. A. 1918C.

Parents—(a) death of young child.

It has been frequently asserted and it is held by the great weight of authority, that there is a presumption of pecuniary loss to parents from the death of a young child, and there need be no specific evidence of pecuniary loss in order to entitle the parent to recover substantial damages.³ This rule is not in conflict

(1876) 64 N. Y. 655, holding that a husband and next of kin of a married woman cannot recover for pecuniary loss due to her death without evidence as to her mental and physical capabilities and situation and circumstances in life.

* *Little Rock & Ft. S. R. Co. v. Barker* (1882) 39 Ark. 491; *Hillebrand v. Standard Biscuit Co.* (1903) 139 Cal. 233, 73 Pac. 163, 14 Am. Neg. Rep. 520; *Grace & H. Co. v. Strong* (1906) 224 Ill. 630, 79 N. E. 967; *Chicago & E. I. R. Co. v. Huston* (1902) 196 Ill. 480, 63 N. E. 1028; *Bradley v. Sattler* (1895) 156 Ill. 603, 41 N. E. 171; *Chicago v. Hesing* (1876) 83 Ill. 204, 25 Am. Rep. 378; *Rockford, R. L. & St. L. R. Co. v. Delaney* (1876) 82 Ill. 198, 25 Am. Rep. 308; *Huff v. Peoria & E. R. Co.* (1906) 127 Ill. App. 242; *Joliet v. Weston* (1887) 22 Ill. App. 225, affirmed in (1888) 123 Ill. 641, 14 N. E. 665; *Smiley v. East St. Louis & Suburban R. Co.* (1912) 169 Ill. App. 29, affirmed in (1912) 266 Ill. 482, 100 N. E. 157; *Nordhaus v. Vandalia R. Co.* (1909) 242 Ill. 166, 89 N. E. 974; *Chicago v. Keele* (1885) 114 Ill. 222, 55 Am. Rep. 860, 2 N. E. 267; *Elwood v. Addison* (1901) 26 Ind. App. 28, 59 N. E. 47; *Curran v. Lewiston, A. & W. Street R. Co.* (1914) 112 Me. 96, 90 Atl. 973; *Youngquist v. Minneapolis Street R. Co.* (1907) 102 Minn. 501, 114 N. W. 259; *Baldwin v. Harvey* (1915) 191 Mo. App. 233, 177 S. W. 1087; *McGovern v. New York C. & H. R. R. Co.* (1876) 67 N. Y. 417; *Prendegast v. New York C. & H. R. R. Co.* (1874) 58 N. Y. 652; *Ihl v. Forty-Second & G. Street Ferry R. Co.* (1872) 47 N. Y. 317, 7 Am. Dec. 450; *Oldfield v. New York & H. R. Co.* (1856) 14 N. Y. 310; *Predmore v. Consumers' Light & P. Co.* (1904) 99 App. Div. 551, 91 N. Y. Supp. 118; *Gorham v. New York C. & H. R. R. Co.* (1881) 23 Hun. (N. Y.) 449; *Russel v. Windsor S. B. Co.* (1900) 126 N. C. 961, 36 S. E. 191; *Davis v. Seaboard Air Line R. Co.* (1904) 136 N. C. 116, 48 S. E. 591, 1 Ann. Cas. 214; *Atkeson v. Jackson Estate* (1913) 72 Wash. 233, 130 Pac. 102; *Atrops v. Costello* (1894) 8 Wash. 149, 35 Pac. 620; *Blackley v. Toronto R. Co.* (1897) 27 Ont. App. Rep. 44, note; *Ricketts v. Markdale* (1900) 31 Ont. Rep. 610; *London & W. Trust Co. v. Grand Trunk R. Co.* (1910) 22 Ont. L. Rep. 262; *McKeown v. Toronto R. Co.* (1908) 19 Ont. L. Rep. 361; *Pedlar v. Toronto Power Co.* (1913) 29 Ont. L. Rep. 527, 15 D. L. R. 684; *Davidson v. Stuart* (1903) 34 Can. S. C. 215; *Brown v. British Columbia Electric R. Co.* (1910) 15 B. C. 350.

The mother is the lineal kindred of her

with the rule that the burden is upon the plaintiff in actions of this character to prove the different elements necessary to recover, including the pecuniary loss suffered by the beneficiaries. There is, however, a vital distinction between the evidence necessary to establish pecuniary loss to collateral kindred and that necessary to show pecuniary loss to a parent from the death of a child. The law does not require impossibilities.

It is recognized that it is not practicable in actions to recover compensation to parents for loss due to negligently killing a child of tender years to furnish direct evidence of any specific pecuniary loss, but that nevertheless it cannot be said as a matter of law that there is no pecuniary damage in such cases, or that the expense of maintaining and educating the child would necessarily exceed the pecuniary advantage from his

continued life. Moreover, the statute authorizes a recovery of damages for negligently killing a person, and makes no exception as to children of tender years. In obedience to the spirit of the requirements of this statute as well as the natural dictates of humanity, and in accord with the common observation and experience of mankind, by the weight of authority pecuniary loss is presumed to result to parents from the death of a child, although of tender years.⁴ And the jury have the right to act upon their knowledge and experience, and, without specific proof, hold that the services of a young child are of value to the parents, and to estimate such value.⁵ While it is not the purpose of this note to consider the question as to the character of the evidence necessary or admissible to show pecuniary loss, as that subject is covered by

son, and hence is presumed in law to have sustained actual damages by his death. *Smiley v. East St. Louis & Suburban R. Co.* (1912) 169 Ill. App. 29, affirmed in (1912) 256 Ill. 482, 100 N. E. 157; *Nordhaus v. Vandalia R. Co.* (1909) 147 Ill. App. 274, affirmed in (1909) 242 Ill. 166, 89 N. E. 974; *Chicago v. Keefe* (1885) 114 Ill. 222, 55 Am. Rep. 860, 2 N. E. 267.

Bradley v. Sattler (1895) 156 Ill. 603, 41 N. E. 171, holding that since a mother is entitled to the earnings of her son, where the husband and father is dead, she is entitled to recover substantial damages for the son's death without proving pecuniary loss.

⁴ *Little Rock & Ft. S. R. Co. v. Barker* (1882) 39 Ark. 491, holding that where the death of a person earning or capable of earning wages or of rendering service is the subject of an action, the amount he is earning or is capable of earning at the time of his death may be proved by witnesses as the basis of forming a judgment of probable future earnings; but where the death of a child incapable of earning anything or rendering services of any value at the time of his death is the subject of an action, the value of the probable future services to his parents during his minority must, in the nature of things, be a matter of conjecture.

Elwood v. Addison (1901) 26 Ind. App. 28, 59 N. E. 47, holding that where the father of a minor seven years old sues to recover damages for his wrongful death, the law implies a pecuniary loss for which compensation is to be made.

Baldwin v. Harvey (1915) 191 Mo. App. 233, 177 S. W. 1087, holding that as to a child nineteen months old, the natural value of its services during minority are not susceptible of exact proof, but the law as well as the express direction of the statute leaves it to the good sense, observation, and experience of the jury, guided by the facts and circumstances. The law allows the J.R.A.1918C.

jury to presume that the child would be dutiful and obedient, and from that to figure what its services would be worth.

Predmore v. Consumers' Light & P. Co. (1904) 99 App. Div. 551, 91 N. Y. Supp. 118, holding that a parent is entitled to recover more than nominal damages for the death of a young child; *Gorham v. New York C. & H. R. R. Co.* (1881) 23 Hun (N. Y.) 449; *Oldfield v. New York & H. R. Co.* (1856) 14 N. Y. 310; *Ihl v. Forty-Second Street & G. Street Ferry R. Co.* (1872) 47 N. Y. 317, 7 Am. Rep. 460; *Prendergast v. New York C. & H. R. R. Co.* (1874) 58 N. Y. 652.

Atkeson v. Jackson Estate (1913) 72 Wash. 233, 130 Pac. 102, holding that to recover more than nominal damages for the death of a child of tender years, proof of special pecuniary damage is not essential, and recovery is not prevented by the probability that the cost of the maintenance of the child during minority would have exceeded her earnings.

In North Carolina, substantial damages are also allowed for the death of children of tender years, although there is no proof of any special pecuniary loss to anyone from such death. *Russel v. Windsor S. B. Co.* (1900) 126 N. C. 961, 36 S. E. 191; *Davis v. Seaboard Air Line R. Co.* (1904) 136 N. C. 116, 48 S. E. 591, 1 Ann. Cas. 214.

⁵ *O'Mara v. Hudson River Co.* (1868) 38 N. Y. 445, 98 Am. Dec. 61, holding that the jury have a right to act upon their knowledge, and, without specific proof, hold that the services of a boy from eleven to twenty-one years of age are valuable to the parents, and to estimate such value.

Gorham v. New York C. & H. R. R. Co. (N. Y.) supra, holding that, in an action by parents to recover for the wrongful death of their six-year-old child, the jury may estimate their pecuniary loss, although there is no direct evidence of such loss.

another note in this series, it may be said here that the presumption of pecuniary loss to parents by the death of a child does not render unnecessary any evidence on the point, but obviates the necessity of producing any direct evidence of pecuniary loss, leaving the burden upon the plaintiff to produce only such evidence as may be reasonably possible, and from which the jury may assess the pecuniary loss. For example, evidence as to the age, sex, health, disposition, etc., of the child, and as to the age, health, condition, circumstances, etc., of the parents.

It has, however, been held that the burden of proof is upon the parents of a child of tender years to prove actual pecuniary damages resulting from its death, and, in the absence of such proof, only nominal damages may be recovered.⁶ And recovery of even nominal damages has been denied where there was no allegation or proof of pecuniary loss to parents for the death of a child of tender years.⁷

In Georgia, where capability of the child to render services at the time of the death is essential to the right of recovery, it is held that there is a conclusive presumption that an infant less than two years old is incapable of performing services of value to his parents, and since the loss of services is the basis of an action by a parent for negligently killing his child, no recovery can be had for negligently killing a child under two years of age. It is a question for the jury whether a child over two years of age is capable of

rendering services of value to his parents.⁸

—(b) for death of child having an earning capacity or earning wages.

Where a child is killed who was old enough to be or was actually employed in a gainful occupation, pecuniary loss and substantial damage will be presumed in favor of the parent.⁹ And this presumption is not conclusively overcome by evidence that the decedent was self-supporting and that his parent resided in another state, and had demanded no pecuniary assistance from him for several years.¹⁰ In order to recover in behalf of the parents of a boy who was working for wages, it is not necessary to satisfy the jury that the boy would have continued to contribute to the support of his parents after reaching majority, had he lived.¹¹ No pecuniary loss to parents by the death of a child need be shown where the damages recoverable are compensation for the life lost, and not merely the pecuniary loss to the parents.¹²

Widow and children.

While there is a presumption that a married man having minor children is supporting or aiding in the support of, his wife and children, and hence a presumption of pecuniary loss to widow and children by his death, nevertheless only such damages are recoverable as evidence on the part of the plaintiff shows to be the pecuniary loss to the widow and children, and the burden of proof is upon the plaintiff to show such loss, although the presumption of pecu-

⁶ *Hamilton v. Morgan's, L. & T. R. & S. S. Co.* (1890) 42 La. Ann. 824, 8 So. 586.

⁷ *Hurst v. Detroit City R. Co.* (1891) 84 Mich. 539, 48 N. W. 44, holding that in an action to recover damages for the death of a child for the benefit of the parents, no recovery can be had where pecuniary loss to them is not alleged and proved, and in such case even nominal damages are not recoverable.

Peters v. Bessemer & L. E. R. Co. (1909) 225 Pa. 307, 74 Atl. 61; *Kost v. Ashland* (1912) 236 Pa. 164, 84 Atl. 691.

⁸ *Southern R. Co. v. Covenia* (1896) 100 Ga. 46, 40 L.R.A. 253, 62 Am. St. Rep. 312, 29 S. E. 219; *Atlanta Consol. Street R. Co. v. Arnold* (1897) 100 Ga. 566, 28 S. E. 224, 3 Am. Neg. Rep. 753; *Crawford v. Southern R. Co.* (1899) 106 Ga. 870, 33 S. E. 826, 6 Am. Neg. Rep. 459; *James v. Central of Georgia R. Co.* (1912) 138 Ga. 415, 41 L.R.A. (N.S.) 795, 75 S. E. 431, Ann. Cas. 1913D, 468; *Crenshaw v. Louisville & N. R. Co.* (1914) 15 Ga. App. 182, 82 S. E. 767.

And see *Bell v. Wooten* (1875) 53 Ga. 684, holding that, in order to be entitled to L.R.A.1918C.

recover for the homicide of an infant child, a parent must show that he sustained a pecuniary damage.

⁹ *Robel v. Chicago, M. & St. P. R. Co.* (1886) 35 Minn. 84, 27 N. W. 305, holding that substantial damages will be presumed in favor of the father from the death of a son twenty years and two months old, who was employed in a gainful occupation at the time of his death.

¹⁰ *Youngquist v. Minneapolis Street R. Co.* (1907) 102 Minn. 501, 114 N. W. 259.

¹¹ *Raines v. Southern R. Co.* ante, 1052, holding that, under the Federal Employers' Liability Act, in order to recover in behalf of the parents for the death of a son sixteen years old, the burden does not rest upon the plaintiff to satisfy the jury that the decedent would have continued to contribute to the support of his father after he arrived at majority, or as to the amount of such contribution.

¹² *McClagherty v. Rogue River Electric Co.* (1914) 73 Or. 135, 140 Pac. 64, 144 Pac. 569.

niary loss may be sufficient to sustain a judgment of substantial damages on very meager and indefinite evidence of specific pecuniary loss. In other words, while there is a presumption of substantial pecuniary loss to the widow and minor children of a man in the

habit of supporting or aiding in their support,¹³ yet the amount of such loss is to be determined from the evidence produced by them, bearing upon this question,¹⁴ affected by whatever contrary evidence may be produced by the defendant.¹⁵ The mere fact, however,

¹³ *Standard Oil Co. v. Parkinson* (1907) 82 C. C. A. 29, 152 Fed. 681; *Peden v. American Bridge Co.* (1903) 120 Fed. 528; *Barr v. Southern California Edison Co.* (1914) 24 Cal. App. 22, 140 Pac. 47; *Flynn v. Fogarty* (1883) 106 Ill. 263; *Betting v. Hobbett* (1892) 142 Ill. 72, 30 N. E. 1048; *Fischer v. Chicago & W. I. R. Co.* (1912) 171 Ill. App. 347; *Malott v. Shimer* (1899) 153 Ind. 35, 74 Am. St. Rep. 278, 54 N. E. 101, 6 Am. Neg. Rep. 263; *Louisville, N. A. & C. R. Co. v. Buck* (1889) 116 Ind. 566, 2 L.R.A. 520, 9 Am. St. Rep. 888, 19 N. E. 453; *Korraday v. Lake Shore & M. S. R. Co.* (1892) 131 Ind. 261, 29 N. E. 1069; *Chicago & E. R. Co. v. Thomas* (1900) 155 Ind. 434, 58 N. E. 1040; *Duzan v. Myers* (1903) 30 Ind. App. 227, 96 Am. St. Rep. 341, 65 N. E. 1046; *Cleveland, C. C. & St. L. R. Co. v. Drumm* (1908) 32 Ind. App. 547, 70 N. E. 286; *Cleveland, C. C. & St. L. R. Co. v. Starks* (1909) — Ind. App. —, 89 N. E. 602; *Hunt v. Connor* (1901) 26 Ind. App. 41, 59 N. E. 50; *Pittsburgh, C. C. & St. L. R. Co. v. Reed* (1900) 44 Ind. App. 635, 88 N. E. 1080; *McCullough v. Chicago, R. I. & P. R. Co.* (1913) 160 Iowa, 524, 47 L.R.A. (N.S.) 23, 142 N. W. 67; *Friend v. Burleigh* (1898) 53 Neb. 674, 74 N. W. 50; *Omaha & R. Valley R. Co. v. Crow* (1898) 54 Neb. 747, 69 Am. St. Rep. 741, 74 N. W. 1066; *Pizzi v. Reid* (1902) 72 App. Div. 162, 76 N. Y. Supp. 306; *Haug v. Great Northern R. Co.* (1898) 8 N. D. 23, 42 L.R.A. 664, 73 Am. St. Rep. 727, 77 N. W. 97, 5 Am. Neg. Rep. 467; *Dunhene v. Ohio L. Ins. & T. Co.* (1868) 1 Disney (Ohio) 257; *Johnston v. Cleveland & T. R. Co.* (1857) 7 Ohio St. 336, 70 Am. Dec. 75; *Union R. Co. v. Carter* (1913) 129 Tenn. 459, 166 S. W. 592, 7 N. C. C. A. 748.

Bonato v. Peabody Coal Co. (1911) 248 Ill. 422, 94 N. E. 69, holding, where the deceased leaves a widow and children, that there is a presumption that they suffer pecuniary loss from his death.

In *Houghkirk v. Delaware & H. Canal Co.* (1883) 92 N. Y. 219, 44 Am. Rep. 370, it is held that the damages to the next of kin for the death of a relative are necessarily indefinite, prospective, and contingent, and cannot be proved with even an approach to accuracy, but they are to be estimated and awarded, for the statute has so commanded.

Johnston v. Cleveland & T. R. Co. (1857) 7 Ohio St. 336, 70 Am. Dec. 75, holds that a statute very similar in its provisions to Lord Campbell's Act regards the widow and next of kin as sustaining at least a nominal pecuniary injury by the death of the decedent through the wrongful act of the defendant.
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Union R. Co. v. Carter (1913) 129 Tenn. 459, 166 S. W. 592, 7 N. C. C. A. 748, holds that a widow suing for the death of her husband may recover the damages she has sustained, and also such damages as the deceased might have recovered had he survived, and she may recover substantial damages without any special showing of pecuniary loss to herself.

¹⁴ *St. Louis, I. M. & S. R. Co. v. Freeman* (1909) 89 Ark. 326, 116 S. W. 678 (holding that the burden of proof is upon the plaintiff to show in some substantial way the probable future earnings of the deceased, and the present value thereof to those dependent upon him); *St. Louis, I. M. & S. R. Co. v. Robbins* (1893) 57 Ark. 377, 21 S. W. 886, 13 Am. Neg. Cas. 216.

Atlantic Coast Line R. Co. v. Jones (1909) 132 Ga. 189, 63 S. E. 834, holding that the burden of proof is upon the plaintiff to show the loss of care and training by the decedent.

St. Louis & S. F. R. Co. v. Townsend (1901) 69 Ark. 380, 63 S. W. 994, 10 Am. Neg. Rep. 1, holding that to be entitled to have considered as an element of their damages for the wrongful death of their father, the loss to them of the moral and intellectual training they would have received from him, his children must show that he was fitted to furnish such training.

Where there is no evidence that the deceased father ever rendered any services during his lifetime in the superintendence of his family and education of his children, the jury are not to be permitted to take these elements of damage into consideration in assessing the loss to the children by the death of their father. *Texas & P. R. Co. v. Gullett* (1911) — Tex. Civ. App. —, 134 S. W. 262.

Compare with *Texas Power & Light Co. v. Bird* (1914) — Tex. Civ. App. —, 165 S. W. 8, holding, in an action for the death of the father, that the jury may consider the value of his mental and moral training to his minor children, had he lived, although the petition does not allege such damages and the evidence does not show such training.

¹⁵ *Standard Oil Co. v. Parkinson* (1907) 82 C. C. A. 29, 152 Fed. 681, holding that the presumption is that the widow and children were dependent upon the husband and father for their support, and hence that they sustained pecuniary injury by his death; but this presumption is rebuttable and evidence in support of it is competent even before the defendant has undertaken to overcome it.

that the evidence as to pecuniary loss to the widow and children may not be in all respects complete does not preclude the recovery of substantial damages in their behalf; it merely affects the amount of such recovery.

For example, the mere failure to produce evidence as to the length of time the intestate would have been able to continue his earnings, and the portion of his earnings which was spent for the support of his wife and children, does not render it necessary that the jury should award only nominal damages, for it is the legal duty of the husband and father to support his wife and children, and, when ability is shown, the law presumes that the duty is discharged until overcome by evidence.¹⁶

It has been held that, to entitle the widow to recover more than nominal damages for the negligent killing of her husband, there must be evidence of pecuniary loss to her by his death,—that she received some support or pecuniary aid from him, or that she had reasonable expectations of future aid or support had he lived out his natural life;¹⁷ and that, although there is evidence of the decedent's earnings, yet, where it appeared that he lived with his mother and did not contribute anything to his wife, or aid her in any way, she was not entitled to recover substantial damages for his death.¹⁸

¹⁶ *Malott v. Shimer* (1899) 153 Ind. 35, 74 Am. St. Rep. 278, 54 N. E. 101, 6 Am. Neg. Rep. 263.

¹⁷ *Rouse v. Detroit Electric R. Co.* (1901) 128 Mich. 149, 87 N. W. 68, holding that evidence of pecuniary loss is necessary in order to justify an award of damages for the benefit of the widow and minor children of the deceased.

Moe v. Smiley (1889) 125 Pa. 136, 3 L.R.A. 341, 17 Atl. 228, holding that a widow may maintain an action for the wrongful death of her husband only where she shows pecuniary loss thereby resulting to her.

And see *Missouri, K. & T. R. Co. v. Foreman* (1909) 98 C. C. A. 281, 174 Fed. 377; *Illinois C. R. Co. v. Porter* (1913) 125 C. C. A. 55, 207 Fed. 311; *James v. Richmond & D. R. Co.* (1890) 92 Ala. 231, 9 So. 335; *Boyd v. Missouri P. R. Co.* (1913) 249 Mo. 126, 155 S. W. 13, Ann. Cas. 1914D, 37; *Tucker v. Draper* (1901) 62 Neb. 66, 54 L.R.A. 321, 86 N. W. 917, 10 Am. Neg. Rep. 307.

See also *Fierro's Case* (1916) 223 Mass. 378, 111 N. E. 957, holding that a widow is not presumed to have been wholly dependent upon her husband for support, within the purview of the Workmen's Compensation Act, where, at the time of his death, she was a resident and native of a foreign country, although there was evi-

Husband.

It has been held that the damages to a husband by the death of his wife are based upon the value of her services to him, and hence it is incumbent upon him to prove such services and their value.¹⁹ It has, however, been held that the husband need not show that he suffered special pecuniary loss, it being sufficient in this regard if he shows the age of the decedent, her state of health, etc.²⁰

To show loss to decedent's estate.

In an action to recover the damages to the estate of a deceased due to his being negligently killed, while the plaintiff is entitled to recover at least nominal damages, based upon the wrongful act itself, yet in substantial damages he is entitled to recover only for such pecuniary loss as he is able to show that the estate of his decedent has suffered by the death complained of. The burden of proof is upon him to produce evidence tending to show the different elements of pecuniary loss for which he seeks to recover.²¹

Thus, in a suit by virtue of a survival statute to recover damages for personal injuries to plaintiff's intestate by falling 20 feet, which resulted in his death, the burden of proof is on the plaintiff to show that decedent suffered pain during the fall, which occupied but an

dence that the deceased had remitted to her between \$100 and \$200 during the period of over six years in which he had been in this country.

¹⁹ *Goen v. Baltimore & O. S. W. R. Co.* (1913) 179 Ill. App. 566, holding that, to entitle the widow to recover more than nominal damages for the death of her husband, there must be evidence that she received some support or pecuniary aid from him, or that she had reason to believe that she would thereafter receive aid or support.

²⁰ *Nelson v. Lake Shore & M. S. R. Co.* (1895) 104 Mich. 582, 62 N. W. 993.

Mitchell v. New York C. & H. R. R. Co. (1874) 2 Hun (N. Y.) 535, 5 Thomp. & C. 122, holding that where the only evidence of pecuniary loss to the husband for the death of his wife is the fact of marriage and the age of the wife, he can recover only nominal damages or injuries resulting in her death.

²¹ *Delaware, L. & W. R. Co. v. Jones* (1889) 128 Pa. 308, 18 Atl. 330.

²² *Hesse v. Meriden, S. & C. Tramway Co.* (1903) 75 Conn. 571, 64 Atl. 299, 13 Am. Neg. Rep. 482; *East Tennessee, V. & G. R. Co. v. Gurley* (1883) 12 Lea (Tenn.) 46; *St. Louis, I. M. & S. R. Co. v. Sweet* (1897) 63 Ark. 563, 40 S. W. 463, 2 Am. Neg. Rep. 295; *Friend v. Ingersoll* (1894) 39 Neb. 717, 58 N. W. 281.

instant of time, where he became unconscious upon striking the ground.²² And the burden of proof is upon the plaintiff to produce evidence showing the suffering of the decedent for a substantial period of time in order to have that element included in assessing damages for his death through the negligence of the defendant.²³

Where damages recovered for negligently killing a servant are to be distributed according to the Statute of Distribution, in an action by the personal representative of the decedent's estate, to recover for his death, it is not necessary to allege or prove that the decedent was survived by heirs at law,

for collateral facts of this character, the existence of which, in most cases, is a matter of common knowledge, are to be presumed.²⁴

Substantial damages may be recovered for the death of a child of tender years although it is impossible to prove what the occupation of the child would have been and the compensation which it would have received in such an occupation. All that is required of the plaintiff in this regard is to place before the jury such facts as shall support proper legitimate inferences, and leave them to determine the matter with the assistance of the knowledge and observation common to all alike.²⁵

²² *Kennedy v. Standard Sugar Refinery Co.* (1878) 125 *Mass.* 90, 28 *Am. Rep.* 214.

²³ *Chicago, R. I. & P. R. Co. v. White* (1914) 112 *Ark.* 607, 165 *S. W.* 627.

²⁴ *St. Louis, I. M. & S. R. Co. v. Dawson* (1900) 68 *Ark.* 1, 56 *S. W.* 46, holding that the burden of showing that the deceased suffered is upon the plaintiff, and such suffering is not shown merely by evidence that the deceased was struck by a slowly moving train, where no one saw the deceased at the time she was struck, or heard her cry or groan, or testifies to any act which might indicate conscious suffering, and she was apparently dead when reached after the accident.

²⁵ *Woodstock Iron Works v. Kline* (1907) 149 *Ala.* 391, 43 *So.* 362; *Columbus & W. R. Co. v. Bradford* (1888) 86 *Ala.* 574, 6 *So.* 90.

²⁶ *Love v. Detroit, J. & C. R. Co.* (1912) 170 *Mich.* 1, 135 *N. W.* 963.

Gregory v. Wabash R. Co. (1904) 126 *Iowa*, 230, 101 *N. W.* 761, holding that, in an action by the personal representative to recover for the wrongful death of a little girl, two years old, who left surviving her as next of kin, a father and mother, the jury are not limited in their award of damages to merely nominal damages, although it is impossible to prove what the occupation of the child would have been, and the compensation which would have been received in such calling. To the same effect, see *Walters v. Chicago, R. I. & P. R. Co.* (1875) 41 *Iowa*, 71; *Eginoire v. Union County* (1900) 112 *Iowa*, 558, 84 *N. W.* 758; *Hively v. Webster County* (1902) 117 *Iowa*, 672, 91 *N. W.* 1041, 12 *Am. Neg. Rep.* 590; *Farrell v. Chicago, R. I. & P. R. Co.* (1904) 123 *Iowa*, 690, 99 *N. W.* 578, 16 *Am. Neg. Rep.* 318 A. G. S.

NORTH DAKOTA SUPREME COURT.

LOUIS RUEHL, Admr., etc., of Louis Ruhl, Jr., Deceased, Appt.,
v.

LIDGERWOOD RURAL TELEPHONE
COMPANY, Resp't.

(23 *N. D.* 6, 135 *N. W.* 793.)

Negligence — precautions — liability.

1. Where, in the making of an improvement, it is manifest that injury is likely to result unless due precautions are taken, a duty rests upon him who causes the work

Headnotes by BRUCE, J.

Note. — As to admissibility and use of mortality tables in death actions, see annotation following this case, post, 1071. For other questions in relation to evidence in measure of damages in action for death, see references in the first part of the annotation following *Raines v. Southern R. Co.* L.R.A.1918C.

to be done to see that such necessary precautions are taken.

For other cases, see *Negligence, I. a*, in *Dig.* 1-52 *N. S.*

Master — independent contractor — safeguarding product of work.

2. Where a telephone company contracts with a laborer to dig holes in the dooryard of a house, under a contract to furnish a telephone to the occupant of such house, and into which holes someone else is to place the telephone poles when the proper times comes, it is a legal duty of such company to properly safeguard such holes; and it is immaterial whether the laborer who digs the same is a servant or an independent contractor.

For other cases, see *Master and Servant, III. b*, in *Dig.* 1-52 *N. S.*

ante, 1066; and generally, as to questions distinctive to the action for death, see L.R.A. Indexes under the titles, "Death" and "Damages," subtitles, "Measure of compensation—Death."

The subject of contributory negligence of children is discussed in the annotation fol-

Same — direct and collateral injury — distinction.

3. There is a distinction between the liability for injuries resulting from the work which is intrusted to be done and the liability for injuries occasioned by wrongful and careless acts done in connection with some collateral work or matter.

For other cases, see Master and Servant, III. b, 2, in Dig. 1-52 N. S.

Negligence — failure to anticipate.

4. There is a natural presumption that everyone will act with due care; and it cannot therefore be imputed to a plaintiff as contributory negligence that he did not anticipate culpable negligence on the part of the defendant.

For other cases, see Negligence, II. a, in Dig. 1-52 N. S.

Same — failure to watch child.

5. It is not contributory negligence, as a matter of law, for a mother to allow her children to play in the dooryard while a telephone is being put in the house, and the necessary poles are being erected for the purpose. At the most, the question is one for the jury, and not for the court.

For other cases, see Negligence, II. b, 1, in Dig. 1-52 N. S.

Evidence — action for death — mortality tables.

6. In a suit, under the statute, for damages to the parents occasioned by the death, by wrongful act, of a child three and one half years of age, where there is proof that the child, at the time of the accident, was in good health, it is not necessary to a recovery of damages that mortality tables shall be introduced in evidence, in order to prove the life expectancy of the deceased. Such tables are admissible both at the common law and under § 7303, Rev. Codes 1905; but their introduction is not indispensable. The courts also may take judicial notice of such tables, and may instruct the jury accordingly.

For other cases, see Evidence, I.; IV. r, in Dig. 1-53 N. S.

Trial — jury — negligence — unguarded hole.

7. The question as to whether it was negligence for a telephone company to leave unguarded a telephone pole hole 4½ feet in depth and 20 inches square, in the dooryard of a farmhouse, in which its servant knew that children were playing, is a proper matter for determination by the jury, under all of the circumstances of the case.

For other cases, see Trial, II. o, 8, e, in Dig. 1-52 N. S.

lowing Jacobs v. Koehler Sporting Goods Co. L.R.A.1917F, 10.

The effect of contributory negligence of parent as bar to action by parent or administrator for death of child non sui juris is treated in the notes to *Vinnette v. Northern P. R. Co.* 18 L.R.A.(N.S.) 328, and *Nashville Lumber Co. v. Busbee*, 38 L.R.A.(N.S.) 754. For notes on related questions, see L.R.A. Indexes under the title, "Death," subtitle, "Defenses." L.R.A.1918C.

Negligence — child.

8. A child three and one half years of age cannot itself be charged with contributory negligence.

For other cases, see Negligence, II. b, 1, in Dig. 1-52 N. S.

(March 15, 1912.)

A PPEAL by plaintiff from a judgment of the District Court for Richland County in defendant's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Reversed.

Statement by Bruce, J.:

This is an action brought under the statute by Louis Ruehl, the father of and the administrator of the estate of Louis Ruehl, Jr., deceased, for and on behalf of the father and mother and sisters of the deceased, to recover damages for the death of the said Louis Ruehl, Jr., alleged to have been occasioned by the defendant by carelessly and negligently leaving a telephone post hole "without placing any guards over or above the same, and without taking any precaution of any kind to avoid" the accident. The evidence is to the effect that on or about the 1st day of April, 1910, one L. J. Christenson was president and manager of the defendant telephone company; that at about such time the company arranged to extend its line past the house of the plaintiff and to put a telephone therein; that the dwelling house of the plaintiff stood about 4 rods from the east end of the section line, on which was laid out a traveled highway; that before the holes in which the telephone poles were to be set were dug, defendant telephone company had caused the necessary poles to be hauled and placed along the route of the proposed extension, at about the places where the same were to be set, and had caused the places where it was proposed to have the holes dug marked or designated by sticks or broken lath; that on or about the 1st day of April, 1910, Christenson, on behalf of the telephone company, employed one Frank Zimmerman to dig a line of post holes along the said extension, and agreed to pay him 12½ cents for each hole; that Christenson told said Zimmerman what to

For questions in relation to independent contractors, including both the question who is an independent contractor, and the liability of the employer for the acts of an independent contractor, see L.R.A. Indexes under the title, "Master and Servant," subtitles, "Liability of master to third person—for acts of independent contractor."

do, and supplied him with the tools, and told him how to do the work; that the post holes were to be 4½ feet deep, and that this depth was directed by Christenson; that the spade used by Zimmerman was given to him by Shulke, the employee of the company who marked the holes; that the arrangement was that Zimmerman should dig a line of holes from Lidgerwood out about 2 miles, and the line of poles ran down alongside the highway for about a mile; that he commenced digging at the city limits and worked due east a mile, and in the evening had to go home, so took his tools over to Ruehl's house, and went horseback to town, and started at Ruehl's place and worked towards town; that, after finishing up that mile, he commenced next morning at Ruehl's house, and worked back and met the holes dug before; that the whole job was about 2½ miles long; that his arrangement with Christenson was that he should dig that line of holes, and should be paid therefor at the rate of 12½ cents per hole, to be paid when the job was finished and accepted by the company; that at the time of the accident plaintiff's family consisted of himself, his wife, and five children, the oldest child being at the time ten years of age, and the youngest about one year; that the deceased child was aged three years and five months; that on the day of the accident the weather was warm, and plaintiff's children were playing about the house and in the dooryard; that on the said day Frank Zimmerman dug a hole in which to insert one of the telephone poles, about 4 rods directly east from the plaintiff's house, and on or near the west edge of the said public highway; that the hole was partly in the highway and partly to the west, on plaintiff's land; that it was about 4½ feet deep and 20 inches across; that, when completed, this hole was left uncovered and unguarded; that Zimmerman finished this hole about a quarter after 8 in the morning; that he saw the children about ten minutes before he completed it; that when he had completed the hole he proceeded to dig another one about 10 rods from the first one; that they were with him when he dug the third hole, the second one from the one in question; that after he finished they walked with him a ways; that he did not put anything over the holes, or guard them in any way; that about ten or fifteen minutes before the child was found in the hole the children were with Zimmerman, and about three quarters of an hour from the time that he finished digging the first hole; that the plaintiff talked to Zimmerman two or three minutes while he was digging the first hole, and left when he had the hole about half done; that he

then went into the field to work; that when he left, Zimmerman was still digging at the first hole; that when he left for the fields the children were all at home; that he thought they were in the house; that he did not see them in the yard; that Zimmerman did not say anything about covering the hole; that he (Ruehl) did not think or say anything about covering the hole; that the child was a bright, good, and healthy boy, and was his only son, and had never been sick; that Mrs. Ruehl was working in the house; that she saw Zimmerman digging the hole; that she knew that the telephone company was about to extend its line to the house; that she did not know how deep the hole was going to be dug, nobody had told her anything about it; that she did not miss her children at any time; that she could hear them talking in the yard, and supposed they were all right; that about an hour after the first hole had been dug, the deceased, Louis Ruehl, Jr., fell into the first hole head first, and was either drowned or smothered in the mud.

After the close of plaintiff's testimony, the defendant moved for a directed verdict, on the grounds (1) that there was no actionable negligence on the part of the defendant; (2) contributory negligence on the part of the parents of the deceased child; (3) that the hole in which the child lost its life was not dug by a servant of the defendant, but by an independent contractor. This motion was granted, and from the judgment dismissing the action this appeal is taken.

Mr. W. S. Lauder, for appellant:

The one doing the work was not an independent contractor.

Covington & C. Bridge Co. v. Steinbrock, 61 Ohio St. 215, 76 Am. St. Rep. 382, 55 N. E. 618, 7 Am. Neg. Rep. 154; Waggener v. Haskell, 89 Tex. 435, 35 S. W. 1; People ex rel. Nechamus v. Warden, 144 N. Y. 529, 27 L.R.A. 718, 39 N. E. 686; Jensen v. Barbour, 15 Mont. 582, 39 Pac. 906.

The word "result" as used in these definitions means a production or product of some kind, and not a service. One may contract to produce a house or ship or a locomotive, and such house or ship or locomotive produced is the "result." Such results are produced often, and probably generally, by independent contractors, but plowing a field, mowing a lawn, driving a carriage or a horse car, for one trip or for many trips a day, is not a result in the sense that the word is used in the rule. Such acts do not result in a product. They are simply a service.

Holmes v. Tennessee Coal, Iron & R. Co.

49 La. Ann. 1465, 22 So. 403, 3 Am. Neg. Rep. 174; *Waters v. Pioneer Fuel Co.* 52 Min. 474, 38 Am. St. Rep. 564, 55 N. W. 52; *O'Neill v. Blase*, 94 Mo. App. 648, 68 S. W. 764; *Fink v. Missouri Furnace Co.* 10 Mo. App. 61; *Homan v. Stanley*, 66 Pa. 464, 5 Am. Rep. 389; *Sadler v. Henlock*, 4 El. & Bl. 570, 119 Eng. Reprint, 209, 24 L. J. Q. B. N. S. 138, 3 C. L. R. 766, 1 Jur. N. S. 677, 3 Week. Rep. 181; *Turner v. Great Eastern R. Co.* 33 L. T. N. S. 431; *Texas & P. R. Co. v. Juneman*, 18 C. C. A. 394, 30 U. S. App. 541, 71 Fed. 936; *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175; *Stone v. Codman*, 15 Pick. 297; *State, Redstrake, Prosecutor, v. Swayze*, 52 N. J. L. 126, 18 Atl. 697; *Lancaster Ave. Improv. Co. v. Rhoads*, 116 Pa. 377, 2 Am. St. Rep. 608, 9 Atl. 852; *Jensen v. Barbour*, 15 Mont. 582, 39 Pac. 906; *Lewis v. Detroit Vitrified Brick Co.* 164 Mich. 489, 129 N. W. 726; *Larsen v. Home Teleph. Co.* 164 Mich. 295, 129 N. W. 894; *Barg v. Bousfield*, 65 Minn. 355, 68 N. W. 45, 16 Am. Neg. Cas. 188; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408, 2 Mor. Min. Rep. 194; *Brackett v. Lubke*, 4 Allen, 138, 81 Am. Dec. 694.

Whether or not a particular person is, under the evidence, an independent contractor, is a question of fact for the jury.

Emerson v. Fay, 94 Va. 60, 26 S. E. 386; *Hass v. Philadelphia & S. Mail S. S. Co.* 88 Pa. 269, 32 Am. Rep. 462; *Pioneer Fireproof Constr. Co. v. Hansen*, 176 Ill. 100, 52 N. E. 17; *Atlantic Transport Co. v. Coneys*, 28 C. C. A. 388, 51 U. S. App. 570, 82 Fed. 177; *Rait v. New England Furniture & Carpet Co.* 66 Minn. 76, 68 N. W. 729; *Whitson v. Ames*, 68 Minn. 23, 70 N. W. 793, 2 Am. Neg. Rep. 178; *Brophy v. Bartlett*, 108 N. Y. 632, 15 N. E. 368; *Carlson v. Stocking*, 91 Wis. 432, 65 N. W. 58; *Wallace v. Southern Cotton Oil Co.* 91 Tex. 18, 40 S. W. 399.

Where the proposed work is of a known dangerous character, or where danger is liable or likely to result from the work unless preventive measures are taken, the person procuring the work to be done must at his peril see to it that the rights of the public and of third persons are properly safeguarded.

McCarrier v. Hollister, 15 S. D. 366, 91 Am. St. Rep. 695, 89 N. W. 862, 11 Am. Neg. Rep. 641; *Donovan v. Oakland & B. Rapid Transit Co.* 102 Cal. 245, 36 Pac. 516; *Savannah v. Waldner*, 49 Ga. 316; *Joliet v. Harwood*, 86 Ill. 110, 29 Am. Rep. 17; *Dooley v. Sullivan*, 112 Ind. 451, 2 Am. St. Rep. 209, 14 N. E. 566; *Bonaparte v. Wiseman*, 89 Md. 12, 44 L.R.A. 482, 42 Atl. 918; *Stewart v. Putnam*, 127 Mass. 403; *Pye v. Faxon*, 156 Mass. 471, 31 N. E. 640; *Gor-* L.R.A.1918C.

ham v. Gross, 125 Mass. 232, 28 Am. Rep. 224; *Woodman v. Metropolitan R. Co.* 149 Mass. 340, 4 L.R.A. 213, 14 Am. St. Rep. 427, 21 N. E. 482, 12 Am. Neg. Cas. 80; *Dillon v. Hunt*, 105 Mo. 154, 24 Am. St. Rep. 374, 16 S. W. 516; *Johnston v. Phoenix Bridge Co.* 44 App. Div. 581, 60 N. Y. Supp. 947; *Covington & C. Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 76 Am. St. Rep. 375, 55 N. E. 618, 7 Am. Neg. Rep. 154; *Houston v. Isaacks*, 68 Tex. 116, 3 S. W. 693; *Wilber v. Follansbee*, 97 Wis. 577, 72 N. W. 741, 73 N. W. 559; *Chicago Economic Fuel Gas Co. v. Meyers*, 168 Ill. 139, 48 N. E. 66; *Bower v. Peate*, L. R. 1 Q. B. Div. 321, 45 L. J. Q. B. N. S. 446, 35 L. T. N. S. 321; *Thompson v. Lowell, L. & H. Street R. Co.* 170 Mass. 577, 40 L.R.A. 345, 64 Am. St. Rep. 323, 49 N. E. 913; *Davis v. Summerfield*, 133 N. C. 325, 63 L.R.A. 492, 45 S. E. 654; *Wolf v. Third Ave. R. Co.* 67 App. Div. 605, 74 N. Y. Supp. 336; *Denison, B. & N. O. R. Co. v. Barry*, 98 Tex. 248, 83 S. W. 5, — Tex. Civ. App. —, 80 S. W. 634; *Wetherbee v. Partridge*, 175 Mass. 185, 78 Am. St. Rep. 486, 55 N. E. 894; *Thomas v. Harrington*, 72 N. H. 45, 65 L.R.A. 742, 54 Atl. 285; *Mullins v. Siegel-Cooper Co.* 183 N. Y. 129, 75 N. E. 1112; *Downey v. Low*, 22 App. Div. 460, 48 N. Y. Supp. 207; *Wile v. Los Angeles Ice & Coal Storage Co.* 2 Cal. App. 190, 83 Pac. 271, 19 Am. Neg. Rep. 85; *Keys v. Second Baptist Church*, 99 Me. 308, 59 Atl. 446, 17 Am. Neg. Rep. 526; *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528; *Murphy v. Perlstein*, 73 App. Div. 256, 76 N. Y. Supp. 657; *Ann v. Herter*, 79 App. Div. 6, 79 N. Y. Supp. 825; *Loth v. Columbia Theatre Co.* 197 Mo. 328, 94 S. W. 847; *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207, 7 L.R.A. 701, 24 N. E. 269; *Palmer v. Lincoln*, 5 Neb. 136, 25 Am. Rep. 470; *Robbins v. Chicago*, 4 Wall. 679, 18 L. ed. 427; *Omaha v. Jensen*, 35 Neb. 68, 35 Am. St. Rep. 432, 52 N. W. 833.

A rule of law under which the defendant can escape in this case on the ground that the party employed to dig the holes was an independent contractor cannot be defended upon any principle of justice or right.

Loth v. Columbia Theatre Co. 197 Mo. 328, 94 S. W. 847; *Adams Exp. Co. v. Schofield*, 111 Ky. 832, 64 S. W. 903; *Reuben v. Swigart*, 15 Ohio C. C. 565, 7 Ohio C. D. 638; *Cameron Mill & Elevator Co. v. Anderson*, 98 Tex. 156, 1 L.R.A.(N.S.) 198, 81 S. W. 282, 16 Am. Neg. Rep. 599.

An independent contractor is one who renders service to another in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished.

Alabama Western R. Co. v. Talley-Bates Constr. Co. 162 Ala. 396, 50 So. 341; *Green v. Soule*, 145 Cal. 96, 78 Pac. 337, 17 Am. Neg. Rep. 8; *Jahn v. McKnight*, 117 Ky. 655, 78 S. W. 862; *Waters v. Pioneer Fuel Co.* 52 Minn. 474, 38 Am. St. Rep. 564, 55 N. W. 52; *Kipp v. Oyster*, 133 Mo. App. 711, 114 S. W. 538; *Jansen v. Barbour*, 15 Mont. 582, 39 Pac. 906; *Goldman v. Mason*, 2 N. Y. Supp. 337; *Texas & N. O. R. Co. v. Parsons*, — Tex. Civ. App. —, 109 S. W. 240; *Bibb v. Norfolk & W. R. Co.* 87 Va. 711, 14 S. E. 163; *Engler v. Seattle*, 40 Wash. 72, 82 Pac. 136, 19 Am. Neg. Rep. 49; *Good v. Johnson*, 38 Colo. 440, 8 L.R.A. (N.S.) 896, 88 Pac. 439; *Humpton v. Unterkircher*, 97 Iowa, 509, 66 N. W. 776, 14 Am. Neg. Cas. 595; *Powell v. Virginia Constr. Co.* 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691; 1 *Shearm. & Redf. Neg.* § 164.

To constitute an independent contractor the employer must have no right to interfere or control the performance or direction of the work.

Atlantic Transport Co. v. Coneys, 28 C. C. A. 388, 51 U. S. App. 570, 82 Fed. 177; *Campbell v. Lunsford*, 83 Ala. 512, 3 So. 522, 13 Am. Neg. Cas. 164; *Giacomini v. Pacific Lumber Co.* 5 Cal. App. 218, 89 Pac. 1059; *Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287; *De Palma v. Weinman*, 15 N. M. 68, 24 L.R.A. (N.S.) 423, 103 Pac. 782; *Goldman v. Mason*, 2 N. Y. Supp. 337; *Pickens v. Diecker*, 21 Ohio St. 212, 8 Am. Rep. 55; *Smith v. Humphreyville*, 47 Tex. Civ. App. 140, 104 S. W. 495.

If one seeks to avoid liability on the ground that the person doing the work was an independent contractor, the burden is upon him to show the independence of the employee.

Anderson v. Moore, 108 Ill. App. 106; *Perry v. Ford*, 17 Mo. App. 212; *Midgett v. Branning Mfg. Co.* 150 N. C. 333, 64 S. E. 5; *Foster v. National Steel Co.* 216 Pa. 279, 65 Atl. 618; *Taylor, B. & H. R. Co. v. Warner*, 88 Tex. 642, 32 S. W. 868; *Kampmann v. Rothwell*, — Tex. Civ. App. —, 107 S. W. 120.

Plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was approximately caused by the defendant's omission after becoming aware of the plaintiff's danger.

1 *Shearm. & Redf. Neg.* 4th ed. § 99, note 2; *Pickett v. Wilmington & W. R. Co.* 53 Am. St. Rep. 611, and note, 117 N. C. 616, 30 L.R.A. 257, 23 S. E. 264; *Bostwick v. Minneapolis & P. R. Co.* 2 N. D. 440, 51 N. W. 781; *Hodgins v. Minneapolis, St. P. & S. Ste. M. R. Co.* 3 N. D. 382, 56 N. W. 139; L.R.A.1918C.

Harrington v. Los Angeles R. Co. 98 Am. St. Rep. 85, and note, 140 Cal. 514, 63 L.R.A. 238, 74 Pac. 15; *Tully v. Philadelphia W. & B. R. Co.* 2 Penn. (Del.) 537, 82 Am. St. Rep. 425, 47 Atl. 1019.

Messrs. Purcell & Divet, George W. Freerks, and P. L. Keating, for respondent:

Where the employee represents the will of the employer as to the result of the work, but not as to the means or manner of accomplishment, he is an independent contractor.

Penny v. Wimbledon Urban Dist. Council, [1899] 2 Q. B. 212, 67 L. J. Q. B. N. S. 754, 62 J. P. 582, 14 Times L. R. 477, 78 L. T. N. S. 748; *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175; *Casement v. Brown*, 148 U. S. 617, 37 L. ed. 582, 13 Sup. Ct. Rep. 672; *Carlson v. Stocking*, 91 Wis. 432, 65 N. W. 58; *Kuehn v. Milwaukee*, 92 Wis. 263, 65 N. W. 1030; *Salliotte v. King Bridge Co.* 65 L.R.A. 620, 58 C. C. A. 466, 122 Fed. 378; *Bailey v. Troy & B. R. Co.* 57 Vt. 252, 52 Am. Rep. 129; *King v. New York C. & H. R. R. Co.* 66 N. Y. 181, 23 Am. Rep. 37; *Humpton v. Unterkircher*, 97 Iowa, 509, 66 N. W. 776, 14 Am. Neg. Cas. 595; *Kelleher v. Schmitt & H. Mfg. Co.* 122 Iowa, 635, 98 N. W. 482; *Bennett v. Mt. Vernon*, 124 Iowa, 537, 100 N. W. 349; *Francis v. Johnson*, 127 Iowa, 391, 101 N. W. 878, 17 Am. Neg. Rep. 507; *Brown v. Rockwell City Canning Co.* 132 Iowa, 631, 110 N. W. 12.

When the employer has not control of the time and manner of the work and operations, there can be said to be no breach of legal duty on his part, in case the same is so negligently done as to cause injury to outside parties.

St. Louis, Ft. S. & W. R. Co. v. Willis, 38 Kan. 330, 16 Pac. 728; *Kansas City, M. & O. R. Co. v. Loosley*, 76 Kan. 103, 90 Pac. 990; *Chute v. Moeser*, 77 Kan. 706, 95 Pac. 398; *St. Louis & S. F. R. Co. v. Madden*, 77 Kan. 80, 17 L.R.A. (N.S.) 788, 93 Pac. 586; *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209; *Riedel v. Moran*, Fitzsimons Co. 103 Mich. 262, 61 N. W. 509; *St. Paul v. Seitz*, 3 Minn. 297, Gil. 205, 74 Am. Dec. 753; *Shute v. Princeton Twp.* 58 Minn. 337, 59 N. W. 1050; *Solberg v. Schlosser*, 20 N. D. 307, 30 L.R.A. (N.S.) 1111, 127 N. W. 93; *Rogers v. Parker*, 159 Mich. 278, 34 L.R.A. (N.S.) 955, 123 N. W. 1111, 18 Ann. Cas. 753; *Barg v. Bousfield*, 65 Minn. 355, 68 N. W. 45, 16 Am. Neg. Cas. 188; *Gahagan v. Aermotor Co.* 67 Minn. 252, 69 N. W. 914, 1 Am. Neg. Rep. 92; *Rait v. New England Furniture & Carpet Co.* 66 Minn. 76, 68 N. W. 729; *Vosbeck v. Kellogg*, 78 Minn. 176, 80 N. W. 957, 7 Am. Neg. Rep. 86; *Corrigan v. Elainger*, 81 Minn. 42, 83 N.

W. 492, 8 Am. Neg. Rep. 262; Aldritt v. Gillette-Herzog Mfg. Co. 85 Minn. 206, 88 N. W. 741; Smith v. Milwaukee Builders' & T. Exch. 91 Wis. 360, 30 L.R.A. 504, 51 Am. St. Rep. 912, 64 N. W. 1041; Anderson v. Tug River Coal & Coke Co. 59 W. Va. 301, 53 S. E. 713; Barclay v. Puget Sound Lumber Co. 48 Wash. 241, 16 L.R.A. (N.S.) 140, 93 Pac. 430; Norfolk & W. R. Co. v. Stevens, 97 Va. 631, 46 L.R.A. 367, 34 S. E. 525; Stephensville, N. & S. T. R. Co. v. Couch, 56 Tex. Civ. App. 336, 121 S. W. 189; McHarge v. Newcomer, 117 Tenn. 595, 9 L.R.A. (N.S.) 208, 100 S. W. 700; Rogers v. Florence R. Co. 31 S. C. 378, 9 S. E. 1059; McColligan v. Pennsylvania R. Co. 214 Pa. 229, 6 L.R.A. (N.S.) 544, 112 Am. St. Rep. 739, 63 Atl. 792, 20 Am. Neg. Rep. 471; MacDonald v. O'Reilly, 45 Or. 589, 78 Pac. 753; Midgette v. Branning Mfg. Co. 150 N. C. 333, 64 S. E. 5; Finkelstein v. Balkin, 103 N. Y. Supp. 99; Omaha Bridge & Terminal R. Co. v. Hargadine, 5 Neb. (Unof.) 418, 98 N. W. 1071, second appeal in 76 Neb. 729, 107 N. W. 864; Hawver v. Whalen, 49 Ohio St. 69, 14 L.R.A. 828, 20 N. E. 1049; Poor v. Madison River Power Co. 38 Mont. 341, 99 Pac. 947; McGrath v. St. Louis & H. Constr. Co. 215 Mo. 191, 114 S. W. 611; Brackett v. Lubke, 4 Allen, 138, 81 Am. Dec. 694; Smith v. Benick, 87 Md. 610, 42 L.R.A. 277, 41 Atl. 56, 4 Am. Neg. Rep. 641; Singer Mfg. Co. v. Rahn, 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175.

The contributory negligence of the plaintiff administrator, or other beneficiaries named in the complaint, is a good defense.

Scherer v. Schlager, 18 N. D. 421, 24 L.R.A. (N.S.) 520, 122 N. W. 1000; Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257.

Bruce, J., delivered the opinion of the court:

The first question to be determined is whether the defendant, at the time of the accident, was acting through a servant, or by means of an independent contractor. On this point, John L. Matthews, the vice president of the company, testifies that Mr. Christenson was the vice president, and had charge of and was general manager of the construction work; that the company employed Shulke to mark the places where the holes were to be dug; that no one was employed by the company to dig them. Frank Zimmerman, on the other hand, testifies that "Christenson employed me to dig that hole. I spoke for the job, and he offered me so much a hole, and I did that. Christenson offered me so much a hole, and I accepted the proposition on certain terms. He paid me 12½ cents for L.R.A.1918C.

each hole. I worked for the telephone company off and on all summer. My directions were that the holes should be 4½ feet. I asked Christenson, and that is what he told me the depth was. I put no guard around the first hole I dug. I made arrangements with Christenson. The arrangement was that I should dig the line of holes from Lidgerwood out to the place, about 2 miles, and that line of holes ran down along the side of the railway for about a mile. My arrangement with Christenson was that I should dig that line of holes, and should be paid at the rate of 12½ cents per hole, to be paid for when the job was finished and accepted by the company; and under that arrangement I went ahead and did the work."

Q. The tools used in digging the hole belonged to the telephone company?

By the Court: Do you know that they belonged to the telephone company, or do you merely mean that they were given you by Christenson?

A. Why, they were not just exactly given me by Christenson. The tools were given me by Shulke. I don't know who owned them. I had a talk with Christenson at the time I made the arrangement to dig these holes, at the time Christenson supplied me with these tools. I had nothing to do with marking the place where these holes were to be dug. I was told to dig the holes where I found the stakes. Christenson told me that he would send Shulke out and mark the holes, and to dig them where the stakes were.

The defendant cannot, under these facts, escape liability on the theory that Zimmerman was an independent contractor. There is much confusion in the authorities as to what is and what is not an independent contract. Some hold that the service must be rendered in the course of an *independent occupation*, and that the work done must be done by one whose independent business it is to do it. Judge Cooley, for instance, defines the term "independent contractors" as follows: "Persons following a *regular, independent employment*, in the course of which they offer their services to the public to accept orders and execute commissions for all who may employ them in a certain line of duty, using their own means for the purpose and being accountable only for final performance." Cooley, Torts, p. 549. Other authorities make the distinction depend solely upon whether, in the transaction of the business, the workman is subject to the orders of his patron, both as to the manner of doing and the result of his work. Singer Mfg. Co. v. Rahn, 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep.

175. Nearly all of the writers, however, agree that, where a person or corporation undertakes to do work upon the premises of the owner, or of him who is in possession, and such first person intrusts the performance of the work to a contractor or workman, but does not, and is not authorized by the one in possession to, give the control of the premises to the workman or contractor, such workman or contractor will be looked upon as a servant of the first party, and not as an independent contractor. In other words, the courts are inclined to hold, and we hold in this case, that when the telephone company undertook to put the telephone in the house of Louis Ruehl, it impliedly agreed to put it in in a safe and proper manner, and not in a manner which would endanger the lives of the plaintiff and of his family. *Anderson v. Moore*, 108 Ill. App. 106; *Perry v. Ford*, 17 Mo. App. 213; *Waters v. Pioneer Fuel Co.* 52 Minn. 474, 38 Am. St. Rep. 564, 55 N. W. 52. There is much in this case which would lead us to hold that in no sense could the witness Zimmerman be held to be an independent contractor; and the general rule is that the burden of proof in such matters is upon him who alleges the fact. *Midgett v. Branning Mfg. Co.* 150 N. C. 333, 64 S. E. 5. Zimmerman testifies that he was in the employ of the defendant all summer, and that he did not furnish his own tools. A person is not an independent contractor merely because he is paid by the piece or by the job. *Foster v. National Steel Co.* 216 Pa. 279, 65 Atl. 618; *Waters v. Pioneer Fuel Co.* supra; *Holmes v. Tennessee Coal, Iron & R. Co.* 49 La. Ann. 1465, 22 So. 403, 3 Am. Neg. Rep. 174. Nor does the fact that Zimmerman was not to be paid until the job was satisfactorily completed alter the case. This would merely be evidence of the fact that the method of work was subject to the approval of the company. It is a provision which is implied in all contracts of employment. No laborer can recover his daily wage unless he can show that he has earned it. Even if Zimmerman could be considered as an independent contractor in relation to the digging of the hole, he was not an independent contractor in relation to the whole of the work, which was the digging of the holes and the placing of the posts therein. His work was but a part of a series of work. The posts were on the ground, to be put in by someone else. All that we learn of his contract was that he should dig the post holes. If the contract presupposed this, and this alone, it would presuppose the construction of dangerous pitfalls; and the principal would be liable for them the same as if he had authorized an independent contractor to con-

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struct a wall or a building according to specifications which were inherently dangerous, and which resulted in the falling of such wall.

The rule seems to be well established that where, in the making of an improvement of any kind, it is manifest that injury is likely to result unless due precautions are taken, a duty rests upon him who causes the work to be done to see that all necessary precautions are taken. See Cyc. vol. 28, p. 1560, and numerous cases there cited. According to the evidence, the contract was merely to dig the holes, into which someone else was to place the posts when the proper time came. It is really immaterial, in this view of the case, whether Zimmerman was an independent contractor or not. It was the legal duty of the defendant to properly safeguard the holes. There is no evidence that the defendant transferred this duty to another. We are in serious doubt as to whether it could. *Bower v. Peate*, L. R. 1 Q. B. Div. 321, 45 L. J. Q. B. N. S. 446, 35 L. T. N. S. 321; *Hughes v. Percival*, L. R. 8 App. Cas. 443, 52 L. J. Q. B. N. S. 719, 49 L. T. N. S. 180, 31 Week. Rep. 725, 47 J. P. 772. We consider the reasoning of the case of *Donovan v. Oakland & B. Rapid Transit Co.* 102 Cal. 245, 36 Pac. 516, as entirely applicable in the case at bar, and we adopt it as our own. See also *Homan v. Stanley*, 66 Pa. 464, 5 Am. Rep. 389.

There is a distinction between injuries resulting from the work itself, and where the wrongful or careless act is in connection with some collateral work or matter. A distinction is made, indeed, between a contract whereby the independent contractor is required to dig a deep pit or well, and a third person is injured by falling into that well, and a case where a contractor is authorized to build a house, which in itself is not dangerous, but while building it he drops a plank upon the head of a passer-by. In one case, the injury is occasioned by the subject of the contract itself, or the thing constructed under the contract. In the other, it is occasioned by an act collateral to the construction. *Davie v. Levy*, 39 La. Ann. 551, 4 Am. St. Rep. 225, 2 So. 395.

We are unable to find, as a matter of law, that the father was guilty of contributory negligence in this case. It is true that, before going to work in the fields, he talked with Zimmerman, who was digging the first hole, and that he testifies that at the time "he did not think anything about covering the hole," and that respondent's counsel not only seeks to argue contributory negligence therefrom, but a lack of negligence on the part of the defendant. "Why, then," he asks, "should Zimmerman think of it?"

The conclusion he contends for, however, by no means follows. Plaintiff had the right to assume that in digging the holes in question Zimmerman would proceed with due care; and at the time he left for the fields Zimmerman was in complete control, and the hole was not even fully dug. "As there is a natural presumption that everyone will act with due care, it cannot be imputed to the plaintiff as negligence that he did not anticipate culpable negligence on the part of the defendant." 1 Shearm. & Redf. Neg. 4th ed. § 92, and cases cited. The duty to properly guard the holes was upon the defendant, and not upon the plaintiff.

Nor do we believe that it was contributory negligence, as a matter of law, on the part of the mother to allow the child to play in the yard. In considering such matters, by far the greater number of the courts have borne in mind the fact that "men must work;" that seed must be sown and housework done; that the hard-working mother of a family has many duties, and that the provider of bread must give a more or less uninterrupted attention to his labors; that it is only the few who have the means to employ a retinue of servants. At the most, and according to the great weight of authority, the question of contributory negligence was one for the jury, and not for the court. *Garner v. Trumbull* (C. C. A. Eighth Circuit) 94 Fed. 321, 36 C. C. A. 361; *Mellen v. Old Colony Street R. Co.* 184 Mass. 399, 68 N. Y. Supp. 15 Am. Neg. Rep. 79; *Hewitt v. Taunton Street R. Co.* 167 Mass. 483, 46 N. E. 106, 1 Am. Neg. Rep. 444; *Howell v. Rochester R. Co.* 24 App. Div. 502, 49 N. Y. Supp. 17; *Ehrman v. Nassau Electric R. Co.* 23 App. Div. 21, 48 N. Y. Supp. 379; *Muller v. Brooklyn Heights R. Co.* 18 App. Div. 177, 45 N. Y. Supp. 954; *Kitchell v. Brooklyn Heights R. Co.* 6 App. Div. 99, 39 N. Y. Supp. 743; *Jones v. Brooklyn Heights R. Co.* 10 Misc. 543, 31 N. Y. Supp. 445; *Karahuta v. Schuykill Traction Co.* 6 Pa. Super. Ct. 319.

It is, of course, well established that a child three and one-half years of age cannot itself be made chargeable with contributory negligence. *Rice v. Crescent City R. Co.* 51 La. Ann. 108, 24 So. 791; *Barnes v. Shreveport City R. Co.* 47 La. Ann. 1218, 49 Am. St. Rep. 400, 17 So. 782, 11 Am. Neg. Cas. 636; *Pueblo Electric Street R. Co. v. Sherman*, 25 Colo. 114, 71 Am. St. Rep. 116, 53 Pac. 322. Even the most rigid rule would make the question one for the jury. *Young v. Atlantic Ave. R. Co.* 10 Misc. 541, 31 N. Y. Supp. 441.

But respondent's counsel contends that the judgment should be affirmed, because the L.R.A.1918C.

plaintiff failed to introduce any mortality tables in evidence, or in any way to prove the life expectancy of the deceased child. He claims that on this account the jury could only have found a verdict for nominal damages, and that where only nominal damages could be recovered the doctrine of *de minimis non curat lex* applies, and appellate courts will not reverse judgments for the defendant when a new trial would only result in nominal damages for the plaintiff. Appellant answers this contention chiefly by stating that the matter was not brought to the attention of the court below; and the failure to prove damages was not urged as a reason for the motion for a directed verdict. Both counsel are partially mistaken. The fact as to whether the matter was brought to the attention of the trial court at the time of the motion for a directed verdict is of no moment; and the rule is well established that, except in the case of what may be called "hard actions," and actions which involve title to land, or other than merely money rights, the appellate court will not reverse a judgment for the defendant when a new trial would merely result in the awarding of nominal damages. *Raymond v. Edelbrock*, 15 N. D. 231, 107 N. W. 194. The respondent, on the other hand, is mistaken in his assumption that it was necessary for the plaintiff to introduce mortality tables in evidence, and that the plaintiff failed to introduce evidence from which the value of the loss of the services and earnings of the deceased might be inferred. He proved the age of the child, and that the child was in good health. There was also evidence enough in the record for the jury to form a fair estimate of the business and occupation and the circumstances of the father. On these facts, the jury could base their conclusions.

After a very exhaustive examination of the cases and authorities, we fail to find a single authority which makes the introduction of such tables a prerequisite to a recovery of damages. Such tables, it is true, are admissible in evidence; and our statute (Rev. Code 1905, § 7303, Comp. Laws 1913, § 7922) makes the so-called "Carlisle Tables" admissible. But nowhere do we find authority for the proposition that their introduction is absolutely necessary. In fact, the overwhelming weight of authority is to the effect that the court will take judicial notice of the standard tables, and, if called upon, or even if not called upon, may instruct the jury in relation thereto. It would have been perfectly competent, in the case at bar, for the court to have instructed the jury as to the fact of the contents of such mortality tables; and the request for this instruction, of course, was not

required to be made prior to or at the time of the motion for the directed verdict. *Kansas City, M. & B. R. Co. v. Phillip*, 98 Ala. 159, 13 So. 65; *Louisville & N. R. Co. v. Mothershed*, 97 Ala. 261, 12 So. 714; *McDonnell v. Alabama Gold L. Ins. Co.* 85 Ala. 401, 5 So. 120; *Arkansas Midland R. Co. v. Griffith*, 63 Ark. 481, 39 S. W. 550, 2 Am. Neg. Rep. 105; *Nelson v. Branford, Lighting & Water Co.* 75 Conn. 548, 54 Atl. 303, 13 Am. Neg. Rep. 490; 1 Greenl. Ev. 16th ed. § 66; 17 Am. & Eng. Enc. Law, 2d ed. 900; *Indianapolis v. Marold*, 25 Ind. App. 428, 58 N. E. 512; *Louisville, N. A. & C. R. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343, 9 Am. Neg. Cas. 288; *Shover v. Myrick*, 4 Ind. App. 7, 30 N. E. 207; *Alexander v. Bradley*, 3 Bush, 687; *Boettger v. Scherpe & K Architectural Iron Co.* 136 Mo. 531, 38 S. W. 298, 16 Am. Neg. Cas. 421; *Davis v. Standish*, 26 Hun, 608; *Abell v. Penn Mut. L. Ins. Co.* 18 W. Va. 400; *Abbott, Trial Ev.* 729, note 4; *Scheffler v. Minneapolis & St. L. R. Co.* 32 Minn. 518, 21 N. W. 711. Anything that the court may take judicial notice of must be something which, from its nature, is or should be known to all men of ordinary understanding and intelligence, and such men the jury must be deemed to have been.

In the following cases, damages running all the way from \$1,000 to \$7,500 were awarded by the juries, and sustained by the courts, even though there was an entire absence of mortality tables, or even of an instruction upon the subject: *Myers v. San*

Francisco, 42 Cal. 215; *Chicago & E. R. Co. v. Branyan*, 10 Ind. App. 570, 37 N. E. 190; *Eginiole v. Union County*, 112 Iowa, 558, 84 N. W. 758; *Union P. R. Co. v. Dunden*, 37 Kan. 1, 14 Pac. 501; *Franke v. St. Louis*, 110 Mo. 516, 19 S. W. 938; *Omaha v. Bowman*, 63 Neb. 933, 88 N. W. 521, 11 Am. Neg. Rep. 47; *Morris v. Metropolitan Street R. Co.* 170 N. Y. 592, 63 N. E. 1119; *Hoon v. Beaver Valley Traction Co.* 204 Pa. 369, 54 Atl. 270; *Southern Queen Mfg. Co. v. Morris*, 105 Tenn. 654, 58 S. W. 651; *Johnson v. Chicago & N. W. R. Co.* 64 Wis. 425, 25 N. W. 223; *Kansas P. R. v. Cutter*, 19 Kan. 91, 9 Am. Neg. Cas. 355; *Chicago & A. R. Co. v. Becker*, 84 Ill. 483; *Louisville & N. R. Co. v. Connor*, 9 Heisk. 20; *Oldfield v. New York & H. R. Co.* 3 E. D. Smith, 103; *McGovern v. New York C. & H. R. R. Co.* 67 N. Y. 417.

On the main question as to whether the jury could infer negligence from the leaving of the post holes unprotected, we hold that it could. The first hole was completed at least three quarters of an hour before the time of the accident. Zimmerman knew that children were playing, or liable to play, in the yard. This they had a perfect right to do. The question, in the main, is one for the jury, and not one for the court.

The judgment of the District Court is reversed, a new trial granted, and the cause remanded for further proceedings according to law.

Annotation—Admissibility and use of mortality tables in death actions.

For other notes in this series relative to the admissibility, character, or sufficiency of evidence to show pecuniary loss from the negligent killing of a person, see the note appended to *Raines v. Southern R. Co.* ante, 1056, where the different notes presenting different aspects of this matter are referred to at length.

In general.

In actions to recover pecuniary compensation, either to the estate of the decedent or to the statutory beneficiaries, for the pecuniary loss to the parties represented by the plaintiff from the negligent killing of the plaintiff's intestate, one of the important matters to be considered as affecting the damages recoverable is the life expectancy of the deceased, and in many cases the life expectancy of the statutory beneficiaries. Generally, one of the most practical methods of showing the life expectancy, either of the de-

ceased or the statutory beneficiaries, is introducing in evidence life expectancy or mortality tables. As a rule these tables are based upon a record extending over a period of years, of the deaths among a stated number of people chosen without reference to their age, health, or occupation, the number of people included and the period of time covered by the record being sufficient to be fairly representative. Standard tables of this character, which are in common use, are very generally held to be admissible in evidence as an aid or guide in determining the natural duration of life of the person or persons whose life expectancy is the subject of inquiry.¹

¹ *Ward v. Dampskibsselskabet Kjoebenhavn* (1906) 144 Fed. 524; *Louisville & N. R. Co. v. Anderson* (1907) 150 Ala. 350, 43 So. 566; *Nevers Lumber Co. v. Fields* (1907) 151 Ala. 367, 44 So. 81; *St. Louis, I. M. & S. R. Co. v. Hitt* (1905) 76 Ark. 227, 88 S.

As affected by the health or occupation of the deceased.

In most jurisdictions standard mortal-

ity tables are admissible in evidence notwithstanding the poor health of the deceased, or the person whose life ex-

W. 908, 990; Kansas City Southern R. Co. v. Morris (1906) 80 Ark. 528, 98 S. W. 363, 10 Ann. Cas. 618; Keast v. Santa Ysabel Gold Min. Co. (1902) 136 Cal. 256, 68 Pac. 771; Valente v. Sierra R. Co. (1907) 151 Cal. 534, 91 Pac. 481, s. c. subsequent appeal in (1910) 158 Cal. 413, 111 Pac. 95; Kansas P. R. Co. v. Lundin (1876) 3 Colo. 94; Denver, S. P. & P. R. Co. v. Woodward (1877) 4 Colo. 1, 9 Am. Neg. Cas. 115; Georgia R. & Bkg. Co. v. Oaks (1874) 52 Ga. 410; Central R. Co. v. Crosby (1885) 74 Ga. 737, 58 Am. Rep. 463, 14 Am. Neg. Cas. 140; Central R. & Bkg. Co. v. Wiggins (1892) 91 Ga. 208, 8 S. E. 187; Florida, C. & P. R. Co. v. Burney (1895) 98 Ga. 1, 26 S. E. 730; Western & A. R. Co. v. Clark (1903) 117 Ga. 548, 44 S. E. 1; Central of Georgia R. Co. v. Minor (1907) 2 Ga. App. 804, 59 S. E. 81; Winn v. Cleveland, C. C. & St. L. R. Co. (1909) 239 Ill. 132, 87 N. E. 954; Springfield Electric Light & P. Co. v. Calvert (1907) 134 Ill. App. 285, affirmed in (1907) 231 Ill. 290, 14 L.R.A. (N.S.) 782, 83 N. E. 184, 12 Ann. Cas. 423; Presley v. Kinlock-Bloomington Teleph. Co. (1910) 158 Ill. App. 220; Pittsburgh, C. C. & St. L. R. Co. v. Sudhoff (1909) 173 Ind. 314, 90 N. E. 467; Pittsburgh, C. C. & St. L. R. Co. v. Brown (1912) 178 Ind. 11, 97 N. E. 145, 98 N. E. 625; Smiser v. State (1896) 17 Ind. App. 519, 47 N. E. 229; Pittsburgh, C. C. & St. L. R. Co. v. Rogers (1910) 45 Ind. App. 230, 87 N. E. 28; Gorman v. Minneapolis & St. L. R. Co. (1902) 117 Iowa, 720, 90 N. W. 79; Scagel v. Chicago, M. & St. P. R. Co. (1891) 83 Iowa, 380, 49 N. W. 990; Worden v. Humeston & S. R. Co. (1888) 76 Iowa, 310, 41 N. W. 26; Beepus v. Chicago, R. I. & P. R. Co. (1885) 67 Iowa, 435, 25 N. W. 693; Coates v. Burlington, C. R. & N. R. Co. (1883) 62 Iowa, 486, 17 N. W. 760; Walters v. Chicago, R. I. & P. R. Co. (1875) 41 Iowa, 71; Donaldson v. Mississippi & M. R. Co. 18 Iowa, 280, 87 Am. Dec. 391; Atchison, T. & S. F. R. Co. v. Hughes (1895) 55 Kan. 491, 40 Pac. 919, 3 Am. Neg. Cas. 479; Erb v. Popritz (1898) 59 Kan. 264, 68 Am. St. Rep. 362, 52 Pac. 871; Louisville, C. & L. R. Co. v. Mahony (1870) 7 Bush (Ky.) 235; Southern R. Co. v. Adkins (1909) 133 Ky. 219, 117 S. W. 321, 119 S. W. 820; Louisville & N. R. Co. v. Thomas (1916) 170 Ky. 145, 185 S. W. 840; Chesapeake & O. R. Co. v. Dupee (1902) 23 Ky. L. Rep. 2349, 67 S. W. 15; Cooper v. Lake Shore & M. S. R. Co. (1887) 66 Mich. 261, 11 Am. St. Rep. 482, 33 N. W. 306; Hunn v. Michigan C. R. Co. (1889) 78 Mich. 513, 7 L.R.A. 500, 44 N. W. 502; Jones v. McMillan (1901) 129 Mich. 86, 88 N. W. 206; Davis v. Michigan C. R. Co. (1907) 147 Mich. 479, 111 N. W. 76; Little v. Bousfield (1911) 165 Mich. 654, 131 N. W. 63; Scheffler v. Minneapolis & St. L. R. Co. (1884) 32 Minn. 518, 21 N. W. 711; Deisen v. Chicago, St. P. M. & O. R. Co. (1890) 48 Minn. 454, 45 N. W. 864; L.R.A.1918C.

Schlereth v. Missouri P. R. Co. (1893) 115 Mo. 87, 21 S. W. 1110; O'Mellia v. Kansas City, St. J. & C. B. R. Co. (1893) 115 Mo. 206, 21 S. W. 593; Boettger v. Scherpe & K. Architectural Iron Co. (1896) 136 Mo. 531, 38 S. W. 298, 16 Am. Neg. Cas. 421; Collins v. Star Paper Mill Co. (1910) 143 Mo. App. 333, 127 S. W. 641; Haines v. Pearson (1903) 100 Mo. App. 551, 75 S. W. 194; Chicago, R. I. & P. R. Co. v. Hambel (1902) 2 Neb. (Unof.) 607, 89 S. W. 643; Roose v. Perkins (1879) 9 Neb. 304, 31 Am. Rep. 409, 2 N. W. 715; King v. Bell (1882) 13 Neb. 409, 14 N. W. 141; Sellars v. Foster (1889) 27 Neb. 118, 42 N. W. 907; Friend v. Ingersoll (1894) 39 Neb. 717, 58 N. W. 281; Friend v. Burleigh (1902) 53 Neb. 674, 74 N. W. 50; Murray v. Omaha Transfer Co. (1915) 98 Neb. 482, L.R.A.—, 153 N. W. 488; Moses v. Mathews (1914) 96 Neb. 672, 146 N. W. 920, Ann. Cas. 1915A, 698; Notto v. Atlantic City R. Co. (1908) 75 N. J. L. 826, 17 L.R.A. (N.S.) 1138, 127 Am. St. Rep. 835, 69 Atl. 968; Camden & A. R. Co. v. Williams (1898) 61 N. J. L. 646, 40 Atl. 634; Sauter v. New York C. & H. R. Co. (1876) 66 N. Y. 50, 23 Am. Rep. 18, 5 Am. Neg. Cas. 208; Hall v. Germain (1891) 59 Hun, 626, 37 N. Y. S. R. 320, 14 N. Y. Supp. 5; Coley v. Statesville (1897) 121 N. C. 301, 28 S. E. 492; RUEHL v. LIDGERWOOD RURAL TELEPH. Co. ante, 1063; Rober v. Northern P. R. Co. (1913) 25 N. D. 394, 142 N. W. 22; Steinbrunner v. Pittsburg & W. R. Co. (1891) 146 Pa. 504, 28 Am. St. Rep. 806, 23 Atl. 239; Emery v. Philadelphia (1904) 208 Pa. 492, 57 Atl. 977, 16 Am. Neg. Rep. 563; Sweet v. Providence & S. R. Co. (1899) 20 R. I. 785, 40 Atl. 237; Reynolds v. Narragansett Electric Lighting Co. (1904) 26 R. I. 457, 59 Atl. 393; Whaley v. Vidal (1911) 27 S. D. 642, 132 N. W. 246; Gulf, C. & S. F. R. Co. v. Smith (1894) — Tex. Civ. App. —, 26 S. W. 644; Gulf, C. & S. F. R. Co. v. Johnson (1895) 10 Tex. Civ. App. 254, 31 S. W. 255; Galveston, H. & S. A. R. Co. v. Gormley (1896) — Tex. Civ. App. —, 35 S. W. 488; Missouri, K. & T. R. Co. v. Hines (1897) — Tex. Civ. App. —, 40 S. W. 152; Missouri, K. & T. R. Co. v. Ransom (1897) 15 Tex. Civ. App. 689, 41 S. W. 826; San Antonio & A. P. R. Co. v. Engelhorn (1900) 24 Tex. Civ. App. 324, 62 S. W. 561, 65 S. W. 68; Galveston, H. & S. A. R. Co. v. Burnett (1897) — Tex. Civ. App. —, 42 S. W. 314; Huber v. Texas & P. R. Co. (1908) — Tex. Civ. App. —, 113 S. W. 984; Galveston, H. & S. A. R. Co. v. Hughes (1899) 22 Tex. Civ. App. 124; Norfolk & W. R. Co. v. Spencer (1905) 104 Va. 657, 52 S. E. 310; Baltimore & O. R. Co. v. Noell (1879) 32 Gratt. (Va.) 394; Culp v. Virginian R. Co. (1915) 77 W. Va. 125, 87 S. E. 187.

In *Louisville & N. R. Co. v. Thomas* (1916) 170 Ky. 145, 185 S. W. 840, it is held that in an action based upon the Fed-

pectancy is the subject of inquiry;² or the fact that he was afflicted with a fatal disease which might at any time result in death;³ they are also generally held to be admissible in evidence as to the life expectancy of the deceased, although at the time he received the injury resulting in his death he was engaged in a hazardous occupation.⁴

eral Employers' Liability Act to recover for the negligent killing of an adult, for the benefit of his parents, life tables are admissible in evidence in behalf of the defendants to show the life expectancy of the parents, and the plaintiff is entitled to introduce such tables to show the life expectancy of the deceased merely for the purpose of showing that it covered the period of the life expectancy of the parents.

² *Friend v. Ingersoll* (1894), 39 Neb. 717, 58 N. W. 281.

Smiser v. State (1896) 17 Ind. App. 519, 47 N. E. 229, holding that life tables are admissible although decedent had been a sufferer from bronchitis and lung trouble, and drew a pension on that account, where, however, he had been able to work constantly.

Deer v. Suckow Co. (1915) 60 Ind. App. 277, 110 N. E. 700, holding that mortality tables are admissible in evidence to show the duration of the life of the deceased without reference to his health; that his poor health goes merely to the force and weight to be given to the table.

Memphis Street R. Co. v. Berry (1907) 118 Tenn. 581, 102 S. W. 85, holding that, although there is evidence that the deceased at the time he was killed was in an advanced stage of dropsy, which, however, was contradicted, evidence is admissible as to the expectancy of life of the deceased as shown by the mortality tables.

Galveston, H. & S. A. R. Co. v. Gormley (1896) — Tex. Civ. App. —, 35 S. W. 488, holding that mortality tables are admissible in evidence to show the life expectancy of the deceased, although he was in poor health at the time of his injury which resulted in death.

But see *Mississippi Cotton Oil Co. v. Smith* (1909) 95 Miss. 528, 48 So. 735, holding that it is improper to admit in evidence life expectancy tables as bearing upon the life expectancy of a deceased person who was afflicted with a disease, where people suffering from such disease were not included in such tables.

Compare with *Mississippi C. R. Co. v. Robinson* (1914) 106 Miss. 896, 64 So. 838, holding that, where the decedent's only infirmity was deafness, mortality tables are admissible to show his life expectancy.

In *Rafferty v. Buckman* (1877) 46 Iowa, 195, the court expressed doubt as to the admissibility in evidence of the Carlisle Tables as bearing upon the duration in life of a man addicted to the use of intoxicating liquors.

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As affected by the tender years of the deceased.

There is a conflict of judicial opinion as to the admissibility of evidence of mortality tables as an aid in determining the life expectancy of a young child whose age is not tabulated therein. It has been held that tables of this character are admissible in such cases not-

³ *Moses v. Mathews* (1914) 95 Neb. 672, 146 N. W. 920, Ann. Cas. 1915A, 698, holding that mortality tables are admissible in evidence in an action to recover damages for the death of a person suffering from a disease which might terminate fatally at any time.

⁴ *San Bois Coal Co. v. Resetz* (1914) 43 Okla. 384, 143 Pac. 46.

Central R. Co. v. Crosby (1885) 74 Ga. 737, 58 Am. Rep. 463, 14 Am. Neg. Cas. 140, holding that fact that the deceased was a locomotive engineer, and hence engaged in a hazardous occupation, did not render the Carlisle Tables inadmissible as evidence of his life expectancy, since such tables are not conclusive evidence, and that the degree of weight to be attached to them was for the jury.

Coates v. Burlington, C. R. & N. R. Co. (1883) 62 Iowa, 486, 17 N. W. 760, holding that the standard mortality tables are admissible in evidence to show the probable duration of life of a person of decedent's age at the time of his death, although the decedent in his lifetime was engaged in an extrahazardous and dangerous vocation.

Farmers' Loan & T. Co. v. Toledo, A. A. & N. M. R. Co. (1895) 67 Fed. 73, holding that the fact that the deceased was engaged in an extrahazardous occupation, does not render inadmissible general mortality tables as bearing upon his life expectancy.

Culp v. Virginian R. Co. (1915) 77 W. Va. 125, 87 S. E. 187, holding that the fact that the deceased was a freight train conductor, and not a member of the class whose lives were included in a life expectancy table offered in evidence, does not render the table inadmissible.

Galveston, H. & S. A. R. Co. v. Johnson (1900) 24 Tex. Civ. App. 180, 58 S. W. 622, holding that, although mortality tables have reference only to insurable lives, and do not include occupations of special risks, such as locomotive engineers, nevertheless such tables are admissible in evidence in an action to recover damages for the negligent killing of a locomotive engineer, since even in such a case it is of some importance for the jury to know the result of the statistics.

It has been held, however, that, where the deceased is engaged in a hazardous occupation, the pecuniary loss to his widow by his death is impossible of determination upon any scientific basis. *Dobyns v. Yazoo & M. Valley R. Co.* (1907) 119 La. 72, 43 So. 934.

withstanding the tender age of the deceased, for this fact merely bears upon the weight to be attached to the table, and not upon its admissibility.⁵ In other jurisdictions mortality tables have been held inadmissible to show the life expectancy of a young child, where the lives of children of that age are not included in the table.⁶

The rule denying the admissibility of such tables is based upon the ground that the rate of mortality among children of very tender years is much greater than it is among children of more advanced age, and that hence a table covering the life expectancy of an older child would not be any guide as to the life expectancy of a substantially younger child, and it might be misleading.⁷ It is to be noted that this objection can be obviated by the use of such tables as the Carlisle Table, for this

tablet contains a tabulation of the lives of infants from one year old up.

The admissibility in evidence of these tables in cases where the person whose life expectancy is involved was not within the class included in the table, either because he was in poor health, afflicted with a fatal disease, engaged in a hazardous occupation, or was of an age not included in the table, where sustained, is generally based on the ground that these are matters which merely affect the value or weight to be attached to the table as a guide in ascertaining in a particular case the life expectancy in issue.

Conclusiveness of table.

Although admissible in evidence, life expectancy or mortality tables are not generally conclusive upon the question of the decedent's duration of life, or the life expectancy of the decedent's beneficiaries.⁸ As a rule, they are admissi-

⁵ *Walters v. Chicago*, R. I. & P. R. Co. (1875) 41 Iowa, 71.

RUEHL v. LIDGERWOOD RURAL TELEPH. Co. ante, 1063, holding that mortality tables are admissible to show the duration of life of a three-year-old child in this state, where the statute makes life expectancy tables admissible in evidence without limiting the same to any class of persons.

Sweet v. Providence & S. R. Co. (1890) 20 R. I. 785, 40 Atl. 237, holding that the Carlisle Tables are admissible in evidence as bearing upon the life expectancy of a child six and one-half years of age.

⁶ *Morse v. Detroit*, G. H. & M. R. Co. (1911) 168 Mich. 99, 133 N. W. 935, holding that, in an action to recover for the negligent killing of a child twenty-seven months old, statutory mortality tables are not admissible in evidence to show the probable duration of the life of the child after reaching majority.

Rajnowski v. Detroit, B. C. & A. R. Co. (1889) 74 Mich. 20, 41 N. W. 847, holding that the statutory mortality tables are not admissible to show the life expectancy of a child five years of age.

Decker v. McSorley (1901) 111 Wis. 91, 86 N. W. 554, holding that mortality tables showing the life expectancy of a child ten years of age are not admissible to show the expectancy of a child between four and five years old.

⁷ *Morse v. Detroit*, G. H. & M. R. Co. (1911) 168 Mich. 99, 133 N. W. 935.

⁸ *Kountz v. Toledo*, St. L. & W. R. Co. (1911) 189 Fed. 494; *The Oceanic* (1894) 61 Fed. 338, affirmed in (1896) 20 C. C. A. 419, 44 U. S. App. 353, 74 Fed. 261; *St. Louis, I. M. & S. R. Co. v. Needham* (1892) 3 C. C. A. 129, 10 U. S. App. 339, 52 Fed. 371; *Nevers Lumber Co. v. Fields* (1907) 151 Ala. 367, 44 So. 81; *Louisville & N. R. Co. v. Anderson*, (1907) 150 Ala. 350, 43 So. 566; *Alabama Mineral R. Co. v. Jones* L.R.A.1918C.

(1896) 114 Ala. 519, 62 Am. St. Rep. 121, 21 So. 507, 1 Am. Neg. Rep. 551; *Valente v. Sierra R. Co.* (1907) 151 Cal. 534, 91 Pac. 481; *Harrison v. Sutter Street R. Co.* (1897) 116 Cal. 156, 47 Pac. 1019, 1 Am. Neg. Rep. 403; *Western & A. R. Co. v. Clark* (1903) 117 Ga. 548, 44 S. E. 1; *Florida, C. & P. R. Co. v. Burney* (1895) 98 Ga. 1, 26 S. E. 730; *Central R. & Bkg. Co. v. Wiggins* (1892) 91 Ga. 208, 8 S. E. 187; *Central R. Co. v. Thompson* (1886) 76 Ga. 770; *Central R. Co. v. Crosby* (1885) 74 Ga. 737, 58 Am. Rep. 463, 14 Am. Neg. Cas. 140; *Central of Georgia R. Co. v. Minor* (1907) 2 Ga. App. 804, 59 S. E. 81; *Farrell v. Chicago, R. I. & P. R. Co.* (1904) 123 Iowa, 690, 99 N. W. 578, 16 Am. Neg. Rep. 318; *Calvert v. Springfield Electric Light & P. Co.* (1907) 231 Ill. 290, 14 L.R.A.(N.S.) 782, 83 N. E. 184, 12 Ann. Cas. 423; *Chesapeake & O. R. Co. v. Dupe* (1902) 23 Ky. L. Rep. 2349, 67 S. W. 15; *Little v. Bousfield* (1911) 165 Mich. 654, 131 N. W. 63; *Davis v. Michigan C. R. Co.* (1907) 147 Mich. 479, 111 N. W. 76; *Jones v. McMillan* (1901) 129 Mich. 86, 88 N. W. 206; *Hunn v. Michigan C. R. Co.* (1889) 78 Mich. 513, 7 L.R.A. 500, 44 N. W. 502; *Scheffler v. Minneapolis & St. L. R. Co.* (1884) 32 Minn. 518, 21 N. W. 711; *Haines v. Pearson* (1903) 100 Mo. App. 551, 75 S. W. 194; *Moses v. Mathews* (1914) 95 Neb. 672, 146 N. W. 920, Ann. Cas. 1915A, 698; *Friend v. Ingersoll* (1894) 39 Neb. 717, 58 N. W. 231; *Camden & A. R. Co. v. Williams* (1898) 61 N. J. L. 646, 40 Atl. 634; *Lake Shore & M. S. R. Co. v. Schultz* (1898) 9 Ohio C. D. 816; *Steinbrunner v. Pittsburgh & W. R. Co.* (1892) 146 Pa. 504, 28 Am. St. Rep. 806, 23 Atl. 239; *Bussey v. Charleston & W. C. R. Co.* (1907) 78 S. C. 352, 58 S. E. 1015; *Texas Mexican R. Co. v. Higgins* (1906) 44 Tex. Civ. App. 523, 99 S. W. 200; *Culp v. Virginia R. Co.* (1915) 77 W. Va. 125, 87 S. E. 187.

ble merely as a guide for the jury in ascertaining the life expectancy in accordance with the facts and circumstances of the particular case. In this regard it is very generally recognized that the life expectancy of the person is to be determined by the evidence relating to his age, health, habits, occupation, and such other matters as may be properly developed in the particular case. As a guide, however, in applying such evidence, these tables are very valuable, and are generally used.

In this regard it has been asserted that, while mortality tables may be taken as evidence of how long the deceased might have lived, this question, in an action to recover for his death, is for the jury to determine from all the evidence in the case and the observation

and experience of its members. Compensation for pecuniary loss is the measure of damages, and there is no formal or fixed rule prescribed to govern the jury in its ascertainment.⁹ And it has been held that life expectancy tables are not conclusive, and are far from satisfactory evidence, but they are admitted from necessity because they are the best guide obtainable to establish a material and necessarily uncertain fact,—the probable duration of the life of the decedent.¹⁰ On the other hand, it has been held that mortality tables when received in evidence are controlling upon the question of expectancy of life, in the absence of evidence tending to show that the deceased had a probability of life greater or less than that shown by the tables.¹¹

In *Alabama Mineral R. Co. v. Jones* (1896) 114 Ala. 519, 62 Am. St. Rep. 121, 21 So. 507, 1 Am. Neg. Rep. 551, it is held that there is no method of ascertaining the decedent's life expectancy as a positive fact, for in any case the period fixed is necessarily an inference drawn from many conditions and circumstances.

In *Hebert v. Lake Charles Ice, Light & Waterworks Co.* (1903) 111 La. 533, 64 L.R.A. 101, 100 Am. St. Rep. 508, 35 So. 731, it is held that the mortality tables are simply an assistance to the court by way of estimate or approximation, but they have no absolute probative force. They may properly be referred to by insurance companies in making their contracts, but judgments of courts cannot be based absolutely upon them, for the earning power of the deceased would generally have to be exercised throughout a long number of years and under numberless contingencies.

In *Speight v. Seaboard Air Line R. Co.* (1912) 161 N. C. 80, 76 S. E. 684, it is held that it is proper to instruct the jury that, in determining the life expectancy of the deceased, the mortality tables introduced in evidence may be considered by them, but they are not binding upon them.

In *Lake Shore & M. S. R. Co. v. Schultz* (1898) 9 Ohio C. D. 816, it is held that, in determining the excessiveness of a verdict, the court should not apply any rule from a table of probability, for the jury does not necessarily base their verdict upon fixed mathematical tables, and it is not the object or intention of the statute that they should.

⁹ *Texas Mexican R. Co. v. Higgins* (1906) 44 Tex. Civ. App. 523, 99 S. W. 200, holding that the jury are not bound to take the mortality tables as evidence of the probable duration of the decedent's life, but they may determine that fact from all the evidence in the case and their observations and experience.

It has been said that basing the damages recoverable for the benefit of the next of

kin upon annuity tables and the expectancy of decedent's life is not a fair way to arrive thereat, since the amount of money which would purchase an annuity during the expectancy of life of the next of kin, equal to the annual contributions to their support by the deceased, would be excessive, for it must necessarily be lessened and cut down by contingencies which such cases present. *Commercial Club v. Hilliker* (1898) 20 Ind. App. 239, 50 N. E. 578.

And see *Central R. Co. v. Thompson* (1896) 76 Ga. 770, holding the tables prepared for life insurance companies do not contemplate at all the ability to work, and the length of time that ability will continue, and the amount it will decrease as age increases; hence they are not conclusive on the question of the earning capacity of the decedent, and the jury should be instructed in connection with these tables that these other elements should also be taken into consideration.

And see *St. Louis, I. M. & S. R. Co. v. Needham* (1892) 3 C. C. A. 129, 10 U. S. App. 339, 52 Fed. 371, declaring that, where the jury find difficulty in reaching a conclusion by any mathematical calculation, they may estimate the pecuniary loss from the death complained of by their own good sense and sound judgment.

¹⁰ *Emery v. Philadelphia* (1904) 208 Pa. 492, 57 Atl. 977, 16 Am. Neg. Rep. 563.

¹¹ *Nelson v. Lake Shore & M. S. R. Co.* (1895) 104 Mich. 582, 62 N. W. 993; *Little v. Bousfield* (1911) 165 Mich. 654, 131 N. W. 63.

Davis v. Michigan R. Co. (1907) 147 Mich. 479, 111 N. W. 76, holding that, where there was testimony that the health of the decedent prior to the injury was first-class, and there was no evidence in the case to impair the effect of this testimony, mortality tables showing the duration of his life were conclusive.

Jones v. McMillan (1901) 129 Mich. 86, 88 N. W. 206, holding that the tables are conclusive where there is no other evidence

Necessity of use of — in general.

While admissible it is not necessary to introduce in evidence life expectancy or mortality tables in order to entitle the plaintiff to recover substantial damages as compensation for the pecuniary loss by the death complained of. The jury may assess such damages as may fairly compensate for the pecuniary loss complained of, determining the life expectancy of the decedent or the statutory beneficiaries, as the circumstances of the case may require, from other evidence in the case, such as evidence as to health, habits, occupation, environment, etc., of the person whose life expectancy is the subject of inquiry.¹³

Judicial notice of.

A ground for avoiding the necessity

bearing on the duration of the life in question; but they are not conclusive if this question is in dispute.

And see *Rowley v. London & N. W. R. Co.* (1873) 1 L. R. 8 Exch. (Eng.) 221, 42 L. J. Exch. N. S. 153, 29 L. T. N. S. 180, 21 Week. Rep. 869, holding that, if there is no evidence as to the health of deceased or his statutory beneficiaries, the jury may consider the lives of the decedent and the beneficiaries as average lives.

¹³ *Northern Alabama R. Co. v. Key* (1907) 150 Ala. 641, 43 So. 794; *St. Louis, I. M. & S. R. Co. v. Evans* (1911) 90 Ark. 69, 137 S. W. 568; *Kansas City Southern R. Co. v. Morris* (1906) 80 Ark. 528, 98 S. W. 363, 10 Ann. Cas. 618; *Valente v. Sierra R. Co.* (1907) 151 Cal. 534, 91 Pac. 481; *Boswell v. Barnhart* (1895) 96 Ga. 521, 23 S. W. 414; *Farrell v. Chicago, R. I. & P. R. Co.* (1904) 123 Iowa, 690, 99 N. W. 578, 16 Am. Neg. Rep. 318; *Beems v. Chicago, R. I. & P. R. Co.* (1885) 67 Iowa, 435, 25 N. W. 693; *Atchison, T. & S. F. R. Co. v. Hughes* (1895) 55 Kan. 491, 40 Pac. 919, 3 Am. Neg. Cas. 479; *Chesapeake & O. R. Co. v. Dupes* (1902) 23 Ky. L. Rep. 2349, 67 S. W. 15; *Deisen v. Chicago, St. P. M. & O. R. Co.* (1890) 43 Minn. 454, 45 N. W. 864; *Haines v. Pearson* (1903) 100 Mo. App. 551, 75 S. W. 194; *Moses v. Mathews* (1914) 95 Neb. 672, 146 N. W. 920, Ann. Cas. 1915A, 698; *RUEHL v. LINGERWOOD RURAL TELEPH. Co.* ante, 1063; *Rober v. Northern P. R. Co.* (1913) 25 N. D. 394, 142 N. W. 22; *Bussey v. Charleston & W. O. R. Co.* (1907) 78 S. C. 352, 58 S. E. 1015; *Galveston H. & S. A. R. Co. v. Hughes* (1899) 22 Tex. Civ. App. 134, 54 S. W. 264; *Norfolk & W. R. Co. v. Phillips* (1902) 100 Va. 362, 41 S. E. 726.

In *Little v. Bousfield* (1911) 165 Mich. 654, 131 N. W. 63, it is held that the failure to show the life expectancy of the deceased is not a ground for reversing a judgment in favor of the plaintiff in an action to recover damages for the death of the deceased through the negligence of the defendant; nevertheless where the damages allowed are apparently computed upon a L.R.A.1918C.

of offering in evidence mortality tables is that a standard table in common use belongs to that class of books and documents of which the court will take judicial notice, and hence the use of a standard table will be authorized, although it is not formally offered and received in evidence.¹⁴ So, where mortality tables are referred to and made part of the rules of the court, it may take judicial notice of them although they are not offered in evidence.¹⁵ Before the court will take judicial notice of mortality tables, however, it must know by experience, or the general use of the tables by lawyers or actuaries, or by reputation, that they are accurate.¹⁶

Necessity of preliminary proof to show authenticity of.

A standard mortality table is admis-

basis not supported by the mortuary tables, they will be held excessive.

¹³ *Nelson v. Branford Lighting & Water Co.* (1903) 75 Conn. 548, 54 Atl. 363, 13 Am. Neg. Rep. 490; *Pittsburgh, C. C. & St. L. R. Co. v. Sudhoff* (1909) 173 Ind. 314, 90 N. E. 467; *Notto v. Atlantic City R. Co.* (1908) 75 N. J. 826, 17 L.R.A.(N.S.) 1138, 127 Am. St. Rep. 835, 69 Atl. 968; *Coley v. Statesville* (1897) 121 N. C. 301, 28 S. E. 482; *Rober v. Northern P. R. Co.* (1913) 25 N. D. 394, 142 N. W. 22.

And see *Scheffer v. Minneapolis & St. L. R. Co.* (1884) 32 Minn. 518, 21 N. W. 711, holding that life tables are to be received in evidence upon judicial notice of their authenticity.

In *Alabama Mineral R. Co. v. Jones* (1896) 114 Ala. 519, 62 Am. St. Rep. 121, 21 So. 507, 1 Am. Neg. Rep. 551, it is held that tables of mortality computed upon the experience of life insurance companies, being of universal recognition, will be taken judicial cognizance of by courts; but they are not conclusive that the life expectancy of any particular person, although in good health and of sober habits, should be declared to be the period estimated, for there may be other physical infirmities creating extraordinary hazard, such as heritable diseases in ancestors, undue relation of height to weight, and occupation of the decedent. These are all matters of evidence for the jury to take into consideration in arriving at the probable expectancy of life of the decedent.

¹⁴ *Davis v. Standish* (1882) 26 Hun (N. Y.) 608.

Compare with *Western & A. R. Co. v. Hyer* (1901) 113 Ga. 776, 39 S. E. 447, holding that the mere fact that certain tables were published by the official reporter of the court in the form of an appendix to a volume of the state reports does not authorize the court to take judicial notice of the contents of the tables there to be found.

¹⁵ *Pittsburgh, C. C. & St. L. R. Co. v. Sudhoff* (1909) 173 Ind. 314, 90 N. E. 467.

sible in evidence in actions to recover compensation for pecuniary loss due to the negligent killing of a person, without preliminary proof, if the court is satisfied of its authenticity.¹⁹ Preliminary proof in this regard may be required, however, if the court is not satisfied.¹⁷ Where required, the proof must be of a character to satisfy the court of the authenticity of the table.¹⁸ It is not necessarily sufficient that it is published in a law book or that its authenticity is testified to by a lawyer who is

not familiar with the table.¹⁹ Evidence must be given of the accuracy of a table contained in a cheap unknown book.²⁰ It is, however, sufficient to render admissible in evidence a life table to show that it is in common use by life insurance companies.²¹ Although a mortality table is not distinctly shown to be one of the standard tables, it has been held to be admissible, the lack of full proof of the question going merely to its probative value.²²

¹⁹ *Valente v. Sierra R. Co.* (1907) 151 Cal. 534, 91 Pac. 481; *Keast v. Santa Ysabel Gold Min. Co.* (1902) 136 Cal. 256, 68 Pac. 771.

¹⁷ *Keast v. Santa Ysabel Gold Min. Co.* (Cal.) *supra*.

¹⁸ *Camden & A. R. Co. v. Williams* (1898) 61 N. J. L. 646, 40 Atl. 634, holding that the authenticity of a paper offered as a Carlisle life table should be established by proof satisfactory to the court, as by a witness familiar with it or with its use. This is not necessary, however, where its authenticity is admitted.

¹⁹ *Notto v. Atlantic City R. Co.* (1908) 75 N. J. L. 828, 17 L.R.A.(N.S.) 1138, 127 Am. St. Rep. 835, 69 Atl. 968, holding that the table published in the American & English Encyclopedia Law is not admissible in evidence unless its accuracy is proven by com-

petent proof, and the testimony of a lawyer not familiar with such table is not sufficient.

²⁰ *Galveston, H. & S. A. R. Co. v. Arispe* (1891) 81 Tex. 517, 17 S. W. 47, holding that, where there is no evidence to show that life expectancy tables contained in a cheap unknown book are accurate, they are not admissible in evidence.

²¹ *Gulf, C. & S. F. R. Co. v. Smith* (1894) — Tex. Civ. App. —, 26 S. W. 644, holding that it is sufficient to render a life table admissible to show that it is in common use by life insurance companies as a basis of determining the life expectancy. To the same effect is *Gulf, C. & S. F. R. Co. v. Johnson* (1895) 10 Tex. Civ. App. 254, 31 S. W. 255.

²² *Culp v. Virginian R. Co.* (1915) 77 W. Va. 125, 87 S. E. 187. A. G. S.

WISCONSIN SUPREME COURT.

VILLAGE OF WEST SALEM.

v.

INDUSTRIAL COMMISSION OF WISCONSIN et al.

(162 Wis. 57, 155 N. W. 929.)

Master and servant — workmen's compensation — basis for computation to one summoned to assist marshal.

The compensation for death of a plumber killed while responding to the call of the village marshal for aid in enforcing the criminal law must be based not on his earnings as a plumber, but on those of policemen under a statute providing that where specified methods for ascertaining the average earnings cannot be fairly and reasonably applied, then the average annual earn-

ings for basis of compensation shall be fixed at the sum received by other employees of the same or most similar class engaged in the same or similar employment in the same or neighboring locality.

For other cases, see Master and Servant, II. a, in Dig. 1-52 N. S.

(January 11, 1916.)

CROSS APPEALS from a judgment of the Circuit Court for Dane County setting aside an award of the Commission requiring plaintiff to pay defendant Vocek a certain amount as compensation for the death of her husband, and remanding the cause to the Commission for further proceedings; plaintiff appealing from the part of the judgment holding it liable at all under the Compensation Act; and defend-

Note.—As to evidence of the earnings of the deceased to show pecuniary loss by his death, see annotation following this case, post, 1080. For other questions in relation to evidence bearing on measure of damages in action for death, see references in the first part of the annotation following *Raines v. Southern R. Co.* ante, 1056; and generally as to questions distinctive to the action for death, see L.R.A. Indexes under the titles, "Death" and "Damages." subtitles, "Measure of Compensation—Death." L.R.A.1918C.

As to the ascertainment of the average earnings of workmen under the Workmen's Compensation Acts, see the annotation in L.R.A.1916A, at pp. 149 and 260, and the annotation in L.R.A.1917D, at p. 175. As to "average weekly earnings" under these acts of a workman employed by several employers, see annotation following *Gillen v. Ocean Acci. & G. Corp.* L.R.A.1916A, 371.

ants appealing from the part holding that compensation was computed upon a wrong basis. Affirmed.

Statement by Siebecker, J.:

This is an action to set aside an award of the Industrial Commission requiring the plaintiff village to pay to Alice Voeck \$3,000 on account of the death of her husband, William Voeck, caused by an accidental injury while in the employ of the plaintiff village. The circuit court set aside the award of the Industrial Commission and remanded the cause to the Commission for further proceedings. Both parties appeal from this judgment of the circuit court.

William Voeck was a resident of the village of West Salem at the time of his death. One William Jones had left the village to escape criminal prosecution. He returned in about a year. On or about May 2, 1914, a warrant, which had been previously issued by a justice of the peace and made returnable before the county court of La Crosse county, was put into the hands of the deputy sheriff, Weingarten, who attempted to take William Jones into custody. Mr. Wilcox, the village marshal of West Salem, met Jones and Weingarten immediately after Weingarten took Jones into custody, and was informed by Weingarten that Jones did not wish to go to the village lockup. Wilcox suggested that Jones might give bail for his appearance, and they applied to Justice Nelson for release of Jones on his bond; but the justice disclaimed any authority to release Jones from custody. The parties then applied to Justice Phillip, who also refused to take any steps to release Jones. Jones became angered at this refusal, and, drawing a gun, threatened Mr. Phillip. The deputy sheriff prevailed upon Jones not to shoot and to leave Justice Phillip's house but when Phillip closed the house door Jones made angry threats and broke the glass in the door and again threatened Phillip. Weingarten did not succeed in restraining Jones in this disturbance of the peace, whereupon Wilcox stated to Weingarten that they must do something and that he would get help, and started to get assistance. Wilcox met Voeck and told him that Jones had a gun and that Weingarten needed his help, and proceeded to call others to assist in suppressing Jones' disturbance and violation of the criminal law. When Voeck got within a few feet of Jones and Weingarten, Jones suddenly drew his revolver and shot Voeck, who died a short time thereafter.

Voeck was employed as a plumber in the village of West Salem and earned about \$18 per week. The Industrial Commission

based the award of \$3,000 upon Voeck's earnings as a plumber. The circuit court, upon appeal, held the village to be liable under the Compensation Act, but held that the award as fixed by the Industrial Commission was erroneously based upon Voeck's average earnings as a plumber, and held that compensation must be based upon earnings in "the same or a similar" or the "most similar employment" to that in which the deceased was engaged at the time of the injury, namely, that of a policeman of the village, and remanded the cause to the Commission for further proceedings. From such judgment both of the parties appeal.

Messrs. Baldwin & Bosshard, for plaintiff:

In order to hold plaintiff liable, it must first be determined that Voeck was a policeman under an appointment or contract of hire in the service of the village, and was not an official.

Hayes v. Oshkosh, 33 Wis. 314, 14 Am. Rep. 760; Schultz v. Milwaukee, 49 Wis. 254, 35 Am. Rep. 779, 5 N. W. 342; Little v. Madison, 49 Wis. 605, 35 Am. Rep. 793, 6 N. W. 249; State ex rel. Gordon v. McNay, 90 Wis. 104, 62 N. W. 917.

Voeck was not entitled to any compensation for assisting an officer in making an arrest, even if it be considered that he so acted.

3 Cyc. 884; McCumber v. Waukesha County, 91 Wis. 442, 65 N. W. 61; Mellen Lumber Co. v. Industrial Commission, 154 Wis. 114, L.R.A. 1916A, 374, 142 N. W. 187, Ann. Cas. 1915D, 997; International Harvester Co. v. Industrial Commission, 157 Wis. 167, 147 N. W. 53, Ann. Cas. 1916B, 330, 5 N. C. C. A. 822.

Messrs. W. C. Owen, Attorney General, and Winfield W. Gilman, Assistant Attorney General, for defendant Industrial Commission:

The Commission did not err in its method of computing compensation.

Gorrell v. Battelle, 93 Kan. 370, 144 Pac. 244; Re Petrie, 215 N. Y. 335, 109 N. E. 549; Boyd, Workmen's Compensation, § 525; Gillen v. Ocean Acci. & G. Corp. 215 Mass. 96, L.R.A. 1916A, 371, 102 N. E. 346; State ex rel. Gaylord Farmers Co-op. Creamery Asso. v. District Ct. 128 Minn. 486, 151 N. W. 182, 9 N. C. C. A. 86.

Voeck was an employee of plaintiff, within the meaning of that term as used in the Workmen's Compensation Act.

State ex rel. Brown v. Appleby, 139 Wis. 195, 120 N. W. 861; State ex rel. Quintin v. Edwards, 40 Mont. 287, 106 Pac. 695, 20 Ann. Cas. 239; State ex rel. Hosford v. Kennedy, 69 Conn. 220, 37 Atl. 503; Brownell

v. Russell, 76 Vt. 326, 57 Atl. 103; Harwell v. Mansfield, 9 Ga. App. 479, 71 S. E. 764; Gilbert v. Paducah, 115 Ky. 160, 72 S. W. 816; Huey v. Jones, 140 Ala. 479, 37 So. 193; Upshur v. Hamilton, 95 Md. 561, 52 Atl. 977; Folsom v. Conklin, 3 Cal. App. 480, 86 Pac. 724; Cote v. Biddeford, 96 Me. 491, 90 Am. St. Rep. 417, 52 Atl. 1019; Lattime v. Hunt, 196 Mass. 261, 81 N. E. 1001; Stebbins v. Police Comrs. 196 Mass. 365, 82 N. E. 42; People ex rel. Bancroft v. Weygant, 14 Hun, 546; Sheridan v. Colvin, 78 Ill. 237; Com. v. Boles, 160 Ky. 775, 170 S. W. 170; St. Louis, I. M. & S. R. Co. v. Grafton, 51 Ark. 504, 14 Am. St. Rep. 66, 11 S. W. 702; Cornwell v. St. Louis Transit Co. 100 Mo. App. 268, 73 S. W. 305, 106 Mo. App. 135, 80 S. W. 744; Stuart v. Harris, 69 Ill. App. 668; Binmore, Sheriffs, § 6.

Messrs. Grotophorst, Evans, & Thomas, for defendant Voeck:

The Industrial Commission was justified in deciding that the plaintiff was entitled to recover in her application for an award.

Milwaukee Coke & Gas Co. v. Industrial Commission, 160 Wis. 247, 151 N. W. 245; Nekoosa-Edwards Paper Co. v. Industrial Commission, 154 Wis. 105, L.R.A.1916A, 348, 141 N. W. 1013, Ann. Cas. 1915B, 995; Hoenig v. Industrial Commission, 159 Wis. 646, L.R.A.1916A, 339, 150 N. W. 996, 8 N. C. C. A. 192.

Stebecker, J., delivered the opinion of the court:

The inquiries are: Was the deceased, Voeck, at the time in question, assisting the village marshal in the execution of his duties in suppressing a disturbance of the peace, and aiding the marshal and the deputy sheriff, Weingarten, in arresting Jones for violating the law of the state? And was he, if so engaged, employed as a policeman of the village, within the provisions of the Workmen's Compensation Act?

The trial court correctly and clearly states the situation of affairs at the time Jones created the trouble at Justice Philip's home, which caused the village marshal to call on Voeck to assist him and Weingarten at this place. The circuit court concluded that "while Jones was technically under arrest by the deputy sheriff, it is apparent that he was not under the control of the deputy, and that the deputy sheriff did not have either the courage or the ability to perform his duty as a peace officer. After his arrest Jones was both disturbing the peace and violating the law, and the deputy sheriff did not prevent further continuance of such conduct. Under such circumstances, it was the duty L.R.A.1918C.

of the marshal to take such action as would prevent further continuance of this lawless conduct on the part of Jones."

The facts and circumstances of the case show that Jones defied Weingarten and the marshal in their efforts to execute the law, and that an occasion was presented to the village marshal for calling upon citizens to aid them. It is clearly shown that the marshal called on Voeck for aid and that Voeck responded to the call and proceeded to the place where he was needed. While approaching Jones and Weingarten, Jones shot him.

The marshal's acts constituted in the law a command to Voeck to assist in the execution of the criminal law under the provision of § 884, Stat. 1913, and refusal to comply therewith would have subjected him to the penalties of § 4888, Stat. 1913. By command of the village marshal Voeck was required to perform duties of the same kind as those of the marshal; namely, police duties to suppress a breach of the peace and to enforce the criminal law. The transaction in fact conferred on Voeck the powers and duties of a police officer for the purposes and the exigencies of the occasion. From this it logically follows that Voeck was engaged with the marshal in performing police duties in the village at the marshal's command. The duties and powers thus imposed on him under authority of the village marshal, by force of the statutes, constituted an appointment of Voeck to perform police service for the village. State ex rel. Brown v. Appleby, 139 Wis. 195, 120 N. W. 861; McCumber v. Waukesha County, 91 Wis. 442, 65 N. W. 51; 3 Cyc. 877; 2 R. C. L. 491, § 52. The result is that Voeck acquired the status of a police officer of the village, and was engaged in the execution of the criminal law at the time of his death.

The Compensation Act provides (§ 2304 —7) that the term "employee," as used in the act, shall be construed to mean: "(1) Every person in the service of the state, or of any county, city, town, village, or school district therein under any appointment, or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city, town, village, or school district therein. . . . Policemen and firemen shall be deemed employees within the meaning of subdivision 1" of this section, and any compensation awarded a policeman or fireman shall be reduced by any sum he received from any pension or benefit fund to which his municipality contributed.

It is considered that Voeck, as we have shown, was in fact rendering services

under an authorized appointment of the village within the power conferred by statute upon the marshal; that he acted in the capacity of a temporary policeman for the village by authority of law, and that the deceased was performing policeman's service within the contemplation of the Workmen's Compensation Act.

The service which he was performing did not entitle him to any specified fee or remuneration, and hence it furnishes no wage basis upon which to compute compensation. The circuit court held that the Commission erred in basing their award on decedent's average wage as a plumber, which was his employment up to that time. We consider that the court properly held that decedent's employment as a plumber is not the correct basis of computation under § 2394—10, Stat. 1913, which provides that, where the specified methods for

ascertaining the average annual earnings cannot reasonably and fairly be applied, then the average annual earnings for basis of compensation shall be fixed, in the light of decedent's previous earnings, at the sum received by other employees of the same or most similar class, engaged in the same or similar employment, in the same or neighboring locality. The decedent not having been employed nor earning a salary as policeman during the year preceding his death, the award must be based on the earning of one doing policeman's service in his or the neighboring locality, as provided by § 2394—10, Stat. 1913. The Circuit Court rendered a correct judgment and properly remanded the cause to the Industrial Commission for further proceedings according to law.

The judgment appealed from is affirmed. No costs are allowed to either party.

Annotation—Evidence of the earnings of the deceased to show pecuniary loss by his death.

This note is confined strictly to the consideration of the question of the earnings or earning capacity of the deceased as bearing upon the amount recoverable for his death. It is not concerned with questions affecting the amount of accumulations or contributions from that source, or the basis or method of fixing their equivalent.

For a reference to other notes passing upon different phases of the question as to the character and sufficiency of the evidence to show pecuniary loss to the estate of the deceased or his beneficiaries, see note appended to *Raines v. Southern R. Co.* ante, 1056.

Earnings or earning capacity as affecting damages recoverable—in general.

In assessing the damages to a beneficiary for the destruction of the life of a relative, one of the important matters to be considered as bearing upon the

beneficiary's pecuniary loss is that of the earning capacity of the deceased.¹ Decedent's earning capacity, however, is not the criterion of the beneficiary's pecuniary loss, for it is only to the extent of contributions from the decedent's earnings and a reasonable expectation of future contributions therefrom that the beneficiary may be said to have suffered a pecuniary loss in so far as concerns the question of support or aid. Nor does evidence of the actual contributions by the deceased from his earnings in the past alone determine the beneficiary's pecuniary loss in this regard, for there is also to be taken into consideration the reasonable expectation of contributions in the future; and the amount of such contributions is to be determined not only from the earnings of the decedent at the time of his injury and death, but also in view of his increased or diminished earning capacity in the future.² It cannot be assumed

¹ *Baltimore & P. R. Co. v. Mackey* (1895) 157 U. S. 72, 39 L. ed. 624, 15 Sup. Ct. Rep. 491 (stating the general rule); *Morris v. Chicago, M. & St. P. R. Co.* (1885) 26 Fed. 22; *St. Louis, I. M. & S. R. Co. v. Needham* (1892) 3 C. C. A. 129, 10 U. S. App. 330, 52 Fed. 371.

For other cases sustaining the right to consider the earnings of the deceased in estimating the pecuniary loss to his estate or beneficiaries by his death, see other notes in this series, referred to in note to *Raines v. Southern R. Co.* ante, 1056.

Betting v. Hobbett (1892) 142 Ill. 72, 30 N. E. 1048, affirming (1891) 42 Ill. App. L.R.A.1918C.

174, holding that in case of the death of the husband, the loss of the wife's means of support is coextensive with the duration of her life; and the general average of the husband's contributions can only be ascertained from proof of his wages and earnings which furnished her means of support.

² *Southern Traction Co. v. Hulbert* (1915) — Tex. Civ. App. —, 177 S. W. 551, holding that the wages paid to the deceased at the time of his injury and death are not exclusively the standard of the damages sustained by his widow.

The measure of damages recoverable in actions of this character is worked out

that the earning capacity of a young man will remain stationary during his life; hence there is to be considered the question of a reasonable prospect of the decedent's promotion and consequent increase of wages.³

The question, however, as to what is to be taken as the basis to determine the earnings or the earning capacity of the deceased, may be controlled by statute. For example, where the statute in effect provides that, under designated circumstances, the basis for determining

the earning capacity of the deceased shall be the average earnings of other persons pursuing similar employment in the same vicinity, in assessing the compensation to be made for the death of a plumber, killed while aiding the village marshal in making an arrest at the latter's request, the earnings of one doing police service in that locality are to control, and not the earning capacity of the deceased in his trade as a plumber.⁴

quite in detail in *Secord v. Schroeder Lumber Co.* 160 Wis. 1, 150 N. W. 971, wherein the court, while conceding that "there is no standard by which they can be gaged, except the judgment of a jury, which may take a wide range and not be manifestly excessive by any rule which the court can lay down, there are some definite data to figure from: First, the average earning power of the deceased at the time of his death; second, his expectancy of life; third, his probable average earning power during such expectancy, considering his condition of health, what he had been accustomed to earn, and all the circumstances bearing on the question; fourth, the proportion of such earning capacity which, with reasonable certainty, would have reached the wife had he not been taken away; fifth, the present worth thereof; and sixth, the amount it would take to purchase an income during the expectancy of his life equal to the amount the dependents would probably have received out of his earnings."

Kansas City Southern R. Co. v. Leslie (1915) 238 U. S. 599, 59 L. ed. 1478, 35 Sup. St. Rep. 844, holds that under the Federal Employers' Liability Act, the measure of damages to statutory beneficiaries is their actual pecuniary loss; and it is error to instruct the jury that it is the present worth of such sum as the evidence indicates to be a fair and just compensation with reference to the pecuniary loss, taking into consideration the age, health, habits, occupation, and expectation of life and mental and physical disposition of the deceased to labor, and the probable increase or diminution of that ability with lapse of time, and the decedent's earning power and rate of wages, deducting therefrom the personal expenses of the deceased.

³ *Central of Georgia R. Co. v. Minor* (1907) 2 Ga. App. 804, 59 S. E. 81, holding that where there is no evidence of a definite, reasonable, or certain prospect of increase of earnings, but there is evidence as to the age, health, and habits, etc., of the deceased from which the jury may reasonably infer an increase of capacity, the jury should not be authorized to consider decedent's prospect of increase of earnings, but they may properly consider the probabilities of increased earning capacity.

Beecher v. Long Island R. Co. (1900) 53 App. Div. 324, 65 N. Y. Supp. 642, holding L.R.A.1918C.

that, in estimating the damages resulting to a widow from the death of her husband, an active business man, sixty-one years old and enjoying excellent health, the jury are not bound by the amount the decedent actually earned during his life, but may consider whether his earning capacity would have probably increased or diminished with increasing age.

International & G. N. R. Co. v. Ormond (1885). 64 Tex. 465, holding that the decedent was earning at the time of his death forms no standard by which to estimate the damages for his death, for the additional experience and skill which he may substantially acquire may increase his wages; hence there is an element of uncertainty in fixing any mathematical standard.

And see *Southern Railway-Carolina Div. v. Bennett* (1914) 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. Rep. 566, 10 N. C. C. A. 853, affirming in (1913) 98 S. C. 42, 79 S. E. 710, holding that the jury are not confined in their award of damages under the Federal Employers' Liability Act to the wages being earned by the deceased at the time of his death, and the amount which would produce such income for the life expectancy of the deceased.

Gulf, C. & S. F. R. Co. v. John (1895) 9 Tex. Civ. App. 342, 29 S. W. 558, holding that the reasonable prospect of the promotion of the deceased and the consequent increase of his wages are properly to be considered in assessing the damages for his death.

Chicago, St. L. & N. O. R. Co. v. Benedict (1913) 154 Ky. 675, 159 S. W. 526, holding that the court cannot assume that a young man's earning power will always remain the same; hence, calculations based on his earning capacity at the time of his death are not conclusive, for his earning capacity may increase, and frequently does.

Central Foundry Co. v. Bennett (1905) 144 Ala. 184, 1 L.R.A.(N.S.) 1150, 113 Am. St. Rep. 32, 39 So. 574, holding that where the decedent was a bright, economical, and industrious person, the jury, in assessing damages for his death, may take into consideration his probable increased earning capacity.

⁴ *WEST SALEM v. INDUSTRIAL COMMISSION*, ante, 1077. This case arose under the Workmen's Compensation Act, and ref-

—where earnings of the deceased would not benefit estate or beneficiary.

Where the earnings of the decedent would not benefit the decedent's estate or his statutory beneficiaries they are not to be taken into consideration in assessing the damages for the negligent destruction of his life. For example, where the recovery for the death of a child is his probable value to his estate had he lived out his life expectancy the earnings of the child, during minority are not to be included in estimating the damages, if such earnings belong to the parents.⁵ So, where damages are assessed to cover the pecuniary loss to children by the death of the mother, her earnings are not to be considered, since they belong to the husband.⁶

Character of evidence—earnings or earning capacity at the time of the injury.

As pointed out in another note in this series,⁷ there is a conflict of judicial opinion with regard to the admissibility of evidence relative to the profits derived by a deceased from a business

in which he was engaged at the time of his injury and death, as bearing upon his earning capacity. This conflict, however, does not exist with reference to the admissibility of evidence as to the wages received or the earnings of the deceased in the profession or trade he was following; the distinction frequently made between the two classes of cases being that the evidence is not admissible in the first class of cases if the capital invested in the business represents the larger basis of income, the personal services of the deceased being only subsidiary. Of course, as to salary or wages this question cannot arise.

Since the earnings of the deceased and his earning capacity are to be taken into consideration in assessing the damages for the negligent destruction of his life, it follows that these matters are to be proved by the plaintiff, and he is entitled to introduce any competent evidence having a material bearing thereon, including evidence as to the actual earnings or the earning capacity of the deceased at about the time he was injured.⁸ And it is not necessary in

erence is made to annotations in L.R.A. 1916A, pp. 149, 260, and 371, and L.R.A. 1917D, at p. 175, for other cases arising under these acts.

⁵ Tutwiler Coal, Coke & I. Co. v. Enslin (1900) 129 Ala. 336, 30 So. 600.

⁶ Tilley v. Hudson River R. Co. (1862) 24 N. Y. 471.

⁷ Spreen v. Erie R. Co. post, 1086.

⁸ Chicago & E. R. Co. v. Ponn (1911) 112 C. C. A. 228, 191 Fed. 682, holding that testimony may be given as to the average earnings of the deceased, if the witness has personal knowledge with reference thereto.

Central of Georgia R. Co. v. Alexander (1905) 144 Ala. 257, 40 So. 424, holding that the amount the deceased was being paid at the time of his death is a fair criterion of his earning capacity.

Reiter-Connolly Mfg. Co. v. Hamlin (1906) 144 Ala. 192, 40 So. 280, holding that evidence as to the amount of wages decedent was earning at the time of his death is admissible as bearing upon the prospective value of the services of the decedent.

Peters v. Southern P. Co. (1911) 160 Cal. 48, 116 Pac. 400, holding that evidence is admissible as to decedent's average rate of wages at the time of his death, although only general damages are alleged in the petition.

Illinois Steel Co. v. Ostrowski (1901) 194 Ill. 376, 62 N. E. 822, holding that evidence is proper as to the average amount earned by the decedent in an employment in which he had been engaged for about two years prior to his death.
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Chicago & A. R. Co. v. Pearson (1898) 82 Ill. App. 605, affirmed in (1900) 184 Ill. 386, 56 N. E. 633, holding that evidence is admissible as to the earnings of the deceased, who was survived by wife and children.

Vandalia Coal Co. v. Ringo (1916) — Ind. App. —, 114 N. E. 486, holding that it is competent to show earnings of deceased, and that he contributed a large portion of the same to his parents and children for their support.

McCullough v. Chicago, R. I. & P. R. Co. (1913) 160 Iowa, 524, 47 L.R.A.(N.S.) 23, 142 N. W. 67, holding that evidence as to the decedent's earning capacity is admissible (damage to estate of decedent).

Pearl v. Omaha & St. L. R. Co. (1902) 115 Iowa, 535, 88 N. W. 1078, holding that testimony of the widow is competent to show the earnings of her husband.

Simonson v. Chicago, R. I. & P. R. Co. (1878) 49 Iowa, 87, holding that evidence of the earnings of the deceased is admissible, not as a basis of compensation, but as a mere circumstance tending to show his capacity and disposition to earn money.

Baltimore & O. R. Co. v. Howard County (1910) 13 Md. 404, 77 Atl. 930, holding that evidence is competent as to the amount actually earned by the decedent, as bearing upon his earning capacity.

United Electric Light & P. Co. v. State (1905) 100 Md. 634, 60 Atl. 248, holding that evidence as to the earning capacity of the decedent is admissible in an action for his wrongful death.

Chicago, R. I. & P. R. Co. v. Holmes

this regard to produce direct evidence as to the decedent's earnings, but indirect evidence may be sufficient.⁹ For example, the earnings or earning capacity of the deceased may be established by evidence of the scale of wages paid persons working in an occupation similar to that pursued by the deceased at the time of his death.¹⁰ And as affecting the decedent's earning capacity, evidence is admissible as to his physical condition and his ability to pursue his ordinary vocation.¹¹ If there are any extraordinary circumstances existing tending to show that the amount of wages decedent was receiving at the time of his death is not a proper criterion as to his future earnings, defendant is entitled to show the facts.¹²

—earnings for some time prior to injury.

It has been held that where the in-

quiry as to the decedent's earnings is not confined to any particular time, evidence relative thereto is immaterial;¹³ and evidence is inadmissible as to the earnings of a married woman prior to her marriage, some years before her injury and death;¹⁴ and it has been held that evidence as to the amount the deceased was earning at the time he was killed is admissible, but not as to the amount he was earning a year prior thereto.¹⁵ Generally, however, evidence is admissible as to the earnings of the deceased for a considerable period of time prior to his death.¹⁶ For example, evidence is admissible as to wages received by the deceased when last employed,¹⁷ and decedent's earning capacity may be shown from the time of his death back to his young manhood, including his earnings in a partnership some years before.¹⁸

(1903) 68 Neb. 826, 94 N. W. 1007, holding, in an action by the personal representative to recover damages for his decedent's death for the benefit of the widow and children, that evidence is admissible as to the amount the deceased earned, the portion thereof he devoted to his family, his expectation of life, his character and disposition as to industry and frugality, to determine the damages recoverable.

McIntyre v. New York C. R. Co. (1867) 37 N. Y. 287, 5 Am. Neg. Cas. 97, holding that, in an action by children for the death of their mother, it is proper to prove the amount she earned before she was killed, and her capacity for personal care, intellectual culture, and moral training of her children.

Austin v. Metropolitan Street R. Co. (1905) 108 App. Div. 249, 95 N. Y. Supp. 740 (death of wife—earnings may be shown).

Seitter v. Brooklyn Heights R. Co. (1900) 85 App. Div. 10, 66 N. Y. Supp. 1107, reversed on other grounds in (1901) 169 N. Y. 254, 62 N. E. 349, holding that evidence is admissible as to the earning capacity of the deceased and the amount of his contributions to his family, as bearing upon their pecuniary loss by his death.

Wiltzie v. Tilden (1890) 77 Wis. 152, 46 N. W. 234, holding that, in an action by a mother to recover for the killing of a daughter, evidence is admissible as to the latter's education and capacity to earn money.

⁹ Atlanta & W. P. R. Co. v. Newton (1890) 85 Ga. 517, 11 S. E. 776, holding that evidence is admissible as to the capacity of the deceased, both mentally and physically, in order to show his ability to earn money in his vocation.

¹⁰ Atlantic Coast Line R. Co. v. Jones (1909) 132 Ga. 189, 63 S. E. 834, holding that, in an action to recover for the negligent killing of a locomotive engineer, evidence is admissible as to scale of wages paid engineers.
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¹¹ Slavin v. Germain (1892) 64 Hun, 506, 19 N. Y. Supp. 492, holding that as, bearing upon the earning capacity of the deceased, evidence is competent with regard to his condition of health at the time of the injury complained of, which may tend to show probable incapacity for labor, or probable shortness of life; as, for example, that the decedent was injured a short time prior to the injury complained of, and had not recovered from the effects thereof, and had not been able to resume work since such injury.

¹² Reiter-Connolly Mfg. Co. v. Hamlin (1906) 144 Ala. 192, 40 So. 280, holding that evidence is proper as to the amount of wages the deceased was earning at the time of his death.

¹³ Alabama Consol. Coal & I. Co. v. Heald (1911) 171 Ala. 263, 55 So. 181.

¹⁴ Wilcox v. Wilmington City R. Co. (1899) 2 Penn. (Del.) 157, 44 Atl. 686.

¹⁵ Hamman v. Central Coal & Coke Co. (1900) 156 Mo. 232, 56 S. W. 1091, holding that, in an action for damages for a wrongful death, the amount the decedent was earning at the time of his death is a material question of inquiry, but not the amount he was earning the year before.

¹⁶ Central of Georgia R. Co. v. Perkerson (1899) 112 Ga. 923, 53 L.R.A. 210, 38 S. E. 365, holding that evidence is admissible as to wages actually earned by the deceased within a reasonable time prior to his death (seven or eight years).

¹⁷ Sellers v. Foster (1889) 27 Neb. 118, 42 N. W. 907, holding that evidence is admissible as to the amount decedent earned the preceding year, and the amount he could earn in the future.

¹⁸ Oakes v. Maine C. R. Co. (1901) 95 Me. 103, 49 Atl. 418, holding that evidence as to the wages received by the deceased when last employed is admissible as bearing upon her ability and capacity to obtain continuous profitable employment.

¹⁹ Grand Trunk Western R. Co. v. Red-

Evidence of earnings in other trades previously followed by the deceased.

Evidence is also admissible to the effect that the deceased was skilled in trades other than the one he was engaged in at the time he met his death, and as to the amount he could earn at such trades,¹⁹ especially where it did not appear that he had permanently abandoned the same, or had become incapacitated from following them.²⁰ And this evidence may be answered by evidence that the deceased was not competent to fill the position which it was claimed he had formerly occupied.²¹

Evidence as to trades never followed by the deceased.

It has been held that, as bearing upon the earning capacity of a child, evidence is admissible as to the occupation followed by the parent, and as to

the wages received by him.²² This evidence was admitted on the ground that there was some likelihood that the child would have followed the occupation of the parent had it survived the injury, the weight to be attached to the evidence being for the jury. But evidence is not admissible as to the earnings of persons following a certain trade as bearing upon the earning capacity in the future of an apprentice to such trade, had he continued to live.²³

Evidence relative to value of deceased's services in the future.

Since it involves the opinion of the witness and is remote and contingent, evidence is inadmissible as to what the deceased's services would be worth when he should have reached majority, had he lived, although the measure of recovery is the value of the life lost.²⁴ But where

dick (1907) 88 C. C. A. 80, 160 Fed. 898, holding that evidence is admissible as to the health, character, and earning capacity of the deceased at the time of his death and covering a period from the time of his death to his young manhood, including evidence as to his earning capacity during the time he was connected with a partnership fifteen years before his death.

¹⁹ San Antonio, U. & G. R. Co. v. Galbreath (1916) — Tex. Civ. App. —, 185 S. W. 901, holding that evidence is admissible as to the decedent's earnings at different times in other employments.

Christian v. Columbus & E. R. Co. (1892) 90 Ga. 124, 15 S. E. 701, holding that where a decedent had engaged in different occupations during his life, evidence is admissible as to what he made or was capable of making in each.

Grimmelman v. Union P. R. Co. (1897) 101 Iowa, 74, 70 N. W. 90, 1 Am. Neg. Rep. 237, holding that, in an action to recover damages for the death of a person employed by the defendant as an engine wiper at the time of his death, evidence is admissible that his occupation theretofore had been that of a plasterer, and also as to the wages paid plasterers.

²⁰ Alabama G. S. R. Co. v. McWhorter (1908) 156 Ala. 269, 47 So. 84, holding that evidence is admissible that, shortly prior to his death, the deceased had been employed as a baggage master, and also as to the amount he earned at this occupation, although at the time of his death he was employed as a flagman, there being no evidence that he had abandoned the former employment or had become incapacitated from following it.

Alabama Steel & Wire Co. v. Griffin (1907) 149 Ala. 423, 42 So. 1034.

²¹ Burns v. Ashboro & M. R. Co. (1899) 125 N. C. 304, 34 S. E. 495, holding that where the decedent at the time of his death was employed as locomotive fireman, but prior to that time had been an engineer, it L.R.A.1918C.

was proper to show what he earned as engineer together with evidence as to his habits of industry and ability, and upon this point it is competent for the defendant to show that the deceased was not competent to fill the position of engineer.

²² Gregory v. Wabash R. Co. (1904) 126 Iowa, 230, 101 N. W. 761, holding it not to be error for the court to receive evidence of the compensation female school-teachers received in the neighborhood in which the decedent lived in her lifetime, although the decedent was a little girl, only two years old, the evidence being received as bearing upon the position in society and the relative status of the family in which the decedent had lived, and the opportunities afforded in that locality to young women to pursue an independent calling. It is, however, pointed out that the verdict indicates that the jury did not allow the total earnings which, as a school-teacher, the little girl would have received for the period of her expectancy of life, or even the total net earnings, and it is further pointed out that it is not claimed that the damages awarded (\$1,210) were excessive.

Eginoire v. Union County (1900) 112 Iowa, 558, 84 N. W. 758, holding, where the same question arose as to evidence of this character in an action to recover for the death of a girl eight years old, whose stepfather was a school-teacher, that the evidence was competent to go to the jury for what it was worth, since there was some likelihood of the child's following the vocation of her stepfather.

²³ Central Foundry Co. v. Bennett (1905) 144 Ala. 186, 1 L.R.A.(N.S.) 1150, 113 Am. St. Rep. 32, 39 So. 574.

²⁴ Nave v. Alabama G. S. R. Co. (1893) 96 Ala. 264, 11 So. 391. See Sellars v. Foster, supra, note 16.

The substantive question of the right of parents to recover for loss of services or contributions by a child will be considered in a series of notes, subsequently to be pub-

the deceased was actually engaged for future service, evidence is admissible of what he would earn therein, based upon his earnings in a previous service of a similar character.²⁵ And it has been held that evidence is admissible as to the ability and capacity of the decedent to earn money generally, and it need not be confined to the occupation followed by him at the time of his death, although, as bearing upon his earning capacity, evidence of the salary actually received by him at this time is also admissible.²⁶ The opinion of witnesses as to what the deceased could earn in an occupation he was not pursuing and which he never pursued is inadmissible.²⁷

Evidence as to chances of promotion.

It has been held that evidence is admissible as to the chances the deceased had for promotion in the line of work or trade he was pursuing at the time he was killed.²⁸ The general rule, however, is that evidence as to the chances for the promotion of the deceased depends very largely upon the showing as to the

existence of a reasonable likelihood thereof had he survived the injury; if shown to have existed, evidence in regard thereto is admissible,²⁹ but not where the chances for promotion are merely conjectural or are dependent upon the deceased having qualifications he is not shown to have possessed.³⁰ And evidence is inadmissible with regard to the chance the decedent had for a promotion of which he had no definite assurance.³¹ Nor is evidence admissible as to the mere possibility of the promotion of the deceased.³²

At the best, evidence of this character is difficult, problematical, and uncertain as a basis of damages, for there are always possibilities of promotion and advancement for every person, and whether any given person will reap the harvest depends on his personal qualities, his industry, zeal, and the duration of his life. It is impossible, in the nature of things, for proof to be introduced which will cover the various elements in the problem.³³

lished, on the measure of damages recoverable for the destruction of the life of a human being.

²⁵ *Puget Sound Nav. Co. v. Lavender* (1908) 87 C. C. A. 655, 160 Fed. 851, holding that evidence may be given that the deceased was engaged to go on a voyage, and the amount he would have earned upon it, based upon his earnings on a similar voyage the previous year.

²⁶ *Chesapeake & O. R. Co. v. Hoskins* (1915) 164 Ky. 575, 176 S. W. 29, holding that evidence is admissible as to the ability and capacity of decedent to earn money, but where this amount greatly exceeds his actual salary as a minister of the Gospel, evidence should be admitted as to what such salary actually is.

²⁷ *Atchison, T. & S. F. R. Co. v. Chance* (1896) 57 Kan. 40, 45 Pac. 60.

Atlanta & W. P. R. Co. v. Newton (1890) 85 Ga. 517, 11 S. E. 776, holding that, where the deceased had always followed a certain occupation, opinion evidence is inadmissible as to the amount he could have earned in some other occupation.

²⁸ *St. Louis, A. & T. R. Co. v. Johnston* (1890) 78 Tex. 536, 15 S. W. 104, holding that, as bearing upon the damages to a wife for the death of her husband, it is proper to show the average wages of a man in the decedent's situation and his chances for promotion.

Galveston, H. & S. A. R. Co. v. Ford (1898) — Tex. Civ. App. —, 46 S. W. 77, holding that, in an action for the death of a locomotive fireman, it may be shown that he was in line for promotion to engineer, and that engineers received certain compensation.
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Ft. Worth & D. C. R. Co. v. Stalcup (1914) — Tex. Civ. App. —, 167 S. W. 270, holding that evidence is admissible that the deceased, a brakeman, was in line for promotion as conductor, with an increased salary of a certain amount.

²⁹ *Geary v. Metropolitan Street R. Co.* (1902) 73 App. Div. 441, 77 N. Y. Supp. 54, holding, where the decedent was a member of the fire department, that his prior promotion and a reasonable likelihood of future promotion may be shown, but not where advancement was dependent upon competitive examinations and other qualifications not required in the position then held by the decedent.

³⁰ *Ibid.*

Brown v. Chicago, R. I. & P. R. Co. (1894) 64 Iowa, 652, 21 N. W. 193, holding that, where the decedent was a locomotive fireman, it was error to admit evidence that when firemen had acquired sufficient experience and skill, they were sometimes promoted to the position of engineers, at an increased compensation, since the evidence of prospective promotion and consequent increase in pay was too conjectural.

And see *Central Foundry Co. v. Bennett* (Ala.) *supra*.

³¹ *Central of Georgia R. Co. v. Perkerson* (1899) 112 Ga. 923, 58 L.R.A. 210, 38 S. E. 365, declaring it to be incompetent to show that the decedent was in line for promotion, and the increased rate of wages he would have received.

Central of Georgia R. Co. v. Minor (1907) 2 Ga. App. 904, 59 S. E. 81.

³² *Colorado Coal & I. Co. v. Lamb* (1895) 6 Colo. App. 255, 40 Pac. 251.

A. G. S.

NEW YORK COURT OF APPEALS.

SOPHIE SPREEN, Admr., etc., of Carl Speen, Deceased, Resp.,

v.

ERIE RAILROAD COMPANY, Appt.

(219 N. Y. 533, 114 N. E. 1049.)

Evidence — wrongful death — profits of business.

1. Evidence of the profits of the business in which decedent was engaged is not admissible upon the question of the damages to be allowed for wrongful death.

For other cases, see Evidence, XI. g, in Dig. 1-52 N. S.

Same — earnings from investments.

2. Permitting the widow to state the amount contributed by her husband, who conducted a small express business, to her support before his death, as bearing upon the damages to be awarded for such death, does not violate the rule that proof of the profits of a business is not admissible upon such question, where his income was due chiefly to his own efforts, his investment being in horses and wagons used by himself, with the occasional assistance of other drivers.

For other cases, see Evidence, XI. g, in Dig. 1-52 N. S.

(Hiscock, Chase, and Collin, JJ., dissent.)

(December 28, 1916.)

A PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a trial term for New York County, Part VII., in plaintiff's favor in an action brought to recover damages for the death of her intestate, alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. William C. Cannon, with Messrs. Stetson, Jennings, & Russell, for appellant:

The court committed error in respect of the admission of evidence adduced by the plaintiff.

16 Cyc. 1052; *Chrystal v. Troy & B. R. Co.* 105 N. Y. 164, 11 N. E. 380; *O'Brien*

Note. — As to admissibility, in action for wrongful death, of evidence of profits or contributions from business conducted by decedent, see annotation following this case, post, 1087. For other questions in relation to evidence in measure of damages in action for death, see references in the first part of the annotation following *Raines v. Southern R. Co.* ante, 1056, and generally, as to questions distinctive to the action for death, see L.R.A. Indexes under the titles, "Death" and "Damages," subtitles, "Measure of compensation—death." L.R.A.1918C.

v. Erie R. Co. 210 N. Y. 96, 103 N. E. 895; *Masterton v. Mt. Vernon*, 58 N. Y. 391; *Walsh v. New York C. & H. R. R. Co.* 204 N. Y. 58, 37 L.R.A.(N.S.) 1137, 97 N. E. 408; *Gombert v. New York C. & H. R. R. Co.* 195 N. Y. 273, 133 Am. St. Rep. 794, 88 N. E. 382; *Weir v. Union R. Co.* 188 N. Y. 416, 81 N. E. 168, 11 Ann. Cas. 43; *Hewlett v. Brooklyn Heights R. Co.* 63 App. Div. 423, 71 N. Y. Supp. 531; *Read v. Brooklyn Heights R. Co.* 32 App. Div. 503, 53 N. Y. Supp. 209; *Demarest v. Little*, 47 N. J. L. 28.

Mr. Sydney A. Syme, for respondent:

There was no error in the admission of evidence.

Quinlan v. Utica, 11 Hun, 217, affirmed in 74 N. Y. 603; *Nelson v. Young*, 91 App. Div. 457, 87 N. Y. Supp. 69, affirmed in 180 N. Y. 523, 72 N. E. 1146; *Packer v. Thomson-Houston Electric Co.* 175 Mass. 406, 56 N. E. 704; *Casterton v. American Blower Co.* 142 Mich. 407, 106 N. W. 61; *Woolsey v. Ellenville*, 84 Hun, 238, 32 N. Y. Supp. 546, affirmed in 155 N. Y. 573, 50 N. E. 270; *Cohn v. New York C. & H. R. R. Co.* 6 App. Div. 197, 39 N. Y. Supp. 986; *Chrystal v. Troy & B. R. Co.* 105 N. Y. 164, 11 N. E. 380; *Neuberger v. Long Island R. Co.* 131 App. Div. 899, 116 N. Y. Supp. 311; *Walsh v. New York C. & H. R. R. Co.* 204 N. Y. 58, 37 L.R.A.(N.S.) 1137, 97 N. E. 408; *Kronold v. New York*, 186 N. Y. 40, 78 N. E. 572, 20 Am. Neg. Rep. 690; *Fraser v. Buffalo*, 123 App. Div. 159, 108 N. Y. Supp. 127.

Willard Bartlett, Ch. J., delivered the opinion of the court:

The only question which we deem it necessary to discuss in disposing of this appeal relates to the admission of certain evidence introduced to show the pecuniary injuries resulting from the decedent's death to the person or persons for whose benefit the action was brought. Code Civ. Proc. § 1904.

After having testified that she received money from her husband, the widow was asked what she received and how much. The question was objected to as irrelevant and immaterial, counsel adding to his objection the statement that the decedent was in business for himself, and that the estate was still carrying on the business. The court responded: "The estate, as you call it, could go on in business whether he was living or dead—the same people might—I overrule the objection,"—and counsel for the defendant duly excepted. The witness answered that her husband gave her all the money he made, \$35 a week when they were in business.

By previous and subsequent testimony of

the same witness, all taken without objection or exception, it appeared that the decedent had carried on an express business between Hackensack and New York with wagons and horses driven by himself and sometimes by a driver whom he employed. At first he gave his wife \$25 a week, and later she got more, as the business increased. She could not keep it up after his death, as the expenses were too high, and she seems to have abandoned it altogether about eighteen months after he was killed.

Counsel for the appellant invokes the rule that evidence of profits of business which are uncertain and fluctuating in character and amount is not admissible to prove loss sustained by reason of personal injuries (*Walsh v. New York C. & H. R. R. Co.* 204 N. Y. 58, 68, 37 L.R.A. (N.S.) 1137, 97 N. E. 408), and asks us to reverse the judgment for the violation of this rule. Individually I doubt whether the point was distinctly presented to the mind of the trial judge, but as a majority of the court think otherwise we must pass upon it.

The first question is whether the rule applies to death cases as well as to cases of personal injury not resulting in death. It has been held that it does in Pennsylvania (*McCracken v. Consolidated Traction Co.* 201 Pa. 384, 50 Atl. 832); and in *Read v. Brooklyn Heights R. Co.* 32 App. Div. 503, 53 N. Y. Supp. 209, a death case decided by the appellate division in the second department, when Chief Judge Cullen and I were members of that court, one of the grounds for reversing the judgment was the erroneous admission of proof of the profits realized by the plaintiff's intestate as member of a partnership which was engaged in performing contracts with the city of Brooklyn for cleaning out sewers. The reasons for the rule excluding proof of profits are just as cogent in a death case as in an action for personal injuries not resulting in death, and we think it applies to both classes of actions alike.

But was the rule really violated in the case at bar? I think not. Not a word was said about profits, in questioning the widow or in her responses. After she had stated that her husband was in the express business, she was asked how much money she received from him. I have found no New York case in which such a question has been held to be objectionable. The amount customarily received by a wife from her deceased husband plainly has some bearing on the question what constitutes a fair and just compensation for the pecuniary injuries resulting from the decedent's death to the person or persons for whom the action is brought, the wife being one of those persons. Code Civ. Proc. §§ 1903, 1904. The widow's description of her husband's express business shows that it was really an individual enterprise conducted chiefly by himself, with the occasional assistance of other drivers, in which the horses and wagons corresponded to a mechanic's tools of trade. There is a manifest difference between an individual express business such as this was and the business carried on by a great express company. While the decedent's income was, to some extent, derived from the amount he had invested in his horses and wagons, his earnings were chiefly personal, as is apparent from the fact that there ceased to be any net income from the business after his death. The case falls within the doctrine of *Kronold v. New York*, 186 N. Y. 40, 78 N. E. 572, 20 Am. Neg. Rep. 600, where the element of personal earnings was held to predominate over a comparatively small and incidental investment of capital.

On the whole we conclude that no error was committed by the learned trial judge in the ruling which has been considered, and therefore that the judgment should be affirmed, with costs.

Cuddeback, Hogan, and Pound, JJ., concur.

Hiscock, Chase, and Collin, JJ., dissent.

Annotation—Admissibility, in action for wrongful death, of evidence of profits or contributions from business conducted by decedent.

For other notes in this series as to the admissibility, character, or sufficiency of evidence to show pecuniary loss from the negligent killing of a person, see the note appended to *Raines v. Southern R. Co.* ante, 1056, where the different notes presenting different aspects of this matter are referred to at length.

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Where labor of the deceased formed major part of investment.

At page 36 of the note in 52 L.R.A. on the general subject of damages for tort as affected by loss of profits, it is pointed out that the loss of earnings and of earning power from personal injury are elements of damage, and evidence of the loss of profits which de-

pend upon the personal exertions of the person injured, as distinguished from those which depend upon the investment of capital, may be given in evidence, in an action for personal injuries, not as a rule of damages, but as tending to establish the extent of the injured person's wealth, earnings, or earning power. And at page 38, the doctrine is asserted that the character and extent of the business of a person injured, to which he devoted his personal attention, and the profits therefrom, may be given in evidence in an action to recover damages for personal injury preventing him from transacting his ordinary business, as tending to establish the extent of his loss of earnings or earning power. *SPRENN v. ERIE R. Co.* ante, 1086, holds that the rule applicable to the admissibility of evidence of business profits in actions for personal injuries also applies to actions for the negligent killing of a person engaged in business, and recognizes that such evidence is not admissible where the profits arise from the capital invested in the business rather than from the labor and services of the decedent. It is, however, asserted that this rule does not preclude the plaintiff from showing, in an action to recover compensation for the negligent killing of her intestate, the amount of money which the decedent was in the habit of contributing to the support and maintenance of his family, although these contributions came from the profits of his business. In this case, however, the court also pointed out that the business in which the decedent was engaged was an express business, and the profits therefrom, from which these contributions were made, were very largely due to his personal services and labor.

Admission of evidence of profits from a business in which the capital invested was the major source of income was denied in *McCracken v. Consolidated Traction Co.* (1902) 201 Pa. 384, 50 Atl. 832, holding that evidence to show the profits of the deceased in a partnership business, and the amount of money that he furnished his family, was not admissible as bearing upon the amount of damage they sustained by his death.

And see also *Read v. Brooklyn Heights R. Co.* (1898) 32 App. Div. 503, 53 N. Y. Supp. 209, holding that evidence of the decedent's profits from a temporary partnership of which he was a member, and which was engaged in performing public contracts secured under competitive bidding, involving the use of capi-

tal and property by the decedent, is too speculative, and hence is inadmissible.

And see *Chicago, B. & Q. R. Co. v. Gunderson* (1898) 174 Ill. 495, 51 N. E. 708, holding that, in an action for the wrongful death of a cheese maker, evidence as to the condition of the cheese making business is not admissible.

The following cases, however, apparently hold that in actions of this character evidence of the profits made by the deceased from the business he was conducting at the time of his injury and death is admissible as bearing upon the earning capacity of the deceased and the pecuniary loss to the statutory beneficiaries:

—*Schneider v. Chicago R. Co.* (1913) 177 Ill. App. 334, holding that, where the wife of the decedent was associated with him in his business and knew the amount of his earnings, and his books of account cannot be found, her testimony as to the amount of his earnings is admissible;

—*Walters v. Chicago, R. I. & P. R. Co.* (1875) 41 Iowa, 71, holding to be admissible evidence as to the ownership of a mill by the father of a two-year-old child, and as to the profits received by him therefrom as bearing upon the damages to the estate of the child, on the theory that the child might follow the occupation of the father;

—*Shaber v. St. Paul, M. & M. R. Co.* (1881) 28 Minn. 103, 9 N. W. 575, holding that evidence is admissible as to the decedent's business ability and success and the amount of property he had acquired up to the time of his death, for the purpose of showing the pecuniary loss to his widow and children by his death;

—*Witte v. Atlantic Coast Line R. Co.* (1916) 171 N. C. 309, 33 S. E. 435, holding that, as bearing upon the earning capacity of the deceased, evidence is admissible that he went into business about two years before receiving the injury from which he died having a certain sum of money, and when his estate was wound up he had a much larger amount, and the fact that the evidence was based upon the decedent's bank book and statements by the decedent and his wife and mother does not render the evidence incompetent where these other matters were brought out on cross-examination.

And see *Meyer v. Hart* (1897) 23 App. Div. 131, 48 N. Y. Supp. 904, holding that evidence is admissible as to the earnings and probable profits of the deceased from his business; *Tilley v. Hud-*

son, *River R. Co.* (1864) 29 N. Y. 252, 86 Am. Dec. 297, holding that evidence is admissible as to the capacity of the decedent to conduct business and make money.

In *Blake v. Midland R. Co.* (1852) 18 Q. B. 93, 118 Eng. Reprint, 35, 16 Jur. 562, 21 L. J. Q. B. N. S. 233, for the purpose of aiding in the assessment of damages, evidence was given by the plaintiff of the average income of the deceased from the profits of a mercantile business carried on by the firm to which he belonged, and of the value of a house and furniture which belonged to him, it appearing that the plaintiff married deceased without any fortune and there had been a child by the marriage, which had died. And evidence was given by the defendant of the terms upon which the plaintiff and deceased lived together.

It has been held that, where the deceased, a married woman with a family, carried on a certain shirt and bosom business, evidence is admissible as to the manner in which she carried on the business and the extent thereof, as bearing upon the pecuniary loss to her husband and children by her death. *Meyer v. Hart* (N. Y.) *supra*, holding that evidence of the amount of work, earnings, and probable profits of the deceased, a married woman, is competent in an action to recover for her wrongful death in behalf of her husband, where there are no next of kin surviving; in such case the husband being by statute entitled to the entire personal estate of his deceased wife; *Austin v. Metropolitan Street R. Co.* (1905) 108 App. Div. 249, 95 N. Y. Supp. 740, holding, where the husband was the sole statutory beneficiary of the damages recoverable for the death of his wife, that, if there is evidence that the wife was engaged in business in her individual behalf and also evidence as to the amount that she was making therefrom and as to her health and age, it is error to instruct the jury to award only nominal damages, although the husband was living apart from his wife at the time of her injury and death, since, there being no children, upon her death he would under the statute succeed to her personal estate.

Where decedent's labor furnishes major part of income.

It is clear that, where the profits from the business arise from or are created by the personal efforts and labor of the decedent, evidence thereof is admissible in actions of this character:

—*Diller v. Northern California Power L.R.A.* 1918C.

Co. (1912) 162 Cal. 531, 123 Pac. 359, Ann. Cas. 1913D, 908, holding that evidence is admissible as to the amount the deceased earned in his business as real estate dealer;

—*Evarts v. Santa Barbara Consol. R. Co.* (1906) 3 Cal. App. 712, 86 Pac. 830, holding that evidence is admissible that the deceased was a practising physician having patients at the time he was killed, as bearing upon his earning capacity;

—*Christian v. Columbus & R. R. Co.* (1892) 90 Ga. 124, 15 S. E. 701, holding that, where the decedent was filling a public office for a definite term of years, the amount of his income therefrom is admissible only to the extent of showing the pecuniary loss from the unexpired term, and not to furnish a basis for the direct computation for a longer period;

—*Boyce v. New York City R. Co.* (1908) 126 App. Div. 248, 110 N. Y. Supp. 393, holding that evidence is admissible as to the amount the deceased received as salary, and also as to his income from a position in connection with a corporation, where his interest in the capital stock of this corporation was received in payment of services rendered the corporation;

—*Wheeling & L. E. R. Co. v. Parker* (1906) 29 Ohio C. 1, holding that evidence of the value of decedent's business as a fire insurance agent is admissible as bearing upon his earning capacity when living, and evidence is also admissible as to his personal characteristics in relation to people whom he met in business, but evidence is not admissible that his property is mortgaged;

—*Bogges v. Baltimore & O. R. Co.* (1912) 234 Pa. 379, 83 Atl. 356, holding that evidence is admissible as to the salary of the deceased as the manager of a firm, or as to his profits from a business requiring but little capital; in such case evidence is also admissible as to the monthly allowance he gave his wife.

In *Memphis Consol. Gas & E. Co. v. Letsor* (1905) 68 C. C. A. 453, 135 Fed. 969, writ of certiorari denied in (1905) 197 U. S. 623, 49 L. ed. 911, 25 Sup. Ct. Rep. 800, an action to recover pecuniary loss to widow and children by the death of the husband and father, a contractor, evidence of his contributions to the family was held proper as bearing upon his earning capacity, no witness being able to testify definitely as to decedent's income from his business.

Evidence as to income from farm.

In some jurisdictions it is held that,

where the deceased was a farmer, evidence is admissible as to the amount of crops he raised, or the profits he made from his business, and his accumulations therefrom, for the purpose of showing the pecuniary loss to his statutory beneficiaries by his death:

—*Memphis Consol. Gas. & E. Co. v. Letsor* (Fed.) *supra*, holding that evidence of what the decedent earned upon his farm is admissible as bearing upon his earning capacity;

—*Wrightsville & T. R. Co. v. Gornto* (1907) 129 Ga. 204, 58 S. E. 769, holding that evidence is admissible as to the occupation of deceased and the amount of money he usually made each year as a farmer, as bearing upon his earning capacity;

—*International & G. N. R. Co. v. Kuehn* (1893) 2 Tex. Civ. App. 210, 21 S. W. 58, 12 Am. Neg. Cas. 602, holding that evidence is admissible as to the amount of crops the decedent could raise in a year and the amount of money he could earn;

—*Sebille v. Dunn* (1917) — R. I. —, 99 Atl. 831, holding that evidence as to the crops raised by the deceased and his income therefrom, his personal expenses, and expenses of maintaining the farm, is admissible;

—*Ryan v. Oshkosh Gaslight Co.* (1909) 138 Wis. 466, 120 N. W. 264, holding that evidence is admissible as to the profits made by the deceased in business as a truck farmer, and upon this point evidence is admissible as to the number of acres he cultivated, the crops he raised, and the profits therefrom.

In recognizing and applying this rule

it has been held that where, from the very nature of things, it is impossible to determine with accuracy the income and expenses of the deceased, a lack of accurate figures will not preclude the recovery of substantial damages, if the testimony furnishes sufficient material from which a reasonably fair computation can be made. *Sebille v. Dunn* (R. I.) *supra*. In this case deceased was a farmer and kept no books or memoranda which would furnish any assistance in arriving at either his gross or net income.

In other jurisdictions, however, evidence of the profits made by the deceased in his business of farming or truck gardening, or the amount of crops he raised in previous years, has been held inadmissible as being too speculative:

—*Louisville & N. R. Co. v. Howard* (1891) 90 Tenn. 144, 19 S. W. 116, holding that it is competent to show the ability and capacity for labor of the deceased, as well as his skill in any particular art or profession, in order to show what he was capable of earning, but that evidence is inadmissible as to the minimum value of his crops for different years, for such evidence is mere speculation, since the next year or years might not be so abundant or favorable;

—*Hewlett v. Brooklyn Heights R. Co.* (1901) 63 App. Div. 423, 71 N. Y. Supp. 531, holding that, where the decedent was a market gardener, evidence is not admissible, as bearing upon his income, as to the quantity of garden truck he sold each week or the amount received from it, since this income involved the use of capital as well as labor.

A. G. S.

MICHIGAN SUPREME COURT.

JOSEPH SCEBA, Admr., etc., of Rosalia Sceba, Deceased, Plff. in Err.,
v.

MANISTEE RAILWAY COMPANY.

(189 Mich. 308, 155 N. W. 414.)

Appeal — error in charge — right to complain.

1. One cannot complain of a charge upon an issue which the jury found in his favor. *For other cases, see Appeal and Error, VII. k, 4, in Dig. 1-52 N. S.*

Note.—As to admissibility of opinion evidence to show pecuniary loss in action for wrongful death, see annotation following this case, post, 1096. For other questions in relation to evidence in measure of damages in action for death, see references in L.R.A.1918C.

Evidence — death of child — character.

2. Upon the question of damages to be recovered by parents for the negligent killing of their infant child, the mother may testify as to its being kindly, tractable, and obedient.

For other cases, see Evidence, XI. g, in Dig. 1-52 N. S.

Same — opinion as to value of services.

3. Upon the question of damages to be awarded parents for the wrongful death of their infant child, the mother may testify as to the comparison of the cost of maintenance of the child and the value of its labor, and also as to whether or not the

the first part of the annotation following *Raines v. Southern R. Co. ante*, 1056: and generally as to questions distinctive to the action for death, see L.R.A. Indexes under the titles, "Death" and "Damages," subtitles, "Measure of compensation—Death."

benefits to be derived from its services would increase or diminish with time.

For other cases, see Evidence, VII. f, in Dig. 1-52 N. S.

Same — habits of child.

4. Persons acquainted with a child may testify as to its disposition and habits of obedience, in an action by its parents to recover damages for its wrongful death.

For other cases, see Evidence, VII. e, in Dig. 1-52 N. S.

(December 21, 1915.)

ERROR to the Circuit Court for Manistee County to review a judgment in plaintiff's favor for an inadequate amount, and denying a motion for new trial, in an action brought to recover damages for the alleged wrongful death of plaintiff's decedent. Reversed.

The facts are stated in the opinion.

Mr. Thomas Smurthwaite, for plaintiff in error:

Witnesses may be called to testify to the financial benefit of the child to its parents.

Cooper v. Lake Shore & M. S. R. Co. 86 Mich. 261, 11 Am. St. Rep. 482, 33 N. W. 306; Rajnowski v. Detroit, B. C. & A. R. Co. 74 Mich. 27, 41 N. W. 847; Hurst v. Detroit City R. Co. 84 Mich. 539, 48 N. W. 44; Charlebois v. Gogebic & M. River R. Co. 91 Mich. 59, 51 N. W. 812; Snyder v. Lake Shore & M. S. R. Co. 131 Mich. 418, 91 N. W. 643; Black v. Michigan C. R. Co. 146 Mich. 568, 109 N. W. 1052.

Messrs. P. T. Glassmire and Max E. Neal, for defendant in error:

The proofs should contain some evidence of a pecuniary loss before recovery can be had.

Love v. Detroit, J. & C. R. Co. 170 Mich. 1, 135 N. W. 963.

A witness must, to some extent at least, qualify herself touching the question of damages; mere guesswork will not suffice; a defendant requires some protection from mere conjecture.

Feldman v. Detroit United R. Co. 162 Mich. 486, 127 N. W. 687.

The damages are necessarily confined and expressly limited to the pecuniary loss sustained.

Charlebois v. Gogebic & M. River R. Co. 91 Mich. 59, 51 N. W. 812.

Stone, J., delivered the opinion of the court:

This is an action on the case brought under the Death Act (3 Comp. Laws 1897, §§ 10,427, 10,428), to recover damages by reason of an injury resulting in the death of plaintiff's decedent. At the time of the injury complained of, the defendant owned and operated an electric street railway line L.R.A.1918C.

in and through the city of Manistee. It was laid upon Eighth street, two blocks from Kosciusko street on the west, to Vine street on the east. Englemann street crosses Eighth street one block east of Kosciusko street, in a well-settled neighborhood where there were many people, including children, passing. The closed cars used by the defendant at that time were known as "pay as you enter" cars, and one man performed the duties of conductor and motorman. The plaintiff, with his wife and two children, — a boy about seven years old, and Rosalia, a girl aged five years and three months, — resided on the east side of Englemann street about 200 feet north of Eighth street. He owned a house and lot there. Plaintiff was a laboring man, and had steady employment only a part of the time. In September, 1914, the child Rosalia began going to school, attending the kindergarten department, located south and west of the home. The usual course traveled by the little girl in going to school was south from the home, crossing the street railway track to the south side of Eighth street, then west one block to Kosciusko street, and thence south one block to the schoolhouse. She usually returned by the same route. Her school hours consisted of the forenoon session only. On October 28, 1914, Rosalia went to school at the usual hour and remained during the session, was released at about 11 o'clock, and started for home. One witness who saw her said she was "tripping" along on the sidewalk on the south side of Eighth street. She arrived at the corner of Englemann and Eighth streets, and took a diagonal course from the southwest to the northeast corner. While crossing the track she was overtaken and struck by one of the defendant's eastbound cars, described as above, and was instantly killed. It was a bright, clear day, and there were no objects to prevent a clear view of the situation. The declaration alleged numerous acts of negligence, among them being that defendant failed and neglected to operate its car slowly, and failed and neglected to have its car under proper control, and failed to keep and maintain a diligent outlook for the safety of persons upon said street crossing, and also failed and neglected to use quick stopping devices, and to ring gongs, bells, or other known signals when approaching the said crossing.

The evidence varied as to the speed of the car; the motorman swearing that he was not running to exceed 10 or 12 miles an hour, while another witness testified as follows: "In my judgment that car which struck this child was traveling at that time at 20 miles an hour, anyway; that would be my best judgment."

We shall not state in detail the evidence relating to the claimed negligence of the defendant, for the reason that the question was submitted to the jury, and they found a verdict for the plaintiff, and the defendant has not appealed.

(1) It is sufficient to say that an examination of the record satisfies us that the question of negligence was one for the jury; and, they having found for the plaintiff, he cannot be heard to complain of the charge upon that branch of the case, the error, if any, being harmless.

Upon the trial of the case it appeared that Rosalia was an active girl, in good physical condition; that the plaintiff was thirty-nine years old; that his father and mother were both living; that the former was seventy-seven and the latter sixty-five years of age; and that the expenses of the child's funeral and burial were \$71, not including the cemetery lot.

The mother of the child, Josephine Sceba, was sworn on behalf of the plaintiff.

The following is her testimony, and the rulings of the trial court relating to it:

I am the wife of Joseph Sceba and the mother of Rosa Sceba. I am twenty-eight years old. My father and mother are both living. They live out in the country. My father is sixty-four years of age and my mother is fifty-nine. They are in good health. My health is fine. At the time of her death Rosa was five years, two months, and about eighteen days old. She was born on the 10th day of August, in the year of 1909. Up to the time of her death she had good health.

Q. And what was her disposition as to being kindly, tractable, and obedient?

Counsel for defendant: We object to that as immaterial and incompetent, and the manner in which the question was asked.

Court: The objection is sustained.

Counsel for plaintiff: Note an exception.

Counsel for plaintiff: I didn't get the ground of the objection or the ruling?

Court: Well, it simply goes to the measure of damages, and that is what you are after.

Counsel for plaintiff: Yes.

Court: And that has no tendency to prove damages or disprove it. It is liable to be prejudiced on that subject.

Counsel for plaintiff: Well, I will want to ask her some more questions on that line, and I will say to you that in several cases it is held to be competent.

Court: I think, if you will examine that case you will find the questions were put in a different aspect.

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Counsel for plaintiff: If it is the form of my question, I would be glad to change that for you.

Court: You can prove the usefulness of this girl.

Counsel for plaintiff: That is what I want to do.

Court: Proceed and do it. It has no tendency to do it the way you put it.

Q. State whether or not, Mrs. Sceba, this child was of a helpful nature.

A. Yes, sir. She was willing to do anything she could do, or help me in any way she could. She was good, and willing to work, and she was always coaxing me to do something, and she would always kiss me after I should tell her to do something, and I always put her at something she could do. That is, quite a bit she could do that I would not have to do.

Q. What, if any, work did you do, other than your housework, to help in supporting the family?

A. Well, in summer I had a garden to take care of, and housework, and in the winter I did sewing and the housework. I had all I wanted to do. It kept me going. Before I was married, my work was farm work. Since I was married, I have had a garden on our own lot. We raised all the vegetables that were used in the house. I raised practically all the vegetables the family needed. Rosa helped me. She would water the cabbage and tomato plants. She would help me weed. She would water the chickens and feed them and gather the eggs. It helped me quite a good deal. I could be at something else, busy, and tell her what she could do. I could depend on her. She was skilful. I made the clothes for myself and children. We had quite a few fruit trees on the lot, and she picked the fruit.

Q. In the manner you have stated, Mrs. Sceba, how would the benefits derived from her work and earnings, done by Rosa for you, compare with the cost of her maintenance?

Counsel for defendant: We object to that as immaterial and incompetent, as the record now stands.

Court: I am inclined to think it is incompetent.

Counsel for plaintiff: Think it is what?

Court: Incompetent. There is no proof that the lady has ever brought up any other children, or had any experience in that line.

Counsel for plaintiff: I did not hear.

Court: There is no proof this lady ever brought up and reared any other child, and no proof along that line, and no proof of experience or knowledge on her part, and you are calling for a conclusion.

Counsel for plaintiff: On her personal

knowledge, she knows what it cost to maintain the child.

Court: There is no proof she had any knowledge what it cost to maintain the child, or what it would cost.

Q. I will ask that question.

Q. Do you know, Mrs. Sceba, about what it would cost to feed and clothe the child outside of your vegetables?

Counsel for defendant: I also object to that for the reason it is incompetent.

Court: The objection is sustained. It was all right until you spoiled it.

Q. You have no knowledge of about what it would cost to feed and clothe your daughter?

A. Of course she could just now about earn her living while she was growing better and healthier, or I mean stronger, with her work that she helped me. I never kept track of what it cost to clothe her. It did not cost very much, because I made all her clothes myself and her hats and bonnets,—all except her shoes. Her shoes were about all we had to buy for her.

Q. I will ask you now, how the cost of materials, that you purchased for her food and clothing, would compare with what benefits you derived from her little efforts to help you out?

Counsel for defendant: We object to that as incompetent the way the record stands.

Court: I will sustain the objection, for the reason she has already answered the question, and I am doubtful whether it is competent or not. She has already said it was about even.

Counsel for defendant: I move to have that answer stricken out, if she answered it.

Counsel for plaintiff: I think it is fairly competent.

Court: I will let it stand for the time being, but it is pretty close to the line.

Q. Now, Mrs. Sceba, with your knowledge of the disposition of Rosa, you can state whether or not her efforts in that behalf, and the benefits that were derived from her services, would increase or diminish?

Counsel for defendant: I object to that as incompetent.

Court: The objection is sustained. I think it is a question for the jury.

Counsel for plaintiff: Give me an exception.

A. Rosa was of medium size for her age. I did not work out for other people at any other work except sewing.

Q. State whether or not you have had opportunity to work out to any greater extent as this child grew older?

Counsel for defendant: We object to that as incompetent and immaterial.

Court: I think so. It calls for a con-

elusion based upon the future, of which she could have no knowledge, from the evidence already in, and which may hereafter be put in the case. In other words, I think to admit that line of proof would be an invasion of the province of the jury.

Counsel for plaintiff: There are two classes of cases in Michigan on that subject. . . . (Here followed a discussion of the Michigan cases herein referred to.)

Court: I am trying to rule right along the other case you are talking about.

Counsel for plaintiff: If your Honor is aware of the case, I have nothing further to say.

Court: I don't think there is anything in that case that would admit the proof I have ruled out.

Counsel for plaintiff: Under the prior case it was.

Court: I do not know any case it was.

Counsel for plaintiff: I think they have got that pretty well down to solid rock, when they state the jury was as good a judge as the parents or anybody else. That is all of this witness. You may cross-examine.

Cross-examination: "Our little girl first began going to school the beginning of September, 1914. She was in the kindergarten. Miss Lorenz was her teacher.

Court: I think, in order to make this record safe, I will strike from the record the testimony of this witness of what the child earned and expenses of maintenance, as about equal. That is the substance or gist of what she said. I will strike it out. It calls for a conclusion, and it calls for simply the sentiment of this mother as to the value of the services of this little girl. There is nothing to base it upon. She has given her testimony, and she has nothing upon which she can make that assertion. It is for the jury to say, and not for her to say. It can be stricken out.

Counsel for plaintiff: Note an exception.

The case was submitted to the jury, and the trial resulted in a verdict for the plaintiff in the sum of \$71.

In the course of its charge to the jury the court instructed them that if they found for the plaintiff, and found that the services of the child during her minority would have exceeded the cost of her maintenance, then the father was entitled to recover that amount, whatever they found it to be; that in passing upon that question they should take into consideration the probabilities of the life of the child and the probabilities of the lives of the parents; and the attention of the jury was called to the length of the lives of the grandparents, and of the father and mother of the child, and of the

state of health of the grandparents and of the father and mother, and of the state of health of the child at the time of her death. The court said:

"All these things you are to take into consideration in passing upon this subject. If you find for the plaintiff, if he is entitled to recover anything, he shall recover the cost of the burial of the child, the amount of which has been testified in the evidence and is uncontradicted,—\$71. . . .

"The law says that you are to give fair and just compensation to these parents and this father, the plaintiff in the case, if you find for the plaintiff, in regard to his pecuniary loss, and nothing else at all.

"Counsel has made some figures in your presence. They are not controlling upon you, and they were permitted simply as a part of his argument, and the deductions he makes, or seeks to make, from the proofs in this case. It is your province to say finally what has been proved in the case, and what the damages are, if there are any over and above the \$71.

"So, I say to you finally and briefly that if you find the defendant's negligence has been established, on any of these declared heads, in the manner I have suggested, your verdict will be for the plaintiff. . . .

"If you find for the plaintiff, he is entitled to receive at least \$71, the cost of the burial of the little girl. If you find he has suffered a pecuniary loss because of her premature and early death, then he is entitled, in addition to the \$71, to whatever you may fairly and justly find on that head, taking into consideration all the evidence in the case."

There was a motion for a new trial, based upon the grounds, among others, that the verdict was wholly inconsistent, unjust, and contrary to law, and that the damages awarded were wholly inadequate.

In his reasons for the denial of the motion for a new trial, the circuit judge, among other things, said: "It is true that a verdict like this shocks the sense of mankind, but that is because we have a sympathy which the law absolutely prohibits the jury from indulging in, or the court either. In my opinion, the law should permit damages for grief and sorrow, and then there would be damages of a substantial and tangible kind. My understanding is, the lawmakers refuse to indulge that, because it has been said by some writers that that would put a premium on the death of the child and jeopardize its life in very many cases; and that is probably true; nevertheless, so long as the law is as it is, and makes it purely and solely a question of pecuniary loss or profits, I think the verdict is right. I think that is the L.R.A.1918C.

view the jury took of it. I made that plain to them, or tried to, that they could not indulge in either sympathy or prejudice, and that it was simply a matter of dollars and cents. There were men on that jury who know, I am sure, that to rear a girl from the cradle to her legal majority is an expensive proposition. Of course, it is not as expensive among the laboring classes, but there were members of that class on the jury, and they know. And the peculiar thing about it is that the latest decisions on that subject leave the whole question of damages or lack of it to the judgment of the jury, regardless of the proof. To my mind, that is a perversion of every principle of the law; but if it is the law, and is to obtain as the law, then this court has no right to enter the jury box and say that they are mistaken in their judgment, because it is their judgment and nothing else, and it is based upon nothing. There wasn't a word of proof in the case as to what it cost to maintain this child, or any other child, or what it could earn, or what any other child could earn. There was some proof—a little—as to what the child did. And I say, if that is the law, then I have no right to meddle with this verdict at all, on this ground."

A judgment was entered in accordance with the verdict, and the plaintiff has brought the case here upon a writ of error, and there are twenty-nine assignments of error. Many of these relate to the question of negligence, and, for the reason already stated, will not be considered by us. The assignments of error relating to the question of damages were:

(2) That the court erred in sustaining the objection of counsel for defendant to the following question put to Josephine Sceba on direct examination: "What was her disposition as to being kindly, tractable, and obedient?"

(3) Also, in sustaining the objection of counsel for defendant to the following question asked Josephine Sceba: "Q. I will ask you now how the cost of materials that you purchased for the food and clothing will compare with the benefits you derived from her little efforts to help you?"

(4) Also, in sustaining the objection to the following question: "Q. Now, Mrs. Sceba, with your knowledge of the disposition of Rosa, you can state whether or not her efforts in that behalf, and the benefits that were derived from her services, would increase or diminish?"

(5) Also, in sustaining a like objection to the following question: "Q. State whether or not you would have had opportunity to work out, to any greater extent, as this child grew older?"

(6) That the court erred in ruling upon its own motion in striking certain of the testimony of Josephine Sceba from the record, as above set forth.

(7) That the court erred in sustaining the objection of counsel for defendant to the following question asked Nina Lorenz: "Q. What was her disposition, Miss Lorenz, as to being an obedient child?"

The 23d assignment of error is to the effect that the court in its charge to the jury erred in that the cost of the burial was emphasized, and practically and in effect made the sole basis of damages, if the jury should find for the plaintiff. The 25th, 26th, and 27th assignments of error are based upon the portion of the charge above set forth. The 28th assignment of error is to the effect that the court erred in that it did not instruct the jury as to the proper and lawful manner of computing the damages or as to the elements of damages to the plaintiff, if the jury should find the defendant negligent as charged, which caused the death of Rosalia Sceba. The 29th assignment of error is to the effect that the court erred in denying the motion of plaintiff to set aside the verdict of the jury and the judgment entered thereon, and to grant a new trial for the reasons set forth in said motion. The 2d, 3d, 4th, 5th, and 6th assignments of error will be considered together. We note the fact that the rulings upon which error is assigned in the 3d and 5th assignments of error do not appear to have been excepted to, but the ruling of the court in striking from the record certain testimony covered by the 6th assignment of error was duly excepted to.

(2) A careful perusal of this record has satisfied us that there was prejudicial error in the rulings of the court relating to the testimony of Josephine Sceba. In the earlier cases of *Cooper v. Lake Shore & M. S. R. Co.* 66 Mich. 261, 11 Am. St. Rep. 482, 33 N. W. 306; *Rajnowski v. Detroit, B. C. & A. R. Co.* 74 Mich. 20, 41 N. W. 849; *Hurst v. Detroit City R. Co.* 84 Mich. 539, 48 N. W. 44; *Charlebois v. Gegobie & M. River R. Co.* 91 Mich. 59, 51 N. W. 812; and *Snyder v. Lake Shore & M. S. R. Co.* 131 Mich. 418, 91 N. W. 643, it was the practice to offer testimony generally, consisting of the judgment or opinion of witnesses as to the probable earnings, on the one hand, and cost or expense of rearing a child until majority, upon the other; and it was held that testimony throwing any light upon what the pecuniary injury resulting from death would be was admissible. And in the *Hurst Case* this court said: "Some pecuniary injury or loss must be shown by the evidence." In the *Charlebois Case* it was said that the plaintiff must show that

some person had suffered some pecuniary injury by the death, and that the statute did not imply that damages and pecuniary loss necessarily followed from the negligent killing. In the *Rajnowski Case*, it was held that "the testimony of witnesses who are shown by their knowledge or experience to be qualified to express an opinion upon the pecuniary value of such a life is admissible, not for the purpose of controlling, but of aiding, the jury in arriving at a just conclusion."

In the *Cooper Case* a judgment of \$1,550 upon the death of a girl eleven years of age was sustained; and it was held that the jury could not give damages founded upon their fancy or based upon visionary estimates of probabilities or chances. In the *Snyder Case* the action of the lower court in refusing to set aside, as inadequate, a verdict of \$250 for negligently causing the death of a boy between eleven and twelve years old, was sustained.

In the case of *Black v. Michigan C. R. Co.* 146 Mich. 568, 109 N. W. 1052, this court did not hold that such evidence, as above referred to, was not admissible, but did hold that where evidence had been given as to the age, calling, and condition of health of the father, and of the age and condition of the mother, together with evidence that the child was healthy, intelligent, of a good disposition, and obedient to its parents, that was sufficient to authorize an award of substantial damages; and the court, in that case, refused to set aside a verdict of \$1,500 damages. Justice Moore, who wrote the opinion of the court, after quoting the reasons of the circuit judge in his denial of a motion for a new trial, and after calling attention to the cases of *Parsons v. Missouri P. R. Co.* 94 Mo. 286, 6 S. W. 464, and *Chicago v. Hesing*, 83 Ill. 204, 25 Am. Rep. 378, and other authorities, concluded his opinion in these words: "The jurors have all been boys. The average juror knows the conditions which surround a boy in a family like that of plaintiff. We think it cannot be said, as a matter of law, that there was no basis upon which to find a verdict for pecuniary loss."

This case has since been cited with approval.

Applying either rule of evidence, as indicated by the above-named cases, we think the ruling of the trial court was prejudicially erroneous in refusing to permit Josephine Sceba to answer the question, "What was her disposition as to being kindly, tractable, and obedient?" and the question covered by the 4th assignment of error, and in striking out the testimony referred to by the court, covered by the 6th assignment of error. It is no answer

to say that the mother did not testify in dollars and cents as to the value of the child's earnings, or the expense of maintenance. She had testified generally as to the nature and extent of those services, and the expense she had been put to in clothing the child. Her opinion or judgment, whether the child's efforts, and the benefits derived from her services, would in the future increase or diminish, was admissible. We think she was competent to testify upon that subject. Such testimony would not be mere speculation, conclusion, or sentiment, but would have had a tendency to prove pecuniary damage. By the rulings above referred to, the jury were deprived of testimony which would probably have aided them in reaching a substantial verdict in the case.

In denying the motion for a new trial, the trial judge said: "There wasn't a word of proof in the case as to what it would cost to maintain this child, or any other child, or what it could earn, or what any other child could earn. There was some proof—a little—as to what the child did."

In our opinion, the principal reason why there was no evidence upon those subjects was because of the adverse rulings of the court in dealing with the testimony of Josephine Sceba. The infirmity in the charge of the court was that, having erroneously narrowed the subject of the inquiry of the jury, by the rulings above referred to, the doctrine of the Black Case was not referred to, but was wholly ignored; so that the jury had no basis for the assessment of damages beyond the funeral expenses. We note the fact, however, that the plaintiff did not present any requests to charge, upon this subject, and we should hesitate to reverse the case upon the charge alone.

(3) It has been held by many courts, including those cited in the Black Case, that the law presumes, in the case of the death of a minor child by wrongful act, that there has been a loss for which compensation may be given under the statute; and that the loss may be estimated from the facts proved, in connection with the knowledge and experience possessed by all persons in relation to matters of common observation. 8 R. C. L. p. 835, § 111, citing many cases. While the verdict appears to have shocked the sense of the trial judge, had there been no errors in the rulings and charge, as indicated, we should not feel like holding that the damages awarded were wholly inadequate as matter of law. But we are satisfied that the amount of the verdict was the result of the errors above pointed out, and that the jury were too much circumscribed in their inquiry by the rulings and charge.

(4) The witness Nina Lorenz, the teacher of the child, was asked a question, above referred to, which, being objected to as incompetent and immaterial, the court excluded, using the language, "Sustained so far as school is concerned," to which ruling plaintiff's counsel excepted. We hardly understand the purport of this ruling. We think it was competent for this witness, or any other person acquainted with the child, to testify to her disposition and habits of obedience. The record shows, however, that this witness later gave testimony as to the general disposition of the child, and we only refer to this ruling because it was consistent with other rulings which narrowed the scope of the jury's inquiry, and led to the verdict and judgment in the case.

For the errors pointed out, the judgment of the court below is reversed, and a new trial granted.

Annotation—Admissibility of opinion evidence to show pecuniary loss in action for wrongful death.

For other notes in this series relative to the admissibility, character, or sufficiency of evidence to show pecuniary loss by negligently killing a person, see note appended to *Raines v. Southern R. Co.* ante, 1056, where the different notes presenting different aspects of this matter are referred to at length.

General subject of the right of a witness to express an opinion on a non-technical subject because of the impossibility or difficulty of reproducing the data is discussed in *State v. Prüett*, L.R.A.1918A, 656.
L.R.A.1918C.

As a rule the amount of damages recoverable for wrongful death, from their very nature are not provable by direct evidence or by the opinion of witnesses. In general the opinion of a witness as to the amount which would compensate a statutory beneficiary for the pecuniary loss by the death complained of would be of no greater value than the opinion of individual members of the jury, and to the latter the statute delegates the power as well as the duty to assess such pecuniary loss. In assessing this loss it is the province of the jury to use their

own judgment and experience in life, rather than that of any witness.¹

In some matters, however, as an aid to the jury opinion evidence is received. Thus, as pointed out in a note appended to *Ruehl v. Lidgerwood Rural Teleph. Co.* ante, 1071, the use of mortality tables is very generally indulged in to aid the jury in ascertaining the life expectancy of the deceased and his beneficiaries, although these tables are purely a matter of opinion or computation based upon mortuary records of a large number of people for a given period of time. And the computation of experts as to expectancy of the life of the de-

ceased, based upon these tables, may be received in evidence, and experts may testify therefrom as to the probable duration of the life of the deceased had he not been killed.²

As to the value of services or amount of earnings.

Opinion evidence may be based upon very intimate knowledge of and relationship with the deceased, and in this regard the witness may stand in a better position to judge than the jury does. Under these circumstances, at least where the evidence relates to a matter of value, opinion evidence by such a wit-

¹ As to the measure of damages it is proper for the jury to exercise their own judgment upon the facts in proof by considering them in connection with their own knowledge and experience which they are supposed to possess in common with the generality of mankind. It is not necessary or proper that witnesses should have expressed an opinion as to the amount of such pecuniary loss. *Chicago v. Major* (1857) 18 Ill. 349, 68 Am. Dec. 553.

Houston & T. C. R. Co. v. Maxwell (1910) 61 Tex. Civ. App. 80, 128 S. W. 160, holding that the amount of damages suffered from personal injuries outside of the expenses incurred for medical bills, nursing, etc., are in their very nature not provable by witnesses. Should a witness undertake to state what would compensate a party for physical and mental suffering, he would simply be giving his opinion of the matter based on the circumstances proved. He is in no better position to form a correct conclusion than are the jury. The jury must form their conclusions from their general knowledge and principles applied to the facts and evidence, and to nothing else.

Union P. R. Co. v. Dundan (1887) 37 Kan. 1, 14 Pac. 501, holding it unnecessary that any witnesses should have expressed an opinion as to the amount of pecuniary loss, for the damages are to be assessed by the jury with reference to the pecuniary injury sustained by the next of kin in consequence of the death complained of, including not only the actual present loss which the death produces and which can be proved, but also prospective losses. How these pecuniary damages are to be measured, or what shall be the amount, is left largely to the discretion of the jury.

St. Louis, I. M. & S. R. Co. v. Hitt (1905) 76 Ark. 227, 88 S. W. 908, rehearing denied in (1905) 76 Ark. 234, 88 S. W. 990, holding that a life insurance agent is competent to testify as to the expectancy of the life of the deceased as shown by mortality tables, and he may estimate the amount required to purchase an annuity equal to the decedent's income.

Valente v. Sierra R. Co. (1907) 151 Cal. 534, 91 Pac. 481, holding that evidence is admissible that the life expectancy of the L.R.A.1918C.

beneficiary is as great or greater than that of the deceased, as is also evidence on the part of the defendant tending to show that the life expectancy of the beneficiary is less than that of the deceased.

² *Joliet v. Blower* (1893) 49 Ill. App. 464, holding that computations by experts as to the expectancy of life of the decedent based upon authorized tables of general use may be received in evidence.

Louisville, C. & L. R. Co. v. Mahony (1870) 7 Bush (Ky.) 235, holding that witnesses may testify as to the probable period of the decedent's life by reference to recognized American life tables.

Steinbrunner v. Pittsburgh & W. R. Co. (1891) 146 Pa. 504, 28 Am. St. Rep. 806, 23 Atl. 239, holding that a witness may give his testimony as to the life expectancy of a decedent where based upon mortality tables of recognized standard.

San Antonio & A. P. R. Co. v. Bennett (1890) 76 Tex. 151, 13 S. W. 319, holding that witnesses may testify from mortality tables as to the number of years the deceased would probably have lived had it not been for the wrongful act causing his death.

Gulf, C. & S. F. R. Co. v. Compton (1890) 75 Tex. 667, 13 S. W. 667, holding that opinion evidence by experts is admissible as to probable duration of life of the deceased.

But see *Erb v. Popritz* (1898) 59 Kan. 284, 64 Am. St. Rep. 362, 52 Pac. 871, holding that testimony is not competent to show the probable duration of life of decedent where based entirely upon knowledge obtained by the witness from life tables.

It has been held, however, that, where amount which it would cost to purchase an annuity equal to the amount of the decedent's income, based upon the probable duration of his life had he survived, is incompetent as bearing upon the question of damages. *Hinsdale v. New York, N. H. & H. R. Co.* (1903) 81 App. Div. 617, 81 N. Y. Supp. 356; *Fajardo v. New York C. & H. R. R. Co.* (1903) 84 App. Div. 354, 82 N. Y. Supp. 912; *Mix v. Hamburg-American S. S. Co.* (1903) 85 App. Div. 475, 83 N. Y. Supp. 322.

ness is admissible as an aid to the jury in assessing the pecuniary loss to parents by the destruction of the life of a child. For example, a parent may testify as to the value of a child's services in the family and his earnings as compared with the cost of his maintenance;³ or as to his probable future earnings;⁴ or the probable value to him of the decedent's services where the latter had aided him in his work.⁵ And in an action for the negligent killing of a five-year-old boy, parents who have reared children may testify as to the net value of the decedent's services during minority, based upon their experience and the evidence in this case.⁶ In the same jurisdiction, however, it has been held by a divided court that opinion evidence was incompetent as to the value of the decedent's life to his family where based upon matters already in evidence, including mortality tables.⁷

It has also been held that evidence is admissible as to the present worth of the decedent's services for his life expectancy based upon different assumptions as to his earning capacity.⁸ And opinion evidence is admissible as to the value of the services of the deceased to her husband as housekeeper.⁹

It has been held that opinion evidence is admissible as to the market value, in the vicinity of the decedent's place of residence, of the services of the manager of a newspaper having a circulation substantially similar to the one of which the decedent was the manager at the time he was killed;¹⁰ but opinion evidence is not admissible as to the amount decedent might earn in some occupation other than that which he was pursuing at the time he met his death;¹¹ nor is opinion evidence admissible as to the amount the decedent's services would have been worth when he reached majority had he

³*SCERA v. MANISTEE R. Co.* ante, 1090, holding that evidence is admissible, in an action by the mother of a child negligently killed, to show how the cost of the maintenance of the child compared with the benefits derived from her services. Although the child was only a trifle over five years of age, she may testify that these benefits would increase as the child grew older.

Atrops v. Costello (1894) 8 Wash. 149, 35 Pac. 620, holding where damages are claimed by parents for the future earnings of a child then attending school, evidence is admissible as to the probable value of such earnings, taking into consideration the expense of the future schooling of the child for clothing, lodging, maintenance, etc.

⁴*Snyder v. Lake Shore & M. S. R. Co.* (1902) 131 Mich. 418, 91 N. W. 643, holding that in an action to recover compensation for the death of a boy between eleven and twelve years of age, it is competent for the father to testify as to when the boy would become sufficiently proficient in a trade in which he had shown aptitude to earn money, and as to the amount he would thus earn.

Compare with *Nave v. Alabama G. S. R. Co.* (1892) 96 Ala. 264, 11 So. 391, holding that where deceased was a boy sixteen years old, and employed as a flagman, evidence is not admissible as to what his services would be worth when he reached the age of twenty-one years if he had lived.

⁵*Kansas City, M. & O. R. Co. v. Starr* (1917) — Tex. Civ. App. —, 194 S. W. 637, holding that opinion evidence by the father of decedent is admissible as to the probable value to him of the services of the deceased, a boy eleven years old when killed, had he lived to reach the age of fifteen years.

⁶*Rajnowski v. Detroit, B. C. & A. R. Co.* (1889) 74 Mich. 20, 41 N. W. 847, holding that, as bearing upon the pecuniary value L.R.A.1918C.

of the life of a young child during minority, witnesses who have reared children from infancy to manhood are competent to express their opinion upon the value of the life in question.

⁷*Klanowski v. Grand Trunk R. Co.* (1885) 57 Mich. 525, 24 N. W. 801, holding to be incompetent testimony as to the pecuniary value of the life of the deceased to his family, where the opinion of the witness is based upon matters already in evidence, together with life tables used by the witness in making his computation.

⁸*Storrs v. Grand Rapids* (1896) 110 Mich. 483, 68 N. W. 258, holding that evidence may be given as to the present worth of the decedent's services, based upon his expectancy of life and upon different assumptions as to his earning capacity.

⁹*Craig v. Chicago, St. P. M. & O. R. Co.* (1915) 97 Neb. 586, 150 N. W. 648, holding that the husband may testify as to the value of his wife's services in an action to recover for her wrongful death.

Dillon v. Hudson, P. & S. Electric R. Co. (1905) 73 N. H. 367, 62 Atl. 93, holding where the earning capacity of the decedent is an element of damage for her wrongful death, evidence of the value of her services as housekeeper in her husband's family is competent.

¹⁰*Southern Traction Co. v. Hulbert* (1915) — Tex. Civ. App. —, 177 S. W. 551, holding that in the action for the negligent killing of the manager of a newspaper, opinion evidence is admissible as to the market value, in the vicinity of the decedent's place of residence, of the services of the manager of a newspaper having a circulation similar to the one of which the decedent was the manager.

¹¹*Atlanta & W. P. R. Co. v. Newton* (1890) 85 Ga. 517, 11 S. E. 776; *Atchison, T. & S. F. R. Co. v. Chance* (1896) 57 Kan. 40, 45 Pac. 60.

lived.¹² Where the decedent was a farmer, opinion evidence was held admissible as to the probable receipts from the

farm while he operated it, this being the best evidence procurable under the circumstances.¹³

¹² Nave v. Alabama G. S. R. Co. (1892) 96 Ala. 264, 11 So. 391.

¹³ Seville v. Dunn (1917) — R. I. —, 99 Atl. 831. A. G. S.

IOWA SUPREME COURT.

MRS. EDNA E. NICOLL, Admr., etc., of
Walter H. McNulty, Deceased,
v.

MRS. EMMA R. SWEET, Admr., etc., of
S. S. Sweet, Deceased, Appt.

(163 Iowa, 683, 144 N. W. 615.)

Death — negligent injury — predisposition.

1. One causing pneumonia in another by a negligent injury cannot escape liability for his resulting death by the fact that his state of health predisposed him to such disease

For other cases, see Death, II. a, in Dig. 1-52 N. S.

Evidence — sufficiency — death — proximate cause — pneumonia following injury.

2. That the pneumonia was caused by the injury may be found where there is, on the one hand, testimony that the person for whose wrongful death the action is brought was not in robust health at the time of the injury, that he had recently suffered from bronchitis and had some indications of weakness of the lungs; and, on the other hand, that the pneumonia which caused his death was of traumatic origin, and that from such an injury as the deceased had suffered pneumonia is likely to follow as a natural consequence.

For other cases, see Evidence, XII. b, in Dig. 1-52 N. S.

Same — res ipsa loquitur — fall of cornice.

3. The doctrine of res ipsa loquitur applies where a cornice falls from a building into the street, to the injury of a passer-by.

For other cases, see Evidence, II. h, 1, f, in Dig. 1-52 N. S.

Note.—As to character and sufficiency of evidence to show pecuniary loss to estate of decedent, see annotation following this case, post, 1111. For other questions in relation to evidence bearing on measure of damages in action for death, see references in the first part of the annotation following Raines v. Southern R. Co. ante, 1056; and generally as to questions distinctive to the action for death, see L.R.A. Indexes under the titles, "Death" and "Damages," subtitles "Measure of compensation—Death."

Pre-existing disease or condition of person injured as affecting recovery from one negligently causing injury is treated in the L.R.A.1918C.

Trial — instruction — refusal.

4. The refusal of an instruction which is fully covered by instructions given by the court on its own motion is not error.

For other cases, see Trial, III. b, in Dig. 1-52 N. S.

Evidence — death — family left by deceased.

5. Where the measure of recovery for death of an individual is the value of his life to his estate had he not come to an untimely end, evidence as to the family left by him is admissible as bearing upon his incentive to habits of industry had he lived.

For other cases, see Evidence, XI. g, in Dig. 1-52 N. S.

Appeal — instruction — who may complain.

6. The error, if any, in an instruction, in an action for wrongful death, that the amount of damages to be assessed in favor of the estate of the deceased is not to be increased by reason of his leaving children, but that evidence of his children, and the number thereof, may be considered as bearing upon the question of his inducement or incentive to habits of industry had he lived, is not one of which defendant can complain. *For other cases, see Appeal and Error, VII. f, in Dig. 1-52 N. S.*

Same — exclusion of evidence — non-prejudicial error.

7. The exclusion, in an action for wrongful death in which the issue is whether the injury to the deceased caused the pneumonia which occasioned his death, of evidence of a statement by deceased that he could not obtain life insurance because of his health, while erroneous, is not prejudicial, where the circumstances of his health were fully inquired into.

For other cases, see Appeal and Error, VII. m, 3, b, in Dig. 1-52 N. S.

note to Jones v. Caldwell, 48 L.R.A.(N.S.) 119.

For excessiveness or inadequacy of damages for personal injuries resulting in death, see annotation following St. Louis, I. M. & S. R. Co. v. Craft, L.R.A.1916C, 820.

The applicability of the doctrine res ipsa loquitur in an action for injury on the highway, including injuries from falling objects, is treated in the note to Corbin v. Benton, 43 L.R.A.(N.S.) 591. Many other phases of the doctrine of res ipsa loquitur are considered in notes cited in the L.R.A. Indexes under the title "Evidence," subtitle "Care; negligence; res ipsa loquitur."

Evidence — admissibility — complaint of suffering.

8. In an action for wrongful death, complaints of the deceased of pain and suffering, made soon after his injury, are admissible as bearing upon the nature, extent, and location of his injuries.

For other cases, see Evidence, X. d, in Dig. 1-52 N. S.

Damages — amount — death.

9. \$8,000 is not an excessive amount of damages for the loss to his estate occasioned by the death of a boiler maker having an expectancy of life of thirty-six years, and earning from \$56 to \$108 per month.

For other cases, see Damages, III. i, 4, b, in Dig. 1-52 N. S.

(Preston and Deemer, JJ., dissent.)

(December 13, 1913.)

APPEAL by defendant from a judgment of the District Court for Benton County in plaintiff's favor in an action brought to recover damages for injuries to her husband, resulting in death, for which defendant was alleged to be responsible. Affirmed.

Statement by Weaver, Ch. J.:

Action at law to recover damages against the estate of S. S. Sweet, deceased, on account of the death of one Walter H. McNulty. Verdict and judgment for plaintiff, and defendant appeals.

Messrs. Dawley & Wheeler and C. F. Jordan, for appellant:

Evidence that deceased left children, and as to their number and ages, was inadmissible for any purpose, and it was error to permit the jury to consider such evidence as an incentive to habits of industry.

Beems v. Chicago, R. I. & P. R. Co. 58 Iowa, 150, 12 N. W. 222; *State v. Rutledge*, 135 Iowa, 588, 113 N. W. 461; *State ex rel. Pitham v. Wangler*, 151 Iowa, 555, 132 N. W. 22; *Dufree v. Wabash R. Co.* 155 Iowa, 544, 136 N. W. 695.

The court ought to have instructed the jury as asked by defendant, that the table of mortality did not show the expectancy of men in poor health.

Hughes v. Chicago, R. I. & P. R. Co. 150 Iowa, 232, 129 N. W. 956.

Defendant was entitled to show that deceased had said he could not get insurance because of his health, the same being competent as an admission of the deceased as against the representative of his estate.

1 *Greenl. Ev.* § 189; *Davis v. Melson*, 66 Iowa, 715, 24 N. W. 526; *Ross v. McQuiston*, 45 Iowa, 145; *Drefahl v. Rabe*, 132 Iowa, 563, 107 N. W. 179; 2 *Wigmore, Ev.* §§ 1049, 1475.
L.R.A.1918C.

There was not sufficient evidence to justify the submission to the jury of the question whether the injuries caused by the falling of the wall produced the pneumonia from which McNulty died, and a verdict should therefore have been directed for the defendant.

Ashcroft v. Davenport Locomotive Works, 148 Iowa, 420, 126 N. W. 1111; *Helgeson v. E. B. Higley Co.* 148 Iowa, 587, 126 N. W. 769.

The damages awarded in the sum of \$8,000 were excessive and the result of passion and prejudice.

Engvall v. Des Moines City R. Co. 145 Iowa, 560, 121 N. W. 12; *Ross v. Des Moines Valley R. Co.* 39 Iowa, 246.

Mr. T. H. Milner also for appellant.

Mr. Daniel L. Johnston, for appellee.

Evidence of the suffering of the deceased is competent for the purpose of showing that there was a connection between the injury and the pneumonia from which McNulty died. It helps to show the character and continuation of the injury.

Martin v. Sherwood, 74 Conn. 475, 51 Atl. 526.

The number and ages of children left by deceased were admissible in evidence.

Donaldson v. Mississippi & M. R. Co. 18 Iowa, 280, 87 Am. Dec. 391; *Lowe v. Chicago, St. P. M. & O. R. Co.* 89 Iowa, 433, 56 N. W. 519; *Wheeler v. Chicago, M. & St. P. R. Co.* 85 Iowa, 176, 52 N. W. 119; *Dufree v. Wabash R. Co.* 155 Iowa, 544, 136 N. W. 695; *Simonsen v. Chicago, R. I. & P. R. Co.* 49 Iowa, 87; *Kelley v. Central R. Co.* 5 McCrary, 653, 48 Fed. 663; *Hamann v. Milwaukee Bridge Co.* 136 Wis. 39, 116 N. W. 854; 13 Cyc. 358; 8 Am. & Eng. Enc. Law, 941; 7 Enc. Ev. 439; *Louisville & N. R. Co. v. Banks*, 132 Ala. 471, 31 So. 573; *Coffeyville Min. & Gas Co. v. Carter*, 65 Kan. 565, 70 Pac. 635, 12 Am. Neg. Rep. 594; *Fisher v. Central Lead Co.* 156 Mo. 479, 36 S. W. 1107; *Galveston, H. & S. A. R. Co. v. Contreras*, 31 Tex. Civ. App. 489, 72 S. W. 1051; *Breckenfelder v. Lake Shore & M. S. R. Co.* 79 Mich. 560, 44 N. W. 957; *Chilton v. Union P. R. Co.* 8 Utah, 47, 29 Pac. 963; *Baltimore & O. R. Co. v. Sherman*, 30 Gratt. 602; *Atchison, T. & S. F. R. Co. v. Wilson*, 1 C. C. A. 25, 4 U. S. App. 25, 48 Fed. 57; *Hunt v. Conner*, 26 Ind. App. 41, 59 N. E. 50; *Freeman v. Illinois C. R. Co.* 107 Tenn. 340, 64 S. W. 1; *Felton v. Spiro*, 24 C. C. A. 321, 47 U. S. App. 402, 78 Fed. 576, 2 Am. Neg. Cas. 682; *Dimmey v. Wheeling & E. G. R. Co.* 27 W. Va. 33, 55 Am. Rep. 292, 7 Am. Neg. Cas. 111; *Ogan v. Missouri P. R. Co.* 142 Mo. App. 248, 126 S. W. 191; *Louisville & N. R. Co. v. Young*, 168 Ala. 551, 53 So. 213; *Simoneau v. Pacific Electric R. Co.* 159 Cal. 494, 115 Pac. 320, 2 N. C.

C. A. 137; Escambia County Electric Light & P. Co. v. Sutherland, 61 Fla. 167, 55 So. 83; Hartnett v. United R. Co. 162 Mo. App. 554, 142 S. W. 750; Louisville C. & L. R. Co. v. Mahony, 7 Bush, 235; Hammer v. Janowitz, 131 Iowa, 20, 108 N. W. 109, 20 Am. Neg. Rep. 324.

The evidence is clear and convincing that McNulty died of traumatic pneumonia, and that such pneumonia was the result of the injury received by him on account of the falling of the cornice of the Sweet building.

Carroll v. Chicago, St. P. M. & O. R. Co. — Iowa, —, 84 N. W. 1035.

The statement of the deceased that he could not get insurance because of his health was not competent. It was hearsay, pure and simple.

Ponca v. Crawford, 18 Neb. 551, 26 N. W. 365; Armstrong v. Ackley, 71 Iowa, 76, 32 N. W. 180; Butler v. St. Louis L. Ins. Co. 45 Iowa, 93; Heald v. Thing, 45 Me. 392; Alabama G. S. R. Co. v. Arnold, 80 Ala. 600, 2 So. 337; Evans v. Elwood, 123 Iowa, 92, 98 N. W. 584.

The damages were not excessive.

Sutherland, Damages, § 459; Latman v. Douglas & Co. 149 Iowa, 699, 127 N. W. 661; Mickey v. Indianola, — Iowa, —, 114 N. W. 1072; Mahaney v. Bell, 42 Iowa, 383; Gordon v. Pitt, 3 Iowa, 385; Stutsman v. Burlington & S. W. R. Co. 53 Iowa, 760, 6 N. W. 63; Bergert Bros. v. Davenport City R. Co. 34 Iowa, 571; Carpenter v. Scott, 86 Iowa, 563, 53 N. W. 328; Neary v. Northern P. R. Co. 41 Mont. 480, 110 Pac. 226; Stoutenburgh v. Dow G. H. Co. 82 Iowa, 179, 47 N. W. 1039; Haas v. Chicago, M. & St. P. R. Co. 90 Iowa, 259, 57 N. W. 894, 14 Am. Neg. Cas. 649; Locke v. Sioux City & P. R. Co. 46 Iowa, 115; Rose v. Des Moines Valley R. Co. 39 Iowa, 246; Berry v. Central R. Co. 40 Iowa, 564; East Line & R. River R. Co. v. Smith, 65 Tex. 167; International & G. N. R. Co. v. Ormond, 64 Tex. 485.

Mr. C. W. E. Snyder also for appellee.

Weaver, Ch. J., delivered the opinion of the court:

McNulty was injured by the falling of a cornice into the public street from a building owned by Sweet. Eight days after the accident, McNulty died of pneumonia, which plaintiff alleges was caused by the injuries so received, and the claim of damages is based upon that theory.

It is strongly contended upon the part of the appellant that the record shows no evidence from which this fact could be found in favor of plaintiff. It is true that the testimony tends to show that McNulty was not in robust health at the time of his injury, that he had recently suffered from bronchitis and had some indications of

weakness of the lungs; but the fact of ill health or physical weakness, if established or conceded, is by no means inconsistent with plaintiff's theory that the pneumonia which was the immediate cause of death was the direct result of the blow received from the falling brick. Indeed, such weakened condition, if it existed, may have rendered the deceased an easier victim of the fatal disease; yet, if there was evidence for the jury that the pneumonia was the direct result of the injury, and such injury was fairly chargeable to the negligence of Sweet, the state of the deceased's health would in no manner affect the right of action on the part of his administratrix, though it may have bearing on the amount of the recovery. That there was evidence to go to the jury on both questions is scarcely open to doubt. On the matter of the alleged negligence, the fall of the cornice doubtless presented a case for applying the doctrine of *res ipsa loquitur*, to say nothing of other evidence bearing upon the situation. Concerning the relation of cause and effect between the injury received and the disease of which the intestate died, it may be said that the medical testimony on the part of plaintiff tended to show that the pneumonia was of traumatic origin; that is, pneumonia, the inciting cause of which was some physical violence or bodily injury. It is also shown that, from such an injury as the deceased suffered, pneumonia is likely to follow as a natural consequence. No other injury or efficient cause for the disease is suggested, and the question thus presented is one of fact, and not of law. *Brownfield v. Chicago, R. I. & P. R. Co.* 107 Iowa, 254, 77 N. W. 1038, 5 Am. Neg. Rep. 331; *Lehman v. Minneapolis & St. L. R. Co.* 153 Iowa, 124, 133 N. W. 327.

The jury was fairly and correctly instructed upon this proposition. The defendant's request for an instruction that the burden was upon plaintiff to show that the injuries to McNulty did cause pneumonia, and if she failed in this respect she could not recover, stated a correct legal proposition, but it was fully covered and stated in the instructions which the court gave upon its own motion.

The principal debatable question upon this appeal is the following: The surviving wife of McNulty, testifying as a witness, was permitted to say, over the objection of defendant, that the deceased left a family consisting of a wife and four children, ranging from one to ten years of age. Referring to this feature of the evidence, the court told the jury that, if they found the plaintiff entitled to recover, the amount of damage to be assessed in favor of the estate of the deceased "is not to be increased by rea-

son of his having children which he left surviving him; evidence of his children and the number thereof being admitted by the court as having bearing upon the question of inducement or incentive to habits of industry in case the deceased had lived."

Error is assigned upon the admission of the testimony and upon the instruction to which we have referred. It is to be admitted that authority is to be found for the position of the appellant, and cases are not wanting in which recoveries in actions for damages sustained by reason of the death of a person have been set aside because of admission of proof that the deceased left wife and children surviving him. It is a matter, however, on which the precedents are not in harmony, and a majority of this court, after quite careful deliberation, is of the opinion that the better reason is with the rule holding the evidence competent. Practically the only objection of any plausibility to its admission is that its tendency is to excite the sympathies of the jurors and induce undue liberality in the assessment of damages. But, as is well known to all persons who have observed the course of litigation in matters of this kind, it is utterly futile to hope to keep the fact from the knowledge of the jury. More often than otherwise the widow and children are in the court room. If not, the facts concerning the victim of a fatal accident, his family and their circumstances, are public property, upon every tongue; they are mentioned in public print, talked about on the street corners and places where men meet and congregate; they crop out incidentally in the court room; and, even though the evidence be rigidly excluded on the trial, no juror enters upon the consideration of his verdict in ignorance of the actual situation in this respect. Even as a mere matter of protection of the interests of the defendant, it is at least an open question whether it is not better that the testimony of all these conditions surrounding the deceased at the time of his injury should be admitted under the sanction of an oath, and its bearing and effect regulated and controlled by appropriate instructions. If it be said that a juror's sympathies may control his actions even to the extent of disregarding the court's instructions, that suggestion, if sound, is not less applicable where the influencing fact comes to the juror's knowledge from sources other than the testimony, or by absorption from the atmosphere in which the case has been tried. But the average jury is not made up of weaklings. Its members as a rule have an intelligent conception of their duties and obligations.

It is correct to say, as does the appellant, L.R.A.1918C.

that the only true measure of recovery for the death of an individual is the value of his life to his estate, had he not come to such untimely end. It is hardly too much to say that this rule is vague, uncertain, and speculative, if not conjectural, but it is the best which judicial wisdom and experience have yet been able to formulate. No evidence is possible of the time which deceased would have lived but for the injury complained of. Had he avoided this injury, death might have met him the next day, week, or year in some other form. In business he might have become a phenomenal success and accumulated millions, or he might have lived to old age and died a pauper. From being a man of good habits and prudence and industry, he might have become a spendthrift or a tramp; or, if a man of dissolute habits, he might have reformed into an efficient and prosperous citizen. But the demands of justice will not tolerate the idea that human life may be extinguished by the tort of another without the wrongdoer being held to answer therefor in damages, and the rule we have stated is the one which has been devised for this purpose. The principle which underlies it is of unquestionable soundness, but the difficulty which besets its practical application is in the fact that it calls for an estimate or conclusion which must be arrived at by a balancing of mere probabilities and possibilities which we deduce by way of inference from the age, character, habits, condition, education, employment, surroundings, and apparent capacity of the deceased. Fairness to the beneficiaries of the estate, on the one hand, and the defendant, on the other, requires that the jury be put in possession of all the facts having the slightest legitimate bearing upon this intricate problem. It is concededly the law of this state that in such case the plaintiff may show that the deceased was a married man. *Wheelan v. Chicago, M. & St. P. R. Co.* 85 Iowa, 178, 52 N. W. 119. This is said to be competent because "it may fairly be assumed that a married man will be more frugal and industrious and hence will accumulate a larger estate than a single man." *Beems v. Chicago, R. I. & P. R. Co.* 58 Iowa, 158, 12 N. W. 222.

In *Donaldson v. Mississippi & M. R. Co.* 18 Iowa, 290, 87 Am. Dec. 391, the question presented in the case now before us was raised in the following manner: The action, like the one at bar, was brought by the administrator to recover damages for the death of his intestate. Plaintiff offered testimony showing the family of the deceased and their respective ages, as well as his occupation, earnings, and accumulations. The defendant objected there-

to on the ground that the inquiries were improper, immaterial, and not the correct method for the ascertainment of the damages. The trial court instructed the jury that, if plaintiff was found entitled to recover, he would be entitled to recover such damages as the estate of deceased had suffered by reason of his death, and nothing should be allowed on account of his pain and suffering before death, or for the grief and distress of the family, or for their loss of his society. Passing upon the defendant's assignment of error in this respect, this court then said: "When a jury is thus guarded against an allowance of damages for improper causes, it would seem that no prejudice could result if the jury should be fully advised . . . of the exact situation of the deceased, his occupation, annual earnings, age, health, habits, family, and estate. Many of these, and possibly other facts, may have just influence in determining the pecuniary damage to the estate. We would not be understood, however, as determining that evidence as to the number and ages of his children is strictly proper." It would seem from this quotation that, while the statement of facts and argument indulged in by the court indicated its view that the testimony was admissible, yet, as in any event its admission was not prejudicial, the question whether it was technically or "strictly proper" was left undecided.

In the later case of *Beems v. Chicago*, R. I. & P. R. Co. 58 Iowa, 150, 12 N. W. 222, three members of the court held to the view that such evidence was inadmissible, while the other two, Beck and Rothrock, JJ., reached the opposite conclusion. Somewhat singularly the *Donaldson* Case was not referred to and was apparently overlooked. Indeed, there was no discussion of authorities except a brief mention of *Simonson v. Chicago*, R. I. & P. R. Co. 49 Iowa, 87, where it was held generally that the jury was entitled to know all the circumstances surrounding the deceased, affecting his capacity and disposition for earning a living. Since that time the *Beems* Case has been cited in a criminal case (*State v. Rutledge*, 135 Iowa, 581, 113 N. W. 461) and a bastardy case (*State ex rel. Pitham v. Wangler*, 151 Iowa, 555, 132 N. W. 22), but under circumstances so foreign to those with which we are now dealing that they cannot be said to be in point. As applied to the question before us, we think it must be said that the authority of that precedent has not only been discredited, but abandoned.

Bearing upon that proposition, let us first notice that in *Hunt v. Chicago & N. W. R. Co.* 26 Iowa, 363; *Simonson v. Chicago*, R. L.R.A.1918C.

I. & P. R. Co. supra, and *Moore v. Central R. Co.* 47 Iowa, 692, 14 Am. Neg. Cas. 657, we held it competent for the plaintiff in a personal injury case to prove that the injured person was a poor man and had a family dependent upon him for support. In the *Simonson* Case it was said: "The jury was entitled to see [the deceased] as he was viewed with reference to his prospective capacity and disposition for earning and saving money. No data could be given them for a computation. Taking [deceased] as he was shown to them, it was for them to say, from their knowledge of business life and all its contingencies, . . . what was the pecuniary injury sustained . . . in reference to his prospective estate." In this connection it is further said that either party might have shown his habits in regard to the use of intoxicating liquor "and in regard to anything else which affected his prospective savings and earnings."

In *Stafford v. Oskaloosa*, 64 Iowa, 253, 20 N. W. 178, the question was again raised, and, after citing approvingly the *Hunt*, *Moore*, and *Simonson* Cases, the court proceeds to notice the *Beems* Case as follows: "But in the subsequent case of *Beems v. Chicago*, R. I. & P. R. Co. *supra*, it is held by a majority of the court that evidence of the number of the intestate's family, although offered simply as a circumstance tending to stimulate his industry and economy, was incompetent. The majority of the court, as now constituted, are content to adhere to the holding in *Hunt v. Chicago & N. W. R. Co.* and *Moore v. Central R. Co.* and the grounds on which the holding is placed."

In the later case of *Fish v. Illinois C. R. Co.* 96 Iowa, 707, 65 N. W. 997, where the question was raised upon the competency of evidence showing accumulations of the deceased, reliance was placed by the defendant upon the *Beems* Case, where the majority seems to class proof of this character with proof of the family relations of the deceased, and holds both incompetent. Upon this objection the court again remarks: "All that can be said of that case is that it denies the right of showing accumulations with a view to enhance damages because of it, but the case recognizes the right to show that deceased was dependent on his earnings, and had no money, as a probable inducement to industry. . . . It is not intended by what is said in this opinion to commit this court, as now organized, to an approval or disapproval of the rule of *Beems v. Chicago*, R. I. & P. R. Co. should the question therein . . . as to such evidence hereafter arise."

In *Lowe v. Chicago*, St. P. M. & O. R. Co. 89 Iowa, 420, 56 N. W. 519, evidence was

admitted apparently without question that the deceased was married, left no estate, and that his earnings had been applied to the support of his wife and family; and the court in its opinion cites these facts as circumstances to be considered in estimating the value of his life to his estate.

In the *Wheelan Case*, 85 Iowa, 167, 52 N. W. 119, the court cites the *Beems Case* in support of the proposition that, in finding the value of the life of a man to his estate, evidence of his age, habits, health, means, business, and his married or single estate, is admissible.

In *Dufree v. Wabash R. Co.* 155 Iowa, 544, 136 N. W. 695, the plaintiff having shown the wages earned by the deceased, it was developed on cross-examination that he was saving none of his earnings and had no property. On redirect examination plaintiff was permitted to show that deceased was supporting a wife and three children. The defendant assigned error upon this ruling and cited *Beems v. Chicago, R. I. & P. R. Co.* in support of its position. The authority of that precedent was not discussed by the court, for we held that the evidence was admissible in any event as an explanation of the fact that deceased was not making any savings. It is difficult, however, to understand upon what theory the explanation would be material or pertinent if the rule of the *Beems Case* is sound, or if the fact itself has no legitimate bearing on the question of the value of the life of the deceased to his estate.

It is evident from the foregoing that this court has never directly or distinctly reaffirmed *Beems v. Chicago, R. I. & P. R. Co.* so far as it relates to this question, but, on the contrary, has shown a distinct disinclination to do so; and that, taking our cases along this line as a whole, and the reasoning upon which they have been decided, they may fairly be said to affirm the competency of the evidence admitted by the trial court.

For reasons already suggested, most of the adjudicated cases from other states are not specially helpful in this discussion, but there are some in which principles quite analogous to those we here approve have been applied. For example, in *Perry v. Lansing*, 17 Hun, 34, it was held proper to admit such evidence on the theory that it was proper for the jury to be advised in a general way of the situation and condition in life of the party injured. In *Missouri*, contrary, perhaps, to the general trend of cases in that state, it was held admissible to show the existence of wife and family, not as in itself a ground of damage, but to inform the jury of the person's condition

and situation in life. *Winters v. Hannibal & St. J. R. Co.* 39 Mo. 468.

The state of Alabama has a statute which its courts have so interpreted that, if it appear that the deceased consumed his wages in support of his family and was making no accumulations, the measure of recovery is limited to the loss so occasioned; but, if he was making any savings, then the administrator may recover, as in this state, the entire present value of the estate which the deceased would probably have accumulated had he lived. *Alabama Mineral R. Co. v. Jones*, 114 Ala. 519, 62 Am. St. Rep. 121, 21 So. 507, 1 Am. Neg. Rep. 551 and cases there cited. Applying this statute, the court in the cited case says: "As a circumstance aiding the solution of this question, it was competent to show how many and what dependents there were and their ages."

The Nebraska statute is unlike our own in that the right of action is given for injury to the support of dependent relatives; but the reasoning of that court upon the competency of evidence tending to show the extent of such loss is very applicable in cases like the one at bar. There, in an action by a father for the death of a son, the court says that the fact of the existence of a mother and other children was entirely admissible, "not as a direct ground for the jury's action, but as showing what deceased was doing and likely to do to make his life pecuniarily valuable to plaintiff." If such fact is evidence of what the deceased was doing or likely to do to make his life of pecuniary value to the parent, it is no less competent to show the pecuniary value of his life to his estate, where the right of recovery is for its benefit. [*South Omaha Waterworks Co. v. Vocasek*, 62 Neb. 710, 87 N. W. 536, 10 Am. Neg. Rep. 580.]

It is held in *Wisconsin* that in an action by the widow of the deceased, or for her benefit, although she is entitled to recover only for the pecuniary damage resulting to herself, she may prove the number and ages of her children. *Hamann v. Milwaukee Bridge Co.* 136 Wis. 39, 116 N. W. 854.

It is to be said also that the precedents from other states relied upon by the appellant, holding it incompetent to show the fact that the deceased left a family of children, are equally unanimous in holding it improper to show that he was a married man, or otherwise show to the jury the facts as to his domestic or family relations. *Louisville & N. R. Co. v. Collinsworth*, 45 Fla. 403, 33 So. 513; *Stockton v. Frey*, 4 Gill. 406, 45 Am. Dec. 138; *Baltimore & O. R. Co. v. Camp*, 26 C. C. A. 626, 54 U. S. App. 110, 81 Fed. 807; *Sealer v. Rolfe*

Coal & Coke Co. 51 W. Va. 327, 41 S. E. 216, 12 Am. Neg. Rep. 571. The majority opinion in the Beems Case departs from this rule so far as relates to the married condition of the deceased, and we have committed ourselves to the same view in several cases, as already noted.

But it is scarcely possible to conceive of any good reason for admitting proof that defendant had a wife, which does not equally apply to the fact that he had children. In the Beems Case both majority and minority justified the admission of the former upon the sufficient ground that "from observation and experience it may fairly be assumed that a married man will be more frugal and industrious, and hence will accumulate a larger estate than a single man;" but, having said this, the opinion proceeds with palpable disregard of the logic of the situation and of its own concession to hold it improper to show the existence of children, and state as a reason therefor that "observation and experience do not teach that one's income is likely to increase in the same ratio as the number of his children." It would have been scarcely less pertinent to have said that observation and experience do not show that, other things being equal, a married man lives longer than a single man. It is sufficient answer to either to say that no one contends otherwise, and the quip with which the competency of the testimony is there turned aside does not partake of the character of argument. If it be true (and it stands admitted in this court) that proof that deceased was a married man is of some probative force in estimating the probable value of his life to his estate because the responsibilities of wedlock tend to stimulate him to industry, prudence, and economy, shall the court shut its eyes to the equally patent fact that a child or children in the family, whether one or many, has an equal, if not greater, influence in the same direction? It may be said that the dependent members of a man's household may be so numerous as to exhaust his earnings and decrease rather than increase the likelihood of his accumulating an estate. This is true, and in such case the defense is in no position to complain of the admission of the testimony. The writer has been unable to find that any court in any other jurisdiction has drawn any distinction between the admissibility of proof that the deceased in such cases was a married man and proof that he left children.

We have already called attention to the peculiar difficulties surrounding the presentation and trial of these cases, and to the fact that, when all is said, the issue goes to the jury for what we have called

a balancing of the probabilities and possibilities of the extent of that financial success, if any, which would have attended the life of the deceased, had his career not been prematurely arrested by the negligence complained of. We think that no impartial arbitrator, to whom that question might be submitted, would fail to inquire and ascertain, so far as practicable, not only what the deceased had already done or accomplished and the facts as to his age, health, capacity, and earning powers, but also as to his exact situation in life and the surroundings and influences, if any, which, according to common knowledge and observation, tend to the development of industry and thrift. It is to be remembered that actions of this nature were unknown to the common law. The right thereto is a creature of statute, and investigation will show that the provisions made in the different states are of such varying character that decisions thereunder afford few precedents of much value except in the jurisdictions where they have been announced. As the action is not of common-law origin and the injury to be compensated for involves investigation into matters not before made the subject of judicial inquiry, it is not surprising that the rules of evidence therein should become involved in apparent confusion, though it is to be said that, when we consider the different statutes of the various states, the confusion is perhaps more apparent than real,—a situation to which the compilers and annotators of decisions have not always given due attention. The construction and administration of our own statute is, of course, a matter for our own courts; and, notwithstanding there has been some uncertainty of expression with reference to the proper limitations upon the introduction of evidence, we think we are fairly committed to principles and rules recognizing the materiality and competency of testimony such as we have now under consideration. We also think them fully sustained by sound reasoning and the teachings of human experience. The assignment of error upon the admission of this testimony is therefore overruled.

It is next said that the court's instruction to the jury that the amount of plaintiffs' damage, if any, was not to be increased by reason of the deceased having left children, and that evidence concerning the children had been admitted only as bearing upon the question of inducement or incentive to industry in the deceased, is contradictory and misleading. We find nothing in the instruction of which appellant can complain. The attempt of the court to limit the effect of the testimony was favorable to the defense. It said to the jury

in effect that the mere fact that the deceased had children who survived him was not in itself a ground for the recovery of damages, but that if the plaintiff was found otherwise entitled to recover it might be considered for what it was worth as bearing upon deceased's incentives to industry. If we are correct in holding the testimony admissible at all, then the limitation tended to restrict rather than to enlarge the plaintiff's right of recovery, and defendant has suffered no prejudice. Whether such restriction was called for under the record we need not decide.

Error is assigned upon the ruling of the court striking out testimony of a statement by the deceased that he could not obtain life insurance because of his health. We think the testimony should not have been stricken because it was a circumstance, though one of slight importance, bearing upon his condition of health, and consequently upon his expectancy of life and ability to labor; but these circumstances and conditions were quite fully inquired into, and we think the exclusion of this particular item was not a prejudicial error.

The same may be said of one or two other similar rulings. There was no error in admitting complaints made by the deceased of pain and suffering soon after his injury. It is true the administrator was not entitled to recover for the pain and suffering sustained by the deceased, and the jury were so instructed, but the rule which admits the complaints of the injured person as bearing upon the nature, extent, and location of his injuries is quite elementary. *Hamilton v. Mendota Coal & Min. Co.* 120 Iowa, 149, 94 N. W. 282, 13 Am. Neg. Rep. 639; 7 Enc. Ev. 386.

The complaint that the damages allowed (\$8,000) are excessive cannot be sustained. The deceased was still a young man, with an expectancy of life of thirty-six years. He was a boiler maker, earning from \$56 to \$108 per month; and while, as we have said, he was probably not a man of robust health, he was engaged in labor at his trade, and, so far as appears, was in no respect incapacitated to pursue the same, and no circumstances are disclosed rendering it necessarily improbable that he would live out his expectancy, maintaining the physical efficiency of the average man.

We find no prejudicial error in the record, and the judgment of the District Court is affirmed.

Evans, Gaynor, Withrow, and Ladd, JJ., concur.

Preston, J., dissenting:

I regret that I am unable to agree with L.R.A.1918C.

my associates in regard to the admissibility of the evidence as to the number of children and instruction No. 11½ on that subject. I shall set out the record more fully than has been done in the majority opinion.

Plaintiff, Mrs. Nicoll, formerly Mrs. McNulty, was permitted to testify over objections as follows:

Q. Did he leave any family other than yourself?

Did he have any children?

The court: It is not admitted for the purpose of affecting damages in any way, but it is done for some other purpose.

A. Four.

Q. What were their ages at the time of his death?

A. The oldest was ten, the youngest was a little over a year old.

In this connection, the court gave the following instruction: "(11½) You are instructed that there can be no recovery in this case for pain and suffering endured by the deceased resulting from the injury received by him, and you are also instructed that the remarriage of the widow of the deceased is not to be considered by you in diminishing the amount of damages sustained by said estate, if any you find. And, on the other hand, the amount of damages, if any you find, is not to be increased by reason of the deceased having children that he left surviving him; evidence of his children and the number thereof being admitted by the court solely as bearing upon the question of inducement or incentive to habits of industry in case the deceased had lived."

It is urged by appellant that admitting the evidence as to the children was erroneous; that the latter part of the instruction did authorize the jury to enhance the damages by reason of deceased having left children; and that the last two sentences therein are in conflict with each other. It may seem that, even though this evidence was not admissible, the exception taken to its admission was canceled by the instruction of the court that the damages were not to be increased by reason of the fact that deceased left children surviving. It has been held that where the verdict is not excessive, and the court instructed the jury to disregard the evidence, the error in admitting it is not fatal. 13 Cyc. 197, and cases, some of which are to the contrary. But it is claimed by appellant that the verdict is excessive, and that the instruction did not cure the error because the latter part of it did authorize the jury to enhance the damages. The object in introducing this evidence was, no doubt, to in-

form the jury that deceased had infant children dependent upon him for support. It is impossible to determine how far the assessment of damages was controlled by this evidence as to plaintiffs' family of small children. The reasonable inference is that it had some influence upon the verdict. The damages in such cases are more or less uncertain in any event, and the evidence should be limited to legitimate elements of damage. Appellant contends that the question as to the admissibility of such evidence has been settled in the case of *Beema v. Chicago, R. I. & P. R. Co.* 58 Iowa, 150, 12 N. W. 222, and that it is not admissible for any purpose in a case of this character. Appellee says that case was a three to two decision; that it is not in harmony with prior holdings, has not been followed since, is unsound; and that it has been an open question in this state for thirty years. It appears to me that the tendency of our former cases is to exclude such evidence. The question as to evidence in regard to children was not involved in the *Stafford Case*, 64 Iowa, 258, 20 N. W. 178, or the *Wheelan Case*, 85 Iowa, 167, 52 N. W. 119, and many of the other cases cited in the majority opinion. It is being now decided for the first time in this jurisdiction, or any other, so far as I am able to discover, that such evidence is competent, under such a statute as ours, where the question is as to damages to the estate.

As stated, some of the cases hold that the evidence is not competent, but that if the court instructs the jury that it must not be considered as affecting damages, and the damages are not excessive, there is no prejudice. Other cases hold that, if such evidence is admitted and the verdict is excessive, it may be cured by remittitur, because the only effect of the evidence is to enhance the recovery. *Chicago, R. I. & P. R. Co. v. Batsel*, 100 Ark. 526, 140 S. W. 726. Though this is denied in *Jones & A. Co. v. George*, 227 Ill. 64, 81 N. E. 4, 10 Ann. Cas. 285, to which I shall again refer.

But the cases all hold that the evidence is incompetent. I am not prepared to say that a reversal should follow in every case where the evidence as to children is admitted. Cases might arise where the court instructed the jury squarely to not consider it as affecting damages and where the evidence is such that it could be fairly said that the verdict is not excessive and that there was no prejudice. But that is not the question being now determined. The question is: Is the evidence competent? The fact that jurors may learn about it on the street corners, or in the public prints, or incidentally in the court room, is not, as L.R.A.1918C.

I think, a reason for holding it competent.

As an original proposition, I should be inclined to say that the recovery should be the same whether a man is married or single. Conceding the rule to have been established by this court that evidence that the party is married is competent, I would not extend the rule to include evidence as to children. It occurs to me there are reasons for excluding evidence as to children which would not apply to the question whether the party was married. There is but one wife, who is an adult, but there may be many children, some of tender age. But the question as to whether evidence that a person deceased or injured is married is admissible is not the question here, and I shall not discuss it. The only question now is whether it is competent to show the number and ages of children.

I concede that it is proper for a jury to be advised, in a general way, of the situation and condition in life of the party injured, as held in the cited New York case of *Perry v. Lansing*, 17 Hun, 34, and other cases, but it seems to me the argument in support of the proposition that the evidence as to the number and ages of children is admissible is on the theory that children would be a greater inducement to earn and save. If it is an inducement for greater effort and stricter economy, the effect would be to increase the value of the estate, and, if that is so, the estate would suffer greater damage; therefore the recovery should be larger. I understand the majority to say this is not the purpose, but the reasoning and cases in support of the proposition are, as I think, based upon the theory that it is for that purpose. For instance, it is said that under the Nebraska statute, authorizing a recovery for the injury to support of dependent relatives, such evidence is competent, and that the reasoning of that court in such a case is applicable here. That such evidence is admissible, "not as a direct ground for the jury's action, but as showing what deceased was doing, and likely to do, to make his life pecuniarily valuable to plaintiff." [*South Omaha Waterworks Co. v. Vocasek*, 62 Neb. 710, 87 N. W. 536, 10 Am. Neg. Rep. 580.] If the fact of having children is likely to make his life pecuniarily valuable, it should enhance the damages; if less valuable, then the damages should be decreased. It would be one way or the other, depending on the character of the children, whether they were a help or otherwise.

I do not say that the evidence is not competent under the Nebraska statute, where damages do not go to the estate, as in Iowa. What I am trying to show is the false position of the majority when they say it is

not admitted for the purpose of increasing or decreasing the damages, when it cannot have any other effect, and is not and cannot be admissible for any other purpose. It seems to be the theory under the Nebraska holding that the fact of having children would make the life more valuable, while in at least one Iowa case (*Dufree v. Wabash R. Co.* 155 Iowa, 544, 136 N. W. 695) the thought seems to be that the life would be less valuable. This is so, or else I do not comprehend the ruling in that case. Here was the situation in that case, as stated in the majority opinion: "The plaintiff having shown the wages earned by the deceased, it was developed on cross-examination that he was saving none of his earnings and had no property. On redirect examination plaintiff was permitted to show that deceased was supporting a wife and three children. The defendant assigned error upon this ruling and cited *Beems v. Chicago, R. I. & P. R. Co.* in support of its position. The authority of that precedent was not discussed by the court, for we held that the evidence was admissible, in any event, as an explanation of the fact that deceased was not making any savings." If he was unable to save anything because of the expense of raising his children, what other effect could it have but to decrease the value of his estate?

It should be kept in mind that this is not a case under the Employers' Liability Act, but is an action for damages to the estate of deceased. In *State v. Rutledge*, 135 Iowa, 581, 113 N. W. 461, a criminal case, it was held such evidence was not proper, and in it the *Beems* Case is referred to and approved. In *State ex rel. Pitham v. Wangler*, 151 Iowa, 555, 132 N. W. 22, a bastardy case, the ruling was the same, and the *Beems* Case referred to, but it was held that in such a case there was no prejudice, on the theory, no doubt, that the form of the verdict in a bastardy case is guilty or not guilty, and the jury do not have to do with fixing the amount which shall be allowed for the support of the child. But these two cases do not quite reach the point now under consideration. The question first arose in *Donaldson v. Mississippi & M. R. Co.* 18 Iowa, 280, 87 Am. Dec. 391, but was not squarely decided; the court holding that, because the jury were, by the instructions, guarded against allowance of damages for improper causes, there was no prejudice. The court did say: "We would not be understood, however, as determining that evidence as to the number and ages of his children is strictly proper." In *Lowe v. Chicago, St. P. M. & O. R. Co.* 89 Iowa, 420, 433, 56 N. W. 519, decided since the *Beems* Case, it is stated that it was shown

by the evidence, among other things, that deceased left a wife and three children, but the question now being considered was not raised in any manner.

Under statutes which provide that the damages for wrongful death inure to the benefit of the family, such evidence is admissible. *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 39 L. ed. 624, 15 Sup. Ct. Rep. 491. In that case the statute excludes the creditors of deceased from any interest in the recovery, and declares not only that the judgment shall inure exclusively to the benefit of his family, but that the damages shall be assessed with reference to the injury done to the widow and next of kin. This seems to be the distinction running through the cases that, if the damages inure to the benefit of the family, it may be shown what persons compose the family, but not so if the damages go to the estate, as in this case. The question here is: What was the value of the life of the deceased to his estate? The number of his children can have no bearing on that question. The measure of the recovery and the elements to be considered are stated in *Grace v. Minneapolis & St. L. R. Co.* 153 Iowa, 418, 432, 133 N. W. 672, and *Neal v. Sheffield Brick & Tile Co.* 151 Iowa, 690, 695, 130 N. W. 398.

The thought in the last sentence of instruction 11½, that evidence as to the children is to be considered on the question of inducement or incentive to habits of industry, etc., is on the theory, doubtless, that, as stated by the minority in the *Beems* Case, it "would largely add to the value of his personal services to his own estate." The majority opinion in this case says the purpose is "to stimulate him to industry, prudence, and economy." It would seem that, if this be true, the only effect it could have would be to increase the value of his estate, and thus necessarily to increase the damages, so that the last two clauses in instruction 11½ are in conflict and cannot be reconciled.

Some of the cases exclude evidence as to children because its admission is likely to prejudice the jury. It was said by a majority of the court in the *Beems* Case that observation and experience do not teach that one's income is likely to increase in the same ratio as the number of his children. It would seem that there are other reasons for excluding such evidence. If it is thought that children would be an inducement to habits of industry, and thus increase the value of his estate, how long would the inducement continue? Would it continue during the entire expectancy of the person injured or deceased? Would there be other children born after the in-

jury and after the trial? Would some of these die? What is their expectancy? What are their habits? Would their earnings, until they reach their majority, add to the estate, or would it cost more to raise them than they earn? Suppose a man has six minor children, who are dutiful, in good health, industrious, and saving; they would, when old enough, be a great help and aid to the parent in accumulating and saving money. But suppose the children are sickly, requiring medical expense, they are unable to work, or suppose they are lazy and spendthrifts, would they enhance or decrease the value of the estate? We will say that the parent is injured or killed. If proof as to the number of children is competent, then the man with the family of children who are not helpful obtains the same advantage by such proof as the man whose family is an aid to him, unless all these matters are gone into. Would defendant's attorney dare to cross-examine and show that the children are cripples or sickly? For the purpose of argument, I am assuming at this point that the sympathies of the jury would not be aroused, and that they would fairly consider such evidence for the only purpose for which it could be considered, and that is to either enhance or decrease damages. If it be competent to show the number of children composing the family of the person injured or deceased, why would it not be competent to show that the parents or grandchildren of such person were members of his family, if that be the fact? These and other questions naturally arise. It seems to the writer that these matters are too remote, uncertain, speculative, and would involve the investigation of collateral matters. To hold that such evidence is admissible necessarily overrules the Beems Case and overturns a precedent of thirty years' standing, is against the overwhelming weight of authority, and establishes a dangerous rule.

If the evidence is properly in the record, it would be legitimate to refer to it in argument to the jury; and hereafter, in personal injury and like cases, we may expect it to be used to the best advantage, and in all probability we will be compelled to reverse cases because of it.

Appellee cites *Hamann v. Milwaukee Bridge Co.* 136 Wis. 39, 116 N. W. 854, and quotes therefrom as follows: "In an action for negligent death, by decedent's widow, suing as administratrix, she can show the state of her health, and the number of her children; the jury being properly cautioned that she could recover only for the pecuniary damage resulting to herself from the death." The opinion is brief on this point. It cites two prior decisions

of the Wisconsin court, one of which (*Lawson v. Chicago, St. P. M. & O. R. Co.* 64 Wis. 447, 54 Am. Rep. 634, 24 N. W. 618) cites the *Donaldson Case*, 18 Iowa, 280, 87 Am. Dec. 391, as authority; and *Abbot v. McCadden*, 81 Wis. 563, 29 Am. St. Rep. 970, 51 N. W. 1079, in which the court says: "The court charged the jury, on the subject of damages, that the damages 'must be the money value only to her and her children which the life of the deceased was worth to her and them on the day of his death.' . . . This was error. The fact that there are children left surviving, whose support will be thrown on the plaintiff, is proper to be shown in evidence and to be considered by the jury; but the damages recoverable are those which the widow has suffered, not those which the children have suffered." From this it appears that there is a different statute in Wisconsin from ours by which the damages are for the benefit of the widow, and not the estate.

Appellee also cites as being to the same effect as the *Hamann Case* the following: 7 Enc. Ev. 439; but an examination of the text shows that this is the rule in states which by statute allow the right of action for the benefit of the next of kin of deceased. He also cites 8 Am. Eng. & Enc. Law, 941. But at page 940 of the same volume the same distinction is made which I make. It is there stated that, where the action is brought by the widow for the death of her husband, the ground of the admissibility of such evidence is that by the death of the father the responsibility of supporting and rearing the children is cast upon the plaintiff, their mother, and it is proper to show the extent and character of this responsibility thus cast upon her. Also 13 Cyc. 358, and numerous cases there cited. The text here refers to the number and condition of persons dependent upon deceased. Some of the cases there cited are under statutes such as I have mentioned. In my opinion the rule announced in the *Beems Case* as to evidence in regard to children of a deceased person is correct, and it is sustained by the weight of authority. In some of the cases the party injured was deceased, in others he survived; but the rule is the same, for in one case he is suing for his own injuries, and in the other his representative is suing for damages to his estate. As sustaining the rule in the *Beems Case*, see 13 Cyc. 196, and cases, also *Pennsylvania Co. v. Roy*, 102 U. S. 451, 460, 26 L. ed. 141, 145; *Baltimore & O. R. Co. v. Camp*, 26 C. C. A. 626, 54 U. S. App. 111, 81 Fed. 808; *Louisville & L. R. Co. v. Binion*, 107 Ala. 652, 18 So. 78; *Dayharsh v. Hannibal & St. J. R. Co.* 103 Mo. 577, 23 Am. St. Rep. 900, 15 S. W. 555; *Jones*

& A. Co. v. George, 227 Ill. 64, 81 N. E. 4, 10 Ann. Cas. 285; Vandalia Coal Co. v. Yemm, 175 Ind. 524, 92 N. E. 49, 94 N. E. 881; Simpson v. Foundation Co. 201 N. Y. 479, 95 N. E. 10, Ann. Cas. 1912B, 321, 2 N. C. C. A. 183; Carlile v. Bentley, 81 Neb. 715, 116 N. W. 772; Maynard v. Oregon R. & Nav. Co. 46 Or. 15, 68 L.R.A. 477, 78 Pac. 983; Ft. Worth Iron Works v. Stokes, 33 Tex. Civ. App. 218, 76 S. W. 231; St. Louis, I. M. & S. R. Co. v. Adams, 74 Ark. 326, 109 Am. St. Rep. 85, 85 S. W. 768, 86 S. W. 287; Louisville & N. R. Co. v. Eakin, 103 Ky. 465, 45 S. W. 529, 46 S. W. 496, 47 S. W. 872; Chicago, R. I. & P. R. Co. v. Batsel, 100 Ark. 526, 140 S. W. 726; Union P. R. Co. v. Hammerlund, 70 Kan. 888, 79 Pac. 152; Rio Grande Southern R. Co. v. Campbell, 44 Colo. 1, 96 Pac. 986; Standard Oil Co. v. Tierney, 92 Ky. 367, 14 L.R.A. 677, 36 Am. St. Rep. 595, 17 S. W. 1025; Union P. R. Co. v. McMican, 114 C. C. A. 311, 194 Fed. 393. These are not all the cases which might be cited. Many others are cited in some of these. It would unduly extend this dissent to quote at any length from these cases, but I wish to refer to a few of them.

In *Pennsylvania Co. v. Roy*, 102 U. S. 451, 460, 26 L. ed. 141, 145, a verdict for \$10,000 was set aside and the cause reversed solely because of the admission of such evidence.

In the *Kansas case* (*Union P. R. Co. v. Hammerlund*, 70 Kan. 888, 79 Pac. 152). It was held that the evidence was not competent, and the court said the question is not debatable.

In the *Kentucky case* of *Louisville & N. R. Co. v. Eakin*, 103 Ky. 465, 45 S. W. 529, the court quotes from the opinion in the case of *Chicago v. O'Brennan*, 65 Ill. 163, as follows: "Was this evidence admissible? If it was, then it would have been competent to have gone further and shown all the circumstances of the family; such as that the mother was an invalid, that one of the daughters was blind, that one son had accidentally lost a leg, etc., if such had been the case, so as to present a most pitiable picture of a helpless family dependent upon appellee for support as a lecturer; for, as the evidence had no place in the case but as a stimulant to the jury, it would have been just as competent to make the stimulant strong as weak. But was it competent at all? It is an elementary rule that evidence must be confined to the points at issue. There was no point in issue to which this evidence had any relevancy. This sort of attempt to foist irrelevant matters L.R.A.1918C.

upon the attention of the jury, with a view to creating a personal interest, is too often the secondary resort of a party on the witness stand." The *Kentucky case* states that this rule has received the approval of that court in a number of recently decided cases, citing them.

In the case of *Jones & A. Co. v. George*, 227 Ill. 64, 81 N. E. 4, 10 Ann. Cas. 285, supra, it was said: "On the trial of this case appellee was allowed to prove that he was a married man and had three children. The evidence was objected to, and the objection overruled. The damages recoverable in this case can only be compensatory. The domestic relations, the financial standing . . . of the parties, are therefore irrelevant. . . . *Youngblood v. South Carolina R. Co.* 85 Am. St. Rep. 835, and note (60 S. C. 9, 38 S. E. 232), where many other authorities are collected. . . . The error in admitting this evidence is virtually admitted by appellee and was recognized by the appellate court, but it was thought that the remittitur of \$1,500 ought in some way to cure this error. We cannot assent to this view. Evidence of this character not only tends to enhance the damages, but it is calculated to arouse a sympathy for appellee which is liable to unconsciously influence a jury in the decision of other controverted questions of fact in the appellee's favor. It would be a dangerous precedent to hold that a party might introduce irrelevant testimony which would appeal to the sympathy, passions, or prejudices of a jury in such a way as to insure him the verdict on all doubtful questions of fact, then permit the trial court to estimate how much of a gross sum awarded as damages was due to such irrelevant testimony, and deduct that from the total verdict and render judgment for the balance, and thus cure an error, but for which the verdict might have been in favor of the other party."

Early *New York* and *Alabama cases* are cited in the majority opinion. I have not examined them, but the later cases from those states which I cite hold that the evidence is inadmissible.

In my opinion, the evidence as to the number and ages of the children was not admissible in this case for any purpose, and the instruction cannot be sustained because of the conflict therein. I would reverse.

Deemer, J., joins in the dissent.

Petition for rehearing denied April 14, 1914.

Annotation—Character and sufficiency of evidence to show pecuniary loss to estate of decedent.

For other notes in this series relative to the admissibility, character, or sufficiency of evidence to show pecuniary loss by negligently killing a person, see note appended to *Raines v. Southern R. Co. ante*, 1056, where the different notes presenting different aspects of this matter are referred to at length.

This note presupposes the elements of damages recoverable, and is concerned only with the character or sufficiency of the evidence to prove those elements. It does not, therefore, purport to cover the cases where the admissibility of the offered evidence turns upon the question whether the matter to which it relates is a proper element of damages. This, though in form a question of evidence, is really a question of substantive law, and will be treated in subsequent notes in this series.

Character of evidence—in general.

The majority of the actions to recover for negligently killing a person are based upon statutes authorizing the recovery of compensation for the pecuniary loss to designated surviving

relatives of the decedent. In some jurisdictions, however, recovery is permitted in behalf of the estate of the decedent. In that case the damages are computed upon a different principle than they are in cases where the recovery is for the pecuniary loss of designated relatives. As pointed out in the note appended to *Raines v. Southern R. Co. ante*, 1056, where it is sought to recover compensation for the pecuniary loss to the estate of the deceased through his death, the burden of proof is upon the plaintiff to show pecuniary loss to the estate. The material question of inquiry is as to the character and sufficiency of the evidence to entitle the plaintiff to recover substantial damages.

Age; health; physical condition; habits; occupation.

Generally, in order to establish pecuniary loss to the estate of the deceased by his death, evidence is admissible to show his age, health at the time of the injury resulting in his death, his weight, height, hearing, habits, occupation, etc.¹ And evidence is also admissible as to

¹ *Broughel v. Southern New England Teleph. Co.* (1901) 73 Conn. 614, 84 Am. St. Rep. 176, 48 Atl. 751, holding that evidence is admissible to show that the decedent was in good health and in the prime of life.

Di Prisco v. Wilmington City R. Co. (1904) 4 Penn. (Del.) 527, 57 Atl. 906, holding that evidence as to the cheerfulness of the decedent, a boy eight years old, is irrelevant in an action by his personal representative to recover for his death.

Wilcox v. Wilmington City R. Co. (1899) 2 Penn. (Del.) 157, 44 Atl. 686, holding that evidence of the state of health of the decedent at the time of her injury is competent in an action by her personal representative to recover damages to her estate for her wrongful death, and it is also competent to inquire as to her habits of industry, as tending to show a value to her life independently of her duties to her husband.

Van Gent v. Chicago, M. & St. P. R. Co. (1890) 80 Iowa, 526, 45 N. W. 913, holding that evidence is admissible as to the habits of the decedent as to sobriety and industry, and also as to his character as a brakeman.

Simonson v. Chicago, R. I. & P. R. Co. (1878) 49 Iowa, 87, holding that evidence is proper as to the condition of health of the deceased, his aptitude and qualification for business, and his habits of industry.

Donaldson v. Mississippi & M. R. Co. (1864) 18 Iowa, 280, 87 Am. Dec. 391, holding that evidence is admissible relative to the occupation, age, health, habits, earning

power, and property of the decedent, where the measure of damages is loss to his estate.

Cincinnati, N. O. & T. P. R. Co. v. Lovell (1910) 141 Ky. 249, 47 L.R.A.(N.S.) 909, 132 S. W. 569, rehearing denied in (1911) 142 Ky. 1, 133 S. W. 788, holding that evidence is admissible concerning the habits, character, physical condition, earning capacity, and probable duration of life of the deceased.

Cox v. Louisville & A. R. Co. (1910) 137 Ky. 388, 125 S. W. 1056, holding that evidence is admissible as to the decedent's earning capacity, size, weight, height, health, hearing, sight, general physique, and education, moral training, and vocation.

Louisville R. Co. v. Will (1902) 23 Ky. L. Rep. 1961, 66 S. W. 628, holding that in an action to recover compensation for the pain and suffering of the deceased, plaintiff is not prejudiced by the admission of evidence as to the earning capacity, age, and condition of health of the deceased.

East Tennessee, V. & G. R. Co. v. Gurley (1883) 12 Lea (Tenn.) 46, holding that where the damages recoverable are for the same elements as the decedent might have recovered for had he survived the injury, it is competent to show his ability and capacity to labor, his skill in his own business or profession, and that the decedent was a man of good, regular, temperate habits.

And see *Van Gent v. Chicago, M. & St. P. R. Co.* (Iowa) *supra*, holding that where it has been shown that the deceased was in-

the bad habits of the deceased, for the purpose of decreasing the amount of recovery.^{1a}

Earning capacity and property.

It has been held that where the decedent was living upon his income, his earning power may be shown by evidence of his age, health, intelligence, habits, mental and physical capacity to earn and acquire property, and his skill in the management of his property.²

And evidence is generally admissible

relative to the decedent's earning power³ and his aptitude and qualifications for business,⁴ and also as to the amount of property he was possessed of at the time of his injury and death.⁵ But evidence is inadmissible as to the poor pecuniary condition in which he left his family,⁶ although it may be shown that he had saved or accumulated no money or property, and his failure in this regard may be explained by evidence that he was supporting a large family.⁷

jured some years prior to the accident resulting in his death, and that some of the bones in one of his shoulders had been removed, it is competent for his brother, who had, since that time, tussled with the decedent, to testify as to the effect this injury had upon the decedent's health and strength after the wound had healed.

^{1a} *Nashville & C. R. Co. v. Prince* (1871) 2 Heisk. (Tenn.) 580; overruling *Louisville & N. R. Co. v. Burke* (1868) 6 Coldw. (Tenn.) 45, holding that where the right of action is for the benefit of the widow and next of kin, and the measure of recovery is that which the decedent might have recovered had he survived the injury, it is competent for the defendant to show that the deceased was a drunken and worthless man and made no provision for his family.

Compare with *Walter v. Chicago, D. & M. R. Co.* (1874) 39 Iowa, 33, holding that evidence is incompetent to show that the decedent, many years prior to his death, lived in a cabin, in filth and wretchedness.

² *Skottowe v. Oregon Short Line & U. N. R. Co.* (1892) 22 Or. 430, 16 L.R.A. 593, 30 Pac. 222, affirmed in (1896) 162 U. S. 490, 40 L. ed. 1048, 16 Sup. Ct. Rep. 869.

³ *Donaldson v. Mississippi & M. R. Co.* (Iowa); *Cincinnati, N. O. & T. P. R. Co. v. Lovell* (Ky.); *Cox v. Louisville & A. R. Co.* (Ky.); *Louisville R. Co. v. Will* (Ky.); *Skottowe v. Oregon Short Line & U. N. R. Co.* (Or.); *Nashville & C. R. Co. v. Prince* (Tenn.); and *Louisville & N. R. Co. v. Burke* (Tenn.) supra.

⁴ *McKelvy v. Burlington, C. R. & N. R. Co.* (1894) — Iowa, —, 58 N. W. 1068; *Simmonson v. Chicago, R. I. & P. R. Co.* (1878) 49 Iowa, 87.

⁵ *Donaldson v. Mississippi & M. R. Co.* (1864) 18 Iowa, 280, 87 Am. Dec. 391.

Spaulding v. Chicago, St. P. & K. C. R. Co. (1896) 98 Iowa, 205, 67 N. W. 227, holding that evidence is competent to show the amount of money the decedent had contributed to a sister and to others, and also that he had invested some of his earnings in life insurance as tending to show ability to earn money and his habits with respect to saving it.

Fish v. Illinois C. R. Co. (1896) 96 Iowa, 702, 65 N. W. 995, holding that it may be shown that the decedent was dependent upon his earnings as tending to show an inducement for industry on his part.

Beems v. Chicago, R. I. & P. R. Co. (1882) L.R.A.1918C.

58 Iowa, 150, 12 N. W. 222, holding that evidence as to the number of decedent's family and the amount of property he had accumulated is inadmissible on the question of the value of his life to his estate.

McKelvy v. Burlington, C. R. & N. R. Co. (Iowa) supra, holding that evidence is admissible to show that the decedent was an industrious, saving, economical man, that he always carefully looked after his business affairs, and that he was a farmer and it is not prejudicial error to receive evidence as to the size of his farm and as to whether or not his property was accumulated since his marriage.

Compare with *Dalton v. Chicago, R. I. & P. R. Co.* (1897) 104 Iowa, 26, 73 N. W. 349, holding that evidence as to the value of the decedent's interest in a farm is inadmissible in an action by the personal representative to recover for his wrongful death.

⁶ *Southern R. Co. v. Evans* (1901) 23 Ky. L. Rep. 568, 63 S. W. 445, holding, where an action is to recover damages to the estate of the decedent for his death through the negligence of the defendant, that evidence is inadmissible to show that the decedent left a wife and four children, ranging from four or five years to sixteen or seventeen years of age, and that the income of the wife is not sufficient to support her, and she is compelled to use part of the principal.

⁷ *NICOLL v. SWEET*, ante, 1099, holding that, in an action to recover pecuniary compensation for the loss to decedent's estate by his death, evidence is admissible as to the number of children the deceased left surviving him, in order to show an incentive to frugality, industry, and accumulation.

Dufree v. Wabash R. Co. (1912) 155 Iowa, 544, 136 N. W. 695, holding that evidence is admissible as to the amount of decedent's debts, and that he had saved nothing, and the failure of deceased in this regard may be explained by showing that he was supporting a large family.

Louisville, C. & L. R. Co. v. Mahony (1870) 7 Bush (Ky.) 235, holding that evidence of the decedent's pecuniary condition and the number and ages of the members of his family is admissible upon the question of damages for his wrongful death, based upon a statute allowing compensatory and punitive damages.

Lord v. Manchester Street R. Co. (1907) 74 N. H. 295, 67 Atl. 639, holding that, as bearing upon the decedent's capacity to earn

Evidence of existence of dependents.

The courts do not agree as to whether or not, when the action is for the loss to decedent's estate by his death, evidence is admissible that he was survived by a widow and minor children. Such evidence has been held to be admissible as tending to show an incentive upon the part of the decedent to earn and accumulate property, and also to show his actual earnings where connected with the evidence as to the amount he expended in the support of his family.⁸ In other jurisdictions, however, where the action is for the benefit of the estate, evidence has been held to be inadmissible to show that the deceased was survived by a widow and children, although no particular ground for the rejection of this evidence has been pointed out other than its immateriality and the danger that it would improperly affect the damages recoverable.⁹

It has been held that where the measure of damages to the estate of the deceased for his death depends upon whether or not the deceased in his lifetime consumed his wages in the support of his family, and hence was accumulat-

ing nothing, as a circumstance aiding in the solution of the question it is competent to show how many and who were dependent upon the deceased, and what, if anything, they were earning.¹⁰

Action for death of infant.

Although for the death of a child the amount of damages recoverable under the Survival Act cannot be estimated with certainty either as to the element of pain and suffering or future earnings after the age of twenty-one, yet this fact does not deprive the personal representative of the injured person of all damages. The fact that the child's death occurred before he became a wage earner does not foreclose inquiry as to the probable value of his services for the years ensuing his death, after he would have arrived at his majority. To enable the jury to determine the probable earning capacity of a child for the period of his probable life after arriving at the age of twenty-one, a wide latitude is allowed in the admission of testimony in reference to the child's status and future prospects, and the vocations and their remuneration which might reasonably be expected to be open to him.¹¹ As bearing

money, evidence is admissible as to what work she habitually did, including what she did in the way of caring for her children; and in this connection their ages and number may be shown.

⁸ *Louisville & N. R. Co. v. Eakin* (1898) 103 Ky. 465, 45 S. W. 529, 46 S. W. 496, 47 S. W. 872, holding that the measure of damages to a personal representative for the death of his decedent is such a sum as will compensate the estate for the destruction of the decedent's earning power; hence evidence is inadmissible as to the number of children dependent upon the deceased.

Louisville & N. R. Co. v. Kelly (1897) 100 Ky. 421, 38 S. W. 852, 40 S. W. 452, 1 Am. Neg. Rep. 249, holding that while, in an action by the personal representative to recover damages to the estate of the decedent for his death, evidence is inadmissible to show that the decedent left surviving him a wife and children, nevertheless where the wife is plaintiff in the action, she is entitled to be present in the court room during the trial of the action, and to be accompanied by her children.

Cincinnati, N. O. & T. P. R. Co. v. Sampson (1895) 97 Ky. 65, 30 S. W. 12; *Louisville & N. R. Co. v. Taaffe* (1899) 106 Ky. 535, 50 S. W. 850; *Chesapeake & O. R. Co. v. Reeves* (1889) 11 Ky. L. Rep. 14, 11 S. W. 464.

Southern R. Co. v. Evans (1901) 23 Ky. L. Rep. 568, 63 S. W. 445, holding that where the action is in behalf of the estate of decedent, evidence is not admissible to show that he was survived by a widow and a certain number of young children, and that the L.R.A.1918C.

income of the widow was not sufficient to support her and the family.

Oliver v. Houghton County Street R. Co. (1904) 138 Mich. 242, 101 N. W. 530, holding that, in an action under the Survival Statute to recover for loss to the decedent's estate from his death, evidence that he left surviving him a family is immaterial.

Beems v. Chicago, R. I. & P. R. Co. (1882) 58 Iowa, 150, 12 N. W. 222, holding that where the damage recoverable is the loss to the estate of the decedent, evidence is not admissible as to the number of children surviving him.

But see *Donaldson v. Mississippi & M. R. Co.* (1864) 18 Iowa, 280, 87 Am. Dec. 391, holding that evidence is admissible relative to the family of the decedent, their ages, etc., where the jury have been instructed not to allow anything for the pain and suffering of the deceased or the grief of his family, or their loss of his society.

⁹ *Hesse v. Meriden, S. & C. Tramway Co.* (1903) 75 Conn. 571, 54 Atl. 299, 13 Am. Neg. Rep. 482, holding that while there should be some evidence as to quantum of damages other than the mere fact that the injured person died and his age at that time, the evidence is sufficient in this regard where it also shows the size of the decedent and his condition, physical and mental, and that he lived some moments after the injury, and suffered some pain.

¹⁰ *Perry v. Lansing* (1879) 17 Hun (N. Y.) 34.

¹¹ *Love v. Detroit, J. & C. R. Co.* (1912) 170 Mich. 1, 135 N. W. 963.

Eginoire v. Union County (1900) 112

on the vocation that the deceased, a boy twelve years of age, might have followed had he lived, it has been held that evidence is admissible as to the occupation followed by his father.¹²

Sufficiency of evidence — in general.

While there should be some evidence as to the amount of damages suffered by the estate of the decedent through his death other than the mere fact that he died, and his age at that time, it is sufficient in this regard to show the size of the decedent, his physical and mental condition, and that he lived some moments after the injury and suffered some pain.¹³ Evidence of the age of the decedent and his occupation, and that he left a small property and was a man of industrious habits, although not in perfect health, is sufficient to entitle the plaintiff to recover a substantial amount for damage to decedent's estate.¹⁴ Where the damages recoverable are for the same elements as those for which decedent might have recovered had he survived the injury, it is sufficient to show his ability and capacity to labor and his skill in his business or profession, and that he was a man of good, regular, and temperate habits.¹⁵ Even evidence as to the age of the deceased and as to his ability to get around and do light work will support a judgment for substantial

damages.¹⁶ And in order to recover for the expense of a physician attending the deceased, it is not necessary to show that his bill has been paid.¹⁷ But it has been held that to entitle the plaintiff in an action to recover for wrongful death to have included in his damages the amount paid for medical and surgical attendance and the funeral expenses of the decedent, it must appear that the claims for these items have been presented and allowed against his estate.¹⁸

As to pain and suffering.

In order to show pain and suffering by the deceased from the injury which resulted in his death, evidence is admissible of complaints by him of pain and suffering, where they do not refer to a past condition.¹⁹ And testimony is admissible by the physician who examined the body of the deceased immediately after death had ensued, that, in his opinion, the deceased was conscious for a substantial period of time after his injury and before his death, during which he suffered.²⁰ While evidence is admissible as to the decedent's sufferings, evidence of mental anguish and suffering by his relatives is inadmissible.²¹ And where the measure of damages is limited to compensation for the destruction of the decedent's earning power, evidence is inadmissible as to

Iowa, 558, 84 N. W. 758, declaring that the rule permitting the recovery only of nominal damages for the death of a young girl was abhorrent to all civilized ideas of right and justice. It is said that it is not an easy matter correctly to estimate the probable earnings and savings even of those whose life work has already been chosen, and it is still more difficult to determine the question where it relates to an infant. The most that can be done is to place before the jury such facts as shall support proper and legitimate inferences, and leave them to the determination of the matter with the assistance of the knowledge and observation common to all alike.

¹² *Meggison v. James Maine & Sons Co.* (1913) 160 Iowa, 541, 141 N. W. 1074.

¹³ *Hesse v. Meriden, S. & C. Tramway Co.* (Conn.) *supra*.

¹⁴ *Bettinger v. Loring* (1914) 168 Iowa, 103, 150 N. W. 31, holding that, in an action by the personal representative to recover for the wrongful death of his decedent, sufficient evidence of the value of decedent's life to his estate is shown by evidence that he was fifty years of age, that he was a liveryman and left property valued at upwards of \$1,000 and also \$2,500 life insurance, that he was of industrious habits, and although suffering some from rheumatism, it did not render him materially less capable L.R.A.1918C.

of earning money than the average man of his years and experience.

¹⁵ *East Tennessee, V. & G. R. Co. v. Gurley* (1883) 12 Lea (Tenn.) 46.

¹⁶ *Chesapeake & O. R. Co. v. Dupes* (1902) 23 Ky. L. Rep. 2349, 67 S. W. 15, holding that evidence that the deceased was a colored man sixty-eight or seventy years old, but able to get around and do light work, is sufficient to sustain a judgment for substantial damages.

¹⁷ *Friend v. Ingersoll* (1894) 39 Neb. 717, 58 N. W. 281.

¹⁸ *St. Louis, I. M. & S. R. Co. v. Sweet* (1897) 63 Ark. 563, 40 S. W. 463, 2 Am. Neg. Rep. 295.

¹⁹ *Evarts v. Santa Barbara Consol. R. Co.* (1906) 3 Cal. App. 712, 86 Pac. 830, holding that evidence is admissible of complaints by the deceased of pain and suffering, where they do not refer to a past condition.

²⁰ *Chicago, R. I. P. R. Co. v. White* (1914) 112 Ark. 607, 165 S. W. 627.

²¹ *Atchison, T. & S. F. R. Co. v. Chance* (1896) 57 Kan. 40, 45 Pac. 60, holding that a recovery may be had for mental suffering or anguish of mind of the deceased, resulting from physical pain and suffering endured by him, but it is improper to admit evidence of mental suffering on account of the circumstances or condition of others.

his sufferings.²³ So where an injured person brings an action in his lifetime to recover damages for personal injuries, and dies from the injuries during the pendency of the action, upon prosecution of the action after it has been revived by the personal representative, the

death of the decedent cannot be shown in aggravation of damages.²³ The admissibility of evidence as to pain and suffering, however, is not discussed where it depends upon the substantive question whether or not that is a proper element of damages.

²³ Chesapeake & O. R. Co. v. Banks (1911) 142 Ky. 746, 135 S. W. 285.

²³ Quinn v. Johnson Forge Co. (1892) 9 Houst. (Del.) 338, 32 Atl. 858. A. G. S.

TENNESSEE SUPREME COURT.

NASHVILLE, CHATTANOOGA, & ST. LOUIS RAILWAY

v.

W. B. ANDERSON, Admr., etc., of Walter M. Richardson, Deceased.

(134 Tenn. 666, 185 S. W. 677.)

Limitation of actions — change of plaintiff — effect.

1. The substitution of the administrator for the widow in an action for wrongful death is not a change of cause of action within the operation of the Statute of Limitations.

For other cases, see Limitation of Actions, IV. b, in Dig. 1-52 N. S.

Same — change from state to Federal statutes.

2. The change of the basis of a cause of action for wrongful death from a state statute to the Federal Employers' Liability Act, and the insertion of allegations that decedent was employed in interstate commerce, are not a beginning of a new action within the operation of the Statute of Limitations; at least, if the interstate character of the transaction was made to appear by the pleadings before the statute had run.

For other cases, see Limitation of Actions, IV. b, in Dig. 1-52 N. S.

Note.—As to character and sufficiency of evidence to show pecuniary loss to beneficiary in action for death, see annotation following this case, post, 1122. For other questions in relation to evidence in measure of damages in action for death, see references in the first part of the annotation following Raines v. Southern R. Co. ante, 1056; and generally, as to questions distinctive to the action for death, see L.R.A. Indexes under the titles, "Death" and "Damages," subtitles, "Measure of compensation—death."

The general subject of the relation of new pleadings to the Statute of Limitations is considered in the notes to Missouri, K. & T. R. Co. v. Bagley, 3 L.R.A. (N.S.) 259; Bourdreaux v. Tucson Gas, E. L. & P. Co. 33 L.R.A. (N.S.) 196; and Philadelphia, B. & W. R. Co. v. Gatta, 47 L.R.A. (N.S.) 932. Specifically as to amendment of pleading after limitation period by changing from

Pleading — curing omissions.

3. The omission of matters of substance from a declaration may be cured by a plea. *For other cases, see Pleading, I. g, in Dig. 1-52 N. S.*

Appeal — instruction — recovery without evidence.

4. Instructing the jury to find for plaintiff if the greater weight of evidence is on the side of his declaration is error, if some allegations of the declaration are unsupported by evidence.

For other cases, see Appeal and Error, VII. m, 4, a, (5), in Dig. 1-52 N. S.

Damages — for wrongful death — pecuniary loss.

5. The damages to be awarded a widow and child for the wrongful death of the husband and father, under the Federal Employers' Liability Act, is an amount sufficient to compensate them for the loss of such portions of his earnings as they might reasonably have expected to receive.

For other cases, see Damages, III. i, 3, in Dig. 1-52 N. S.

Evidence — of loss from death.

6. To sustain a verdict in favor of a widow and child for the wrongful death of the husband and father, under the Federal Employers' Liability Act, there must be evidence as to the value of his customary contributions towards their support.

For other cases, see Evidence, XII. k, in Dig. 1-52 N. S.

common law to statute, or vice versa, or from statute of one jurisdiction to statute of another, see page 287 of the note in 3 L.R.A. (N.S.) 259, which is supplemented on this point by the note to Allen v. Tuscarora Valley R. Co. 30 L.R.A. (N.S.) 1096.

Generally, as to the amendment of pleadings so as to change from a statute law to the Federal Employers' Liability Law, or vice versa, see pages 76 et seq. of the note to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A. (N.S.) 38, and pages 80 et seq. of the note to Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 47.

The question of damages recoverable under the Federal Employers' Liability Act is treated at pages 80 et seq. of the note in 47 L.R.A. (N.S.) 38, and pages 85 et seq. of the note in L.R.A.1915C, 47, dealing generally with the Federal Employers' Liability Act.

Appeal — award unsupported by evidence.

7. Permitting the jury to award damages for items which there is no evidence to support is error.

For other cases, see Appeal and Error, VII. m, 4, a, (3), in Dig. 1-52 N. S.

Damages — award to widow — life expectancy.

8. In determining the amount to be awarded a widow for the wrongful death of her husband, her life expectancy should be taken into consideration.

For other cases, see Damages, III. i, 3, in Dig. 1-52 N. S.

Damages — death of father.

9. The damages to be awarded a child for the wrongful death of his father, under the Federal Employers' Liability Act, are limited to the pecuniary loss which he will suffer during the period of his minority.

For other cases, see Damages, III. i, 3, in Dig. 1-52 N. S.

Pleading — amount of damages.

10. The pecuniary loss which plaintiffs expect to prove under the Federal Employers' Liability Act should be set out in the pleadings.

For other cases, see Pleading, II. f, in Dig. 1-52 N. S.

(May 2, 1916.)

CROSS WRITS of Certiorari to review a judgment of the Court of Civil Appeals reversing a judgment of the Circuit Court for Davidson County in plaintiff's favor in an action brought to recover damages for the alleged wrongful death of plaintiff's decedent; plaintiff seeking review of the finding that the cause of action was barred by the Statute of Limitations, and the defendant seeking review of the failure to find that there was no evidence to sustain the verdict. Reversed on plaintiff's writ.

The facts are stated in the opinion.

Mr. W. H. Washington, for plaintiff:

The cause of action was the facts constituting the negligence of the company. The amendment stating that those facts occurred in interstate commerce, and the interstate character of defendant's business, and of the train upon which deceased was employed, did not state a new cause of action.

Nashville, C. & St. L. R. Co. v. Foster, 10 Lea, 352; Macklin v. Dunn, 130 Tenn. 342, 170 S. W. 588, Ann. Cas. 1916B, 508; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; Smith v. Atlantic Coast Line R. Co. 127 C. C. A. 311, 210 Fed. 761; Lassiter v. Norfolk & C. R. Co. 136 N. C. 89, 48 S. E. 642, 1 Ann. Cas. 456; Vickery v. New London Northern R. Co. 87 Conn. 634, 89 Atl. 277; Gainesville Midland R. Co. v. Vandiver, 141 Ga. 350, 80 S. E. L.R.A.1918C.

997; Leman v. Baltimore & O. R. Co. 125 Fed. 191.

Defendant, having by the plea brought pertinent facts upon the record, and supplied the absence of them in the declaration, cannot now set up that absence as a defect and as a reason for invoking the Statute of Limitations as a bar to plaintiff's action.

Harmon v. Crook, 2 Yerg. 132; Vickery v. New London Northern R. Co. 87 Conn. 634, 89 Atl. 277; 1 Chitty, Pl. 16th Am. ed. 671, 703-846; Gould, Pl., chap. 3, § 192; Rubens v. Hill, 213 Ill. 523, 72 N. E. 1127; Hedderly v. Downs, 31 Minn. 183, 17 N. W. 274; Bennett v. Phelps, 12 Minn. 326, Gil. 216; Shartle v. Minneapolis, 17 Minn. 308, Gil. 284; Rollins v. St. Paul Lumber Co. 21 Minn. 5; Warner v. Lockerby, 28 Minn. 28, 8 N. W. 879; Lessner v. Getman, 30 Minn. 321, 15 N. W. 309; Brooke v. Brooke, 1 Sid. 184, 82 Eng. Reprint, 1046; United States v. Morris, 10 Wheat. 246-236, 6 L. ed. 314-323; Slack v. Lyon, 9 Pick. 62; Wall v. Toomey, 52 Conn. 35; Elliott v. Stuart, 15 Me. 160; Vinal v. Richardson, 13 Allen, 521; Vaughan v. Havens, 8 Johns. 109; Hill v. George, 5 Tex. 87; Erwin v. Shaffer, 9 Ohio St. 43, 72 Am. Dec. 613; Hoyt v. Smith, 32 Vt. 306.

When a declaration omits material allegations, which are supplied by the plea, the omission is thereby cured.

16 Enc. of Pl. & Pr. 580.

Under the act of Congress, the defendant is liable if, through either employees or officers, it is guilty of any causative negligence, no matter how slight in comparison to that of the plaintiff.

New York C. & St. L. R. Co. v. Niebel, 131 C. C. A. 248, 214 Fed. 955; Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172.

The widow and child may recover for the pecuniary loss resulting from the death of deceased, and the loss of services of the husband by the wife, and the loss of that care, counsel, training, and education by the child which it might reasonably have received from the father.

Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176.

The verdict should be in a separate amount for each beneficiary.

Gulf, C. & S. F. R. Co. v. McGinnis, 238 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. A. 806.

Messrs. Frank Slemons and Claude Waller, for defendant:

If a statute of Georgia is relied upon as giving a right of action for wrongful death, the statute must be averred.

Nashville & C. R. Co. v. Sprayberry, 9

Heisk. 852; Nashville, C. & St. L. R. Co. v. Foster, 10 Lea, 351; Louisville & N. R. Co. v. Reagan, 96 Tenn. 128, 33 S. W. 1050; Whitlow v. Nashville, C. & St. L. R. Co. 114 Tenn. 344, 68 L. R. A. 503, 84 S. W. 618.

An essential averment necessary to set forth a liability under said Federal statute was the averment that the deceased was engaged at the time of his death in interstate commerce.

31 Cyc. 115; Walton v. Southern R. Co. 179 Fed. 175.

The Statute of Limitations of two years barred this action.

Crofford v. Cothran, 2 Sneed, 492; Flatley v. Memphis & C. R. Co. 9 Heisk. 230; East Line & R. River R. Co. v. Scott, 75 Tex. 84, 12 S. W. 995; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247; People ex rel. Michigan C. R. Co. v. Kalamazoo Circuit Judge, 35 Mich. 227; People ex rel. Gorman v. Newaygo Circuit Judge, 27 Mich. 138; Meeks v. Southern P. R. Co. 61 Cal. 149; Phelps v. Illinois C. R. Co. 94 Ill. 549; Alabama G. S. R. Co. v. Smith, 81 Ala. 229, 1 So. 723; Union P. R. Co. v. Wyler, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134.

The presentation of the case to the jury by reading two counts of the declaration and referring to the other counts was prejudicial to the defendant, and erroneous.

Cochran v. Pavise, 1 Tenn. C. C. A. 4; Brickwood's Sackett Instructions to Juries, § 169; Lumaghi v. Gardin, 53 Ill. App. 667; Baker v. Summers, 201 Ill. 57, 66 S. E. 302; 2 Enc. Pl. & Pr. p. 154; Chicago North Shore Street R. Co. v. McCarthy, 66 Ill. App. 667; Chicago Terminal R. Co. v. Schmelling, 197 Ill. 619, 64 N. E. 714; East Tennessee, V. & G. R. Co. v. Lee, 90 Tenn. 572, 18 S. W. 268.

There were averments in the declaration which there was no evidence tending to prove. It was error to submit the same to the jury.

Louisville & N. R. Co. v. Satterwhite, 112 Tenn. 185, 79 S. W. 106; East Tennessee & W. N. C. R. Co. v. Winters, 85 Tenn. 240, 1 S. W. 790; Foster v. Collins, 6 Heisk. 1; Nashville, C. & St. L. R. Co. v. Seaborn, 85 Tenn. 398, 4 S. W. 661; East Tennessee, V. & G. R. Co. v. Lee, 90 Tenn. 573, 18 S. W. 268; 2 Enc. Pl. & Pr. 170.

Under the Federal Employer's Liability Act no damages can be recovered for the beneficiaries of the intestate, except those based on a pecuniary loss, and what that loss is must be shown in the evidence.

Norfolk & W. R. Co. v. Holbrook, 235 U. S. 625, 59 L. ed. 392, 35 Sup. Ct. Rep. 143, L.R.A.1918C.

7 N. C. C. A. 814; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; American R. Co. v. Didricksen, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 175, 57 L. ed. 786, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109.

Green, J., delivered the opinion of the court:

W. M. Richardson, an employee of the plaintiff in error, was killed while in its service in the Atlanta yards June 9, 1908.

On June 23, 1908, W. B. Anderson, who had qualified as administrator of the deceased, brought suit for his death in the circuit court of Davidson county, Tennessee. The deceased left a widow and an infant child.

The declaration as originally filed was founded on the Georgia statutes regulating the right of recovery for wrongful death. It was alleged in the declaration that the deceased was an inexperienced employee put to do dangerous work without any training or instruction, and it was further alleged that the car on which he was riding when killed was being moved at an excessive rate of speed, and that said car was not equipped with proper brakes. The deceased was engaged as a switchman when killed, and was thrown from a car by the force of a coupling made with another car. In the declaration and amendments thereto a number of sections of the Georgia Code supposed to control this suit were set out.

Various pleas were interposed by the railway company, to all of which it is not necessary to refer.

As stated above, the suit was originally brought in the name of W. B. Anderson, administrator of the deceased, but later, it appearing that under the Georgia statutes the widow was the proper person to bring the suit, she was made a party plaintiff, and an order was entered which, in effect, dismissed the case as to the administrator, Anderson, and directed that the suit be prosecuted in the name of Mary E. Richardson, the widow, by next friend, she being under age.

Among other pleas filed by the railway company was one setting out that it was a common carrier engaged in interstate commerce, and that the deceased was a servant employed in operating a car engaged in interstate commerce when he met his death.

A demurrer was interposed to this plea,

which was sustained by the circuit judge, the scope and effect of the Federal statute with reference to interstate employees not being at that time fully appreciated by the bench and bar, and the court thinking the plea injected an immaterial issue.

The case proceeded to trial, and a judgment was had in favor of the plaintiff. The railway company took the case to the court of civil appeals, and that court reversed the judgment below and remanded the case on account of the error of the trial judge in sustaining the demurrer to the railway company's plea setting out the interstate character of the service of deceased.

When the case was remanded a stipulation was entered into between counsel to the effect that the car from which deceased fell was then being used in interstate commerce, and that the deceased was employed in interstate commerce at that time.

Amendments were offered by which W. B. Anderson, administrator, was again made the party plaintiff instead of the widow, and by which all reference to the Georgia statutes was eliminated from the declaration, and an averment incorporated into the declaration that deceased was engaged in the service of the railway company in interstate commerce at the time of the accident. These amendments were resisted by the railway company on the ground that such procedure was, in effect, the bringing of a new suit, and at the time such amendments were made more than two years had elapsed since the death of Richardson. These objections of the railway company were overruled by the trial judge, and the case again proceeded to judgment. The railway company again appealed in error to the court of civil appeals.

A number of assignments of error were interposed by the railway company in the court of civil appeals. That court was of opinion that the amendments to the former declaration, or rather the amended declaration, eliminating reference to the Georgia statute, and undertaking to proceed under the act of Congress in the name of the administrator, was a change of the cause of action and substantially a new suit. The court of civil appeals held that such new suit was barred by the two-year limitation prescribed in the act of Congress, and accordingly that court concluded that the trial judge improperly overruled the motion of the railway company for a directed verdict. That court passed on other assignments of error interposed by the railway company, and held that three of these assignments were well made, and that the case, upon these three assignments, would have been reversed, if the motion for per-L.R.A.1918C.

emptory instructions had not been deemed sufficient.

A petition for certiorari was filed by the administrator of the deceased to review the action of the court of civil appeals upon the matters just mentioned. The railway company likewise filed a petition for certiorari in which it is maintained that, regardless of the bar of the statute of two years, there is no evidence to sustain the verdict below, and the railway company accordingly insists that its motion for a directed verdict was good on this additional ground.

Both of these petitions for certiorari have been granted, and the case has been argued and fully considered.

We are of opinion that the court of civil appeals erred in holding this suit was barred by the two-year period of limitations prescribed in the act of Congress.

So far as the change from the widow as a party plaintiff to the administrator as a party plaintiff is concerned, such a change is not a change of the cause of action. Likewise, the reference made in the original pleadings of the widow to the Georgia statute may be disregarded as surplusage and of no effect. These propositions have been established by the Supreme Court in the case of *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134.

That case is quite recent and is familiar to the profession, and a bare reference thereto in this opinion is all that is necessary. Suit was brought by the mother of an employee killed in interstate commerce, and was apparently founded on the Kansas statute. Later there was an amendment to the proceeding by which the administrator of deceased was introduced as party plaintiff. This amendment came more than two years after the death of the employee, and an inspection of this case discloses that practically the same argument was made in behalf of the railroad company there which is here made in behalf of the plaintiff in error.

The Supreme Court, however, held that there was no change of the cause of action, that the reference to the Kansas statute "no more vitiated the pleading than a reference to any other repealed statute would have done," and the court distinguished *Union P. R. Co. v. Wyler*, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877, also relied on by the plaintiff in error here.

It must be conceded that *Missouri, K. & T. R. Co. v. Wulf*, supra, destroys much of the argument made in behalf of plaintiff in error. Certainly this case establishes the proposition that such a change of parties—that is, from the beneficiary to the represen-

tative of the beneficiary—is no change in the cause of action. This case, however, differs from *Missouri, K. & T. R. Co. v. Wulf* in that plaintiff's pleading in the former case showed that the deceased servant was employed in interstate commerce when injured, while nothing of this kind appears in the original pleadings filed by the widow in this case. It is therefore insisted that the amendment to the declaration showing the deceased to have been employed in interstate commerce at the time of his death stated a new cause of action. Here again *Union P. R. Co. v. Wyler* is invoked, and it is insisted that this amendment showing the interstate character of the service of deceased is, in effect, a departure from fact to fact and from law to law, and is therefore a new suit.

We think it obvious under the reasoning of *Missouri, K. & T. R. Co. v. Wulf* that there was no departure from law to law. The Federal statute repealed the Georgia statute. The Georgia statute was ineffective for any purpose, and the reference to it did not help or hurt the declaration, unless, indeed, the deceased was engaged in intrastate commerce. That deceased was not engaged in intrastate commerce, but interstate commerce, was fully made to appear by the aforesaid plea interposed to the declaration by the defendant below, and we agree with counsel for the administrator that this plea of the railway company supplied the omission in the declaration and made the interstate character of deceased's service obvious in the pleadings. No issue was ever made on the facts alleged in said plea.

This plea of the railway company was filed seven months after the accident occurred. The declaration stated acts of negligence cognizable under the Federal Employers' Liability Statute. The only point of the plea was that the suit was not brought in the name of the administrator. The suit was not barred at that time. The Georgia statute had been repealed as to employees engaged in interstate service, and the declaration stated a good cause of action under the act of Congress, except that it failed to aver the interstate character of deceased's service. This was admitted by the plea. The sole effect of the special plea referred to was to bar the prosecution of the suit in the name of the widow. This plea set out, as a fact, that deceased was employed in interstate commerce at the time of his death, and challenged the suit in the name of the widow. The plea would not have been good unless such fact had been made to appear. Such fact having been admitted by the demurrer, and the railway company having obtained the benefit of this admission, and having

procured a reversal of the former judgment against it on the strength of the plea, it would be inadmissible at this time to hold that the interstate nature of deceased's employment was not sufficiently brought out in the pleadings prior to the running of the two-year statute.

This court long ago announced the rule that matters of substance omitted from a declaration might be cured by a plea.

In *Harmon v. Crook*, 2 Yerg. 127, the defendant had entered into a covenant to convey certain land if the plaintiff liked it or desired it. The declaration should have averred that the covenantee had notified the covenantor of his desire for the land or of his willingness to accept a conveyance thereof. No such averment, however, was contained in the declaration. The defendant in his plea, instead of making any point of the absence of this averment, stated that he had offered to make the conveyance. It was held that such a plea cured the omission in the demurrer. The court said: "The plea says that the defendants offered to convey these two tracts: hence is inferred an admission on their part that they were bound to do so, which obligation could not otherwise be fixed upon them but by a previous notice given to them by the plaintiff that he was willing to accept of the same two tracts. The plaintiff complains that they did not convey these two tracts, which they were not bound to convey unless by his previous consent to accept them, made known to the covenantors. But the plaintiff and the covenantors agree in the fact that the defendant ought to have conveyed these two tracts. The pleadings, it is argued, show upon their face, when taken altogether, that the fact of notice to the covenantors is sufficiently apparent, though not stated in the declaration. The old rule was that matters of form, such as time, place, and circumstances, which might be taken advantage of by special demurrer, can be cured by the plea of the defendant, but that matters of substance, which can be taken advantage of by general demurrer, cannot be cured by the plea of the defendant. [Citing authorities.] But certainly it has often been extended so as to cure the omission of matters of substance, which must have been taken advantage of on general demurrer. Matters of substance are cured by pleading over. [Citing authorities.] And not only material things imperfectly alleged have been cured, but also material things not alleged at all. [Citing authorities.] The willingness of the plaintiff to take the tracts of 100 and of 52 acres is so plainly apparent upon the record that there seems to be no risk in making the inference that

it was so understood both by the covenantors and covenantee, and that therefore the want of notice alleged in the declaration is cured by the pleas of the defendants." *Harmon v. Crook*, supra.

This rule has been expressly approved by the Supreme Court of the United States in *United States v. Morris*, 10 Wheat. 246, 6 L. ed. 314. In that case the Supreme Court held that a defective plea might be aided by a replication just as a defective declaration might be aided by a plea. The court said: "And this rule is not confined to matters of form merely, but extends to matters of substance. Thus, in an action of trespass for taking goods, not stating them to be the property of the plaintiff, this defect will be aided if the defendant by his plea admits the plaintiff's property. So, where several acts are to be performed by the plaintiff as a condition precedent, and he does not aver performance of all, if it appear by the plea that the act omitted to be stated was, in fact, performed, the defect is cured." *United States v. Morris*, supra.

"If a necessary allegation is omitted from a pleading, and the missing allegation is either alleged or admitted by the pleading of the adverse party, the defect is cured." 31 Cyc. 714.

Many authorities to the same effect are cited in 16 Enc. Pl. & Pr. 580. Although the decisions are not altogether uniform on this question, it certainly appears that this court and the Supreme Court of the United States are committed to the rule that material allegations omitted in a declaration may be supplied by a plea.

Aside, however, from the rule just announced, it is manifest from reading the opinions of the Supreme Court in *Missouri, K. & T. R. Co. v. Wulf*, supra, and in *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156, that the court is committed to a liberal policy with respect to allowing amendments which will save for injured employees and their beneficiaries the rights conferred upon them by the act of Congress.

In the latter case the Supreme Court reversed and dismissed a suit prosecuted without an administrator, but the dismissal was made without prejudice to any rights the administrator might have. The court would not have done a vain thing. This dismissal without prejudice would scarcely have been ordered unless it was in contemplation that the suit might be again prosecuted in the name of the administrator, although naturally more than two years must have elapsed since the inception of the action.

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The Kentucky court of appeals, referring to the cases decided by the United States Supreme Court, observed: "On the authority of these cases, we think it is clear that, when the cause of action arises under the Federal statute, but suit is brought under the state law, or by some person not authorized to maintain an action under the Federal statute, defects in the original petition may be cured by an amendment that does not set up a new and distinct cause of action, filed after the expiration of two years from the accrual of the cause of action, as the amendment will relate back to the filing of the original petition." *Cincinnati, N. O. & T. P. R. Co. v. Goode*, 163 Ky. 60, 173 S. W. 329.

A like conclusion was reached by the United States circuit court of appeals for the fourth district; that court holding that an amendment to the pleadings might be made after the expiration of two years, alleging that defendant was engaged in interstate commerce, and that plaintiff was employed in such commerce at the time of his injury. *Smith v. Atlantic Coast Line R. Co.* 127 C. C. A. 311, 210 Fed. 761.

In the last edition of his work on the Federal Employers' Liability Act (p. 308), Mr. Thornton refers to the above cases, and concludes that "an amendment after the two-years limitation by adding formal allegations to bring the case under the Federal act is permissible; the allegations concerning the injury remaining the same. In such an instance no new cause of action has been brought by adding the amendment or changing the complaint."

So, without further elaboration, we hold that the court of civil appeals improperly sustained that branch of the motion for peremptory instructions interposing the bar of the two-year statute.

Apart from the effect of the statute of two years, the court of civil appeals thought that the motion for peremptory instructions was not well made. The court found material evidence in the record to sustain the verdict of the jury. This action of the court of civil appeals is attacked by the railway company. We have discussed the facts orally, and are of opinion that the court of civil appeals was correct in its conclusion. We think there is evidence to sustain the judgment below.

The court of civil appeals thought the case should be reversed on account of the manner in which the trial judge delivered his charge. Instead of stating the issues of fact to the jury, the circuit judge read a portion of the declaration of the plaintiff below, and directed the jury to find in favor of the plaintiff if the greater weight of the evidence was on that side on any one or

more of the five counts. This was error. Certain of the averments of negligence were not supported by the proof. In fact, no proof was offered as to some of the matters charged, particularly on the question of defective brakes; yet the circuit judge submitted this question to the jury along with others. This, of course, was improper, and, moreover, it is not desirable for the trial judge to read the pleadings to the jury, but rather to give them a succinct statement of the issues with proper instructions as to the law.

The court of civil appeals sustained the third assignment of plaintiff in error in that court, directed to a special request which the circuit judge gave in charge. It is insisted for the company that there was no evidence upon which such a request might have been predicated. We do not agree with the railway company in this contention. We think there was such evidence in the record, and we see no error in the requested instruction given. It results that the action of the court of civil appeals in this respect is reversed.

The court of civil appeals likewise sustained the assignment of error which challenged the propriety of the court's instruction on the measure of damages under the Federal Employers' Liability Act. We think the court of civil appeals was correct in this action. For this error there must be a new trial.

This suit arose under the Act of April 22, 1908 (35 Stat. at L. chap. 149, p. 65), and before the amendment of April 5, 1910 (36 Stat. at L. chap. 143, § 2, p. 291, Comp. Stat. 1916, §§ 8657-8665).

The beneficiaries in this suit are the widow and minor child of the deceased. They were both entitled to support from the deceased. Their damages would therefore have first included such sum as the widow might reasonably have expected to receive from her husband for support, and such a sum as the child might reasonably have expected to receive from his father for support during minority.

In addition to this the Supreme Court of the United States, in *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176, after explaining that the beneficiaries can only recover pecuniary damages, has said: "Nevertheless, the word as judicially adopted is not so narrow as to exclude damages for the loss of services of the husband, wife, or child, and, when the beneficiary is a child, for the loss of that care, counsel, training, and education which it might, under the evidence, have reasonably received from the parent, and which can only be

supplied by the service of another for compensation."

The circuit judge gave the above-quoted extract in his charge, except that he omitted the phrase "under the evidence," which is all-important.

Likewise, in the concluding portion of his charge, the trial judge told the jury that the damages were to be determined upon a consideration of deceased's expectancy of life, etc., and his earnings, and that, taking these things into consideration, they should assess such damages as might be sufficient to compensate for the pecuniary loss of the widow and child.

If it was meant by his Honor to tell the jury that they might find as damages for these beneficiaries a sum equal to the entire amount of the probable earnings of deceased, in the absence of any proof as to what portion of said earnings the beneficiaries might reasonably have expected to receive, this was plain error. It would have been error to have instructed the jury, under such circumstances, that they might find the damages to be the net value of the earnings of deceased after payment of his personal expenses. *Kansas City Southern R. Co. v. Leslie*, 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844. The pecuniary loss of these beneficiaries was not what the deceased might have earned, but what part of his earnings they might reasonably have expected to receive.

Furthermore, it seems very clear from a study of the decisions of the Supreme Court of the United States—namely, *Michigan C. R. Co. v. Vreeland*, supra; *American R. Co. v. Didricksen*, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224; *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 428, 3 N. C. A. 806; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109; *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 59 L. ed. 1160, 33 Sup. Ct. Rep. 704, 9 N. C. C. A. 754; *Norfolk & W. R. Co. v. Holbrook*, 235 U. S. 625, 59 L. ed. 392, 35 Sup. Ct. Rep. 143, 7 N. C. C. A. 814; and *Kansas City Southern R. Co. v. Leslie*, 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844—that there must be evidence of pecuniary damage before such damage can be allowed. This rule is enforced with more strictness by the Supreme Court of the United States, perhaps, than by some of the state courts in jurisdictions where acts fashioned after Lord Campbell's Act prevail.

In this case deceased's age, expectancy, and earning capacity were proven. It was also proven that his wife and child were dependent upon him for support.

There was no proof, however, as to the value of his customary contributions to the support of these beneficiaries, and nothing to indicate what such beneficiaries might reasonably have expected from him in the way of support. There was no proof of any service, pecuniarily determinable, as defined in *Michigan C. R. Co. v. Vreeland*, which deceased had rendered or might reasonably be expected to render to his wife. There was no proof as to the personal qualities of the deceased and the interest which he took in his family, and therefore no occasion to charge the jury that they might take into consideration the care, counsel, training, and education which the child might reasonably have expected from his father. *Norfolk & W. R. Co. v. Holbrook*, 235 U. S. 625, 59 L. ed. 392, 35 Sup. Ct. Rep. 143, 7 N. C. C. A. 814.

It was therefore improper for the trial judge to have submitted such matters to the jury in the absence of any evidence.

The measure of damages of the wife and child was the probable amounts they would have received from the deceased if he had lived, and not his probable earnings. *Thornton, Fed. Employers' Liability Act*, 3d ed. p. 246.

The measure of the damages of these beneficiaries was the amount which the deceased would probably have earned during his life for their benefit, taking into consideration his age, ability, and disposition to work and habits of life and expectancy. *Tiffany, Death by Wrongful Act*, 2d ed. § 160.

It is further complained with reference to the charge that the jury were not instructed to consider in any way the expectancy of the wife, but it was assumed she would live as long as her husband would have lived had he not been injured.

We think this complaint is well made. Mr. Tiffany says: "The damages to the widow should be calculated upon the basis of their joint lives; the damages to the minor children for the loss of support should be confined to their minority." *Tif-*

fany, Death by Wrongful Act, 2d ed. § 160.

Mr. Tiffany's discussion of the measure of damages has been approved in two or three cases by the Supreme Court of the United States. He discusses Lord Campbell's Act and similar acts upon which the act of Congress is modeled.

In this case it was only shown that the beneficiaries of this suit had sustained a loss. There was no proof as to the extent of the loss. There was proof of the earning capacity of deceased and his expectancy, but there was nothing to show that these beneficiaries might reasonably have expected to receive from the deceased, and, under such circumstances, under the rules laid down in the late Supreme Court cases, no recovery for more than nominal damages could stand.

The elements of damage to be considered by the jury are indicated in the foregoing authorities. There must be proof to show the reasonable expectation. Under the reasoning of the Supreme Court decisions, the widow's expectancy of life should be taken into account in estimating her loss. Likewise, as plainly intimated in *Norfolk & W. R. Co. v. Holbrook*, *supra*, the estimate of the child's pecuniary loss should be confined to the period of his minority, both for support and other elements of damage.

As indicated in *Michigan C. R. Co. v. Vreeland*, *supra*, cases may arise in which more latitude would be permitted in measuring damages recoverable under this statute. There is nothing exceptional, however in the case before us, and it is better for all parties that this court confine the pecuniary loss to be estimated herein within limits certainly included by the act, as construed by the Supreme Court.

We find it necessary again to point out that there should, in suits founded on this act, be pleadings averring the pecuniary losses which plaintiffs expect to prove.

Reversed and remanded for another trial, with special reference to the decisions of the Supreme Court of the United States cited in this opinion.

Annotation—Character and sufficiency of evidence to show pecuniary loss to beneficiary in action for death.

I. Character of evidence admissible:

a. In general, 1123.

b. Data as to decedent and beneficiaries:

1. In general, 1124.

2. Health and physical condition of decedent, 1127.

3. Habits, character, and reputation, 1128.

4. Number and ages of beneficiaries, 1130.

I. b.—continued.

5. Relationship and feeling between decedent and beneficiaries, 1133.

6. Contributions made and services rendered, 1135.

7. Physical and pecuniary condition of beneficiaries, 1136.

8. Pecuniary condition of the deceased, 1141.

I. b—continued.

9. *Pecuniary condition of the defendant, 1142.*

10. *Expenses of decedent paid by defendant, 1142.*

This note is one of a series of notes in which are considered questions relative to the character and sufficiency of the evidence to show pecuniary loss, under statutes authorizing the recovery of damages as compensation for the pecuniary loss to the estate of the decedent or to designated relatives, for negligently or wantonly killing a person. For a reference to the other notes in this series, see the note appended to *Raines v. Southern R. Co. ante, 1056.*

It is to be noted that the scope of this note is limited to cases considering the character and sufficiency of evidence to show pecuniary loss, and it does not include cases in which the real question presented was the substantive one as to whether certain elements of loss might be included in the damages recoverable. In other words, in the cases included in this note it is either expressly held or assumed that the damages may include the element involved, and the question is presented as to the character and sufficiency of the proof to establish the same.

*I. Character of evidence admissible.**a. In general.*

Actions for negligently killing a person are statutory. By the terms of the statute they are generally authorized to be brought in behalf of designated relatives of the deceased, and damages are authorized to be recovered for the pecuniary loss of such persons. Hence the pecuniary loss of such statutory beneficiaries is the measure of the recovery by or for them. As pointed out in another note in this series, the burden of proof is upon the plaintiff in actions of this character to show pecuniary loss in order to be entitled to recover substantial damages for the death complained of.¹ The evidence essential to show pecuniary loss to the statutory beneficiaries, from the nature of the circumstances, must be indefinite, prospective, and largely contingent. Such damages cannot be proven with any degree

II. Sufficiency of the evidence:

a. *In general—loss to family, 1142.*

b. *Loss to husband, 1146.*

c. *Loss of parental care and training to children, 1146.*

of accuracy; at the most it is largely a matter for the sound judgment and discretion of the jury based upon their knowledge, experience, and observation. However, there must be some evidence which will afford a reasonable basis for an estimate by the jury. The matter cannot be left entirely to conjecture, for human lives are not all of the same value to the survivors, and even though the evidence may be vague and indefinite, yet there must be evidence with regard to the deceased and his relation to the statutory beneficiaries which will enable the jury to act intelligently in estimating the pecuniary loss suffered by the beneficiaries.²

It has been asserted that, while the law does not intend to give compensation for anything but pecuniary loss, by estimating the money value of the life of the relative, and while it necessarily results that regard must in each instance be paid to such facts and conditions as cast light upon the subject, yet it must be admitted that the inquiry is not to be narrowed down by law to a result that can be exactly accounted for by the facts in evidence, for every parent and husband has for his wife and children a pecuniary value beyond the amount of his earnings by his labor or vocation; that value may to some extent, but not to every extent, be susceptible of allegation and proof, and to the extent that it can be alleged and proved it ought to be. But where no amount is fixed by law, and no rule is prescribed for making the calculation upon facts capable of exact ascertainment, it necessarily follows that the law intended that, having reference as far as practicable to the conditions existing at the time of the death, the jurors, from their own experience and sense of justice, should fix and assess the proper sum. They are expected to act uninfluenced by passion, prejudice, or partiality, and to pay due regard to the ascertained facts and conditions surrounding the subject.³ Very slight evidence of pecuniary loss is sufficient, however, to warrant the submission of the

¹ Note appended to *Raines v. Southern R. Co. ante, 1056.*

² *Houghkirk v. Delaware & H. Canal Co.* (1883) 92 N. Y. 219, 44 Am. Rep. 370. L.R.A.1918C.

³ *Sternfels v. Metropolitan Street R. Co.* (1902) 73 App. Div. 494, 77 N. Y. Supp. 309, affirmed in (1903) 174 N. Y. 512, 66 N. E. 1117.

case to the jury, and if they are satisfied that pecuniary injuries resulted, they are at liberty within the statutory limitation to fix the compensation therefor according to their sense of justice and right.⁴

As a rule any facts tending to show pecuniary loss to the beneficiaries, if competent, are admissible in evidence without reference to whether they tend to increase or diminish the amount recovered.⁵ It is not, however, essential to prove the pecuniary loss by direct evidence,⁶ or by the estimates of witnesses. Indeed, ordinarily, the latter character of evidence is inadmissible.⁷ It is sufficient in this regard to produce evidence as to the deceased and the beneficiaries and their relations to each other which will inform the jury as to the situation and condition of the parties at the time of the decedent's death. It is the purpose of the present note to take up more in detail the different ques-

tions as to the character and sufficiency of the evidence in these regards.

b. Data as to decedent and beneficiaries.

1. In general.

As pointed out in another note in this series, there is a presumption of pecuniary loss to persons of a designated relationship by the destruction of the life of a relative.⁸ For example, such presumption exists in favor of the widow and children, the parents of minor children, and in some jurisdiction the husband. This presumption does not affect the character of the evidence admissible to show pecuniary loss, although it may affect the question as to the necessity of producing evidence along certain lines,—a question which will be subsequently considered. Without reference to the relation existing between the statutory beneficiaries and the decedent, evidence is admissible as to the age and life expectancy of the deceased,⁹

⁴ *Cornwall v. Mills* (1878) 12 Jones & S. (N. Y.) 45.

And see *Ruppel v. United R. Co.* (1905) 1 Cal. App. 666, 82 Pac. 1073, holding the amount of recovery for wrongful death is limited to the value of the pecuniary interest of the statutory beneficiary, but such interest need not be measured and demonstrated as a precise sum of money. For example, the mere failure to show that the decedent at the time of the injury resulting in his death was in sound health and in receipt of full wages or salary, is not fatal to a recovery of more than nominal damages in behalf of his widow.

⁵ *Cincinnati Street R. Co. v. Altemeer* (1899) 60 Ohio St. 10, 53 N. E. 300.

⁶ *Union R. Co. v. Carter* (1913) 129 Tenn. 459, 166 S. W. 592, 7 N. C. C. A. 748, holding that to recover substantial damages for the death of her husband the widow need not make any showing of any specific pecuniary loss to herself.

Houston & T. C. R. Co. v. Walker (1915) — Tex. Civ. App. —, 173 S. W. 208, holding that evidence of pecuniary loss to the statutory beneficiaries need not be proved directly; it may be proved circumstantially.

Grand Trunk R. Co. v. Jennings (1888) L. R. 13 App. Cas. (Eng.) 800, 58 L. J. P. C. N. S. 1, 59 L. T. N. S. 679, 37 Week. Rep. 403, declaring that the extent of the loss depends upon data which cannot be ascertained with certainty, and must necessarily be a matter of estimate and perhaps of conjecture.

⁷ *Illinois C. R. Co. v. Barron* (1867) 5 Wall. (U. S.) 90, 18 L. ed. 591, holding that, under the Illinois statute which permits the jury to give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting

from a person's death to the wife and next of kin, it is not necessary to prove actual pecuniary loss; generally the attempt to do so would substitute the opinions of witnesses for the conclusions of the jury. It is sufficient if the facts proved will enable the jury to decide on the proper measure of responsibility.

⁸ Note appended to *Raines v. Southern R. Co.* ante, 1056.

⁹ *Louisville & N. R. Co. v. Fleming* (1915) 194 Ala. 51, 69 So. 126; *Louisville & N. R. Co. v. Orr* (1890) 91 Ala. 548, 8 So. 360; *Conover v. Harrisburg & S. Coal Co.* (1911) 161 Ill. App. 74; *Soyer v. Great Falls Water Co.* (1894) 15 Mont. 1, 37 Pac. 831; *Holmes v. St. Louis, I. M. & S. R. Co.* (1915) — Mo. —, 176 S. W. 1041; *Chambers v. Kupper-Benson Hotel Co.* (1911) 154 Mo. App. 249, 134 S. W. 45; *Meng v. Emigrant Industrial Sav. Bank* (1915) 169 App. Div. 27, 154 N. Y. Supp. 509; *Kesler v. Smith* (1872) 66 N. C. 154; *Houston & T. C. R. Co. v. Cowser* (1882) 57 Tex. 305; *White v. Central Vermont R. Co.* (1914) 87 Vt. 330, 89 Atl. 618, affirmed in (1915) 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 225, 9 N. C. C. A. 265; *Serdan v. Falk Co.* (1913) 153 Wis. 169, 140 N. W. 1035.

Valente v. Sierra R. Co. (1907) 151 Cal. 534, 91 Pac. 481, holding that evidence is admissible as to the life expectancy of the beneficiaries.

Hunn v. Michigan C. R. Co. (1889) 78 Mich. 513, 7 L.R.A. 500, 44 N. W. 502, holding that from the mortality tables and evidence of the physical condition of the decedent at the time of his death, his life expectancy may be determined.

Williams v. Metropolitan Street R. Co. (1909) 141 Mo. App. 625, 125 S. W. 522, holding that, in an action to recover puni-

his sex, health,¹⁰ habits,¹¹ character,¹² earnings and earning capacity,¹³ occupa-

tion¹⁴ and reasonable future expectations,¹⁵ and the age and life expectancy

tive and compensatory damages in behalf of the family of deceased, evidence is admissible as to his life expectancy and earning capacity.

Freeman v. Moreman (1912) — Tex. Civ. App. —, 146 S. W. 1045, holding that evidence of the life expectancy of the deceased is competent although the plaintiffs, who are minor children, would have had no legal right to aid from their father after reaching their majority.

¹⁰ *Chicago & E. J. R. Co. v. Fowler* (1908) 138 Ill. App. 352, reversed on other grounds in (1908) 234 Ill. 619, 85 N. E. 298, holding it to be competent to prove the state of health and bodily strength of the deceased.

Chambers v. Kupper-Benson Hotel Co. (1911) 154 Mo. App. 249, 134 S. W. 45, holding that, in an action by a widow to recover damages for the death of her husband, their respective ages, expectancy of life, and health may be shown.

Palmer v. New York C. & H. R. R. Co. (1887) 5 N. Y. S. R. 436, holding that evidence is competent to show the relation existing between the decedent and his statutory beneficiaries, the manner in which he had lived, the support, etc., that he had furnished, together with his age, health, condition, and ability to earn money and increase his capital for the benefit of the next of kin.

Tilley v. Hudson River R. Co. (1864) 29 N. Y. 252, 86 Am. Dec. 297, holding that evidence tending to show the decedent's condition in life and his physical and mental capacity is admissible.

¹¹ *Conover v. Harrisburg & S. Coal Co.* (1911) 161 Ill. App. 74, holding that, in an action by a wife to recover for the death of her husband, as bearing on the damages, her testimony should be limited to the earnings of the husband, his age, habits, and the condition of his health, and the support he furnished his wife.

¹² *Sternfels v. Metropolitan Street R. Co.* (1902) 73 App. Div. 494, 77 N. Y. Supp. 309, affirmed in (1903) 174 N. Y. 512, 66 N. E. 1117, holding that evidence is admissible as to decedent's character, habits, health, business ability, or any other matter tending to aid the jury in determining his character, ability, and earning power.

Kesler v. Smith (1872) 66 N. C. 154, holding that evidence is admissible as to decedent's age, strength, health, skill, industry, habits, and character.

¹³ *Louisville, E. & St. L. R. Co. v. Clarke* (1893) 152 U. S. 230, 38 L. ed. 422, 14 Sup. Ct. Rep. 579, holding that evidence as to the income of the deceased and his ability, capacity for labor, and skill may be shown as bearing upon the pecuniary loss to his widow and children.

Conover v. Harrisburg & S. Coal Co. (Ill.) supra.

Holmes v. St. Louis, I. M. & S. R. Co. (1915) — Mo. —, 176 S. W. 1041, holding L.R.A.1918C

that evidence is admissible as to the age, health, business, occupation, and earning capacity of the deceased, although these matters are not alleged in the petition, for they are naturally to be considered with reference to the injury charged in the petition.

McLamb v. Wilmington & W. R. Co. (1898) 122 N. C. 862, 29 S. E. 894, holding that the value of the decedent's personal services as a skilled farmer may be shown.

Meyer v. Hart (1897) 23 App. Div. 131, 48 N. Y. Supp. 904, holding that, in an action by a husband to recover for the negligent killing of his wife, evidence is admissible as to the occupation, business, earnings, and probable profits of the deceased.

And see the note appended to *Spreen v. Erie R. Co.* ante, 1087, as to the admissibility of evidence of profits from a business conducted by the deceased, and the note to *West Salem v. Industrial Commission*, ante, 1080, as to evidence of earnings of deceased to show pecuniary loss by his death.

Houston & T. C. R. Co. v. Cowser (1882) 57 Tex. 305, holding that evidence is admissible as to the circumstances of the deceased, his occupation, age, health, habits of industry, sobriety, and economy, his skill and capacity for business, the amount of his property, his annual earnings, and probable duration of life.

White v. Central Vermont R. Co. (1914) 87 Vt. 330, 89 Atl. 618, affirmed in (1915) 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 225, 9 N. C. C. A. 265, holding that evidence is admissible as to the decedent's age, his previous condition of health, habits, earning capacity, etc., and as to the expectancy of life of a man of his age according to the tables of mortality.

¹⁴ *Louisville & N. R. Co. v. Jones* (1900) 130 Ala. 456, 30 So. 586, holding that evidence as to decedent's experience in rail-roading is relevant on the amount of damages to be recovered for his wrongful death, as bearing upon his earning capacity.

Ryan v. Oshkosh Gaslight Co. (1909) 138 Wis. 466, 120 N. W. 263, holding that evidence is admissible that the deceased, a truck farmer, held an official position, and that he had been to college.

¹⁵ *Louisville & N. R. Co. v. Fleming* (1915) 194 Ala. 51, 69 So. 126, holding that, as a basis for assessing the pecuniary loss to the statutory beneficiaries under the Federal Employers' Liability Act, evidence is admissible as to the decedent's age, probable duration of life, habits of industry, means, earnings, health, skill, intelligence, character, and his reasonable future expectations.

Louisville & N. R. Co. v. Orr (1890) 91 Ala. 548, 8 So. 360.

And see *Taylor, B. & H. R. Co. v. Warner* (1895) 88 Tex. 642, 32 S. W. 868, holding

of the statutory beneficiaries,¹⁶ as well as their relations to the deceased, the feelings existing between them during his

lifetime,¹⁷ and the amount, if any, that he contributed to their support, and the manner in which he supported them.¹⁸

that a photograph of the decedent and his child, although taken two years before he was killed, is admissible as tending to show the probabilities of future development had he lived.

¹⁶ *Boyce v. New York City R. Co.* 126 App. Div. 248, 110 N. Y. Supp. 393, holding that any evidence is admissible that bears on the character, qualities, capacity, or condition of the deceased, and the age, sex, circumstances, and condition of the next of kin, as well as evidence bearing upon the capacity of the deceased, although his particular ability was to accumulate money by the use of money.

Frank v. Otis (1888) 15 N. Y. S. R. 681, holding that, for the purpose of determining the pecuniary loss sustained by the next of kin, evidence is competent as to the character, qualities, capacity, and condition of the deceased, and the age, sex, circumstances, and financial condition of the next of kin, following *Lockwood v. New York, L. E. & W. R. Co.* (1885) 98 N. Y. 523.

Serdan v. Falk Co. (1913) 153 Wis. 169, 140 N. W. 1035, holding that evidence as to the expectancy of life of the decedent is admissible as bearing upon his widow's loss through his death, and for the same purpose evidence is also admissible as to the expectancy of the life of the widow.

The appearance of the widow of the deceased before the jury in an action to recover damages for the death of her husband is sufficient to enable them to judge as to her probable life expectancy. *Warren & O. Valley R. Co. v. Waldrop* (1909) 93 Ark. 127, 123 S. W. 792.

See *Alabama Steel & Wire Co. v. Griffin* (1907) 149 Ala. 423, 42 So. 1034, holding that evidence is inadmissible as to the life expectancy of the parents of the deceased in an action for his death, although they are entitled to the amount recovered. The measure of damages in this case, however, was the value of the life of the decedent.

¹⁷ *Hunt v. Conner* (1901) 26 Ind. App. 41, 59 N. E. 50, holding the obligation, disposition, and ability of the decedent to earn wages or to conduct business, and to care for, support, advise, and protect those dependent upon him, are proper matters to be shown to aid the jury in assessing damages for his wrongful death. To the same effect, see *Pittsburgh, C. C. & St. L. R. Co. v. Burton* (1894) 139 Ind. 357, 37 N. E. 150, 38 N. E. 594, 11 Am. Neg. Cas. 475.

Coffeyville Min. & Gas Co. v. Carter (1902) 65 Kan. 565, 70 Pac. 635, 12 Am. Neg. Rep. 594, holding it to be competent to show the ability of the decedent to earn money, and his disposition to use it in the support of his statutory beneficiaries.

Union P. R. v. Sternberger (1898) 8 Kan. App. 131, 54 Pac. 1101, holding that evi-

dence is admissible as to the conduct of the deceased toward his wife and son, for the purpose of showing the relation between the deceased and his family as bearing upon the question of pecuniary injury suffered by them from his wrongful death.

Meng v. Emigrant Industrial Sav. Bank (1915) 169 App. Div. 27, 154 N. Y. Supp. 509, holding that evidence is admissible as to decedent's age, occupation, salary, life expectancy, and as to the expensiveness of the manner and habit of his family life and living.

Palmer v. New York C. & H. R. R. Co. (1887) 26 N. Y. Week. Dig. 26, holding that it is competent to show the relations existing between the plaintiff and decedent, the manner in which the latter lived, the support he furnished his family, his age, health, condition, and ability to earn money and increase his capacity, and thereby benefit his next of kin.

Compare with *Ohio & M. R. Co. v. Simms* (1892) 43 Ill. App. 260, holding, where the measure of damages for the wrongful death was just compensation for the loss of means of support to the decedent's family, which he might have provided had he lived, evidence of the cost of supporting the decedent's family was inadmissible, since the damages recoverable were not necessarily the entire expense of supporting the family, but were to be based upon the amount the decedent would have contributed to that end had he lived.

¹⁸ *St. Louis, I. M. & S. R. Co. v. Hutchinson* (1912) 101 Ark. 424, 142 S. W. 527, 2 N. C. C. A. 250, holding that evidence is admissible as to the amount of contributions by the deceased for the support of his family, exclusive of his personal expenses.

Western & A. R. Co. v. Moore (1894) 94 Ga. 457, 20 S. E. 640, holding that, in an action for the death of her husband, the widow may testify that the decedent paid her monthly a certain amount and that he had no income except his earnings, as bearing upon the amount of his earnings.

Brennen v. Chicago & C. Coal Co. (1909) 241 Ill. 610, 89 N. E. 756, holding that evidence is admissible that the deceased supported his family with his earnings.

St. Louis, P. & N. R. Co. v. Dorsey (1901) 189 Ill. 251, 59 N. E. 593, holding that the widow may testify that she was supported by her deceased husband during his lifetime, there being no attempt made to show her poverty, helplessness, or dependence.

Lake Erie & W. R. Co. v. Mugg (1892) 132 Ind. 168, 31 N. E. 564, holding that it may be shown that the deceased was in the habit of turning over his wages to his wife to be expended for the support of his family.

Hudson v. Houser (1890) 123 Ind. 309, 24 N. E. 243, holding that as bearing upon the pecuniary loss of the decedent's family

It will be noted that many of the cases cited in the foregoing notes sustain the admissibility of evidence as to items other than the particular one to which they are cited.

2. Health and physical condition of decedent.

Many cases are referred to in the preceding notes which support the general rule that evidence of the health of the deceased is admissible in an action for a negligent killing. In addition to these

cases other cases are now referred to which, perhaps, pass more specifically upon this point, and which sustain the admissibility of such evidence.¹⁹ Not only may the good health of the decedent be shown, but it is also competent for the defendant to show the decedent's poor health.²⁰

In order to show that the injury in question did not hasten the death of the deceased, and was not the approximate cause thereof, evidence is admissible that the deceased was afflicted with a

from his death, the amount of household and living expenses defrayed by him may be shown.

Missouri, K. & T. R. Co. v. Elliott (1899) 2 Ind. Terr. 407, 51 S. W. 1067, holding that evidence is admissible as to the decedent's habits and custom with reference to providing for his family, and also with reference to the disposal of his wages.

Powell v. Union P. R. Co. (1914) 255 Mo. 420, 164 S. W. 628, holding that evidence is admissible as to the amount the deceased expended for the support of his family, in an action by a widow to recover for herself and child compensatory damages for his death. To the same effect, see *Williams v. Chicago, B. & Q. R. Co.* (1913) 169 Mo. App. 468, 155 S. W. 64.

Kettelhake v. American Car & Foundry Co. (1913) 171 Mo. App. 528, 153 S. W. 552, affirmed in (1915) 238 U. S. 311, 59 L. ed. 594, 35 Sup. Ct. Rep. 355, holding that a widow seeking to recover damages for the negligent killing of her husband may testify that she lived with the decedent a certain length of time, that during that time he worked for and supported her, that his earnings were a certain amount, and that she had no other means of support.

Gundy v. Nye-Schneider-Fowler Co. (1911) 89 Neb. 599, 131 N. W. 964, holding that evidence is admissible as to the amount of the decedent's earnings, and the manner in which he supported his family, where the measure of damages for negligently killing is compensation to his family for the loss of support, etc.

Mix v. Hamburg-American S. S. Co. (1903) 85 App. Div. 475, 83 N. Y. Supp. 322, holding that, as bearing upon her pecuniary loss, where the deceased left surviving him only the widow, it is competent to show the probable duration of his life, his earnings, habits, and contributions to his wife, and the way in which he had supported and maintained her.

Ericius v. Brooklyn Heights R. Co. (1901) 63 App. Div. 353, 71 N. Y. Supp. 596, holding that proof of the amount which the widow and family of the deceased received from him for the support of his household is admissible as bearing upon the amount of their pecuniary loss by reason of his death.

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Galveston, H. & S. A. R. Co. v. Cody (1899) 20 Tex. Civ. App. 520, 50 S. W. 135, holding to be admissible evidence that the earnings of the deceased were used to support his widow and family during his lifetime.

¹⁹ *Hall v. Galveston, H. & S. A. R. Co.* 39 Fed. 18; *Richmond & D. R. Co. v. Hammond* (1890) 93 Ala. 181, 9 So. 577, holding that evidence of the state of decedent's health, earnings, ability to labor, etc., is competent.

Coffeyville Min. & Gas Co. v. Carter (1902) 65 Kan. 565, 70 Pac. 635, 12 Am. Neg. Rep. 594, holding that evidence of the state of health of the decedent at the time of his death is competent; *Clapp v. Minneapolis & St. L. R. Co.* 36 Minn. 6, 1 Am. St. Rep. 629, 29 N. W. 340.

Galveston, H. & S. A. R. Co. v. Gormley (1894) — Tex. Civ. App. —, 27 S. W. 1051, holding that evidence is admissible as to the general health of the deceased and the probable duration of his life, although not specially pleaded.

But evidence as to the size and height of the decedent is inadmissible over the objection of the defendant in an action for his wrongful death. *Birmingham Electric R. Co. v. Clay* (1896) 108 Ala. 233, 19 So. 309.

²⁰ *Columbus & W. R. Co. v. Bridges* (1888) 86 Ala. 448, 11 Am. St. Rep. 58, 5 So. 864, holding that evidence is admissible to show that the decedent had a disease which affected the probable continuance of his life.

Nicoll v. Sweet (1914) 163 Iowa, 683, 144 N. W. 615, Ann. Cas. 1916C, 661, holding that evidence is admissible to show that the deceased could not obtain life insurance on his life because of his health; but such evidence is of but little weight.

Dickinson v. Boston (1905) 188 Mass. 595, 1 L.R.A.(N.S.) 664, 75 N. E. 68, holding that, in an action by a personal representative to recover for the conscious suffering of the decedent from the time of her injury to the time of her death, evidence is admissible which has a tendency to prove that during this period she was suffering and finally died from an incurable disease.

fatal disease which would have caused her death as soon as she actually died from the injuries received.²¹ Evidence, however, is not admissible to show the distressing condition in which the body of the deceased was left by the injury which resulted in his death.²²

²¹ *Meekins v. Norfolk & S. R. Co.* (1903) 134 N. C. 217, 46 S. E. 493, holding that evidence that the decedent would have died in a short time from natural causes is admissible upon the issue of damages.

Hardin v. St. Louis Southwestern R. Co. (1905) — Tex. Civ. App. —, 88 S. W. 440.

²² *Flynn v. Fogarty* (1883) 106 Ill. 263, holding that evidence is inadmissible as to the mangled condition of the body of the deceased and his last words to his wife, the obvious effect of which is intended to arouse the sympathies of the jury in favor of the plaintiff.

West v. Bayfield Mill Co. (1912) 149 Wis. 145, 135 N. W. 478, holding that evidence is inadmissible as to the distressing and revolting condition in which the body of the deceased was found after the accident, in an action where the damages recoverable were limited to the pecuniary loss to his widow by his death.

²³ *Citizens' Light, Heat & P. Co. v. Lee* (1913) 182 Ala. 561, 62 So. 199, holding that evidence as to the age, habits, etc., of the deceased, is admissible on the question of damages for his death. To the same effect, see *Central Foundry Co. v. Bennett* (1906) 144 Ala. 186, 1 L.R.A. (N.S.) 1150, 113 Am. St. Rep. 32, 39 So. 574; *Louisville & N. R. Co. v. Orr* (1890) 91 Ala. 548, 8 So. 360.

Killian v. Augusta & K. R. Co. (1887) 79 Ga. 234, 11 Am. St. Rep. 410, 4 S. E. 165, holding that, as bearing upon the personal expenses of the decedent, evidence may be given as to his habits, station in life, means and manner of living.

Chambers v. Kupper-Benson Hotel Co. (1911) 154 Mo. App. 249, 134 S. W. 45, holding that evidence is admissible as to the habits, business capacity, etc., of the deceased, and also as to the age, life expectancy, and health of his widow, in an action by her to recover for his death.

Darks v. Scudder-Gale Grocer Co. (1910) 146 Mo. App. 246, 130 S. W. 430, holding that evidence as to the character of the husband and father is competent as bearing upon his earning capacity, in an action for his death by his widow and minor children.

But see *Wilcox v. Wilmington City R. Co.* (1899) 2 Penn. (Del.) 157, 44 Atl. 686, holding that, in an action by the husband as personal representative of the estate of his deceased wife to recover damages for her wrongful death, evidence is inadmissible as to her health and habits in respect to industry and saving.

²⁴ *Louisville & N. R. Co. v. York* (1900) 128 Ala. 305, 30 So. 676, holding that, in an action by the personal representative to recover damages for the wrongful death L.R.A.1918C.

3. *Habits, character, and reputation.*

As heretofore pointed out, evidence is admissible as to the general habits and character of the deceased.²⁵ In this regard inquiries may be made into his habits for economy,²⁶ industry,²⁵ and sobriety,²⁶ and it has been held that it

of his decedent, as bearing upon the damages to be awarded, it is competent to show that the decedent was saving his earnings with a view to acquiring a home.

Central of Georgia R. Co. v. Alexander (1905) 144 Ala. 257, 40 So. 424, holding that the measure of damages recoverable by the administrator is the pecuniary injury sustained by the persons to whose benefit the recovery inures, and for the purpose of ascertaining the probable pecuniary injury it is proper to inquire into the habits of economy of the decedent, the disposition he made of his earnings, etc., in order to ascertain whether he would have accumulated anything so that the distributees of his estate, when he died, would be likely to realize something out of his estate; for if he spent all his earnings on himself or on other objects than the support of the said distributees, the measure of recovery would be nominal under the Employers' Liability Act. Whether he spent a part of these in such ways and saved a part would be a material inquiry in ascertaining the actual damages.

But see *Baltimore & O. R. Co. v. State* (1895) 81 Md. 371, 32 Atl. 201, holding that, in an action to recover the pecuniary loss to the wife and children of the decedent by his wrongful death, evidence is inadmissible as to whether or not the decedent saved anything from his earnings.

²⁵ *Smith v. Cleveland, C. C. & St. L. R. Co.* (1917) — Ind. App. —, 117 N. E. 534, holding that evidence is admissible that the deceased was an industrious and scientific farmer and a good producer.

Shall v. Detroit & M. R. Co. (1908) 152 Mich. 463, 116 N. W. 432, holding that, as bearing upon the question of the amount of damages, evidence is admissible to show the decedent's habits of industry; disapproving dictum to the contrary in *McQuisten v. Detroit Citizens' Street R. Co.* (1907) 150 Mich. 332, 113 N. W. 1118.

Ft. Worth & R. G. R. Co. v. Keith (1913) — Tex. Civ. App. —, 163 S. W. 142, holding that evidence is admissible to show that the deceased was industrious and energetic, and had purchased a home for his mother and her grandchildren, and that he was their sole support, as bearing upon the reasonable expectancy of pecuniary benefit which these persons would have received had he lived.

²⁶ *Richmond & D. R. Co. v. Hammond* (1890) 93 Ala. 181, 9 So. 577; *Cook v. Clay Street Hill R. Co.* (1882) 60 Cal. 604; *Flynn v. Fogarty* (1883) 106 Ill. 263; *Chicago & G. W. R. Co. v. Travis* (1892) 44 Ill. App. 466; *Wheelan v. Chicago, M. & St. P. R. Co.* (1892) 85 Iowa, 167, 52 N. W.

may be affirmatively shown that the deceased had no bad habits,²⁷ that he did not drink or gamble,²⁸ and that he was a church member,²⁹ and it may be shown that the deceased was a careful and prudent man in his work.³⁰ Evidence of this character, however, has been held to be immaterial and prejudicial to the defendant on the ground that it affected the question of due care on part of de-

ceased.³¹ On the other hand, evidence is admissible as to the bad character and habits of the deceased.³² In this connection it may be shown that he was in the habit of becoming intoxicated,³³ or that he was not industrious.³⁴ Evidence, however, is not admissible as to specific acts of wrongdoing on the part of deceased,³⁵ although, in mitigation of exemplary damages, evidence is admissible

119; *Van Gent v. Chicago, M. & St. P. R. Co.* (1890) 80 Iowa, 526, 45 N. W. 913; *Shaber v. St. Paul, M. & M. R. Co.* (1881) 28 Minn. 109, 9 N. W. 575; *Opsahl v. Judd* (1883) 30 Minn. 126, 14 N. W. 575; *Frank v. Otis*, 15 N. Y. S. R. 681.

Louisville & N. R. Co. v. Gardner (1910) 140 Ky. 772, 131 S. W. 787, holding that evidence of the sobriety of the deceased is admissible as bearing upon his earning capacity.

²⁷ *Ft. Worth & D. C. R. Co. v. Stalcup* (1914) — Tex. Civ. App. —, 167 S. W. 279, holding that evidence is admissible that deceased had no bad habits.

²⁸ *Barboza v. Pacific Portland Cement Co.* (1912) 162 Cal. 36, 120 Pac. 767, holding that evidence is admissible to show that the deceased was not addicted to drink, and that he did not gamble.

²⁹ *White v. Central Vermont R. Co.* (1913) 87 Vt. 330, 89 Atl. 618, holding that evidence that the deceased was a church member is admissible as bearing upon the pecuniary loss to his minor children by reason of the loss of his moral training.

But see *Lipscomb v. Houston & T. C. R. Co.* (1901) 95 Tex. 5, 55 L.R.A. 869, 93 Am. St. Rep. 804, 64 S. W. 923, holding that, as bearing upon the measure of damages, evidence is inadmissible that the deceased was a member of the church and did not use profane language, since it is too remote to be of value in determining the pecuniary loss to his statutory beneficiaries by his death.

³⁰ *Pittsburgh, C. C. & St. L. R. Co. v. Parish* (1902) 28 Ind. App. 189, 91 Am. St. Rep. 120, 62 N. E. 514, holding that evidence that the deceased was a careful man in his work as a railroad conductor is admissible.

Wells v. Denver & R. G. W. R. Co. (1891) 7 Utah, 482, 27 Pac. 688, holding that evidence as to the good reputation of the decedent as a railroad man is admissible on the question of damages for his wrongful death.

³¹ *McQuisten v. Detroit Citizens' Street R. Co.* (1907) 150 Mich. 332, 113 N. W. 1118, holding that the fact that the deceased was a careful man has no particular bearing upon the pecuniary loss to his beneficiaries by his death, and evidence thereof is inadmissible, since it may be injurious to the defendant upon the question as to whether or not the injury to the deceased was due to his own negligence.

³² *Standlee v. St. Louis & S. W. R. Co.* L.R.A.1918C.

(1901) 25 Tex. Civ. App. 340, 60 S. W. 781, holding that it is competent to prove the habits of the deceased in order to show that he was a worthless person whose services were of little or no value to his family.

³³ *Wright v. Crawfordsville* (1895) 142 Ind. 636, 42 N. E. 227; *Nashville & C. R. Co. v. Prince* (1871) 2 Heisk (Tenn.) 580, holding that evidence of the habitual drunkenness of the decedent is admissible as bearing upon the measure of damages to his dependent family from his death.

Fearon v. New York L. Ins. Co. (1914) 162 App. Div. 580, 147 N. Y. Supp. 644, holding that evidence is admissible to show that the deceased was in the habit of becoming intoxicated, as bearing upon his probable earnings and the financial loss to his wife and children through his death.

Mellwaine v. Metropolitan Street R. Co. (1902) 74 App. Div. 496, 77 N. Y. Supp. 426, holding that evidence that the decedent, a cab driver, sometimes came in from a drive intoxicated, is admissible as bearing upon the damages to be awarded for his death.

But see *Chicago & A. R. Co. v. Pearson* (1899) 82 Ill. App. 605, affirmed in (1900) 184 Ill. 386, 56 N. E. 633, holding that it is not proper cross-examination of the personal representative to ask him whether or not deceased was a drinking man.

³⁴ *Alabama Steel & Wire Co. v. Griffin* (1907) 149 Ala. 423, 42 So. 1034, holding that evidence is admissible that the deceased was an inebriate, a tramp, or an indolent man, as bearing on his habits of industry and his earning capacity.

³⁵ *Holland v. Closs* (1912) — Tex. Civ. App. —, 146 S. W. 671, holding that evidence that deceased was taken to another state upon criminal warrant, together with evidence as to the circumstances under which he married the plaintiff and his statements with reference thereto, is inadmissible.

Galveston, H. & S. A. R. Co. v. Pingent (1911) — Tex. Civ. App. —, 142 S. W. 93, holding that, in an action to recover for death from negligence, the defendant cannot try the question as to whether or not the deceased in his lifetime had been guilty of embezzlement.

Kirby Lumber Co. v. Chambers (1906) 41 Tex. Civ. App. 632, 95 S. W. 607, holding that, where there is no claim made to recover damages arising from any prospective advancement of the deceased had he lived, evidence is inadmissible to show that

that the defendant killed the deceased because the latter had had improper relations with the former's daughter.⁸⁶

The defendant also may show that the deceased was evil in his habits, that he uniformly sought bad associations and contributed nothing to the support of his family or the culture of his children, and did not perform the duties of a husband and father properly, either by pecuniary assistance or by moral associations and help; that he was without property, earning power, or ability, and discharged none of the duties which

by common consent devolved upon him as a reputable member of society.⁸⁷

4. Number and ages of beneficiaries.

In actions for the benefit of statutory beneficiaries, to recover compensation for their pecuniary loss due to the destruction of the life of a relative, evidence is admissible as to the existence of such beneficiaries and their number, including the number of the decedent's children who survive him;⁸⁸ and their dependency upon him may be shown and the fact that during his lifetime he had

in his lifetime the decedent had been charged with having committed larceny and embezzlement and that he had admitted his guilt.

⁸⁶ *Holland v. Closs (Tex.) supra*, holding in an action by a widow to recover for the wrongful killing of her husband, that, in mitigation of exemplary damages, evidence is admissible that the deceased had had improper relations with the daughter of the defendant.

⁸⁷ *Sternfels v. Metropolitan Street R. Co. (1902) 73 App. Div. 494, 77 N. Y. Supp. 309*, affirmed in (1903) 174 N. Y. 512, 66 N. E. 1117.

And see *Pell v. Herbert (1917) 33 Cal. App. 730, 166 Pac. 386*, holding that the jury should consider evidence that deceased was of dissolute and unthrifty habits, and was not a very useful member of society or supporter of his family.

⁸⁸ *North Carolina R. Co. v. Zachary (1914) 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109*, holding that under the Federal liability act, there should be an averment, and it should be proven at the trial, that the deceased left a widow, parent, or dependent next of kin, for under this act the damages recoverable are based upon the pecuniary loss sustained by such beneficiaries.

Choctaw, O. & G. R. Co. v. Jackson (1910) 182 Fed. 342, affirmed in (1911) 114 C. C. A. 12, 192 Fed. 792, holding to be admissible testimony by the alleged widow that she was married to the deceased, and that to this union there were born three children who were coplaintiffs with her in the action; and this evidence is sufficient to show that she is the lawful wife of the deceased and that the other plaintiffs are his only children.

Felton v. Spiro (1897) 24 C. C. A. 321, 47 U. S. App. 402, 2 Am. Neg. Cas. 682, 78 Fed. 576, holding that evidence as to the number and ages of children of the deceased is competent in an action for the benefit of the widow and children.

Louisville & N. R. Co. v. Young (1910) 168 Ala. 551, 53 So. 213, holding that evidence is admissible to show that the deceased left surviving him children dependent upon him for their support, correcting in this regard the opinion in the same case L.R.A.1918C.

when formerly before the court as reported in (1901) 132 Ala. 489, 31 So. 573.

Kramm v. Stockton Electric R. Co. (1913) 22 Cal. App. 737, 136 Pac. 523, holding that evidence is admissible as to the number of decedent's family.

Kulvie v. Bunsen Coal Co. (1912) 253 Ill. 386, 97 N. E. 688, holding that the widow may testify as to whether or not she had any other means of support than the earnings of her husband, and also as to the existence of surviving children.

Hughes v. Danville Brick Co. (1913) 180 Ill. App. 603, holding that, in an action to recover for the wrongful death of a person in behalf of the statutory beneficiaries, it is necessary to aver and prove who are the next of kin of the deceased.

Boyer v. Northwestern Elev. R. Co. (1912) 174 Ill. App. 161, holding it to be error to refuse to receive evidence as to the number of children the deceased left surviving him.

Chicago & A. R. Co. v. Pearson (1899) 82 Ill. App. 605, affirmed in (1900) 184 Ill. 386, 56 N. E. 633, holding that evidence is admissible to show that the deceased was survived by a wife and a designated number of children.

Coffeyville Min. & Gas Co. v. Carter (1902) 65 Kan. 565, 70 Pac. 635, 12 Am. Neg. Rep. 594, holding that the number, age, and sex of the decedent's children dependent upon him, may be shown.

Breckenfelder v. Lake Shore & M. S. R. Co. (1890) 79 Mich. 560, 44 N. W. 957, holding that, in an action by the personal representative to recover damages for the death of his decedent for the benefit of the statutory beneficiaries, evidence is admissible as to the number and ages of the children of the deceased who were dependent upon him for support at the time of his death.

Jacoby v. Chicago, M. & St. P. R. Co. (1917) 165 Wis. 610, 161 N. W. 751, holding that evidence is admissible of the number and ages of the decedent's children.

O'Mellia v. Kansas City, St. J. & C. B. R. Co. (1893) 115 Mo. 205, 21 S. W. 503; Schlereth v. Missouri P. R. Co. (1893) 115 Mo. 87, 21 S. W. 1110.

Williams v. Metropolitan Street R. Co. (1909) 141 Mo. App. 625, 125 S. W. 522, holding that, where recovery may be had

supported them.³⁹ It cannot, however, be shown that the statutory beneficiaries had persons dependent upon them, even

though the deceased had supported or aided in the support of such persons in his lifetime.⁴⁰ An exception to this

of penal and compensatory damages for negligently killing a person, evidence is admissible as to the family who survived the decedent.

South Omaha Water Works Co. v. Voseck (1901) 62 Neb. 710, 87 N. W. 536, 10 Am. Neg. Rep. 580, holding that, in an action for wrongful death, the existence of relatives of the decedent may be shown, where there is evidence that he was assisting in their support.

Simpson v. Foundation Co. (1911) 201 N. Y. 479, 95 N. E. 10, Ann. Cas. 1912B, 321, 2 N. C. C. A. 183, holding that evidence that the deceased left surviving him a wife and children is competent.

Freeman v. Illinois C. R. Co. (1901) 107 Tenn. 340, 64 S. W. 1, holding that, where a judgment for wrongful death inures to the benefit of the statutory distributees of the deceased, who are his mother and brothers and sisters, evidence is admissible as to the existence of these persons.

English v. Southern P. R. Co. (1896) 13 Utah, 407, 35 L.R.A. 155, 57 Am. St. Rep. 772, 45 Pac. 47; *Chilton v. Union P. R. Co.* (1892) 8 Utah, 47, 29 Pac. 963; *Pool v. Southern P. Co.* (1891) 7 Utah, 303, 26 Pac. 654, holding that evidence is admissible as to the number and ages of the children of the deceased.

Hamann v. Milwaukee Bridge Co. (1908) 136 Wis. 39, 116 N. W. 854, holding that, in an action by a widow as administratrix to recover damages for the death of her husband, she may show the number of her children and the condition of her health.

Mulcairns v. Janesville (1886) 67 Wis. 24, 29 N. W. 565, holding that, in an action to recover damages for wrongful death, as bearing upon the measure of recovery, it is proper to show the number of children the decedent left and their dependency upon their mother for support.

And see *Galveston, H. & S. A. R. Co. v. Contreras* (1903) 31 Tex. Civ. App. 489, 72 S. W. 1051, holding that, in an action by one of the beneficiaries, a child of the decedent, the defendant may show that there are also other beneficiaries under the statute, and that these beneficiaries have already recovered the damages sustained by them for the death complained of. This evidence, however, is in mitigation, and not in bar of the action.

And see *Preble v. Wabash R. Co.* (1909) 149 Ill. App. 584, affirmed in (1909) 243 Ill. 340, 90 N. E. 716, holding that, where the declaration alleged the surviving relatives to be a widow and an unborn child, evidence is admissible to show the subsequent birth and death of the child.

But see *Bradley v. Ohio River & C. R. Co.* (1895) 122 N. C. 972, 30 S. E. 8, holding that the value of services and earnings given children by the deceased parent is the measure of their damages; hence their number and ages are not to be considered. L.R.A.1918C.

³⁹ *Alabama Mineral R. Co. v. Jones* (1896) 114 Ala. 519, 62 Am. St. Rep. 121, 21 So. 507, 1 Am. Neg. Rep. 551, holding that, to aid circumstantial evidence as to the money which the deceased contributed to the support of those dependent upon him, their relationship, number, and ages may be shown.

Bromley v. Birmingham Mineral R. Co. (1891) 95 Ala. 397, 11 So. 341, holding that, in an action by the personal representative to recover damages for personal injuries to his intestate, evidence that the decedent left surviving him a wife and minor child dependent upon him for support is admissible, where it is also shown that decedent used his earnings in whole or in part for the benefit of the wife and child.

Hughes v. Danville Brick Co. (1913) 180 Ill. App. 603, holding that evidence may be given that the plaintiff is the widow of the deceased, and the ages of the surviving children may be shown, and also the fact that deceased supported his family. And see to the same effect, *Pennsylvania Co. v. Keane* (1892) 143 Ill. 173; *Preble v. Wabash R. Co.* (1909) 243 Ill. 340, 90 N. E. 716; *Brennen v. Chicago & C. Coal Co.* (1900) 241 Ill. 610, 89 N. E. 756.

Kulvie v. Bunsen Coal Co. (1911) 161 Ill. App. 617, affirmed in (1912) 253 Ill. 386, 97 N. E. 688, holding that evidence as to the number of children surviving decedent is admissible in an action for the benefit of the surviving widow and children, where the deceased during his lifetime was their only support.

Beyer v. Peoria, B. & C. Traction Co. (1910) 156 Ill. App. 47, holding that evidence is admissible to show that the deceased left surviving him a widow and five children, which constituted his family, and that he contributed to their support.

Baltimore & O. R. Co. v. State (1866) 24 Md. 271, holding that evidence is admissible as to the members of the decedent's family, and that he supported them by his labor.

Bethel v. Pawnee County (1914) 95 Neb. 203, 145 N. W. 363, holding that evidence is admissible as to the number and ages of decedent's children, and as to the fact that the widow and children had no means of support other than the efforts of the deceased.

Compare with *Chicago, P. & St. L. R. Co. v. Woolridge* (1898) 174 Ill. 330, 51 N. E. 701, holding that the number and ages of the decedent's family are immaterial, where the relation is lineal, as the sole measure of damages is the pecuniary loss: that is, the amount which the deceased would have added to his estate had he lived.

⁴⁰ *Cook v. Cleveland, C. C. & St. L. R. Co.* (1908) 143 Ill. App. 109, holding that evidence is incompetent as to the number of young children of the widowed child of

rule exists, however, as to the widow of the deceased. Where her pecuniary loss is the measure of the recovery, evidence is admissible as to the number of children surviving the deceased, if the burden of their support falls upon the widow, since this is properly a part of

her pecuniary loss.⁴¹ It has, however, been held that, where the measure of the widow's recovery is compensation for loss of support, evidence is inadmissible as to the number of children surviving the deceased; and this is also the rule where the measure of the re-

the decedent, although the deceased had supported them for a number of years.

Murphy v. Erie R. Co. (1911) 202 N. Y. 242, 95 N. E. 699, holding that, where an action by the administratrix of the estate of a deceased person to recover damages for her wrongful death is for the benefit of a half sister and a half brother, evidence relating to the services and expenditures of the deceased for the children of either of such persons is incompetent.

Compare with *Meng v. Emigrant Industrial Sav. Bank* (1915) 169 App. Div. 27, 154 N. Y. Supp. 509, holding that, without reference to whether or not grandchildren of the deceased are entitled to a share of a verdict recovered for his negligent death, the receipt of evidence of their existence is not harmful error.

And see *Philip v. Heraty* (1904) 135 Mich. 446, 97 N. W. 963, 100 N. W. 186, holding that evidence is inadmissible that the decedent had made an arrangement with a woman with whom he was living to adopt two of her children.

⁴¹ *Atchison, T. & S. F. R. Co. v. Wilson* (1891) 1 C. C. A. 25, 43 U. S. App. 25, 48 Fed. 57, holding that, in an action by a widow for the wrongful death of her husband, evidence is admissible as to the number and ages of their children.

Escambia County Electric Light & P. Co. v. Sutherland (1911) 61 Fla. 167, 55 So. 83, holding that evidence as to the number and ages of the children surviving the deceased is admissible in an action by his widow.

Claffy v. Chicago Dock & Canal Co. (1911) 249 Ill. 210, 94 N. E. 551, holding that, in an action by a widow to recover for the death of her husband, she is entitled to show the number and ages of her minor children, since, where she has minor children to support, her damages are greater.

Cook v. Big Muddy-Carterville Min. Co. (1911) 249 Ill. 41, 94 N. E. 90, holding that evidence as to whether or not the deceased left any children is proper for the consideration of the jury in an action by his widow.

Boyd v. Missouri P. R. Co. (1911) 236 Mo. 54, 139 S. W. 561, holding that, in an action by a widow to recover damages for the death of her husband, evidence is admissible as to the number and ages of the children, and it is not error to permit them to remain in the court room during the trial of the case.

Fisher v. Central Lead Co. (1900) 156 Mo. 479, 56 S. W. 1107, holding that, in an action by a wife to recover for the death of her husband, the number and ages of the surviving children may be shown. L.R.A.1918C.

Haehl v. Wabash R. Co. (1893) 119 Mo. 325, 24 S. W. 737, holding that, in an action by a widow to recover for the death of her husband, she may show that she has one child, and that they are dependent upon the deceased for support.

Soeder v. St. Louis, I. M. & S. R. Co. (1890) 100 Mo. 673, 18 Am. St. Rep. 724, 13 S. W. 714, holding that, in an action to recover for the death of her husband, the wife may testify as to the number of their minor children.

Tetherow v. St. Joseph & D. M. R. Co. (1888) 98 Mo. 74, 14 Am. St. Rep. 617, 11 S. W. 310, holding that, in an action by the widow to recover for the wrongful killing of her husband, it is not error to admit evidence as to the number and ages of their minor children. *Holmes v. St. Louis, I. M. & S. R. Co.* (1915) — Mo. —, 176 S. W. 1041.

Kettlehake v. American Car & Foundry Co. (1913) 171 Mo. App. 528, 153 S. W. 552, affirmed in (1915) 236 U. S. 311, 59 L. ed. 594, 35 Sup. Ct. Rep. 355, holding that the widow may testify as to the number and ages of children surviving the decedent.

Hartnett v. United R. Co. (1912) 162 Mo. App. 554, 142 S. W. 750, holding that evidence is admissible as to the number and ages of the children surviving the decedent, in an action by his widow to recover for his death.

Ogan v. Missouri P. R. Co. (1910) 142 Mo. App. 248, 126 S. W. 191, holding that, in an action by the widow to recover for the death of her husband, evidence is admissible as to the number and ages of their children.

Jacoby v. Chicago, M. & St. P. R. Co. (1917) 165 Wis. 610, 161 N. W. 751, holding that evidence is admissible to show the number and ages of the children surviving the deceased, where the damages are limited to pecuniary loss sustained by the widow.

Hamann v. Milwaukee Bridge Co. (1908) 136 Wis. 39, 116 N. W. 854, holding that, in an action by a widow to recover for the death of her husband, although she can recover only her pecuniary loss, evidence is nevertheless admissible as to the number and ages of her children.

Mulcairns v. Janesville (1886) 67 Wis. 24, 29 N. W. 505, holding that, in an action by the personal representative to recover damages due to a widow for the death of her husband, evidence is admissible to show the number of children dependent upon her for support in order to show her loss, for, while living, the deceased was bound to support his children, and after his death,

covery is compensation for the injury to the deceased.⁴²

5. Relationship and feeling between decedent and beneficiaries.

Evidence is admissible on the part of the defendant that the person claiming to be the widow of the deceased was not in fact his wife.⁴³ And it may be shown that the widow was not entitled to or would not receive support from the decedent. And evidence is admissible as to their marital and domestic rela-

tions,⁴⁴ at least to the extent of showing that the parties were not living together at the time of his injury or death, or for the purpose of showing the discontinuance of the marital relation. But evidence of divorce proceedings between the decedent and his wife during his lifetime is inadmissible except for these purposes.⁴⁵ Nor is evidence admissible as to the character or reputation of the widow.⁴⁶ And by the weight of authority it cannot be shown that the surviving husband or wife has remarried or is en-

to the extent of her ability, the mother succeeded to this natural obligation. And see *Thompson v. Johnston Bros. Co.* (1893) 86 Wis. 576, 57 N. W. 298, holding, in an action by the widow to recover for the death of a son, evidence is admissible in her behalf as to the number of children she has living, and the amount of mortgage and taxes due upon her property.

⁴² In *Wood v. Philadelphia, B. & W. R. Co.* (1910) 1 Boyce (Del.) 336, 76 Atl. 613, it is held that, where the widow, in suing for the death of her husband, limits her recovery to loss of the support which she was receiving or was entitled to receive at the time he was killed, the fact that the parties had an infant child which survived the death of its father is not to be considered by the jury as bearing upon the amount of damages to be awarded.

Compare with *St. Louis, P. & N. R. Co. v. Rawley* (1900) 90 Ill. App. 653, holding that, in an action by the widow as personal representative, to recover damages for the death of her husband, it is error to receive evidence that the husband supported his wife and children during his lifetime, followed by evidence in detail as to the ages and sex of the children.

Illinois Steel Co. v. Ostrowski (1901) 194 Ill. 376, 62 N. E. 822, affirming (1901) 93 Ill. App. 57, holding that, although it was improper for the widow of the deceased to testify as to the number and ages of her children surviving their deceased father, yet it was not reversible error where she did not testify that they were dependent upon the deceased for support and that he supported them, and where the jury were correctly instructed as to the measure of damages.

⁴³ *Evarts v. Santa Barbara Consol. R. Co.* (1906) 3 Cal. App. 712, 86 Pac. 830.

Philip v. Heraty (1904) 135 Mich. 446, 97 N. W. 963, 100 N. W. 186, holding that, where recovery for wrongful death is limited to the actual pecuniary loss of the statutory beneficiaries, in a suit by a person claiming as the wife of the decedent, it is competent to show that the plaintiff is not decedent's lawful wife, and that he had a lawful wife then living and children by such wife.

⁴⁴ *Mize v. Rocky Mountain Bell Teleph. Co.* (1909) 38 Mont. 521, 129 Am. St. Rep. 659, 100 Pac. 971, 16 Ann. Cas. 1189, hold-
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ing that evidence is admissible on behalf of the plaintiff as to the marital relations between herself and her deceased husband.

⁴⁵ *Wood v. Philadelphia, B. & W. R. Co.* (Del.) supra, holding that the docket entries or the record of the incomplete divorce proceedings is inadmissible in mitigation of damages in an action by the widow for the death of her husband, although the fact that they were not living together at the time of his death is competent as bearing upon her pecuniary loss of support.

Boos v. Minneapolis, St. P. & S. Ste. M. R. Co. (1914) 127 Minn. 381, 149 N. W. 660, citing *Dunbar v. Charleston & W. C. R. Co.* (1911) 186 Fed. 175, holding it to be improper to inquire into the state of the domestic affairs of the deceased and his wife in an action to recover damages for his negligent death, unless the purpose is to show the discontinuance of the marital relation.

Davis v. Cincinnati, N. O. & T. P. R. Co. (1916) 172 Ky. 55, 188 S. W. 1061, holding that evidence of a divorce decree, divorcing the deceased from the mother of his child, giving her the custody of the child, and providing for the payment to her of a stated sum of money for the support of the child, is inadmissible in behalf of the defendant to diminish the damages recoverable for the benefit of the child.

⁴⁶ *Consolidated Stone Co. v. Morgan* (1903) 160 Ind. 241, 66 N. E. 696, holding that evidence as to the habits and moral character of the widow of decedent is inadmissible in an action for the wrongful death of the husband based upon a statute providing that the damages shall inure to the exclusive benefit of the widow and children.

Weller v. Chicago, M. & St. P. R. Co. (1894) 120 Mo. 635, 23 S. W. 1061, 25 S. W. 532, holding that, where the statute fixes the amount of damages to be recovered for a wrongful death under the circumstances therein designated, evidence is inadmissible to show the social or business standing and relationship of the widow of the decedent.

Chicago, St. P. M. & O. R. Co. v. Lagerkrans (1902) 65 Neb. 566, 91 N. W. 358, 95 N. W. 2, holding that evidence is admissible that decedent's widow has remarried since his death.

gaged to marry, since the pecuniary loss is to be based upon conditions as they existed at the time of the death complained of.⁴⁷ It has been held that evidence is admissible to show that the surviving widow, for several years prior to the injury and death of her husband, had been living in adultery and prostitution, and had not been supported by the decedent.⁴⁸ And it may be shown that the relationship or feelings existing be-

tween the deceased and his beneficiaries were such that they had no reasonable expectation of pecuniary aid from his continued life, or not to the extent claimed by plaintiff.⁴⁹ And in behalf of the plaintiff it may be shown that the deceased entertained a very friendly feeling or strong affection for his beneficiaries, and in this regard evidence is admissible as to his conduct toward and treatment of them.⁵⁰ For example, evi-

⁴⁷ *Davis v. Guarnieri* (1887) 45 Ohio St. 470, 4 Am. St. Rep. 548, 15 N. E. 350, holding that, where a recovery is sought in behalf of the husband and children of deceased, evidence is inadmissible to show that the husband has remarried, and that his new wife is a stout healthy woman and is taking decedent's place in the family in caring for the children.

Gulf, C. & S. F. R. Co. v. Younger (1897) 90 Tex. 387, 38 S. W. 1121, 1 Am. Neg. Rep. 378, holding that the remarriage of the husband does not mitigate the damages recoverable by him and his child for the wrongful death of the wife and mother, and evidence of such marriage and as to the character and capacity of the second wife is inadmissible.

Dimmey v. Wheeling & E. G. R. Co. (1885) 27 W. Va. 32, 55 Am. Rep. 292, 7 Am. Neg. Cas. 111, holding that, in an action for the death of his wife, the plaintiff cannot be required to disclose whether or not he is engaged to be married.

⁴⁸ *Orendorf v. New York C. & H. R. R. Co.* (1907) 119 App. Div. 638, 104 N. Y. Supp. 222.

Disbrow v. Ulster Twp. (1887) 6 Sadler (Pa.) 33, 8 Atl. 912, holding that the defendant may prove the value of the decedent's life to his family and his probable care for its preservation. For example, he may show that the decedent had said that he was tired of life, that he did not want to live, that his life had been a failure, and that his family were a failure.

Holland v. Closs (1912) — Tex. Civ. App. —, 146 S. W. 671, holding that evidence is admissible that deceased had abandoned his wife and small child prior to the time of his injury and death.

Beaumont Traction Co. v. Dilworth (1906) — Tex. Civ. App. —, 94 S. W. 352, holding that, as bearing upon the measure of damages recoverable by minor children for the death of their father, evidence is admissible to show that prior to his death the decedent had abandoned his children.

But see *Boswell v. Barnhart* (1895) 96 Ga. 521, 23 S. E. 414, holding that, where the measure of damages to a widow for the wrongful death of her husband, by statute, is the gross value of his life, evidence is not admissible to show that at the time of the trial she was better provided for than before her husband died, and that he was constantly in criminal scrapes, if not in jail, and when out he was at work L.R.A.1918C.

to earn money to defray the expenses of defending himself against criminal charges.

Compare with *Brown v. Southern R. Co.* (1903) 65 S. C. 260, 43 S. E. 794, holding that statements of the decedent that his children were trying to get his property away from him are incompetent on the part of the defendant in an action to recover for his wrongful death in behalf of his children.

⁴⁹ *Chicago, R. I. & P. R. Co. v. Gunn* (1914) 112 Ark. 401, 186 S. W. 568, Ann. Cas. 1916E, 648, holding that, although the action is to recover only the pecuniary loss to children from the death of their father, evidence is admissible as to his attention to their instruction to show his affection for and interest in them, as bearing upon the likelihood of his contributing to their support.

St. Louis, I. M. & S. R. Co. v. Hutchinson (1912) 101 Ark. 424, 142 S. W. 527, 2 N. C. C. A. 250, holding that a witness may testify that he knew the family of the deceased, that the decedent was industrious and economical, and cared for his family.

Green v. Southern California R. Co. (1901) 6 Cal. Unrep. 843, 67 Pac. 4, holding, in an action by the father and children for damages for the death of the wife and mother, that the evidence will be allowed to take a wide scope as to the habits, health, temperament, intelligence, education, attention, affection, etc., of the deceased.

Cook v. Clay Street Hill R. Co. (1882) 60 Cal. 604, holding that evidence is admissible that the decedent was a kind and good husband and father.

⁵⁰ *Beeson v. Green Mountain Gold Min. Co.* (1880) 57 Cal. 20, 13 Am. Neg. Cas. 461, holding that, in an action by a widow to recover for the death of her husband, evidence is competent as to the kindly relations between the plaintiff and the deceased during the lifetime of the latter, but this evidence can be considered only in estimating the pecuniary loss to the plaintiff, and not as bearing upon her grief, sorrow, wounded feelings, etc.

Kramm v. Stockton Electric R. Co. (1913) 22 Cal. App. 737, 136 Pac. 523; holding that evidence is admissible to show that the decedent was kind and loving to his minor children.

Cleveland, C. C. & St. L. R. Co. v. Starks (1910) 174 Ind. 345, 92 N. E. 54, holding that evidence is admissible as to the de-

dence is admissible as to the habits of the deceased with reference to his family life, the attention which he bestowed upon the members of it, and the interest he took in their social entertainment, and it may be shown that he spent much of his time with his family and took great interest in the education and culture of his children.⁵¹

cedent's habit of industry and his kindly attention, care, and provision for the support of his children.

Union P. R. Co. v. Sternberger (1898) 8 Kan. App. 131, 54 Pac. 1101, holding that it is competent to show the relations existing between a decedent and his family during his lifetime.

Smith v. Barnard (1911) 82 N. J. L. 472, 81 Atl. 736, holding it to be competent to show the relation existing between the deceased and her next of kin, and the fact that they benefited in a pecuniary way by her earnings, as a basis for showing a pecuniary injury resulting to them from her death.

International & G. N. R. Co. v. McVey (1907) 46 Tex. Civ. App. 181, 102 S. W. 172, holding that, where there is evidence that the deceased was very much attached to and interested in his young children, it is proper to show that their mother was not strong and healthy as bearing upon the attention, care, and nurture which their deceased father would have given them had he lived.

Missouri P. R. Co. v. Bond (1893) 2 Tex. Civ. App. 104, 20 S. W. 930, holding that, in an action by a widow and children to recover for the death of the husband and father, it may be shown that the decedent was kind and affectionate in his family and was an intelligent husband and father.

Pool v. Southern P. Co. (1891) 7 Utah, 303, holding that, where the jury are authorized to assess the damages for the wrongful or negligent killing of a person at such sum as, under all the circumstances of the case, they deem just, evidence is proper as to the number and ages of the members of the family of the deceased, their relations with each other during his lifetime, and his ability to earn wages and provide for them.

Chilton v. Union P. R. Co. (1892) 8 Utah, 47, 29 Pac. 963, holding that evidence is admissible as to the number and ages of the children of the deceased and as to the manner in which he treated his family.

⁵¹ Sternfels v. Metropolitan Street R. Co. (1902) 73 App. Div. 494, 77 N. Y. Supp. 309, affirmed in (1903) 174 N. Y. 512, 66 N. E. 1117.

But compare with Conover v. Harrisburg & S. Coal Co. (1911) 161 Ill. App. 74, holding that evidence by a wife that her husband spent most of his time at home with her and her children, and that he was their only support, is inadmissible in an action to recover for his wrongful death, since it

6. Contributions made and services rendered.

Evidence is admissible as to contributions by the deceased in his lifetime to the support, aid, or benefit of his beneficiaries,⁵² and where the deceased was the mother of infant children, evidence may be given as to the value of her services to them;⁵³ and the inten-

tends to show loss of companionship and the recovery is limited to pecuniary loss.

⁵² Louisville & N. R. Co. v. Morgan (1896) 114 Ala. 449, 22 So. 20, 2 Am. Neg. Rep. 294, holding that the amount the decedent was expending upon a young brother, a distributee of his estate, is to be considered in determining the damages sustained by the next of kin.

Powley v. Swensen (1905) 146 Cal. 471, 80 Pac. 722, holding that, in an action to recover damages to children for the death of their father, evidence as to the amount he contributed for their support is admissible.

Re Bennett (1910) 160 Mich. 309, 125 N. W. 2, holding that evidence is admissible to show the amount of contribution previously made by a brother to a sister, in action to recover for the death of the former through intoxication, where the recovery is for her benefit. Such contributions may be shown by the sister's memorandum book, showing her expenditures with money furnished by the decedent.

Boyd v. Missouri P. R. Co. (1913) 249 Mo. 110, 155 S. W. 13, Ann. Cas. 1914D, 37, holding that, in an action by children to recover damages for the death of their father, evidence is admissible that the father had given and would continue to give support to them, although he was divorced from their mother and they were living with the latter, but evidence is not admissible of the father's failure in one instance to pay alimony to the mother.

San Antonio & A. P. R. Co. v. Long (1894) 87 Tex. 148, 24 L.R.A. 637, 47 Am. St. Rep. 87, 27 S. W. 113, holding that adult children may give testimony tending to show that their deceased parent had aided and was aiding them at the time she was killed through the negligent act of the defendant, and that some of them were living with her.

And Atchison, T. & S. F. R. Co. v. Ryan (1901) 62 Kan. 682, 64 Pac. 603, holding that declarations of collateral kindred are admissible in favor of the defendant to show that the deceased had never contributed to their support.

But see Bonnet v. Galveston, H. & S. A. R. Co. (1895) 89 Tex. 72, 33 S. W. 334, holding that evidence that an adult son during his minority had paid all his earnings to his father is inadmissible.

⁵³ Missouri P. R. Co. v. Baier (1893) 37 Neb. 235, 55 N. W. 913, holding that, where the deceased was survived by several small children, evidence given in connection with

tion of the parent to aid a child in the future may be shown.⁵⁴ And in behalf of the husband of a woman negligently killed, the value of her services as housekeeper may be shown,⁵⁵ but on the ground that it related to a matter which the jury were to determine, it has been held that testimony by the husband as to the value per annum to him and his children of the services of his wife is inadmissible.⁵⁶ As bearing on the value of the decedent's services while living, the defendant may show that she never earned any money, and in view of her station in life never would render services calling for compensation.⁵⁷ And where the action is for the benefit of the next of kin of the wife, evidence is inadmissible as to the value of her services to her husband.⁵⁸

7. *Physical and pecuniary condition of beneficiaries.*

The physical and pecuniary condition of the relatives of the deceased who are entitled to claim damages for his death

through the negligence of the defendant may and generally does have a direct bearing upon their pecuniary loss. Thus, it may be reasonably presumed that a father, if living, would supply the material needs of a minor child. The needs of such a child are therefore a material matter of inquiry, and they are largely dependent upon the physical condition of the child. If not in good health or in any way crippled, the need of the child is greater than it otherwise would be, and hence its pecuniary loss by the death of the parent is greater. This is likewise true as to the widow and other beneficiaries of the decedent, where there is a reasonable ground for expectation that the decedent would have supplied their needs. Hence, by the great weight of authority, evidence is admissible to show the pecuniary and physical condition of the beneficiaries, especially that of the widow and children, in order to show their pecuniary loss by the destruction of the life of the decedent.⁵⁹ In this regard it may be shown what

her life expectancy is admissible as to the value of her services to them as their mother.

⁵⁴ *Butte Electric R. Co. v. Jones* (1908) 18 L.R.A.(N.S.) 1205, 90 C. C. A. 240, 164 Fed. 308, holding that, as an element of damage to a child for the death of his mother, it may be shown that the mother intended to send him to college and would have done so had she lived.

⁵⁵ *Hartzler v. Metropolitan Street R. Co.* (1910) 140 Mo. App. 665, 126 S. W. 760, holding that evidence as to the capacity of the wife, while living, to do housework, is admissible in an action by her husband to recover for her death.

⁵⁶ *Chicago & E. I. R. Co. v. Roberts* (1889) 35 Ill. App. 137, holding that, in an action to recover damages for the wrongful death of his wife, the husband cannot testify as to the value per annum of her services to himself and children.

⁵⁷ *Dillon v. Hudson, P. & S. Electric R. Co.* (1905) 73 N. H. 367, 62 Atl. 93, holding that, in an action by a husband to recover for the wrongful death of his wife, where, by the statute, one element of damages is the capacity of the decedent to earn money, evidence that the wife never earned any money, and by reason of her station in life never would render services calling for compensation, is competent.

⁵⁸ *Dickins v. New York C. R. Co.* (1861) 23 N. Y. 158, 5 Am. Neg. Cas. 61, holding that, where by statute the damages for a woman's death inure to the benefit of her next of kin, her husband, suing as her administrator to recover for her wrongful death, cannot show the value of her services to him.

⁵⁹ See *infra*, note 70.

Coffeyville Min. & Gas Co. v. Carter L.R.A.1918C.

(1902) 65 Kan. 565, 70 Pac. 635, 12 Am. Neg. Rep. 594, holding that, in actions for the benefit of children of the decedent, on the question of damages, regard is had alone to their necessitous conditions. Whatever made the life of the deceased of pecuniary value to his surviving children, whether arising on the one hand from the ability or disposition of the deceased to contribute to their support, as evidenced by his capacity to earn money and accumulate property, his inclination to provide support, the condition of his health, and probable duration of life, or on the other hand from the necessity that the survivors receive sustenance, as measured by the number, age, sex, health, or condition in life of the survivors left dependent upon the decedent for care, support, and maintenance, may be shown in estimating the pecuniary and just measure of the value of his life.

Louisville, C. & L. R. Co. v. Mahony (1870) 7 Bush (Ky.) 235, holding that, where the damages recoverable are compensatory and punitive, evidence is admissible as to the condition of the members of the family of the deceased who survived his death.

Hunt v. Conner (1901) 26 Ind. App. 41, 59 N. E. 50.

Chicago & N. W. R. Co. v. Bayfield (1877) 37 Mich. 205, 16 Am. Neg. Cas. 87, holding that evidence that the decedent's family, his mother and sister, were poor, has no tendency to show whether his contributions were, or were likely to be, large or small. It is, however, admitted that there are cases in which such evidence must be received as tending to show a moral obligation to demand assistance in the future, as where the decedent was a very young

the deceased has done in the past with reference to supporting and aiding his beneficiaries,⁶⁰ and the actual condition

and situation of the parties as they existed at the time of the death of the decedent may be shown.⁶¹ And in this

child and at the time of his death was contributing nothing to the aid of anyone.

Kettelkake v. American Car & Foundry Co. (1913) 171 Mo. App. 528, 153 S. W. 552, affirmed in (1915) 236 U. S. 311, 59 L. ed. 594, 35 Sup. Ct. Rep. 355, holding that evidence is admissible that the widow of the deceased had no other means of support than her deceased husband.

Perry v. Lansing (1870) 17 Hun (N. Y.) 34; *Winters v. Hannibal & St. J. R. Co.* (1867) 39 Mo. 468, holding that evidence relative to the family of the deceased, his wife and children, their ages, etc., is admissible in order to advise the jury in a general way of the situation and condition in life of the deceased.

Pressman v. Mooney (1896) 5 App. Div. 121, 38 N. Y. Supp. 44, holding, in an action by a personal representative to recover for the death of his decedent, that the pecuniary condition of the decedent's family is admissible to show the necessity that he should work to support the household, as tending to show the amount which he might reasonably have been expected to contribute to that end.

Fowler v. Buffalo Furnace Co. (1899) 41 App. Div. 84, 58 N. Y. Supp. 223, appeal dismissed in (1899) 160 N. Y. 665, 55 N. E. 1095, holding that evidence is admissible as to the financial circumstances of the next of kin.

Cincinnati Street R. Co. v. Altmeier (1899) 60 Ohio St. 10, 53 N. E. 300, 6 Am. Neg. Rep. 179, holding that, where the damages for wrongful death are to be based upon the pecuniary injury thereby resulting to the statutory beneficiaries, it is competent to show the financial condition and means of support of such beneficiaries.

Gulf, C. & S. F. R. Co. v. Younger (1897) 90 Tex. 387, 38 S. W. 1121, 1 Am. Neg. Rep. 378, holding that the amount of recovery by a child for the death of its mother is not affected by the financial condition of the family, but the circumstances which surround the mother and child are different in wealthy and in poor families, and therefore the financial condition of the family is admissible to show what aid the child could expect to receive from the continuance of the mother's life under the circumstances as shown by the evidence. And it has been held in this state that the necessitous condition of the daughter may be shown in the action to recover damages for the death of the father by the wrongful act of the defendant, as bearing upon the question of the amount he would have contributed to her support had he lived. *St. Louis Southwestern R. Co. v. Bowles* (1903) 32 Tex. Civ. App. 118, 72 S. W. 451.

Lazelle v. Newfane (1898) 70 Vt. 440, 41 Atl. 511, holding, where the next of kin of the deceased is an adult son, that evidence is admissible showing the amount of property possessed by the deceased, and also

by the son, as indicating the situation and circumstances of the parties.

Thoresen v. La Crosse City R. Co. (1896) 94 Wis. 129, 68 N. W. 548, holding that, in an action for the wrongful death of the wife, evidence of the husband's financial condition is competent, where the damages to be awarded are based upon his pecuniary injury.

Annas v. Milwaukee & N. R. Co. (1886) 67 Wis. 46, 57 Am. Rep. 388, 30 N. W. 242, 10 Am. Neg. Cas. 546, holding, in an action by a widow to recover for the wrongful death of her husband, that she may show that she was dependent upon him for support.

⁶⁰ See supra, note 52.

⁶¹ *Farley v. New York, N. H. & H. R. Co.* (1913) 87 Conn. 328, 87 Atl. 990, holding that the widow of the deceased may be cross-examined as to her source of support and as to her relations with her deceased husband, as bearing upon the pecuniary benefits she might reasonably have expected to receive from the continuation of his life.

Staal v. Grand Rapids & I. R. Co. (1885) 57 Mich. 239, 23 N. W. 795, holding that, where the action is to recover damages for the death of the head of a family, the fullest insight into the family circumstances is of value in determining to what extent they are injured thereby.

Murphy v. Erie R. Co. (1911) 202 N. Y. 242, 95 N. E. 699, holding that evidence is admissible as to the decedent's age, sex, health, and general intelligence, and relation to the next of kin, and their condition of life, as bearing upon the pecuniary loss suffered by them.

Baltimore & O. R. Co. v. Wightman (1877) 29 Gratt. (Va.) 431, 26 Am. Rep. 384, holding that evidence as to the relationship and dependent condition of the parties, the mental and physical capacity and ability of the deceased, and all the surrounding circumstances and situation of the family is competent in order to enable the jury properly to estimate the loss sustained and assess the damages. Reversed on other grounds in (1881) 104 U. S. 5, 26 L. ed. 643.

On this point in *Lazelle v. Newfane* (Vt.) supra, the court says: "Human lives are not of equal pecuniary value, and the value of services rendered depends upon the wants of the beneficiary; therefore it is competent to show the situation of the persons who claim to have been so injured, and the occasion for and value to them of the services of the deceased. The death of the father of young children who required his care and training would be a greater pecuniary loss to them than the death of a father would be who had become almost wholly dependent upon his children for his maintenance. So the loss of a husband who maintained and cared for his wife

connection evidence is admissible as to the crippled condition or the poor health of the beneficiaries.⁶² In some jurisdictions apparently a narrower view is taken as to the bearing of this character of evidence, and it has been held that

would be a greater pecuniary loss to her than if he were indolent, thriftless, and were supported by her."

⁶² *Simoneau v. Pacific Electric R. Co.* (1911) 159 Cal. 494, 115 Pac. 320, 2 N. C. C. A. 737, holding that, in an action to recover damages for the death of the husband and father, evidence is admissible as to the crippled condition of one of decedent's children.

Evarts v. Santa Barbara Consol. R. Co. (1906) 3 Cal. App. 712, 86 Pac. 830, holding that evidence is admissible as to the ill health of the wife of the decedent, as tending in some degree to establish her pecuniary loss from the death of her husband.

Coffeyville Min. & Gas Co. v. Carter (1902) 65 Kan. 565, 70 Pac. 635, 12 Am. Neg. Rep. 594, holding, where a daughter in her representative capacity is seeking to recover damages for the death of her father, for the benefit of herself and other children of the deceased, that she may show that she is, and for years has been, in bad health, and that her father was kind and affectionate toward her and the other children.

Lockwood v. New York, L. E. & W. R. Co. (1885) 98 N. Y. 523, holding that evidence is admissible that the adult children of the deceased had no property of their own, and that a daughter who had lived with him was so afflicted with a disease that it interfered with her ability to work.

De Luna v. Union R. Co. (1909) 130 App. Div. 386, 114 N. Y. Supp. 893, holding that pecuniary injuries to statutory beneficiaries are to be determined from the evidence, which is as a rule limited to the age, sex, and intelligence of the deceased, and the situation and condition of the survivors and their relations to the decedent.

Texas Midland R. Co. v. Crowder (1901) 25 Tex. Civ. App. 536, 64 S. W. 90, holding that evidence is admissible to show that one of the daughters of the deceased was seriously affected with a disease existing for years, and that the deceased, her father, kept a horse and buggy for the principal purpose of sending her to school.

Lynch v. Central Vermont R. Co. (1915) 80 Vt. 363, 95 Atl. 683, holding that evidence is admissible to show that a seventeen-year-old daughter surviving the deceased had never been strong enough to care for herself, and was not physically able to earn her living, and that the deceased provided her with everything that she needed, and assisted in caring for her.

Evans v. Oregon Short Line R. Co. (1910) 37 Utah, 431, 108 Pac. 638, Ann. Cas. 1912C, 259, holding that evidence is admissible as to the poor physical condition of the widow of the deceased, and her inability to do

evidence is inadmissible to show the pecuniary or physical condition or the state of health of the beneficiaries.⁶³ This holding is based on the ground that such evidence has no legitimate bearing upon the pecuniary loss to the bene-

housework, and the necessity of caring for her.

McKeigue v. Janesville (1887) 68 Wis. 50, 31 N. W. 298, holding it not to be error to admit evidence that two of the younger children of the decedent are in poor health, as bearing upon their pecuniary loss from the death of their mother; and see *Johnson v. Chicago & N. W. R. Co.* (1885) 64 Wis. 425, 25 N. W. 223.

On this point in *Hunt v. Conner* (1901) 26 Ind. App. 41, 59 N. E. 50, it is said: "Whatever material need of a surviving minor child it may reasonably be presumed would have been supplied by the father if alive, and is lost through his death, or must be provided for from some other source, is a pecuniary loss. If it be a permanent incapacity of an infant daughter, it is not beyond the discretion of the jury to determine that the father, if he had survived, would have continued during its life to provide for it, as he would have continued to provide for his wife during the joint lives of the husband and wife. The evidence of the existence of the permanent disability and consequent need of a father's continued care and protection and support is no more immaterial or remote in such an inquiry than evidence, in addition to proof that children survived, of the number thereof, and of their respective ages. The evidence to which the appellant objected did not merely prove a need of the beneficiary; it tended, we think, in this instance, to prove also a material loss, and therefore it was not inadmissible."

⁶³ *Seattle Electric Co. v. Hartless* (1906) 75 C. C. A. 317, 144 Fed. 379, holding that, under the Washington statute providing that, when the death of a person was caused by the wrongful act, etc., of another, his heirs or personal representatives may maintain an action against the person causing the death, and the jury may give such damages, pecuniary or exemplary, as under all the circumstances of the case to them may seem just, and further providing that no action for a personal injury occasioning death shall abate if the injured person had a wife or children living, but such action may be prosecuted or commenced and prosecuted in favor of the wife or the wife and children, or if the wife is not living, then in favor of the children, evidence is inadmissible to show the physical condition of any of the statutory beneficiaries. The court said that their physical condition had nothing whatever to do with the pecuniary loss the decedent's death occasioned them.

Green v. Southern P. Co. (1898) 122 Cal. 503, 55 Pac. 577, holding that it is not competent to show that a child is without

ficiaries and has a tendency to prejudice the defendant. According to the Illinois doctrine, while it is not competent to show the pecuniary circumstances of the widow, family, or next of kin of the decedent at the time of or since his death,

or their crippled condition or poor health, yet it is competent to show that the wife, children, or next of kin were dependent upon the decedent for support before and at the time of his death.⁶⁴ Where the measure of damages

property, although she is the plaintiff in a suit to recover damages for the wrongful death of her father.

Mahoney v. San Francisco & S. M. R. Co. (1895) 110 Cal. 471, 42 Pac. 968, holding that, in an action by a widow and children to recover for the death of the husband and father, evidence that the children are without means is inadmissible.

Hughes v. Danville Brick Co. (1913) 180 Ill. App. 603, holding that evidence is inadmissible as to the pecuniary condition of the widow and family of the deceased, although it is competent to show that they were dependent upon the deceased for support at the time of his death.

Delphi v. Lowery (1881) 74 Ind. 520, 39 Am. Rep. 98, holding that, in an action by the personal representative to recover for the wrongful death of his decedent, evidence that the decedent left his family in a destitute condition is incompetent.

Consolidated Gas, E. L. & P. Co. v. State (1908) 109 Md. 186, 72 Atl. 651, holding that, in an action based upon Lord Campbell's Act, to recover for wrongful death, evidence of the widow's poverty is inadmissible.

Hunn v. Michigan C. R. Co. (1889) 78 Mich. 513, 7 L.R.A. 500, 44 N. W. 502, holding that evidence is not admissible as to the extent of the means of the decedent, or of the amount of encumbrance upon land he left.

Chicago & N. W. R. Co. v. Bayfield (1877) 37 Mich. 214, 16 Am. Neg. Rep. 87, holding that evidence that the decedent's family are poor is inadmissible, for it has no tendency to show what the family were accustomed to receive, or what they had a reasonable expectation of receiving from the continued life of the decedent.

Lake Shore & M. S. R. Co. v. Reynolds (1900) 11 Ohio C. D. 701, holding that evidence is incompetent to show the poverty of the widow and children of deceased, but, where the evidence was to the effect that they were possessed of property to the value of \$1,500, it was not prejudicial.

Dutton v. Atlantic Coast Line R. Co. (1916) 104 S. C. 16, 88 S. E. 263, holding that, in an action based upon the Federal Employers' Liability Act, evidence is not admissible to show that the decedent left no property or insurance, and that his surviving wife and children were dependent upon him.

Texas & P. R. Co. v. Harrington (1884) 62 Tex. 597, holding that, in an action by a widow to recover for the death of her husband, testimony is inadmissible as to her pecuniary condition and lack of means to support and educate her children.

Galveston, H. & S. A. R. Co. v. Gormley L.R.A.1918C.

(1896) — *Tex. Civ. App.* —, 35 S. W. 488, holding that, in an action by the widow to recover for the wrongful death of her husband, it may be shown that she had no other means of support, and that the decedent had nothing but his wages at the time of his death.

In *Boswell v. Barnhart* (1895) 96 Ga. 521, 23 S. E. 414, it is held that, in an action by a widow to recover for the death of her husband, evidence on the part of the defendant is incompetent to show that to all appearances the plaintiff was better provided for than prior to the death of her husband, that she and her children were then constantly in rags and in destitute condition, and that the deceased was constantly in criminal scrapes, if not in jail under criminal charges, where, by statute, the measure of damages was the gross value of the decedent's life without regard to whether or not the wife had previously received anything from him, and without reference to what his personal expenses may have been.

⁶⁴*Preble v. Wabash R. Co.* (1909) 243 Ill. 340, 90 N. E. 716, holding that evidence is admissible to show that the decedent was the sole support of his widow at the time of his death, although proof of the pecuniary circumstances of the widow would be improper.

Pittsburgh, C. C. & St. L. R. Co. v. Kinare (1903) 203 Ill. 388, 67 N. E. 826, holding that, in an action by a personal representative to recover the pecuniary loss sustained by the widow and next of kin through the wrongful death of his decedent, their dependency upon the decedent may be shown, but not their necessitous condition, as the fact that there are some of them who are blind, palsied, deaf, or crippled.

Swift v. Foster (1896) 163 Ill. 50, 44 N. E. 837, holding that it is competent to show that the widow and children of the deceased were dependent upon him before and at the time of his death for their support, but it is not competent to show their pecuniary circumstances.

Pennsylvania, Co. v. Keane (1892) 143 Ill. 172, 32 N. E. 260, holding that, in an action by a widow as administratrix of the estate of her husband, to recover for his wrongful death, she may testify that at the time of his death the decedent was her sole support.

Chicago, B. & Q. R. Co. v. Johnson (1882) 103 Ill. 512; *Chicago & A. R. Co. v. May* (1883) 108 Ill. 288, holding that the widow may show her prior dependency upon the deceased for support.

And see *Litchfield & M. R. Co. v. Shuler* (1907) 134 Ill. App. 615, holding that, in a suit by a widow as administratrix to re-

is the value of the life lost, the physical condition, age, etc., of the statutory beneficiaries, are not material, for these matters have no bearing upon the amount of recovery; that is to be determined from data as to the decedent and those entitled under the statute to participate in the judgment rendered.⁶⁵

In any event, for evidence of the pecuniary or physical condition of the statutory beneficiaries to be admissible there must have been a dependent connection between decedent and the surviving relatives. Thus, evidence is not admissible as to the feeble health or

crippled condition of persons other than those entitled under the statute to participate in the damages awarded for the destruction of the decedent's life.⁶⁶ And evidence is not generally admissible of hardships and financial losses endured by the beneficiaries since the death of the decedent. For example, evidence is inadmissible as to their ill health or as to specific instances of hardship other than a general dependent or crippled condition, since that time,⁶⁷ or that they have been compelled to work for a living.⁶⁸ But it has been held that evidence is admissible that a child was born to

cover for the death of her husband, evidence is inadmissible that she and her minor children were dependent upon the deceased for support at the time of the injury which resulted in his death; *Brennen v. Chicago & C. Coal Co.* (1909) 241 Ill. 610, 89 N. E. 756, holding that evidence is inadmissible as to the resources of the widow of the decedent or her financial condition; *Chicago, P. & St. L. R. Co. v. Woolridge* (1898) 174 Ill. 330, 51 N. E. 701, holding that the poverty, health, helplessness, or dependency of the lineal next of kin of the decedent is immaterial on the question of the amount of recovery for his wrongful death based upon the statute limiting the damages recoverable to the pecuniary loss of the statutory beneficiaries. In this case it is pointed out that the loss is the amount which the deceased would have added to his estate had he lived out his natural life. But it is immaterial whether or not the next of kin had other pecuniary resources. *Chicago & N. W. R. Co. v. Moranda* (1879) 93 Ill. 302, 34 Am. Rep. 168, 14 Am. Neg. Cas. 362; *Heyer v. Salisbury* (1880) 7 Ill. App. 93; *Chicago, R. I. & P. R. Co. v. Henry* (1880) 7 Ill. App. 322; *Beard v. Skeldon* (1883) 13 Ill. App. 54; *John Morris Co. v. Burgess* (1892) 44 Ill. App. 27; *Rautman v. Chicago Consol. Traction Co.* (1910) 156 Ill. App. 457; *Lee v. Toledo, St. L. & W. R. Co.* (1913) 184 Ill. App. 144; *Chicago & N. R. Co. v. Howard* (1880) 6 Ill. App. 569.

And see *Kulvie v. Bunsen Coal Co.* (1911) 161 Ill. App. 617, affirmed in (1912) 253 Ill. 386, 97 N. E. 688, holding that evidence as to the pecuniary circumstances of the widow and family is incompetent, although it may be shown that the widow and family were entirely dependent upon the deceased for their support.

Illinois C. R. Co. v. Baches (1870) 55 Ill. 379, holding, where the measure of recovery is the pecuniary loss sustained by the widow and children, that the feelings of these parties or their health or poverty cannot be considered in assessing damages; nor can it be shown that the wife was deformed and disabled.

⁶⁵ *McClagherty v. Rogue River Electric Co.* (1914) 73 Or. 135, 140 Pac. 64, 144 Pac. 569.

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⁶⁶ *Staal v. Grand Rapids & I. R. Co.* (1885) 57 Mich. 239, 23 N. W. 795, holding, where there is no dependent connection between the decedent and the statutory beneficiaries, their poverty and his health should not be considered; but where, as the head of the family, he was the family supporter, the jury are entitled to the fullest insight into the family circumstances, and, in the absence of special instructions, they are to use their best judgment in arriving at the result.

Lipp v. Otis Bros. & Co. (1900) 161 N. Y. 559, 56 N. E. 79, holding that, where the measure of recovery is the pecuniary loss of the next of kin, it is not competent to show the necessitous condition of other relatives of the decedent than those entitled to participate in the proceeds of the recovery.

Serdan v. Falk Co. (1913) 153 Wis. 169, 140 N. W. 1035, holding that evidence is inadmissible as to the age and condition of the health of the parents of the wife of the deceased, and as to the age of his father.

⁶⁷ *Harrison v. New York C. & H. R. R. Co.* (1909) 195 N. Y. 86, 87 N. E. 802, holding that evidence is admissible as to the age of decedent's children and their dependence upon him for support, but not as to one of them being an inmate of an orphan asylum.

Beaumont Traction Co. v. Dilworth (1906) — Tex. Civ. App. —, 94 S. W. 352, holding that evidence is inadmissible to show that the home of the decedent and his minor children had been lost by foreclosure proceedings since his death.

Simoneau v. Pacific Electric R. Co. (1913) 166 Cal. 264, 49 L.R.A.(N.S.) 737, 136 Pac. 544, holding that, notwithstanding the admissibility of evidence showing permanent disabilities of children dependent upon the deceased for support, nevertheless evidence is not admissible to show sickness of members of decedent's family subsequent to his death.

⁶⁸ *Flynn v. Fogarty* (1883) 106 Ill. 263, holding that evidence is inadmissible as to the hardships which the widow had endured since her husband's death, and the fact that one of her daughters had been compelled to go out to service.

the widow of the decedent since the latter's death and that it died.⁶⁹

8. Pecuniary condition of the deceased.

As a general rule evidence is inadmissible to show the pecuniary condition of the deceased at the time of his death,⁷⁰ although, as shown in another note in this series, evidence that the deceased had accumulated property during his lifetime is admissible as bearing upon his earning capacity and his probable accumulation of property had he lived out his natural life.⁷¹ As a practical matter, the pecuniary condition of the

deceased at the time of his death may be indirectly shown, at least in some cases, by evidence of the dependent and needy condition of the widow and children of the deceased. Except as admitted in this manner, or for the purpose of showing the earning capacity or business ability of the deceased, evidence has been held inadmissible in behalf of the defendant to show that the widow and children or other beneficiaries, as a matter of fact, have profited by the death of the decedent because of property which he had accumulated and which came to them,⁷² nor is evidence admis-

Central R. Co. v. Moore (1878) 61 Ga. 151, holding that, in an action by a widow to recover for the death of her husband, evidence is inadmissible to show that since her husband's death she has worked in the fields for a living.

⁶⁹ Preble v. Wabash R. Co. (1909) 243 Ill. 340, 90 N. E. 716, holding that evidence of the widow is admissible to show that since the death of the deceased she has given birth to a stillborn child where the declaration contained an allegation that the deceased was survived by a widow and an unborn child.

⁷⁰ S. H. Kress & Co. v. Markline (1918) — Miss. —, 77 So. 858, holding that evidence in behalf of the widow is inadmissible to show that decedent's home was not paid for. In this case the receipt of such evidence was held not to be reversible error.

Starcher v. South Penn Oil Co. (1918) — W. Va. —, 95 S. E. 28, holding that evidence is inadmissible in behalf of the widow that the deceased owned a farm which had not been paid for. Receipt of such evidence, however, was held not to be reversible error.

Brunswick & W. R. Co. v. Wiggins (1901) 113 Ga. 842, 61 L.R.A. 513, 39 S. E. 551, holding that, in an action by a widow to recover for the wrongful death of her husband, evidence that the decedent left no estate or property is not admissible.

Delphi v. Lowery (1881) 74 Ind. 520, 39 Am. Rep. 98, holding that evidence that the decedent left his family in a destitute condition is incompetent in an action for his wrongful death.

Hunn v. Michigan C. R. Co. (1889) 78 Mich. 513, 7 L.R.A. 500, 44 N. W. 502, holding that evidence is not admissible as to the means of the widow, and as to the fact that there was an encumbrance upon land left by the decedent.

Chicago, R. I. & P. R. Co. v. Holmes (1903) 68 Neb. 826, 94 N. W. 1007, holding that evidence as to the amount of property left by the decedent is immaterial in an action by his personal representative for the benefit of the widow and children. To the same effect is Chicago, R. I. & P. R. Co. v. Hambel (1902) 2 Neb. (Unof.) 607, 89 N. W. 643.

But see Ft. Worth & D. C. R. Co. v. L.R.A.1918C.

Stalcup (1914) — Tex. Civ. App. —, 167 S. W. 279, holding that the widow may testify that, at the time of the killing of her husband, they owned no property and were renting the house in which they lived, and that the deceased was a good provider for his family.

And see *supra*, note 59.

And see Koosorowska v. Glasser (1889) 8 N. Y. Supp. 197, holding that it is not reversible error to permit evidence that the decedent left no property.

⁷¹ Note appended to West Salem v. Industrial Commission, *ante*, 1080.

And also note appended to Spreen v. Erie R. Co. *ante*, 1087, Phelps v. Winona & St. P. R. Co. (1887) 37 Minn. 485, 5 Am. St. Rep. 867, 35 N. W. 273, holding evidence as to what the deceased was worth at the time of his death is admissible as bearing upon the reasonable expectation of pecuniary benefit to his family from the continuance of his life.

But see Cooper v. North Carolina R. Co. (1905) 140 N. C. 209, 3 L.R.A.(N.S.) 391, 52 S. E. 932, 6 Ann. Cas. 71, holding to be irrelevant evidence tending to show the amount of property left by the decedent as bearing upon his capacity to earn and accumulate money, for, if this evidence should show a large estate, there are many ways by which it might be explained otherwise than by the capacity of the deceased to accumulate money, and if it shows a small estate there are as many ways in which it could be accounted for consistent with the highest capacity to earn and acquire; hence such evidence would tend rather to confuse than to aid the investigation.

⁷² Sloss-Sheffield Steel & I. Co. v. Holloway (1905) 144 Ala. 280, 40 So. 211, holding that the fact that the deceased may have saved some money out of his earnings, which his widow received at the time of his death, will not reduce the amount of the recovery in her behalf.

Stahler v. Philadelphia & R. R. Co. (1901) 199 Pa. 383, 85 Am. St. Rep. 791, 49 Atl. 273, holding that evidence is inadmissible that the children of the decedent, who are suing to recover their pecuniary loss by his death through the negligence of the defendant benefited by his death by inheriting his estate, which was a large one, the present

sible of the receipt by the beneficiaries of other benefits ascribable to his death.⁷³ It has, however, been held that, in an action by adult children to recover damages for the negligent destruction of the life of their mother, the defendant may show that the decedent left considerable property which the children had received.⁷⁴

9. *Pecuniary condition of the defendant.*

In general the financial condition of the defendant and his ability to respond in damages have no legitimate bearing either upon the question of his liability or the amount of damages recoverable for negligently causing the death of another, where the damages are limited to compensation for the pecuniary loss to the statutory beneficiaries. Hence, evidence of the wealth of the defendant is inadmissible.⁷⁵ This rule, however, has been held not to apply where the damages recoverable are punitive or exemplary, based upon the wrongful or wanton act of defendant, and in such case his wealth may be shown.⁷⁶

worth thereof exceeding the amounts annually received by the plaintiff from the deceased in his lifetime. To the same effect, see *Wiest v. Electric Traction Co.* (1901) 200 Pa. 148, 58 L.R.A. 666, 98 Atl. 891.

⁷³ See notes in 67 L.R.A. 92, and L.R.A. 1915E, 1201, as to receipt of proceeds of insurance as affecting measure of damages for death.

St. Louis, I. M. & S. R. Co. v. Maddry (1893) 57 Ark. 306, 21 S. W. 472, 11 Am. Neg. Cas. 133, holding that evidence is not admissible to show that since the death of decedent his children had been allowed a government pension.

Devine v. Chicago (1912) 172 Ill. App. 246, holding that evidence is not admissible in behalf of the defendant to show that the widow had received certain sums of money since the decedent's death which were paid because of his death.

And see notes in 67 L.R.A. 91, and L.R.A. 1915E, 1205, as to receipt of property from estate of decedent as affecting the measure of the recovery for his death.

⁷⁴ *San Antonio & A. P. R. Co. v. Long* (1894) 87 Tex. 148, 24 L.R.A. 637, 47 Am. St. Rep. 87, 27 S. W. 113, holding where the damages recoverable consist of compensation to the children or parents, in an action by adult children for the wrongful death of their mother, where the only aid they received was a part of the income she received from property, the defendant may show in mitigation of damages that the plaintiff received such property through the death of their mother.

Adult children suing for the death of their mother may introduce in evidence an L.R.A. 1918C.

10. *Expenses of decedent paid by defendant.*

In an action to recover compensation to the statutory beneficiaries for their pecuniary loss by the destruction of the life of a relative, the defendant is not entitled to show, either in bar or in mitigation of damages, that he paid out large sums of money for the support and maintenance of the deceased and for his medical expenses after he was injured and before he died.⁷⁷

11. *Sufficiency of the evidence.*

a. *In general—loss to family.*

In considering the sufficiency of the evidence to entitle the plaintiff to recover substantial damages for the negligent destruction of the life of his decedent, in behalf of designated beneficiaries, the relation existing between the decedent and these beneficiaries is of importance. It is to be noted in this regard, however, that it is not necessary to show that the statutory beneficiary had a legal claim upon the decedent for support or aid.⁷⁸ As heretofore pointed

inventory of her property filed by her administrator in the matter of her estate as bearing upon the decedent's income from her property during her life. *Rader v. Galveston, H. & S. A. R. Co.* (1911) — Tex. Civ. App. —, 137 S. W. 718.

⁷⁵ *Louisville, C. & L. R. Co. v. Mahony* (1870) 7 Bush (Ky.) 235.

Conant v. Griffin (1868) 48 Ill. 410; *Chicago & N. W. R. Co. v. Bayfield* (1877) 37 Mich. 205, 16 Am. Neg. Cas. 87.

⁷⁶ *Louisville, C. & L. R. Co. v. Mahony* (Ky.) supra, holding that, in an action to recover punitive damages for death through the wrongful or wanton act of the defendant, his pecuniary condition may be shown.

Morgan v. Durfee (1879) 69 Mo. 469, 33 Am. Rep. 508, holding that it is only when exemplary damages are recoverable that evidence as to the financial condition of the defendant is admissible.

⁷⁷ *Murray v. Usher* (1889) 117 N. Y. 542, 23 N. E. 564, holding that evidence of amounts paid by the defendant during the lifetime of the decedent to cover his support, maintenance, and medical expenses, as well as evidence as to the amount paid for his funeral expenses, is not admissible in behalf of the defendant, either in bar or in mitigation of damages, in an action by the injured person's personal representative to recover the pecuniary loss to the statutory beneficiaries through his death, where the sums thus paid out were not paid in settlement of the claim of the decedent.

⁷⁸ *Illinois C. R. Co. v. Barron* (1867) 5 Wall. (U. S.) 90, 18 L. ed. 591, holding that, under a statute similar to Lord Campbell's Act, the maintenance of an action

out, and as more particularly shown in another note in this series,⁷⁹ a presumption of pecuniary loss exists in favor of the widow and children and the parents of minor children. But this presumption does not exist in favor of collateral kindred, and the courts are not agreed as to whether or not it exists in favor of a parent for the death of an adult child,⁸⁰ or in favor of an adult child for the death of a parent.⁸¹

One effect of this presumption, where it exists, is to relieve the plaintiff of the necessity of making direct proof of pecuniary loss, this essential resting in inference from general evidence. For

for wrongful death does not depend upon the ability of the widow and next of kin of the decedent to show that they would have had a legal claim on the deceased for support had he survived.

⁷⁹ See note to *Raines v. Southern R. Co.* ante, 1056.

⁸⁰ See note in L.R.A.1916E, 190.

⁸¹ See note in L.R.A.1916E, 176.

⁸² *Backer v. Aspinwall* (1917) 255 Pa. 541, 100 Atl. 479, holding that evidence of the decedent's age, health, occupation, earnings, personal expenses, habits, and the manner in which he used his earnings, is sufficient to show pecuniary loss to his family.

⁸³ *Malott v. Shimer* (1899) 153 Ind. 35, 74 Am. St. Rep. 278, 54 N. E. 101, 6 Am. Neg. Rep. 263, holding that where the relation of the decedent to those for whose benefit a suit for his wrongful death is being prosecuted has been shown, as well as his obligation, disposition, and ability to earn wages or conduct business, and care for, support, advise, and protect those dependent upon him, the matter is then to be submitted to the judgment and sense of the jury. To same effect in *Pittsburgh, C. C. & St. L. R. Co. v. Burton* (1894) 139 Ind. 357, 37 N. E. 150, 38 N. E. 594, 11 Am. Neg. Cas. 475.

Cleveland, C. C. & St. L. R. Co. v. Lutz (1917) — Ind. App. —, 116 N. E. 429, holding that evidence tending to show that the decedent contributed to the aid of her children, and that there was some probability that she would have continued such contributions had she lived, is sufficient.

⁸⁴ *Murphy v. Erie R. Co.* (1911) 202 N. Y. 242, 95 N. E. 699, holding that it is always proper, and sometimes necessary, to make proof of such facts as the age, sex, health, and general intelligence of the person killed, and his relation to the next of kin, and their condition in life, for all these matters have a bearing upon the question of pecuniary loss suffered by those for whose benefit the action is maintained.

Houghkirk v. Delaware & H. Canal Co. (1883) 92 N. Y. 219, 44 Am. Rep. 370, holding that, where the circumstances of the next of kin, and the age, sex, and char-

acteristics of the deceased, are shown, it is for the jury to estimate the pecuniary injuries, present and prospective, to the next of kin from the death complained of. *Baltimore & O. R. Co. v. State* (1866) 24 Md. 271, holding that it is sufficient to sustain a verdict for substantial damages to show the age, habits, health, and character of the employment of decedent, and the members of his family surviving him, and the fact that he supported them by his labor.

⁸⁵ *Foster v. Butler County Light Co.* (1917) 255 Pa. 590, 100 Atl. 452, holding that evidence of the age, life expectancy, occupation, wages, health, and habits of industry of the deceased, and the manner in which he supported his family, will sustain a substantial recovery in behalf of the family.

Evarts v. Santa Barbara Consol. R. Co. (1906) 3 Cal. App. 712, 86 Pac. 830, holding that, in an action for the death of a man survived by a wife and children, evidence as to his health and domestic relations, together with evidence that the decedent was a kind and indulgent father and an attentive husband to his wife, who was an invalid, and needed much personal care and nursing, is sufficient to sustain a judgment for substantial damages.

⁸⁶ *Betting v. Hobbett* (1892) 142 Ill. 72, 30 N. E. 1048, holding that evidence that the widow had no means of support of her own, and that her deceased husband was a good workman, a strong, healthy young man, earning \$20 per month, which was devoted to the support of his family, that he paid the rent, for her clothing and for provisions for the family, shows actual loss to the widow by his death, and is not overcome by evidence that the wife labored, kept boarders, and that the deceased collected money which she earned.

Chicago v. Scholten (1874) 75 Ill. 468, holding that the pecuniary loss to the lineal kindred of the deceased can be determined from evidence as to his personal characteristics, mental and physical capacity, habits of industry and sobriety, and earnings and contributions to his family. Approved in *Chicago, P. & St. L. R. Co. v. Woolridge* (1898) 174 Ill. 330, 51 N. E. 701.

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been held that evidence of the decedent's age, habit of industry, means, business, character, etc., is not only admissible, but that it is indispensable to the recovery of substantial damages.⁸⁷

Generally, however, many of these requirements may be dispensed with without affecting the right of the plaintiff to recover substantial damages. For example, evidence of the amount actually contributed by the deceased to the support of his family is not essential to the recovery of substantial damages in their behalf, where there is evidence as to his life expectancy, health, habits of industry, etc., and the manner in which he supported his wife and children.⁸⁸ Even though there is no precise evidence as to the value of the decedent's life, the widow is entitled to recover substantial damages for his death where there is evidence that the decedent was an active workman and earned a good living for himself and family.⁸⁹ And evidence merely that deceased was a stout healthy man of a

given age, and that he was survived by a minor son who was living with him, was held sufficient to carry the case to the jury on the question of whether or not the son suffered pecuniary loss, and if so the amount thereof.⁹⁰ It is not essential to show that the next of kin would probably have received from the deceased contributions of money or of things purchased with money.⁹¹

Evidence as to the earnings of the deceased and as to his contributing a reasonable amount thereof toward the support of his family,⁹² or as to the age, occupation, or condition in life of the deceased,⁹³ has been held sufficient to sustain a substantial recovery in behalf of his beneficiaries. But evidence of the earnings of the deceased is not essential where there are data with regard to the deceased, his employment, the manner in which he supported his family, or their circumstances or condition, from which the jury may estimate their pecuniary loss,⁹⁴ and the failure to produce evidence of the earnings of the

⁸⁷ *Burton v. Wilmington & W. R. Co.* (1880) 82 N. C. 504, holding that evidence as to the decedent's age, habits of industry, means, business, character, etc., is not only admissible, but is indispensable.

Lazelle v. Newfane (1898) 70 Vt. 440, 41 Atl. 511, holding that, to enable the jury properly to estimate the pecuniary injury, it is necessary that evidence be given showing the situation and circumstances in life of the deceased, his age, probable duration of life, mental and physical condition, ability and disposition to labor, habits of industry, and earning power, and also the amount of his estate.

⁸⁸ *Foster v. Butler County Light Co.* (1917) 255 Pa. 590, 100 Atl. 452, holding that evidence as to the decedent's life expectancy, occupation, health, habits of industry, and the manner in which he supported his wife and children, will sustain a verdict for substantial damages, although there is no direct evidence as to the amount actually contributed by the deceased to his wife and family.

⁸⁹ *Murdock v. Brown* (1885) 16 Mo. App. 548, holding, in an action by a widow to recover damages for the death of her husband, a judgment in her favor will not be reversed because there is no precise evidence as to the value of decedent's life, where, however, it was shown that he was an active workman and earned a good living for himself and family.

⁹⁰ *Utah Sav. & T. Co. v. Diamond Coal & Coke Co.* (1903) 26 Utah, 299, 73 Pac. 524, holding, where the evidence shows that the deceased was a stout healthy man forty-two years old, and that his son twenty years old was living with him, the question of damages to the son for his father's negligent death is for the jury. L.R.A.1918C.

⁹¹ *Carter v. West Jersey & S. R. Co.* (1908) 76 N. J. L. 602, 19 L.R.A.(N.S.) 128, 71 Atl. 253, 16 Ann. Cas. 929.

⁹² *Cahaba Southern Min. Co. v. Pratt* (1906) 146 Ala. 245, 40 So. 943, holding that, in an action by a personal representative where there is evidence that decedent earned from \$50 to \$60 per month, and contributed to the use of his family from \$20 to \$30 per month, it is proper to refuse to instruct the jury that if they find for the plaintiff their verdict shall be for nominal damages only.

⁹³ *Hays v. Hogan* (1914) 180 Mo. App. 237, 165 S. W. 1125, holding that, where the wife sued for the death of her husband, evidence of the age and condition in life of the deceased will sustain an award of substantial damages, and she is not restricted to the recovery merely of nominal damages.

⁹⁴ *Carpenter v. Rolling* (1900) 107 Wis. 559, 83 N. W. 953, holding that, in an action by a widow to recover the pecuniary loss she suffered through the death of her husband, evidence showing that he was a farmer and owned a farm, and the amount of crops he raised with her help, and that she had continued to work the farm after his death, made a sufficient case for the jury.

And see *Sebille v. Dunn* (1917) — R. I. —, 99 Atl. 831, holding that evidence as to the crops raised by the deceased and his income therefrom, his personal expenses, and the expense of maintaining the farm, is sufficient to sustain a recovery of substantial damages, although not based upon exact figures, it being the best evidence procurable on the subject.

deceased, the amount he contributed to the support of his family, or as to the time he spent with them, or what he did toward educating his children, does not necessarily preclude the recovery of more than nominal damages.⁹⁵ It has, however, been held that evidence of the age, health, and habits of the deceased, without any showing as to his earning capacity or expenditures, is not sufficient to entitle the plaintiff to recover substantial damages.⁹⁶ But evidence as to the age of the deceased and that upon the day he was killed, and for a long

time prior thereto, he had been performing manual labor for which he received good wages, is some evidence from which the jury may estimate the pecuniary loss to his beneficiaries, although there is no evidence as to his habit of saving his earnings or of any contributions made by him to his beneficiaries.⁹⁷ Where the widow is in court it is not essential to offer evidence as to her age and health, for the jury may judge for themselves in this regard.⁹⁸ And it has been held that evidence that there were statutory beneficiaries dependent upon

⁹⁵ *Ruppel v. United R. Co.* (1905) 1 Cal. App. 686, 82 Pac. 1073, holding that, while evidence that the deceased was a man in sound health and earning monthly wages is important to be considered in assessing damages to his widow and children, yet the absence of such proof does not preclude the recovery in their behalf of more than nominal damages.

Malott v. Shimer (1899) 153 Ind. 35, 74 Am. St. Rep. 278, 54 N. E. 101, 6 Am. Neg. Rep. 263, holding that, for the death of her husband, the widow is entitled to recover more than nominal damages, although she does not show what part of the earnings the decedent contributed to the support of his family, or the amount of time he spent with his family, or what he did toward educating and raising his children.

In *Missouri P. R. Co. v. Moffatt* (1899) 60 Kan. 113, 72 Am. St. Rep. 343, 55 Pac. 837, although no evidence was given as to the amount the deceased earned or had earned, or as to the amount of pecuniary aid or benefit which it would have been possible for him to give to his children in the future, a judgment for \$5,000 damages was affirmed, there being evidence of the age and health of the deceased, and as to his habits of industry and sobriety and the character of his employment, and evidence that he supported himself and family of six children, four of whom were girls.

Baltimore & O. R. Co. v. State (1866) 24 Md. 271, holding that, where evidence is given as to the age, habits, health, and occupation of the deceased, and also as to the number of his family, and their condition before and after his death, the court should not direct the jury to assess nominal damages only, although there is no proof as to the amount of wages earned.

Voelker v. Hill-O'Meara Constr. Co. (1910) 153 Mo. App. 1, 131 S. W. 907, holding that it is not necessary for the widow in an action to recover damages for the death of her husband, to prove what his earnings were in order to avoid being limited to the recovery of nominal damages. Aside from his society, for the loss of which she is not entitled to recover, and his support, she has other property rights in the life of her husband which are elements of damage in her favor. For ex-L.R.A.1918C.

ample, the personal attention of the husband to insure her comfort, and the many ways he can make himself useful and helpful, should be taken into consideration in assessing her loss. *Foster v. Butler County Light Co.* supra, note 88.

Norfolk & W. R. Co. v. Phillips (1902) 100 Va. 362, 41 S. E. 726, holding the evidence that the deceased was thirty-eight years of age, and had been for some time in the employ of the defendants as a section hand, and received wages sufficient to support his wife and eight children, is sufficient to sustain a reasonable verdict in behalf of his widow and family, although there is no direct evidence as to his probable earnings, considering his age, business capacity, experience, habits, energy, perseverance, etc.

And see *Dillon v. Hudson, P. & S. Electric R. Co.* (1905) 73 N. H. 367, 62 Atl. 93, holding that, although there is evidence that the decedent, the wife of the plaintiff, never earned any money and probably never would earn any, the jury are not thereby required to find that the decedent did not have the capacity to earn money.

⁹⁶ *McHugh v. Schlosser* (1894) 159 Pa. 480, 23 L.R.A. 574, 39 Am. St. Rep. 699, 28 Atl. 291, holding that evidence of the age, health, and habits of the deceased, without any showing as to his earning capacity or expenditures, will not support a verdict for substantial damages in an action by his widow to recover her pecuniary loss.

⁹⁷ *Christensen v. Floriston Pulp & P. Co.* (1907) 20 Nev. 552, 92 Pac. 210.

⁹⁸ *Philadelphia, B. & W. R. Co. v. Tucker* (1910) 35 App. D. C. 123, L.R.A.1915C, 39, holding that a recovery for death through negligence may be had although there is no direct evidence as to the age or health of decedent's widow or an infant child, or as to their probable duration of life, where there is evidence of the age of the deceased and the widow appeared before the jury as a witness.

Meng v. Emigrant Industrial Sav. Bank (1915) 169 App. Div. 27, 154 N. Y. Supp. 509, holding that, where the widow is in court, it is not necessary to introduce proof as to her age and state of health, as the jury may judge as to her age and health by her looks.

the deceased and as to the amount that he contributed to their support is sufficient without proving their ages.⁹⁹

And it has been held that, where the evidence fails to show the habits of the deceased for industry and sobriety, his treatment of his family, and whether he ever contributed to their support, the law presumes that the deceased was sober and industrious, treated his family tenderly and properly, and contributed sufficiently toward their support.¹⁰⁰

But where the only evidence to show pecuniary loss to the widow from the death of her husband was that the husband earned a certain amount of money per month and lived with his mother, it is not sufficient to sustain a verdict of substantial damages in behalf of the widow.¹⁰¹

b. Loss to husband.

For the husband of the person negligently killed to be entitled to recover his pecuniary loss based upon loss of services of the deceased, it is not essential to prove the value of the services with mathematical certainty.¹⁰² Gener-

ally, evidence as to the age of the deceased, her strength, health, life expectancy, and her good qualities as mother and housekeeper, is sufficient in this regard,¹⁰³ and even evidence of the age, capacity, and situation of the deceased, and as to the business and condition of the husband, will make a sufficient case of pecuniary loss to him, although the deceased was not living with him at the time of her injury and death.¹⁰⁴ But it is not enough to prove the marriage, the age of the parties, and the death of the wife, and then turn the jury loose upon the field of speculation or prejudice to hunt for some basis for a verdict.¹⁰⁵

c. Loss of parental care and training to children.

Where one element of damages sought to be recovered in behalf of the minor children is the loss of parental care and training, by the great weight of authority it is sufficient in this regard to show the good character of the deceased and his devotion to his family,¹⁰⁶ especially where there is also evidence that the

⁹⁹ Alabama Mineral R. Co. v. Jones (1898) 121 Ala. 113, 25 So. 814.

¹⁰⁰ Voelker v. Hill-O'Meara Constr. Co. (Mo.) supra.

¹⁰¹ Evarts v. Santa Barbara Consol. R. Co. (1906) 3 Cal. App. 712, 86 Pac. 830, holding that evidence that during his life the domestic relations between the plaintiff and her deceased husband were the happiest that could exist raises a presumption that the deceased performed the duty of supporting his family.

¹⁰² Goen v. Baltimore & O. S. W. R. Co. (1913) 179 Ill. App. 566.

¹⁰³ Moses v. Mathews (1914) 95 Neb. 672, 146 N. W. 920, Ann. Cas. 1915A, 698, holding that, to entitle the husband to recover for the loss of the wife's services through her death, it is not essential to prove the value of such services with mathematical certainty.

¹⁰⁴ Fisher v. Ellston (1916) 174 Iowa, 364, 156 N. W. 422, holding that evidence of the age of the deceased, her physical strength, health, and life expectancy, and that she was a good mother to her children, loving to her husband, and made a good home, and was a good housekeeper, doing all her own work and being gentle, kind, sympathetic, and companionable, furnishes a sufficient basis for estimating the damages for the loss of her services.

¹⁰⁵ Austin v. Metropolitan Street R. Co. (1905) 108 App. Div. 249, 95 N. Y. Supp. 740, holding that, although at the time a woman was killed she was not living with her husband, and she was successfully conducting a business of her own, nevertheless, in an action for her wrongful death for the benefit of her husband, the jury should

not be limited to a verdict of nominal damages, there being evidence of the decedent's earning capacity, expectancy of life, etc., and the husband being entitled to a share of the wife's personal property in event that he survived her.

And see Ingrafia v. Samuels (1902) 71 App. Div. 14, 75 N. Y. Supp. 718, holding, where there is evidence as to the sex, age, capacity, and situation of the deceased, and as to the next of kin, and as to the business, occupation, and condition of the husband, and also evidence that the deceased left a father and brother surviving her, although their exact condition is not shown, that the evidence is sufficient to support a verdict for substantial damages.

¹⁰⁶ Nelson v. Lake Shore & M. S. R. Co. (1895) 104 Mich. 582, 62 N. W. 993.

¹⁰⁷ St. Louis, I. M. & S. R. Co. v. Standifer (1907) 81 Ark. 275, 99 S. W. 81, holding that evidence that the decedent was an honest, industrious man, kind to his children, and that he sent them to school as much as his circumstances permitted, and that he labored for their support, justifies a recovery by the children, as an element of damages for his death, for the loss of his parental instruction and training.

Wabash R. Co. v. Gretzinger (1914) 182 Ind. 155, 104 N. E. 69, holding, where a child is of tender age, that it is not error to submit to the jury the question of the loss of parental care, training, advice, guidance, etc., through the death of the father, although the only evidence bearing upon this point is that the deceased was sober, industrious, and devoted his earnings to the support of his wife and child.

St. Louis, I. M. & S. R. Co. v. Haist

deceased undertook to instruct his children.¹⁰⁷ So, where there is testimony concerning the personal qualities of the deceased, and the interest which he had in his family, it is proper to instruct the jury that they may take into consideration the care, attention, instruction, training, and guidance which the evidence shows the deceased reasonably might have expected to give his children during their minority, and to include the pecuniary value thereof in the damages assessed.¹⁰⁸

It has been held that, to entitle children to have considered as an element of their damages from the death of their father loss of nurture, instruction, and moral and physical training,

there must be evidence of the value of decedent's instruction and physical, moral, and intellectual training, and not merely inferences which may arise from evidence that he rendered them occasional assistance in their studies, such as a parent is supposed to render his children.¹⁰⁹

In general, it may be said that, to recover in behalf of children for care, training, and support after reaching majority, there must be some evidence showing that they had a reasonable expectation of the continuation of benefits of this character, or that there was a reasonable probability that they would continue to receive the same.¹¹⁰

(1903) 71 Ark. 258, 100 Am. St. Rep. 65, 72 S. W. 803, holding that, in assessing the damages to an infant for the death of its father and only parent, where it appears that the decedent in his lifetime was an honest hard-working man who had well provided for the child after the mother's death, the jury may consider the loss of care, support, and sustenance, and lost advantages in the way of training and education.*

St. Louis, I. M. & S. R. Co. v. Sweet (1895) 60 Ark. 550, 31 S. W. 571, holding that, where the proof shows that the decedent was a careful, painstaking, industrious, temperate, and trustworthy man, and of good business qualifications, it is sufficient to authorize damages for the loss to his children of his training and instruction.

¹⁰⁷ *Goddard v. Enzler* (1905) 123 Ill. App. 108, affirmed in (1906) 222 Ill. 462, 78 N. E. 805, holding that evidence that the deceased was a man of careful sober habits, that he instructed his children in good behavior, in right and wrong, to obey their parents, and to go to church, authorizes a recovery for the benefit of minor children, as damages for the loss of parental instruction and moral training, the deceased leaving a widow and eight children ranging from two to eight years of age.

St. Louis, I. M. & S. R. Co. v. Maddry (1893) 57 Ark. 306, 21 S. W. 472, 11 Am.

Neg. Cas. 133, holding that minor children, for the death of their father, are entitled to recover the loss of instruction and physical, intellectual, and mental training which they would have received from him had he lived, it appearing that he was a man of industrious habits, good character, a dutiful father who tried to educate his children properly. To the same effect, where the father was a man of industrious and temperate habits, and of good business qualifications, see *St. Louis, I. M. & S. R. Co. v. Sweet* (1895) 60 Ark. 550, 31 S. W. 571.

¹⁰⁸ *Norfolk & W. R. Co. v. Holbrook* (1915) 235 U. S. 625, 59 L. ed. 392, 35 Sup. Ct. Rep. 143, 7 N. C. C. A. 814.

¹⁰⁹ *Walker v. Lake Shore & M. S. R. Co.* (1897) 111 Mich. 518, 69 N. W. 1114, 1 Am. Neg. Rep. 267.

¹¹⁰ *Cleburne Electric & Gas Co. v. McCoy* (1912) — Tex. Civ. App. —, 149 S. W. 534, holding that, where there is no evidence that minor children had any expectation or that there was any probability of their receiving anything from their father after reaching their majority, had he not been killed, it is error to instruct the jury, as to the measure of damages, that they may include the reasonable value of the nurture, care, and education which the children would have received from the continued life of the father, without limiting the same to their minority. A. G. S.

KANSAS SUPREME COURT.

MICHAEL CHILLETI, by Next Friend,
Appt.,
v.

MISSOURI, KANSAS, & TEXAS RAIL-
WAY COMPANY.

(102 Kan. 297, 171 Pac. 14.)

Writ — service on railroad agent — ef-
fect on receiver.

Where a railway corporation has been

Headnote by PORTER, J.
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placed in the hands of a receiver under an order directing him to take into his possession and control all the assets and property of the corporation and to operate the railway, service of summons, in an action against the railway corporation, upon a

Note. — The subject of service of process, after appointment of receiver, upon person designated by statute to receive service for the corporation, is discussed in the note to *Ennest v. Pere Marquette R. Co.* 47 L.R.A. (N.S.) 179; and see later case, *Gursky v. Blair*, L.R.A.1916F, 359.

station agent who is in the employ of the receiver, and who had formerly occupied the same position for the corporation, is not good service as to the corporation.

For other cases, see Writ and Process, II. b, in Dig. 1-52 N. S.

(January 12, 1918.)

APPEAL by plaintiff from an order of the District Court for Cherokee County sustaining a motion to set aside the service of summons in an action brought to recover damages for personal injuries alleged to have occurred prior to the appointment of a receiver of the defendant company. Affirmed.

The facts are stated in the opinion.

Mr. Charles Stephens, for appellant:

If the railway corporations made some man its agent to act for it from day to day in business matters in which it had no right to act, it cannot be heard to say thereafter that, by reason of the fact that it was acting unlawfully when it was within the jurisdiction of this court and when summons was served upon it, such service is therefore not good.

Ennest v. Pere Marquette R. Co. 176 Mich. 398, 47 L.R.A. (N.S.) 179, 142 N. W. 567, Ann. Cas. 1915B, 594; State v. Port Royal & A. R. Co. 84 Fed. 67; Stewart v. Harmon, 98 Fed. 190; Brockert v. Central Iowa R. Co. 82 Iowa, 369, 47 N. W. 1026; Louisville, N. A. & C. R. Co. v. Cauble, 46 Ind. 277; Barnhart v. Michigan C. R. Co. 176 Mich. 406, 142 N. W. 570; Faltiska v. New York, L. E. & W. R. Co. 12 Misc. 478, 33 N. Y. Supp. 679, affirmed in 151 N. Y. 650, 46 N. E. 1146; Farris v. Richmond & D. R. Co. 115 N. C. 600, 20 S. E. 167; Grady v. Richmond & D. R. Co. 116 N. C. 952, 21 S. E. 304; Wert v. Keim, 2 Pa. Co. Ct. 405; Simpson v. East Tennessee V. & G. R. Co. 89 Tenn. 304, 15 S. W. 735; Anderson v. Buffalo, N. Y. & P. R. Co. 2 Pa. Co. Ct. 402; Georgia Southern R. Co. v. Bigelow, 68 Ga. 219; Hill v. Baltimore & O. R. Co. 7 Pa. Dist. R. 473; Howard v. Chesapeake & O. R. Co. 11 App. D. C. 300; Eddy v. Lafayette, 163 U. S. 456, 41 L. ed. 225, 16 Sup. Ct. Rep. 1082, affirming 1 C. C. A. 441, 4 U. S. App. 247, 49 Fed. 807; Central Trust Co. v. St. Louis A. & T. R. Co. 40 Fed. 426; Peterson v. Baker, 78 Kan. 337, 97 Pac. 373; Proctor v. Missouri, K. & T. R. Co. 42 Mo. App. 124; Jacobs v. Blair, 157 App. Div. 601, 142 N. Y. Supp. 897.

Defendant absolutely failed to impeach the sheriff's return when it failed to make affirmative proof that the Missouri, Kansas, & Texas Railway Company was not in Columbus, Kansas, through E. R. Lane, who acted as its agent in the collecting of L.R.A.1918C.

freight and bills due antedating the appointment of the receiver, and making such remittances direct to the corporation, and receiving receipts therefrom.

Huntington v. Crouter, 33 Or. 408, 72 Am. St. Rep. 726, 54 Pac. 208; Goddard v. Harbour, 56 Kan. 749, 54 Am. St. Rep. 608, 44 Pac. 1055; Davant v. Carlton, 53 Ga. 491; Wilson v. Shipman, 34 Neb. 573, 33 Am. St. Rep. 660, 52 N. W. 576.

Messrs. W. W. Brown, James W. Reid, and A. F. Williams, for appellee:

The return of the sheriff was void on its face because it does not affirmatively show that the service was had upon some person designated by the statute as a proper person upon whom service of summons could be made.

Union P. R. Co. v. Pillsbury, 29 Kan. 652.

Only those matters which are within the personal knowledge of the sheriff or the officer serving the writ are presumed to be true; and any matter as to which his information must be based upon inquiry, or upon information received from someone else, may be rebutted by proof.

Bond v. Wilson, 8 Kan. 228, 12 Am. Rep. 466; Starkweather v. Morgan, 15 Kan. 274.

The person upon whom the summons is served must be in the employ of such company or corporation.

LeRoy & C. Valley Air Line R. Co. v. Sidell, 62 Kan. 349, 63 Pac. 599; Union P. R. Co. v. Smith, 59 Kan. 85, 52 Pac. 102; St. Louis & S. F. R. Co. v. Bricker, 65 Kan. 326, 69 Pac. 328, 12 Am. Neg. Rep. 438; Cincinnati & M. R. Co. v. Orme, 1 Ohio C. C. 511, 1 Ohio C. D. 285; Cain v. Seaboard Air-Line R. Co. 7 Ga. App. 461, 67 S. E. 127.

Porter, J., delivered the opinion of the court:

The trial court sustained a motion to set aside the service of summons, and the plaintiff appeals.

The action was brought October 4, 1915, to recover against the railway company for injuries alleged to have occurred several years prior thereto. In September, 1915, by an order of the Federal court, a receiver was appointed for the railway company, and all the property and assets of the corporation of every kind and nature, and wherever situated or found, was by the order of the court taken out of its hands and turned over to the receiver, who was ordered to operate the same.

The summons was served upon E. R. Lane, and the return recites that "the said E. R. Lane being the general station agent and representative of said defendants and each of them in said capacity, the president, vice president, treasurer, secretary, chair-

man of the board of directors, or other chief officers not being found in my county, and the said defendants or either of them, not having designated any person or officer upon whom service of process could be made under the provision of the statute."

Section 72 of the Civil Code (Gen. Stat. 1915, § 6963), which provides for the manner of service of summons on a railroad corporation, reads: "Such process may be served on any local superintendent of repairs, freight agent, agent to sell tickets, or station keeper of such company or corporation in such county, or such process may be served by leaving a copy thereof at any depot or station of such company or corporation in such county, with some person in charge thereof and in the employ of such company or corporation, and such service shall be held and deemed complete and effectual."

It is the contention of plaintiff that the testimony taken on the hearing of the motion conclusively establishes that E. R. Lane, at the time the summons was served, was the station agent of the defendant. He testified in substance that the duties performed by him in the office and at the station had been the same during the last five years, and that after the appointment of the receiver he had performed certain services for the railway company which consisted of looking after a number of collections for services rendered by the railway company previous to the appointment of the receiver; that he had never been discharged by the railway company, except as he was notified by a circular letter sent to all the employees at the time the receiver was appointed. There is a stipulation that after the receivership the name of the Missouri, Kansas, & Texas Railway Company remained uncanceled on all stationery and forms of printed blanks just as it had been previous to the appointment of the receiver.

The findings of the court are that the receiver took charge of the property about September 26, 1915, and that E. R. Lane proceeded to look after the business under the employment of the receiver, otherwise performing practically the same duties as those he had been performing in the past; that other than by circular letter to all the employees notifying them of the receivership, he had not been formally discharged by the company; and that in the first two or three months following the receivership he collected a number of small items of freight and remitted them to the railway company as he was directed to do as general freight and ticket agent at Columbus; and that he was receipted for the same by the railway company, and not by the receiver.

L.R.A.1918C.

In our opinion the order setting aside the service must be affirmed. Whatever duties the station agent performed after the appointment of the receiver, he performed as agent of the receiver. Under the terms of the order appointing the receiver, the station agent was not in a position where, in the conduct of the same business, he could serve two masters. All the property and assets of the defendant company were taken out of its control and placed in the hands of the receiver to control and operate. If all the former employees of the railway company continued to be the agents of the company until they could be individually notified of their discharge and re-employment by the receiver, an intolerable situation would arise not contemplated by the order of the court, and one which would benefit neither the public nor the property. No formal discharge by the railway company of its former employees was required in order to sever the relation of employer and employee. That resulted immediately on the making of the order appointing the receiver. The railway corporation was not dissolved by the appointment; is still exists as a legal entity, and it may have agents for certain purposes; but no person in the employ of the receiver, in operating the railway or in handling any of the assets or property of the railway company, can be regarded as the agent of the company merely because of the duties performed by him. Whatever any servant, agent, or employee does in connection with the operation or control of any of the assets or property of the railway company is performed as agent of the receiver, and not of the company.

The fact that the name of the railway company remained on the blanks used by the receiver in the conduct of the business is of no probative force, any more than the fact that the name on the cars and engines of the company was not changed. In *Union P. R. Co. v. Smith*, 59 Kan. 80, 52 Pac. 102, the question arose over the admissibility of testimony to the effect that the engine causing the injury was a Union Pacific engine, and that the employees were employees of the Union Pacific, and it was said in the opinion: "In speaking of a railroad in the hands of receivers, it is usually designated by the name of the road, or of the corporation owning it, rather than that of the receivers. No confusion ordinarily arises, and there is none in this case. Proof that the property was Union Pacific property was competent evidence against the receivers, whose duty it was to have charge of the property. Proof that the employees were Union Pacific employees was good proof that they were employees

of the receivers, when the fact became clearly established that the receivers had entire and exclusive control of all the properties of the company and of the transaction of all its business." p. 85.

In *St. Louis & S. F. R. Co. v. Bricker*, 65 Kan. 321, 69 Pac. 328, 12 Am. Neg. Rep. 438, the question involved was whether or not an employee of the receiver was also an employee of the corporation, the principal contention being that the corporation was not liable for an injury occasioned by the negligence of the employees of the receiver. It was said in the opinion: "The principle of respondeat superior has no application. The receivers were the officers of the court and not the agents of the corporation, and the corporation is not, therefore, liable for the acts of the receivers, or the acts of their employees." p. 326.

Because the corporation could only be liable in consequence of some negligence of its own agents or employees, it was held that the company was not liable. It was said in the opinion: "The plaintiff, when injured, was not an employee of the corporation, and his injuries are not the result of the negligent act of any agent of the corporation or of the mismanagement of any engineer or employee of the corporation." p. 327.

The same question involved here has arisen in a number of cases. The decisions, however, are controlled by statutes, some of which differ from our provision as to the manner of service upon a railway company. A case directly in point is *Cain v. Seaboard Air-Line R. Co.* 7 Ga. App. 461, 67 S. E. 127. It was there held that "service of a suit against a corporation in the hands of a receiver, by serving an agent of the receiver, which agent had formally occupied the same position for the corporation, is not good service as to the corporation, (a) because, in order for service upon a corporation to be effective by reason of service upon an agent, the agent must at the time of service be in fact the agent of the corporation; and (b) because, when a corporation is in the hands of a receiver who is conducting its business, the agents

and employees are no longer those of the corporation, but are the agents of the receiver. *Cherry v. North & South R. Co.* 59 Ga. 447; *Henderson v. Walker*, 55 Ga. 481; *Ocean S. S. Co. v. Wilder*, 107 Ga. 220, 33 S. E. 179." p. 462.

It is argued that the court committed error in ignoring certain presumptions. It is said in the briefs "that it is the legal duty of a sheriff, in serving papers, to make due inquiry as to the identity of the person on whom such papers are served, and in all cases, until the contrary is shown by a clear preponderance of the evidence, the presumption is that such officer has performed his duty and his return speaks the truth."

The sheriff made due inquiry as to the identity of the person on whom he served the papers, and there is no question as to the correctness of the return in this respect. He did, in fact, serve the papers on E. R. Lane, who was the station agent; but when the order of the court appointing the receiver was introduced in evidence, it was shown that the sheriff was mistaken in stating that Lane was the agent of the railway company.

It is seriously contended that, because the court reserved the right to modify the order and to enlarge or diminish the duties of the receiver, it devolved on the defendant to show that some other order had not been made in the meantime authorizing the railway company to operate or control its property. The presumption, however, is that the order continued in force and effect until the contrary is shown. Again, it is said that "there is no evidence properly admitted even tending to overturn the presumption that the receiver acted within his authority when he permitted the railway company, through its agent Lane, to remain" at the station and "collect for it outstanding accounts," etc.

The contention begs the question by assuming that Lane was the agent of the railway company.

The judgment is affirmed.

Petition for rehearing denied March 15, 1918.

MISSOURI SUPREME COURT. (Division No. 2.)

STATE OF MISSOURI
v.

SWIFT & COMPANY et al.

(— Mo. —, 200 S. W. 1066.)

Food — forbidding sale — delivery — liability.

A nonresident doing business in another L.R.A.1918C.

state cannot be convicted of keeping on hand for sale colored oleomargarin contrary to state statutes, by reason of the fact that, upon receiving a telephone order for a quantity of the commodity by a resident of the

Note.—Under the form of statute involved in *STATE v. SWIFT & Co.*, the decisive question was whether the defendant had kept the commodity on hand "for the purpose of sale," and not merely the question where the sale was actually deemed to have

state, he placed such quantity in a vehicle and brought it into the state for delivery. For other cases, see *Food*, in *Dig. 1-52 N. S.*

(February 16, 1918.)

CERTIFICATION by the St. Louis Court of Appeals for determination by the Supreme Court of questions arising upon appeal by defendants from a judgment affirming a judgment of the Court of Criminal Correction convicting them of illegally selling imitation butter. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. A. & J. F. Lee and James A. Waechter, for defendants:

The evidence was not sufficient to support a conviction.

State v. Rosenberger, 212 Mo. 650, 20 L.R.A.(N.S.) 284, 126 Am. St. Rep. 580, 111 S. W. 509; State v. Wingfield, 115 Mo. 428, 37 Am. St. Rep. 406, 22 S. W. 363; Kerwin v. Doran, 29 Mo. App. 397; Glass v. Blazer Bros. 91 Mo. App. 564; Cunningham v. Ashbrook, 20 Mo. 553; Third Nat. Bank v. Smith, 107 Mo. App. 178, 81 S. W. 215; Ober v. Carson, 62 Mo. 209; State v. Newell, 140 Mo. 282, 41 S. W. 751; Longsdorff v. Meyers, 171 Mo. App. 256, 157 S. W. 85; Bass v. Walsh, 39 Mo. 192; Wheless v. Meyerschmid Grocer Co. 140 Mo. App. 572, 120 S. W. 708; Benjamin, Sales, 5th ed. 2; State v. Scott, — Mo. App. —, 189 S. W. 1191; Garbracht v. Com. 96 Pa. 449, 42 Am. Rep. 550; Com. v. Hess, 148 Pa. 98, 17 L.R.A. 176, 33 Am. St. Rep. 810, 23 Atl. 977; Williston, Sales, 1909 ed. 353, 547; Williams v. Gray, 39 Mo. 204; Rosenberger v. Pacific Exp. Co. 241 U. S. 47, 60 L. ed. 880, 36 Sup. Ct. Rep. 510; American Exp. Co. v. Iowa, 196 U. S. 134, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Louisville & N. R. Co. v. F. W. Cook Brewing Co. 223 U. S. 70, 56 L. ed. 355, 32 Sup. Ct. Rep. 189; Kirmeyer v. Kansas, 236 U. S. 568, 59 L. ed. 721, 35 Sup. Ct. Rep. 419; Rossi v. Pennsylvania, 238 U. S. 62, 59 L. ed. 1201, 35 Sup. Ct. Rep. 677; Jewell Tea Co. v. Lee's Summit, 189 Fed. 280.

Messrs. Frank W. McAllister, Attorney General, and S. E. Skelley, Assistant Attorney General, for the State:

Evidence of delivery by defendants of

colored oleomargarin to a customer is proof of "sale" or "offer for sale," in violation of the statute.

People v. Koch, 19 Misc. 634, 44 N. Y. Supp. 387; People v. McDermott Dairy Co. 122 N. Y. Supp. 294; Willis v. Standard Oil Co. 50 Minn. 296, 52 N. W. 652; Com. v. Gordon, 159 Mass. 8, 33 N. E. 709; People v. Lewis, 138 App. Div. 673, 122 N. Y. Supp. 1025.

Uncontradicted evidence of a delivery of colored oleomargarin by defendants to a customer in the city of St. Louis is sufficient to make out a prima facie case against defendants.

People v. Koch, 19 Misc. 634, 44 N. Y. Supp. 387; People v. McDermott Dairy Co. 122 N. Y. Supp. 294.

Where, by the terms of the contract of sale, the seller is required to send, forward, or deliver the goods to the buyer or to someone for him, at a designated place, title thereto does not vest in the buyer until the transportation is at an end, or the goods are delivered in accordance with the contract.

35 Cyc. 302, 303; Benjamin, Sales, 5th ed. 1906, pp. 322, 323; Williston, Sales, § 280, pp. 405-407; Tiffany, Sales, 2d ed. p. 156; 24 Am. & Eng. Enc. Law, 1050; Hening v. Powell, 38 Mo. 468; Hance v. Wabash & W. R. Co. 62 Mo. App. 63; Taussig v. Southern Mill & Land Co. 124 Mo. App. 209, 101 S. W. 602; Scharff v. Meyer, 133 Mo. 428, 54 Am. St. Rep. 672, 34 S. W. 858; American Metal Co. v. Daugherty, 204 Mo. 71, 102 S. W. 538; Hunter Bros. Mill. Co. v. Kramer Bros. 71 Kan. 468, 80 Pac. 968; Com. v. Adair, 121 Ky. 689, 89 S. W. 1130; Hagins v. Combs, 102 Ky. 165, 43 S. W. 222; A. J. Neimeyer Lumber Co. v. Burlington & M. River R. Co. 54 Neb. 321, 40 L.R.A. 534, 74 N. W. 670; Taylor v. Cole, 111 Mass. 363; Buckingham v. Dake, 50 C. C. A. 492, 112 Fed. 270.

The use of such words as "sold" and "purchased" in the invoice, order, or other evidence of transactions concerning the transfer of personal property, is not conclusive evidence of completed contract, and does not necessarily imply a change of title in the goods.

Cunningham Iron Co. v. Warren Mfg. Co. 80 Fed. 878; Gallup v. Sterling, 22 Misc.

taken place. The two questions, however, are very closely related. Of course, if upon the facts of the case the place of sale by defendant could be fixed in Illinois, it would be clear that there was no keeping for the purposes of sale in Missouri. In this connection, see the note to Fisher v. Com. 44 L.R.A.(N.S.) 435, dealing with the subject of the place of sale of intoxicating liquor, L.R.A.1918C.

and especially the part of the note beginning at page 463, citing the cases where the delivery is effected without the aid of a common carrier.

Various questions arising under statutes regulating the sale of oleomargarin may be found by consulting the L.R.A. Indexes under the title, "Food," subtitle, "Oleomargarin."

672, 49 N. Y. Supp. 945; *Blackwood v. Cutting Packing Co.* 76 Cal. 212, 9 Am. St. Rep. 199, 18 Pac. 248; *Shainwald v. Cody*, 92 Cal. 83, 28 Pac. 101; *Brooks v. Libby*, 89 Me. 151, 36 Atl. 66.

White, C., filed the following opinion:

The assistant prosecuting attorney of St. Louis court of criminal correction filed information in that court charging that the defendants "did on the 4th day of October, 1915, unlawfully and wilfully offer for sale, and keep on hand for the purpose of sale, to Stocker Brothers, a corporation, a substance" which is described as composed of animal fat, etc., and colored in imitation of butter. The charge is a violation of § 651, Rev. Stat. 1909. The case was first appealed to this court (270 Mo. 694, 195 S. W. 996) and transferred to the St. Louis court of appeals for want of jurisdiction. On a hearing, a majority of the St. Louis court of appeals (— Mo. App. —, 198 S. W. 457) held that the evidence sustained the verdict of guilty as charged in the information, but Judge Reynolds of that court, dissenting, caused the same to be certified to this court on the ground that the majority opinion was in conflict with the decision of the Kansas City court of appeals in the case of *State v. Scott*, reported in — Mo. App. —, 189 S. W. 1191, and with the decision of this court in the case of *State v. Rosenberger*, 212 Mo. 648, 20 L.R.A.(N.S.) 284, 126 Am. St. Rep. 580, 111 S. W. 509.

The evidence shows that the defendant Swift & Company had what is called a "plant" in East St. Louis, Illinois, and that the defendant Hunter was manager of the business of that corporation at that place. Stocker Brothers was a corporation engaged in the grocery business in the city of St. Louis, Missouri. On October 4, 1915, someone representing Stocker Brothers in St. Louis called Swift & Company in East St. Louis on the telephone and ordered 150 pounds of colored Lincoln oleo. That amount of that commodity, being five 30-pound cases, was then separated from the general stock, loaded into a wagon belonging to Swift & Company, hauled to Stocker Brothers' store in St. Louis, Missouri, and there delivered; the price for the same was charged to Stocker Brothers by Swift & Company, and the bill was paid November 26, 1915.

There is no dispute that this commodity was of a character condemned by the statute. The defendants were arrested on the information above set out, with the result as mentioned. It was held by a majority of the St. Louis court of appeals that the oleomargarin in question was kept on hand by L.R.A.1918C.

the defendants in the city of St. Louis for the purpose of sale. While the statute is leveled at a sale of oleomargarin colored so as to resemble butter, as well as keeping the same on hand for sale, the information does not charge a sale, but charges the keeping on hand and offering for sale.

This case differs from the case of *State v. Rosenberger*, supra, which concerns the sale of liquor by a firm in Kansas City on an order from a dealer in Webster county, Missouri, a local option county. The liquor was delivered to the railroad and shipped C. O. D. It was held that the sale took place in Kansas City, and not in Webster county, and therefore was not in violation of the Local Option Law. The *Rosenberger* Case was followed in the *Scott* Case, and in other cases where liquor was the subject of the sale. In those cases delivery to a carrier C. O. D. was held to be delivery to the purchaser. In this case, Swift & Company sent their own wagon with the oleomargarin to Stocker Brothers' place of business in St. Louis. The bill accompanying the goods bears the mark C. A. F. E., which was explained by Mr. Hunter to mean cost of goods and delivery charges; that the price paid defendants included those items.

The rule in this state in sales of this character is that, where anything remains to be done between the parties before the property is delivered, as separating the specific quantity from a larger amount, or identifying it, the sale is not complete; but after the separation for the purpose of delivery, when there is nothing further to be done except to deliver the goods, the sale is complete and the title passes. *Third Nat. Bank v. Smith*, 107 Mo. App. loc. cit. 190, 81 S. W. 215; *Longsdorff v. Meyers*, 171 Mo. App. 255, 157 S. W. 85. The only thing that was lacking in this case was the separation of the goods from the general stock. After they were separated and segregated by placing them in the wagon for the purpose of delivery, it would look as if the contract of sale was complete at that time and title passed, as would have been the case if Swift & Company had had only five cases of oleomargarin and Stocker Brothers had been in the store at the time, designated the five cases, and agreed upon the terms of purchase.

It seems to make no difference that the goods were not paid for at the time, but charged to the purchaser's account. It is held usually that, where a contract of sale is made for a specific article to be charged for, and where there is nothing more to do except to deliver it and collect the price, the contract of sale is complete without delivery and without payment. *Com. v. Hess*, 148 Pa. 98, 17 L.R.A. 176, 33 Am. St.

Rep. 810, 23 Atl. 977; *State v. Davis*, 62 W. Va. 500, 14 L.R.A. (N.S.) 1142, 60 S. E. 584. In the Hess Case the seller conducted a wholesale liquor business at a place where it was lawful to do so, but delivered the liquor in question to the purchaser in territories where it was unlawful, and it was held that the sale was complete at the seller's place of business, where the goods were separated from the general stock and the price charged to the purchaser.

For the purpose of this case it is not necessary to hold that the sale under consideration was complete in the state of Illinois. The defendant is charged not with selling, but with keeping, the forbidden commodity on hand for the purpose of sale, and it becomes important to ascertain what is a "sale" for the purpose of which the oleomargarin was alleged to have been kept. Nor are we concerned with the Statute of Frauds, nor the effect of nondelivery upon the rights of third persons. A contract of sale may be fully executed so that title passes, or it merely may be executory. *Cunningham v. Ashbrook*, 20 Mo. 553; *Third Nat. Bank v. Smith*, 107 Mo. App. 178, 81 S. W. 215. In general, the acceptance of an order by the person on whom the order is made is a binding agreement between the parties, although there is no completely executed contract of sale. As said in the case of *Cunningham v. Ashbrook*, 20 Mo. 556: "The term 'sale,' however, in its largest sense, may include every agreement for the transferring of ownership, whether immediate or to be completed afterwards; and goods, in reference to the disposition of them by sale, may be considered as existing separately and ready for immediate delivery, or as a part of a larger mass from which they must be separated by counting, weighing, or measuring, or as goods to be hereafter procured and supplied to the buyer, or to be manufactured for his use."

Then we have this situation: Here was a binding contract entered into between these parties whereby the owner agreed to sell and deliver certain goods to the purchaser. The goods were separated from the general stock for the purpose of such delivery; they were placed in a wagon and taken to St. Louis in pursuance of that purpose, and delivered there. By what stretch of construction could it be said that Swift & Company kept those goods on hand for even an instant of time for the purpose of sale in St. Louis? Stocker Brothers undoubtedly kept oleomargarin for sale, and sold it in St. Louis, but whether there was a proceeding against them does not appear.

A sale is a contract. It includes an agreement upon quality and price, as well as delivery. To say the goods were kept for the L.R.A.1918C.

purpose of selling them is to say they were kept for the purpose of seeking a purchaser, for the purpose of beginning and concluding a bargain by which title would pass. It is not shown that the driver of the wagon had any discretion in the matter, or had any authority whatever to make a contract regarding the property; on the contrary, it appears that he had no discretion except to deliver it in pursuance of a contract previously made. He could not have had the oleomargarin in his custody for the purpose of sale, unless he had authority to make a contract of sale. If, at any point on his way from the plant in East St. Louis to the purchaser's store in St. Louis, he had been accosted by one who wanted to buy, he would have been obliged to say he had no such goods "for sale," but what he had on his wagon were sold. Statutes usually are to be construed so as to give effect to the ordinary meaning of words. *State ex rel. Gass v. Gordon*, 266 Mo. loc. cit. 411, 181 S. W. 1016. There is no reason why a strained construction should be given the statute with which we have to deal, so as to convict the defendants, because the common understanding of the meaning of the language used seems to accord with the evident purpose of the law.

The judgment is reversed, and the cause remanded.

Roy, C., concurs.

Per Curiam:

The foregoing opinion by White, C., is adopted as the opinion of the court.

All the Judges concur.

RHODE ISLAND SUPREME COURT.

JOSEPH L. SANDERS

v.

HERBERT A. RICE, Attorney General.

(— R. I. —, 102 Atl. 914.)

Election — votes cast for ineligible candidate — effect.

1. Votes cast by competent electors for a candidate alleged by political opponents to be ineligible, which allegation is subsequently sustained by the court, are not cast in wilful defiance of law so that they cannot be counted in determining whether or not

Note. — As to right of candidate receiving next highest number of votes where person receiving highest number is ineligible, see annotation following this case, post, 1157.

any candidate received a majority of votes cast.

For other cases, see Elections, II. c, in Dig. 1-52 N. S.

Office — election — minority candidate.

2. One receiving a minority of votes cast cannot compel acceptance of his official bond so as to enable him to perform the duties of the office, where the Constitution requires a majority of votes for election, although the majority candidate was ineligible to office.

For other cases, see Elections, II. c, in Dig. 1-52 N. S.

(March 1, 1918.)

PETITION for a writ of mandamus to compel respondent to approve officially a certain bond presented to him by petitioner. Writ denied.

The facts are stated in the opinion.

Messrs. Patrick P. Curran and Joseph C. Cawley for petitioner.

Mr. Herbert A. Rice, Attorney General, in propria persona.

Sweetland, J., delivered the opinion of the court:

This is a petition for a writ of mandamus which shall command the respondent, the attorney general of the state of Rhode Island, officially to approve a certain bond presented to him by the petitioner.

The petitioner in substance alleges that he is, and on the 18th day of January, 1918, was, a resident and a duly qualified elector of the city of Cranston; that on said day at a grand committee of the general assembly he was elected to the office of sheriff of Providence county for the term ending February 1, 1920; that in accordance with the provisions of the statute governing such matters (Gen. Laws 1909, chap. 282, § 2), he executed and caused to be executed his bond for \$25,000, with sufficient surety in legal form, running to the general treasurer of the state and conditioned upon the true and faithful execution by the petitioner of the duties of said office; that in accordance with the requirements of the statute in that regard, he presented said bond to the respondent for his official approval of the form thereof, in order that the petitioner might deliver said bond to the general treasurer and enter upon the duties of the office of sheriff of Providence county. The petition further sets forth "that said attorney general has withheld his official approval thereof solely on the pretended ground that your petitioner has not been duly and legally elected to said office for the term aforesaid."

It appears that on said January 18, 1918, there was a vacancy in the office of sheriff L.R.A.1918C.

of Providence county for the term ending February 1, 1920, caused by the death of the late Andrew J. Wilcox; that on said day a meeting of the grand committee of the general assembly was called for the purpose of electing a sheriff of Providence county to fill said vacancy; that at the election so held in grand committee, 116 ballots were cast; 37 of said ballots were for the petitioner and 79 ballots were for Jonathan Andrews, of Woonsocket. It further appears that on January 17, 1918, the day preceding said election, said Jonathan Andrews was a representative in the general assembly for the first representative district of Woonsocket; that on said January 17, 1918, said Andrews presented to the house of representatives his resignation as such representative; that on January 17, 1918, said house of representatives by vote accepted the resignation of said Andrews and declared vacant the seat of said Andrews as first representative from Woonsocket.

Under the provisions of article 16 of Amendments to the Constitution of Rhode Island (see Laws 1911, chap. 675), representatives in the general assembly shall hold their offices until their successors are elected and qualified. Chapter 282, § 1, Gen. Laws, 1909, in part, is as follows: "No person shall be eligible to the office of sheriff who shall, at the time of his election, be a member of the general assembly." In the opinion given in answer to questions pertaining to the legality of the election of Jonathan Andrews as sheriff of Providence county, this court advised the governor that, in the circumstances set forth above, the action of the house of representatives in accepting the resignation of said Andrews was a nullity; that said Andrews was a member of the general assembly on January 18, 1918, and his attempted election by said grand committee to the office of sheriff of Providence county was invalid. *Re Opinion to Governor, — R. I. —, 102 Atl. 913.*

It appears that, at said grand committee and before said election, members of the general assembly who favored the election of the petitioner to said office called the attention of the members of the general assembly then in grand committee to the facts and to the provisions of the Constitution and the statutes which rendered said Andrews ineligible for the office of sheriff of Providence county. Also at that time, in said grand committee, members of the general assembly who favored the election of said Andrews gave it as their opinion that under the provisions of the Constitution, which make each house of the general assembly the judge of the election and qualification of its members, it was within the

power of the house of representatives to accept the resignation of said Andrews, and to create a vacancy in the office of representative from the first representative district of Woonsocket; and that said Andrews on January 18, 1918, was not a member of the general assembly.

The provision of our Constitution governing elections in grand committee is contained in § 7 of article 11 of the Amendments to the Constitution, and is as follows: "In elections by the general assembly in grand committee the person receiving a majority of the votes shall be elected."

The petitioner contends before us that, after notice given to the members of the grand committee of the disqualification of said Andrews, the members who cast their ballots for him did so in wilful defiance of law; that the votes so cast were illegal and should be regarded as though they had been knowingly cast for a fictitious person or for a person known by the electors to be dead; that the language appearing in § 7 of article 11 of Amendments to the Constitution should be construed to intend not that a person to be elected in grand committee must receive a majority of the votes cast, but that a person shall be declared elected if he receives a majority of the votes cast for persons eligible for election. The petitioner bases this contention largely upon the authority of certain English election cases and upon certain American cases which in his opinion follow the English doctrine.

Under the so-called English rule, if the candidate at an election who receives the highest number of votes is ineligible, and his disqualification is known to the electors before they vote for him, their votes are to be considered as thrown away, and the candidate who receives the next highest number of votes shall be declared elected if he be qualified. *Rex v. Parry*, 14 East, 549, 104 Eng. Reprint, 712; *Reg. ex rel. Mackley v. Coaks*, 3 El. & Bl. 249, 118 Eng. Reprint, 1132, 2 C. L. R. 947, 23 L. J. Q. B. N. S. 133, 18 Jur. 378; *Rex v. Hawkins*, 10 East, 211, 103 Eng. Reprint, 755. In Indiana the courts have generally adopted the same rule. *Copeland v. State*, 126 Ind. 51, 25 N. E. 866; *Gulick v. New*, 14 Ind. 93, 77 Am. Dec. 49. In *State ex rel. Clawson v. Bell*, 169 Ind. 61, 13 L.R.A. (N.S.) 1013, 124 Am. St. Rep. 203, 82 N. E. 69, however, the Indiana supreme court appears to imply that, in order to treat a vote given for an ineligible candidate as wasted, the circumstances must be such as to warrant the conclusion that the elector "wilfully and obstinately" cast his vote for such ineligible candidate.

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It has generally been held by the courts of this country, and in contested election cases in the United States Senate and House of Representatives, that the spirit of our democratic institutions requires that, for a person to be declared elected to public office, he must receive a majority of the votes cast in an election for such office, or when the law so provides a plurality of such votes. In the few cases in which an eligible candidate who has received less than a majority or a plurality has been held to be entitled to an office, the circumstances have been such as to indicate that the electors in voting for a candidate who was disqualified have deliberately intended to throw away their votes. A case of this nature is that of *State ex rel. Bancroft v. Frear*, 144 Wis. 79, 140 Am. St. Rep. 992, 128 N. W. 1068, in which it appears that a large number of votes were cast for a candidate whom the court found the electors knew to be dead at the time of the election. The general rule in Wisconsin in relation to this question is declared in *State ex rel. Dunning v. Giles*, 1 Chand. (Wis.) 112, 52 Am. Dec. 149, and *State ex rel. Off v. Smith*, 14 Wis. 497, and is in accord with the American doctrine.

The underlying question involved in the case at bar has been twice passed upon by this court. In an opinion to the governor, *Re Corliss*, 11 R. I. 638, 23 Am. Rep. 538, this court advised that, in the case of a candidate for elector of the President and Vice President of the United States, who was disqualified for that office and who at the election received a plurality of the votes given for that office, the disqualification did not result in the election of the candidate next in vote, but in the failure to elect. In that opinion the court said: "The question submitted to us does not allege or imply that the electors, knowing the disqualification, voted for the ineligible candidate in wilful defiance of the law."

In *Gill v. Pawtucket*, 18 R. I. 281, 27 Atl. 506, one of the candidates at an election for a member of the city council of Pawtucket sought to obtain a writ of mandamus to the body charged with the duty of counting the votes given such election, commanding said body to reject certain votes given at said election for another candidate who was disqualified, and to declare the petitioner elected. The court said: "The question now presented is different from that in *Re Corliss*, since it is averred in the petition that the electors knew of the fact creating the disqualification. It is not averred, however, that the electors knew that the fact amounted to a disqualification in point of law, or that, knowing the disqualification, they voted for the candidate

in defiance of law. Without one or the other of these averments, it is clear, under the cases cited in *Re Corliss*, supra, that the votes could not be rejected and the petitioner held entitled to the office. Whether, if such facts were averred, that result could be accomplished, is a question not now before us."

The petitioner urges that the case at bar is distinguishable in its facts from these two Rhode Island cases, and that they support his contention here, because in this case the members of the grand committee who voted for said Andrews well knew the fact which caused his disqualification, and before giving in their votes it was specifically pointed out to them that this fact amounted to a disqualification in point of law. The petitioner then argues that the controlling circumstances which did not appear in the *Corliss* matter and in *Gill v. Pawtucket* are present here; that, being informed of the fact of his disqualification and being notified of the legal effect of that fact, when, in disregard of such information and notice, members voted for said Andrews, they acted in "wilful defiance of law."

This is not a fair and reasonable conclusion from the circumstances in the case; it is not a proper application of either of the Rhode Island cases referred to, and it is not in accordance with the great weight of American authority. This court used the expressions "defiance of law" and "wilful defiance of law" exactly. It used them as such expressions are employed in the authorities, having reference to conduct on the part of a voter from which a court can fairly infer that he intended to throw his vote away. It is true that the members voting for said Andrews did so vote in disregard of the construction given to the law by the supporters of the petitioner, which is also the construction afterwards placed upon it by this court. If it also appeared that the members so voting admitted the correctness of this construction and then recklessly and contemptuously refused to be governed by such construction and acted in disregard of it, there would be furnished a basis for the petitioner's claim of a "wilful defiance of law," of an intention on the part of such members to waste their votes, and there would be some force in the petitioner's claim that such votes should be entirely disregarded in a consideration of the number of votes cast at said election. It is plain, however, that such was not the attitude of those who voted for Mr. Andrews. It is by no means an unusual situation that members of legislative bodies lack confidence in the assertions of their political opponents, and in perfect good faith differ

from them both as to statements of fact and in regard to the interpretation of law. It is apparent that these members desired to cast effective votes; that they believed in the legal soundness of their expressed opinion as to the eligibility of Mr. Andrews, and, having a majority of the votes in grand committee, it is quite unlikely that they deliberately intended to permit the minority to fill the very important office of sheriff of Providence county. In our opinion it would be an entire disregard of the facts to hold that the votes given for Mr. Andrews were cast in wilful defiance of law.

The people of this state have provided in their Constitution that, for the election of a person to office by the general assembly in grand committee, it is requisite that such person should receive a majority of the votes. The circumstances must be very extraordinary which would warrant a finding that a person has been elected to office in the grand committee, in accordance with this provision of the Constitution, who has received but 37 out of a total of 116 votes cast. We are not unmindful of the petitioner's contention that the votes cast for said Andrews were illegal votes and should be entirely disregarded, and that as the petitioner received all of the legal votes cast he has received the "majority of the votes" requisite under the Constitution. This contention is unsound. The votes cast for said Andrews, although they were inefficient votes for the purpose of his election, are not "illegal votes," as that expression is used in cases like the present. The votes cast for him were given in by persons legally entitled to vote at the election; they express in a perfectly legal way the will of the voter. They must be considered in this sense as legal votes cast for sheriff, although the person named upon the ballot was ineligible to be elected to that office. These votes must surely be considered as votes cast in opposition to the candidacy of the petitioner. That such votes should not be regarded as nullities, in a consideration of the total number of votes cast, is in accordance with many decisions dealing with the subject in American courts. In *Saunders v. Haynes*, 13 Cal. 145, the court said: "The votes are not less legal votes because given to a person in whose behalf they cannot be counted." This principle was reaffirmed in *Crawford v. Dunbar*, 52 Cal. 38. In *Com. ex rel. McLaughlin v. Cluley*, 56 Pa. 270, 94 Am. Dec. 75, the court said: "The votes cast at an election for a person who is disqualified from holding an office are not nullities." To the same effect are the cases of *People ex rel. Crawford v. Molitor*, 23 Mich. 341; *Barnum v. Gilman*, 27 Minn.

466, 38 Am. Rep. 304, 8 N. W. 375; *Swepton v. Barton*, 39 Ark. 549; *Gardner v. Burke*, 61 Neb. 534, 85 N. W. 541; *People ex rel. Furman v. Clute*, 50 N. Y. 451, 10 Am. Rep. 508. The petitioner has called to our attention cases which hold that a vote is illegal and must be considered as a nullity in a count of the total number of votes cast, when the ballot is void because it fails to conform to the requirements of law. There is, however, a manifest distinction between a vote which is illegal because not cast by a qualified elector or because it is not in accordance with a statute regulating the exercise of the elective franchise, and a vote legal in form cast by a legal voter but for a person who is not eligible.

In our opinion the petitioner is not entitled to the writ of mandamus for the rea-

son that he clearly was not elected to the office of sheriff of Providence county as by him alleged.

The hearing on this petition was had immediately before the holding of another grand committee called to fill said vacancy, after the failure to elect in the grand committee of January 18, 1918. We believed that the public interests required that the cause should be determined at that time before an extended opinion could be prepared, and after full consideration of the matter we denied the petition in a rescript. Because of the nature of the questions here we have considered it desirable that the reasons for our determination should be more fully stated in this opinion supplementing said rescript.

Annotation—Right of candidate receiving next highest number of votes where person receiving highest number is ineligible.

This note is supplementary to the notes to *State ex rel. Clawson v. Bell*, 13 L.R.A.(N.S.) 1013, and *Hanson v. Grattan*, 34 L.R.A.(N.S.) 240, on the above question.

As to right of candidate receiving next highest number of votes where person receiving highest number died before election, see note to *Patten v. Haselton*, 51 L.R.A.(N.S.) 226.

The general rule stated in the earlier notes that, in order for one to be legally elected, he must receive a majority of the votes cast, and that the mere fact that the one receiving the highest number proves ineligible confers no right to the office on the one receiving the next highest, was adhered to in *State ex rel. Spruill v. Bateman* (1913) 162 N. C. 588, 77 S. E. 768, Ann. Cas. 1915B, 515, in which it was decided that, where the one receiving the highest number of votes for recorder of a court was ineligible, because not an attorney, the one receiving the next highest was not entitled to the office.

In *Heald v. Payson* (1913) 110 Me. 204, 85 Atl. 576, one receiving the next highest number of votes claimed that the person receiving a plurality of the votes was not lawfully nominated as a candidate, and that all votes cast for such person were null and void and should not have been counted for any purpose, and that consequently he, as the one receiving the next highest number of votes, received a plurality of all the votes that should be counted, and was elected. The court refused to so hold, stating that the person receiving the

highest number was not ineligible, and that any voter who chose might have voted for him, and that there was nothing to show that the electors had any knowledge of any irregularity in the ballot. With respect to the general rule the court said: "It is fundamental that minorities cannot elect or rule. By the overwhelming weight of authority in this country, a candidate receiving less than a plurality of the votes cast is not elected, even if the opposing candidate receiving a plurality of the votes is ineligible. The votes cast for an ineligible candidate are at least so far effectual as to prevent the election of a candidate who received a less number of votes."

And in *Woll v. Jensen* (1917) 36 N. D. 250, 162 N. W. 403, it was held that one who received less than a majority of the votes cast for an office was not entitled to the office, although the voters knew of the disqualification of his opponent and chose to cast a majority of their votes for the latter. The court said: "It seems to be generally conceded that, where the voters do not know of the disqualification, the votes cast for the disqualified candidates cannot be credited to the defeated party, and that the whole election will be deemed a nullity. The only doubt in the minds of the writers has been whether this is true when the disqualification is known. The English rule and the rule of Indiana seem to be that, where the disqualification is known, the party receiving the minority vote will be entitled to the office, and this on the theory that the

voters have wilfully thrown away their votes and that the office should not go begging on that account. The weight of American authority, both legislative and judicial, seems to be that no such intention to throw away the vote can be imputed, but that rather the vote for the disqualified candidate must be considered as a protest against the qualified person, and especially should this be the case where there are only two candidates. The authorities lay stress, indeed, upon the proposition that government by the majority seems to be an American maxim, and that no one should be deemed elected against the protest of that majority. It is true that many of the authorities are purely legislative. It is also true that perhaps in no adjudicated case has the question been fairly presented. The dicta of the courts, however, and the positive rulings of the legislative tribunals, are almost unanimous on the proposition that, where there is no statute declaring votes cast for ineligible candidates to be absolutely void, no right to the office can be presumed in the defeated candidate. We hold, therefore, that the plaintiff was not elected to the office."

The decision in *SANDERS v. RICE*, ante, 1153, is an interesting and important one. The court there held that votes cast by competent electors for a candidate claimed by political opponents to be ineligible, which claim was subsequently upheld by the courts, were not cast in "wilful defiance of law," so that they could not be counted in determining whether or not any candidate received a majority of the votes cast, and that one who received the minority vote was not entitled to be declared elected, where the Constitution required a majority

of votes for election, although, as before stated, the majority candidate was ineligible to office.

The opinion was expressed in *Cadle v. Baker* (1915) 51 Mont. 176, 149 Pac. 960, where the Corrupt Practices Act was involved, that, in view of the constitutional provision that "the person or persons who shall receive the highest number of legal votes shall be declared elected," the legislature had no power to declare anyone elected to an office who had not received the highest number of votes. The court said: "In passing it is worthy of note that certain provisions of the Corrupt Practices Act appear to be in direct conflict with the state Constitution. In § 49 it is provided that if, upon an election contest, 'judgment or ouster against a defendant shall be rendered, said judgment shall award the nomination or office to the person receiving next the highest number of votes.' If by this provision is meant that a candidate who does not receive the highest number of legal votes may be declared elected, it would seem to be in hopeless conflict with the terms of § 13, article 9, of our state Constitution, which reads: 'In all elections held by the people under this Constitution, the person or persons who shall receive the highest number of legal votes shall be declared elected.' While a successful candidate may be deprived of the fruits of his victory by being required to forfeit his office as a punishment for wrongdoing, we undertake to say that it is beyond the lawmaking power to declare elected to an office anyone who has not received the highest number of legal votes therefor."

J. T. W.

WASHINGTON SUPREME COURT.
(Department No. 2.)

FRED KUSAH, Respt.,
v.

FRED W. MCCORKLE, Sheriff of Thurston County, et al., Appts.

(— Wash. —, 170 Pac. 1023.)

Incompetent person — liability of insane person.

1. An insane person is liable civilly for the injuries committed by him.

For other cases, see *Incompetent Persons*, III. in Dig. 1-52 N. S.

Note. — As to civil liability of sheriff or other officer for injury inflicted by prisoner in his custody upon another prisoner, see annotation following this case, post, 1163. L.R.A.1918C.

Trial — jury — negligence of sheriff.

2. The jury must determine whether or not a sheriff was negligent in confining an insane suspect in a room with other prisoners without searching him for weapons, so as to render him liable for injury to a fellow prisoner by an attack made upon him by such suspect with a deadly weapon.

For other cases, see *Trial*, II. c, 8, e, in Dig. 1-52 N. S.

Sheriff — injury to prisoner — liability.

3. A sheriff is liable in damages on his official bond to a prisoner in his custody for injuries inflicted by an attack upon him with a deadly weapon by an insane suspect

As to civil liability of insane persons for torts or negligence, see notes to *Williams v. Hays*, 26 L.R.A. 153, and *Chesapeake & O. R. Co. v. Francisco*, 42 L.R.A.(N.S.) 83.

whom the sheriff's deputy negligently confined in the same room with the injured person without searching him for weapons. *For other cases, see Bonds, II. c, 1, in Dig. 1-52 N. S.*

Same — authority of deputy sheriff.

4. The receipt by a deputy sheriff of an insane suspect for custody without a warrant upon a complaint filed by the district attorney is not so far unauthorized that the sheriff is relieved from liability for the consequences of his act, if such procedure is in due form of law.

For other cases, see Sheriff, in Dig. 1-52 N. S.

Same — negligence of prisoner.

5. An inmate of a jail is not negligent in failing to see that an insane suspect confined in the same room with him was searched to determine that he had no weapons, so as to preclude holding the sheriff liable in case he is injured by such weapon in the hands of the suspect.

For other cases, see Sheriff, in Dig. 1-52 N. S.

Trial — prejudice — setting aside verdict.

6. Two attempts by a jury in an action on a sheriff's bond to assess a larger verdict against the surety than against the sheriff indicate passion or prejudice for which the verdict must be set aside.

For other cases, see New Trial, III. b, in Dig. 1-52 N. S.

(February 14, 1918.)

APPEAL by defendants from a judgment of the Superior Court for Thurston County denying a motion for judgment notwithstanding a verdict for plaintiff, and for a new trial, in an action brought to recover damages for personal injuries inflicted upon plaintiff by a fellow prisoner while an inmate of the county jail. Reversed.

The facts are stated in the opinion.

Messrs. Bates & Peterson, George F. Yantis, and Troy & Sturdevant, for appellants:

The verdict of the jury and the judgment thereupon are not sustained by the evidence.

Ludberg v. Barghoorn, 73 Wash. 477, 131 Pac. 1165; *Olson v. Northern P. R. Co.* 49 Wash. 631, 18 L.R.A.(N.S.) 209, 96 Pac. 150.

The sheriff is not an insurer of the safety of his prisoners. Nothing more than the exercise of ordinary and reasonable care to protect a prisoner while in his custody is required of him, and in that regard the presumption is originally in his favor.

Riggs v. German, 81 Wash. 128, 142 Pac. 479; *Gunther v. Johnson*, 36 App. Div. 437, 55 N. Y. Supp. 869; *Emery v. Littlejohn*, 83 Wash. 334, 145 Pac. 423, Ann. Cas. 1915D, 767. L.R.A.1918C.

As a matter of law Deputy Gifford had no right to search Reich for possible dangerous weapons.

People use of *Tamplin v. Beach*, 49 Colo. 513, 37 L.R.A.(N.S.) 873, 113 Pac. 513; *Emery v. Littlejohn*, supra.

If the plaintiff is entitled to any recovery from Ernest Reich by reason of his acts, the recovery should be merely nominal.

Olson v. Northern P. R. Co. supra.

Neither the sheriff nor his deputy is liable for the injury to plaintiff.

Marquis v. Willard, 12 Wash. 528, 50 Am. St. Rep. 906, 41 Pac. 889; People use of *Tamplin v. Beach*, supra; People use of *Purdy v. Pacific Surety Co.* 50 Colo. 273, 109 Pac. 961, Ann. Cas. 1912C, 577; *Com. ex rel. Richardson v. Cole*, 7 B. Mon. 250, 46 Am. Dec. 508; *Wilkes-Barre v. Rockefeller*, 171 Pa. 177, 30 L.R.A. 393, 50 Am. St. Rep. 795, 33 Atl. 269; *Mechem, Pub. Off. § 283*; *State, Allen, Prosecutor, v. Conover*, 28 N. J. L. 224, 78 Am. Dec. 54; *Gerber v. Ackley*, 37 Wis. 43, 19 Am. Rep. 751; *Greenius v. American Surety Co.* 92 Wash. 401, L.R.A.1917F, 1134, 150 Pac. 394; 29 Cyc. 500; *Gray v. Washington Water Power Co.* 27 Wash. 713, 68 Pac. 360, 11 Am. Neg. Rep. 561; *Eskildsen v. Seattle*, 29 Wash. 583, 70 Pac. 64, 12 Am. Neg. Rep. 366.

It lies within the discretion of the sheriff to do such things as he thinks necessary and proper for the well and safe-keeping of the prisoners in his custody, and unless he does something actuated by malice, caprice, or fraud, the courts are powerless to review his action.

Mechem, Pub. Off. §§ 636, 637; *Schoettgen v. Wilson*, 48 Mo. 253; *Mississippi v. Johnson*, 4 Wall. 475, 498, 18 L. ed. 437, 441; *Henderson v. Smith*, 26 W. Va. 829, 53 Am. Rep. 139; *Emery v. Littlejohn*, 83 Wash. 334, 145 Pac. 423, Ann. Cas. 1915D, 767; *Garff v. Smith*, 31 Utah, 102, 120 Am. St. Rep. 924, 86 Pac. 772; *Rohn v. Osmun*, 143 Mich. 68, 5 L.R.A.(N.S.) 635, 106 N. W. 697; *Davis v. Hall*, 72 Or. 220, 143 Pac. 893, Ann. Cas. 1916D, 922; *Rains v. Simpson*, 50 Tex. 495, 32 Am. Rep. 609; 29 Cyc. 1444; *Sullivan v. Shanklin*, 63 Cal. 247.

Messrs. Elias A. Wright, Sam A. Wright, and E. N. Steele, for respondent:

Defendant McCorkle was in duty bound and obligated to protect his prisoner, the plaintiff, and is bound to exercise ordinary and reasonable care, varying under the circumstances of each particular case, for the preservation of his life and health.

22 Am. & Eng. Enc. Law, 2d ed. 1306; 35 Cyc. 1942; *Ex parte Jenkins*, 25 Ind. App. 532, 81 Am. St. Rep. 114, 58 N. E. 500; *Indiana ex rel. Tyler v. Gobin*, 94 Fed. 48; *Asher v. Cabell*, 1 C. C. A. 693, 2 U.

S. App. 158, 50 Fed. 818; *Hixon v. Cupp*, 5 Okla. 545, 49 Pac. 927; *South v. Maryland*, 18 How. 396, 402, 15 L. ed. 433, 435; *Petit v. Colmery*, 4 Penn. (Del.) 266, 55 Atl. 344; *State v. Dennis*, 2 Marv. (Del.) 433, 43 Atl. 261.

Discretion of the sheriff as to whether or not he should search a fellow prisoner, and particularly a dangerous man, cannot be with any reason urged as being a fulfilment of an absolutely positive ministerial duty of protecting plaintiff.

McPhee v. United States Fidelity & G. Co. 52 Wash. 154, 21 L.R.A. (N.S.) 535, 132 Am. St. Rep. 958, 100 Pac. 174; 25 Am. & Eng. Enc. Law, 2d ed. 723.

Defendant Reisch was liable for the tort committed upon plaintiff.

14 R. C. L. 596, § 51; *Chesapeake & O. R. Co. v. Francisco*, 149 Ky. 307, 42 L.R.A. (N.S.) 83, 148 S. W. 46, 2 N. C. C. A. 636; *Moore v. Horne*, 153 N. C. 413, 138 Am. St. Rep. 675, 69 S. E. 409, 21 Ann. Cas. 1350.

Holcomb, J., delivered the opinion of the court:

While respondent was lawfully incarcerated in the Thurston county jail in the custody of the sheriff and his deputies, on May 9, 1917, he was attacked, cut, and stabbed with a knife by a man named Reisch, then confined in the same jail and custody under the charge of insanity lodged against him by the county attorney on May 6, 1917. Reisch was delivered by the chief of police of Olympia into the custody of Gifford, deputy sheriff and jailer, during the absence of his principal, Sheriff McCorkle. During the three days Reisch was in jail prior to the affray, he was quiet and peaceable, and showed no signs of insanity, and the same was true during the preceding night while he was in custody of the chief of police. It appears that Reisch was not searched when taken into custody by the deputy sheriff, and when the affray took place he was found in possession of a knife with which he inflicted the injuries. Reisch was confined in the main room of the jail with Kusah and several others: The affray took place about 1 o'clock on the morning of May 9th. Respondent alleged in his complaint that he was stabbed by Reisch in the right arm at the elbow, with several other slight stabs, cuts, or scratches, and that the stab in the elbow caused the musculospiral nerve to be severed, which produced a paralysis of the wrist, causing the wrist to drop down, and the condition called "wrist drop."

The negligence charged by the complaint against the sheriff and his surety consisted of the sheriff's receiving into the jail where

the respondent was kept a dangerously insane person, and carelessly and negligently placing the insane person in a cell occupied by respondent, and carelessness and negligence on the part of the sheriff in not searching the insane man and taking from him his weapons.

The sheriff, his surety, and Reisch, the insane man, were all sued by respondent, and the trial court gave appropriate instructions to the jury in order to separate the liability of the sheriff and his surety from that of the defendant Reisch. It is apparently conceded that Reisch, though insane, was liable for such tort as he was alleged to have committed upon the respondent in this case. The court so submitted the case to the jury, and we think properly. 14 R. C. L. 596, § 51.

Upon the submission of the case to the jury they attempted to return a remarkable series of verdicts. They first brought in a verdict for \$1,000 in favor of respondent, segregating the same into a verdict for \$500 against the bonding company, \$400 against the sheriff, and \$100 against Reisch. The court refusing to accept this verdict, after some explanation as to the meaning of the instructions separating the liability of the sheriff and the surety from that of defendant Reisch, they again deliberated and returned a verdict of \$666.66 against the bonding company and \$333.34 against McCorkle and Reisch, which verdict was also refused by the court. The jury were ordered to again deliberate, and thereafter they returned with a verdict of \$1,000 against all of the appellants. This verdict was entered. Appellants moved for judgment notwithstanding the verdict and for a new trial, which were denied, and judgment was entered against appellants and each of them in the sum of \$1,000. A motion had been made by appellants and each of them at the close of respondent's case to direct a verdict on any judgment for appellants, which was denied.

Appellants make the following claims of error: (1) That the verdict of the jury and the judgment thereon are not sustained by the evidence; (2) that the negligence, if any, was the contributory negligence of respondent; (3) that the injuries suffered by respondent, if any, resulted through the unauthorized act of a deputy in placing the insane suspect in jail and holding him there without a warrant or process, and without the knowledge of the sheriff, and as a consequence thereof no legal liability attaches to the defendant sheriff or his surety; (4) if an act of the deputy was an act within his official duties, it was one resting within his discretion, and the court is precluded from reviewing the discretion-

ary action of the sheriff as to the manner of the performance. We shall discuss these contentions in reverse order.

The principal question to be determined is whether or not the sheriff is answerable civiliter for alleged negligence in the performance of his duty by himself or his deputy, in regard to the detention of the insane suspect and the manner of his custody and failure to search him upon receiving him. Our statute (§ 8499, Rem. Code) provides: "The sheriff, or in case of his death, removal, or disability, the person appointed by the law to supply his place, shall have charge of the county jail of his proper county and of all persons by law confined therein, and such sheriff or other officer is hereby required to conform in all respects to the rules and directions of said judge above specified, or which may from time to time by such judge be made and communicated to him by said commissioners."

Section 8500, Rem. Code, provides for the keeping of a jail register by the sheriff or other officer performing the duties of a sheriff, and among other things requires that the name of each prisoner, with the date and cause of his or her commitment, together with a list and value of property taken from such prisoner or delivered to the sheriff or other officer at the time of the commitment of such prisoner, shall be kept. Section 3990, Rem. Code, provides that the sheriff may provide as many deputies as he thinks proper, for whose official acts he shall be responsible to the amount of his bond, and may revoke such appointments at his pleasure, and persons may also be deputed by any sheriff in writing to do particular acts, and the sheriff shall be responsible on his official bond for the default or misconduct in office of his deputies.

These statutory provisions are but declaratory of the common law. 1 Bl. Com. 343; *South v. Maryland*, 18 How. 396, 15 L. ed 433; *Ex parte Jenkins*, 25 Ind. App. 532, 81 Am. St. Rep. 114, 58 N. E. 560; *Indiana ex rel. Tyler v. Gobin* (C. C.) 94 Fed. 48. In *Ex parte Jenkins*, 25 Ind. App. 532, 81 Am. St. Rep. 114, 58 N. E. 560, it was remarked: "It is unnecessary to cite authorities to the effect that when a sheriff takes property of any kind into his possession by virtue of a writ, he is bound to take ordinary care of the property and prevent its deterioration or destruction, and for a failure in this regard he is liable on his bond. There certainly can be no reason for saying that his duty as to care is not at least equally obligatory in respect of a prisoner who is in his custody by virtue of his office."

In *Indiana ex rel. Tyler v. Gobin* (C. C.) L.R.A.1918C.

94 Fed. 48, *Baker, J.*, said: "When a sheriff, by virtue of his office, has arrested and imprisoned a human being, he is bound to exercise ordinary and reasonable care, under the circumstances of each particular case, for the preservation of his life and health. This duty of care is one owing by him to the person in his custody by virtue of his office, and for a breach of such duty he and his sureties are responsible in damages on his official bond,"—citing authorities.

And, as further said in *Ex parte Jenkins*: "The sheriff of the county has the care and custody of prisoners committed to the county jail. The duty the sheriff owes to the state to keep a prisoner committed to his custody and deliver him over to the proper authority at the proper time is no more compulsory than is the duty he owes the prisoner himself to exercise reasonable and ordinary care to protect the prisoner's life and health. If he permits a prisoner to escape or to be taken from his custody the fault is *prima facie* his, and there has been *prima facie* a breach of official duty for which he is liable on his official bond."

Hence it is plain that the sheriff's duties in regard to prisoners or others in his lawful custody is twofold, one to the state to keep and produce the prisoner when required, and the other to the prisoner to keep him in health and safety. That has been declared by this court in *McPhee v. United States Fidelity & G. Co.* 52 Wash. 154, 21 L.R.A.(N.S.) 535, 132 Am. St. Rep. 958, 100 Pac. 174, and *Riggs v. German*, 81 Wash. 128, 142 Pac. 479.

In *Riggs v. German* it is also declared that a sheriff cannot be charged with negligence in failing to prevent what he could not reasonably anticipate, and that a sheriff should not be required, in the exercise of ordinary care, to maintain himself or deputy in the presence and company of his prisoners, unless the circumstances as developed by the testimony are such that it can be said that the sheriff had reasonable ground to apprehend the danger. So in the case at bar the question of whether the sheriff or his deputy was negligent in his manner of keeping the prisoners together in one common room in the jail depends upon a number of circumstances, among which was the question of what was safest and most humane for the prisoners; what was most conducive to their health, well-being, and safety; the character of the prisoners themselves, and their conduct; and possibly a number of other circumstances. The question of whether it was negligent not to search *Reisch*, an insane suspect, who was declared to be mild and inoffensive and showed no violent traits or tendencies, was

also a question of fact to be determined under all the circumstances surrounding him, the complaint against him, and the manner of his custody. All these were questions of fact for the jury, and the court properly so considered, but possibly did not give sufficient instructions to the jury as to how to determine the negligence of the sheriff and his deputies from the facts existent.

Appellants contend that these acts or omissions of the sheriff and his deputy were matters of his discretion and of quasi judicial nature solely committed to him, and for such acts or omissions he is not answerable to another in any court. *Emery v. Littlejohn*, 83 Wash. 334, 145 Pac. 423, Ann. Cas. 1915D, 767, is cited as sustaining this contention. That case clearly does not sustain this contention. That was a case against the superintendent of an insane asylum in this state, and others, for the alleged negligence of the superintendent and his assistant in permitting a patient committed to their charge to be paroled and given over to the custody of the patient's relatives. There is a statute (Rem. Code, § 5967) providing that any patient may be discharged from the hospital when in the judgment of the superintendent it is expedient. It was therefore held that that statute gave authority to the superintendent to use his discretion generally and to finally discharge or temporarily parole patients committed to his custody.

In the case of the sheriff, both by statute and at common law, as we have seen, he owes the direct duty to a prisoner in his custody to keep him in health and free from harm, and for any breach of such duty resulting in injury he is liable to the prisoner, or, if he be dead, to those entitled to recover for his wrongful death. *McPhee v. United States Fidelity & G. Co.* supra; 25 Am. & Eng. Enc. Law, 676; 22 Am. & Eng. Enc. Law, 2d ed. 1306; 35 Cyc. 1942. If the sheriff is found guilty of such negligence, the surety on his bond would also be liable to the extent of the bond, for the bond is conditioned for the faithful performance of his duties.

The sheriff, being responsible for reasonable care in the selection of his deputies, is responsible also for the negligence of a deputy in the performance of his duty as such. The acts or omissions of Gifford as deputy were the acts or omissions of McCorkle as sheriff. Whether due and ordinary care was exercised in searching or omitting to search the insane suspect at the time and in the manner and under the circumstances in which he was brought to the custody of the sheriff and his deputy was a question of fact for the jury, to be de-

termined in the light of all the facts and circumstances.

Neither can it be said, as urged under the third claim of appellants, that the injury, if any, resulted through the unauthorized act of a deputy in placing the insane suspect in jail, and holding him there without a warrant or process, and without the knowledge of the sheriff. The complaint filed by the prosecuting attorney was the only warrant required for the detention of the insane suspect. The suspect was being proceeded against in due form of law, and was delivered to the custody of the sheriff and his deputy for safe-keeping in order that he might be produced before an inquest of lunacy, or discharged. It was the duty of the sheriff, therefore, to keep the suspect safely until so produced or discharged.

It is urged by appellants that the negligence, if any, was the contributory negligence of respondent. This is based upon the fact that the respondent was shown to have had knowledge that Reisch was charged with insanity, and was detained as an insane suspect, and that, if he had any knife in his possession, being confined with respondent and the other prisoners together, respondent must have known of the possession of the knife by Reisch. We can see nothing in this contention, and think that merely to state it is to determine its fallacy. At any rate respondent's testimony was that he did not know that Reisch had a knife until the time of the affray. He certainly was not chargeable with knowledge of any negligence of the sheriff and his deputy in omitting to search and confining Reisch in the common room of the jail with him, for both he and Reisch were in the sole power of the sheriff and his deputy. It would certainly be an inhuman rule that would require any care and caution on the part of an inmate of a jail as to the performance or nonperformance of the duty of his keepers toward him.

As to the contention of appellants that the verdict of the jury and judgment are not sustained by the evidence, there are great grounds for discussion. Certain injuries were concededly inflicted upon respondent for which he was entitled to recover his actual loss occasioned thereby, if any, and his consequential damages, such as pain and suffering and loss of earning capacity. Under the evidence there was no immediate loss of money or property by reason of the injury. His bills for medical services and hospital were paid by the county, and he lost no time, for he was then lawfully confined in the county jail to await trial upon a criminal charge. The only real injury besides pain and suffering claimed by respondent was the wrist drop.

It appears undisputed by the evidence that neither at nor immediately after the conflict in the jail, nor for several days thereafter, did he make any complaint of injury in the nature of wrist drop. Several days after the injury he did claim that his hand was somewhat stiff; that when he attempted to straighten his fingers he found it hard to do so. But the evidence of all the physicians who testified in the case, except that of respondent's medical witness, was that wrist drop produced by the severing of the musculospiral nerve is a condition of the hand and arm whereby the control of the muscles is lost and the hand assumes a clawlike shape, with fingers and thumb drawn in. The wrist cannot be held up; the hand bends or lops forward at the wrist, and cannot be pronated or supinated, as the doctors say,—that is, cannot be turned back down or palm down. Doctors testified that it would be impossible to strike a punching blow; it would break the wrist if such condition existed and injure the striker more than the stricken. It would be impossible to use the hand in the operation of washing one's self. They also testified that wrist drop is so striking and serious and apparent an injury that it would be instantly perceptible; that it would occur instantly after the severing of the musculospiral nerve. None of this evidence is disputed by any medical witness for respondent. His one medical witness testified only that respondent came to him on June 4th, which was about four weeks after the conflict; that then he complained that he could not use his hand, and the doctor said that it was wrist drop. Appellants' medical witnesses testified that wrist drop can easily be and often is simulated. Respondent's medical witness did not see him until four weeks after the injury, when the wound had healed, and he could not then readily tell the nature of the wound, or whether it was in such location as to affect the musculospiral nerve. Appellants' medical witnesses, two of whom treated him within a half hour after the injury, testified that the stab wound in the elbow was a very shallow wound, cutting through the skin, but not through the subcutaneous tissue; that it did not penetrate the muscular tissue at all,

and was from an inch to an inch and a half from the location of the musculospiral nerve; that the musculospiral nerve lies deep in the arm, and it would have required a wound of considerable depth in that location to have touched the nerve at all, but that the wound in question did not go anywhere near it. Respondent himself testified that he did not know he was wounded or out until his attention was later called to that fact by another prisoner who told him that his arm was bleeding. It is also indisputably shown that during the affray respondent struck Reisch a number of times, using both hands to do so, and knocking Reisch down several times; and, further, that immediately after the fight he washed his hands himself, using both hands to do so. This state of facts almost conclusively demonstrates that there was no injury to the musculospiral nerve, and no real wrist drop possible. Yet indisputably there was some injury and damage inflicted.

In view of the fact that the jury twice attempted to assess a larger verdict against the bonding company than against either the sheriff or Reisch, when the bonding company was liable only in case of the negligence of the sheriff, and only to the same extent, we are of the opinion that passion and prejudice on the part of the jury must be inferred.

As shown by the preceding discussion, we cannot hold as a matter of law that the sheriff is not liable for the negligence of himself and deputy, but it is a question of fact whether they were negligent. The right of recovery of any sum approaching \$1,000, or the half of it, under the facts here, is doubtful at best. Under such conditions as are here shown, including the indicated passion and prejudice on the part of the jury, we think it would be unjust to hold any of the appellants foreclosed by the findings of the jury. In the furtherance of justice a new trial should be had.

The judgment is therefore reversed, and the cause remanded for a new trial.

Mount and Morris, JJ., concur. Ellis, Ch. J., concurs in the result.

Petition for rehearing denied.

Annotation—Civil liability of sheriff or other officer for injury inflicted by prisoner in his custody upon another prisoner.

Questions of collateral interest are treated in notes cited in the L.R.A. Indexes under the title, "Jails."

The general rule gathered from the cases which have considered the question under annotation is that, in order to hold L.R.A.1918C.

an officer in charge of a jail or prison liable for an injury inflicted upon one prisoner by another prisoner, there must be knowledge on the part of such officer that such injuries will be inflicted or good reason to anticipate danger there-

of, and negligence in failing to prevent the injury.

Thus, a sheriff was held liable in *Hixon v. Cupp* (1897) 5 Okla. 545, 49 Pac. 927, for injuries inflicted on one confined in the jail by another inmate of the jail, in subjecting him to a penalty because of his refusal to pay a fine assessed by a "kangaroo court" established by the inmates. The decision as to liability was predicated upon the fact that "evidence was adduced to the jury to show that the sheriff knew that it was the custom of the prisoners confined in the jail under his charge to assault and beat prisoners brought to such jail, after pretended or mock trial, and that he failed to use such means as were at his command to prevent such act." The decision in this case was further based on the fact that by statute it was the sheriff's duty to keep the peace in the county, which included the jail.

On the other hand, in *Riggs v. German* (1914) 81 Wash. 128, 142 Pac. 479, although the sheriff knew of the existence of a "kangaroo court" in the jail, it was held that he was not liable for injuries inflicted upon a prisoner for rea-

sons similar to those in the *Cupp Case* (Okla.) supra, as there was no evidence that the sheriff knew or had reason to know that the prisoners contemplated an assault upon the plaintiff, and that, having such knowledge, he took no steps to prevent it.

So, also, in *Gunther v. Johnson* (1899) 36 App. Div. 437, 55 N. Y. Supp. 869, it was held that the sheriff was not liable in damages for the death in a county jail of a prisoner who, having struck another prisoner during an altercation, was pursued and stabbed by the latter, the injuries resulting in his death. The basis of the decision was that there was no evidence to show that the sheriff knew of any trouble in the jail, or that he was bound to anticipate the attack by deceased or the subsequent felonious assault by the other prisoner; and that he could not be charged with negligence in failing to prevent what he could not reasonably anticipate; and consequently it could not be affirmed that he failed in his duty, or that he wilfully did something which resulted in the injury.

J. H. B.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

JACK DAVIS et al., Pliffs. in Err.,
v.

UNITED STATES OF AMERICA.

(247 Fed. 394.)

Criminal law — public trial — excluding spectators.

1. There is a denial of the public trial guaranteed by the Constitution, where, during the arguments to the jury, the court in a criminal case excludes from the court room all but relatives of defendants, members of the bar, and newspaper reporters, although considerable feeling had developed between partisans of defendants and state witnesses, and some witnesses were intoxicated.

For other cases, see Criminal Law, II. b, in Dig. 1-52 N. S.

Same — prejudice — necessity of showing.

2. Prejudice need not be shown to set aside a conviction where accused was denied the public trial guaranteed by the Constitution.

For other cases, see Appeal and Error, VII. m, 7, a, in Dig. 1-52 N. S.

(December 31, 1917.)

Note.—As to right of court to exclude public from court room during criminal trial, see annotation following this case, post, 1168.
L.R.A.1918C.

ERROR to the District Court of the United States for the Eastern District of Oklahoma (Campbell, District Judge) to review a judgment convicting defendants of conspiring to delay the United States mail. Reversed.

The facts are stated in the opinion.

Argued before Hook, Circuit Judge, and Reed and Booth, District Judges.

Messrs. De Roos Bailey and S. M. Rutherford, for plaintiffs in error:

The defendants suffered prejudice because of the mismanagement and misconduct of the jury.

Underhill, *Crim. Ev.* § 232; *Woods v. State*, 43 Miss. 364; *Organ v. State*, 26 Miss. 82; *Com. v. McCaul*, 1 Va. Cas. 271; *Overbee v. Com.* 1 Rob. (Va.) 756; *McLain v. State*, 10 Yerg. 241, 31 Am. Dec. 573; *Com. v. Roby*, 12 Pick. 496; *Hare v. State*, 4 How. (Miss.) 197; *Boles v. State*, 13 Smedes & M. 398; *Rigaby v. State*, 64 Tex. *Crim. Rep.* 504, 38 L.R.A.(N.S.) 1116, 142 S. W. 901; *Pope v. State*, 36 Miss. 121; *Riggs v. State*, 26 Miss. 51; *Edney v. Baum*, 44 Neb. 294, 62 N. W. 481; *Darter v. State*, 39 Tex. *Crim. Rep.* 40, 44 S. W. 850; *Shaw v. State*, 83 Ga. 92, 9 S. E. 768, 8 Am. *Crim. Rep.* 426; *State v. Burton*, 65 Kan. 704, 70 Pac. 640, 14 Am. *Crim. Rep.* 688; *State v. Snyder*, 20 Kan. 306; *State v. Gray*, 100 Mo. 523, 13 S. W. 806; *Hempton v. State*, 111 Wis. 127, 86 N. W. 596, 12 Am. *Crim.*

Rep. 657; *Thompson v. State*, 26 Ark. 323; *Tate v. State*, 38 Tex. Crim. Rep. 261, 42 S. W. 595; *Bilton v. Territory*, 1 Okla. Crim. Rep. 566, 99 Pac. 163; *People v. Hawley*, 111 Cal. 78, 43 Pac. 404; *Riley v. State*, 9 *Humph.* 646; *Com. v. Shields*, 2 Bush, 81; *Johnson v. Root*, 2 Cliff. 128, Fed. Cas. No. 7,409; *Madden v. State*, 1 Kan. 352; *People v. Constantino*, 153 N. Y. 47, 47 N. E. 37.

Defendants were denied a public trial as contemplated by the 6th Amendment to the Constitution.

State v. Osborne, 54 Or. 289, 103 Pac. 62, 20 Ann. Cas. 627; *Bishop*, New. Crim. Proc. § 957; *Cooley*, Const. Lim. 6th ed. 379; *Schick v. United States*, 195 U. S. 65, 49 L. ed. 99, 24 Sup. Ct. Rep. 826, Ann. Cas. 585; *People v. Hartman*, 103 Cal. 245, 42 Am. St. Rep. 108, 37 Pac. 154; *Hopt v. Utah*, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620; *Cancemi v. People*, 18 N. Y. 128; *United States v. Taylor*, 3 *McCrory*, 500, 11 Fed. 470; *Crain v. United States*, 162 U. S. 625, 40 L. ed. 1097, 16 Sup. Ct. Rep. 952; *Re Bonner*, 151 U. S. 242, 38 L. ed. 149, 14 Sup. Ct. Rep. 323; *United States v. Buck*, 4 Phila. 161, Fed. Cas. No. 14,690; *People v. Murray*, 89 Mich. 276, 14 L.R.A. 809, 28 Am. St. Rep. 294, 50 N. W. 995, 9 Am. Crim. Rep. 719; *People v. Yeager*, 113 Mich. 228, 71 N. W. 491; *State v. Hensley*, 75 Ohio St. 255, 9 L.R.A. (N.S.) 275, 116 Am. St. Rep. 734, 79 N. E. 462, 9 Ann. Cas. 108; *Williamson v. Lacy*, 86 Me. 80, 25 L.R.A. 606, 29 Atl. 943; *Tilten v. State*, 5 Ga. App. 59, 62 S. E. 651; *State v. Chambers*, 44 La. Ann. 603, 10 So. 886; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330.

Messrs. D. H. Linebaugh and W. P. McGinnis, for defendant in error:

The law which controls in the Federal courts does not require the jury to be kept together in a case of this character.

United States v. Davis, 103 Fed. 457; *Mattox v. United States*, 146 U. S. 140, 149, 36 L. ed. 917, 921, 13 Sup. Ct. Rep. 50; *Holt v. United States*, 218 U. S. 245, 54 L. ed. 1021, 31 Sup. Ct. Rep. 2, 20 Ann. Cas. 1138.

Before a verdict can rightly be disturbed because of misconduct of the jury in reading papers or books not in evidence, or because of other misconduct of the jury or others, it must be made to appear that the jury were influenced in arriving at the verdict by what they read or by what was done.

Colt v. United States, 111 C. C. A. 205, 190 Fed. 305, 223 U. S. 729, 56 L. ed. 633, 32 Sup. Ct. Rep. 527; *Charlton v. Kelly*, 94 C. C. A. 295, 156 Fed. 433, 13 Ann. Cas. L.R.A.1918C.

518; *Holt v. United States*, 218 U. S. 245, 54 L. ed. 1021, 31 Sup. Ct. Rep. 2, 20 Ann. Cas. 1138; *United States v. Francis*, 144 Fed. 522.

Plaintiffs in error waived their right to object on the ground that they believed the jury were reading the papers.

United States v. Marrin, 159 Fed. 767; *Jackson v. United States*, 42 C. C. A. 452, 102 Fed. 486; *Myers v. United States*, 139 C. C. A. 399, 223 Fed. 919.

The right to a public trial is not unqualified and absolute. It is a relative term and must be consistent with and depend upon circumstances, and while it is a right secured to the defendant, it does not preclude the rights of public justice.

Grimmett v. State, 22 Tex. App. 36, 58 Am. Rep. 630, 2 S. W. 631; *People v. Kerrigan*, 73 Cal. 222, 14 Pac. 849; *People v. Hall*, 51 App. Div. 57, 64 N. Y. Supp. 433; *Benedict v. People*, 23 Colo. 126, 46 Pac. 638; *People v. Swafford*, 65 Cal. 223, 3 Pac. 810; *State v. Nyhus*, 19 N. D. 326, 27 L.R.A.(N.S.) 487, 124 N. W. 71; *Reagan v. United States*, 44 L.R.A.(N.S.) 583, 120 C. C. A. 627, 202 Fed. 488; *Beaver v. Haubert*, 198 U. S. 77, 49 L. ed. 950, 25 Sup. Ct. Rep. 573.

The court, in its discretion, may control the admission of spectators to the court room.

United States v. Buck, 4 Phila. 161, Fed. Cas. No. 14,690; *People v. Kerrigan*, 73 Cal. 222, 14 Pac. 849; *Grimmett v. State*, 22 Tex. App. 36, 58 Am. Rep. 630, 2 S. W. 631; *State v. Callahan*, 100 Minn. 63, 110 N. W. 342; *State v. Nyhus*, 19 N. D. 326, 27 L.R.A. (N.S.) 487, 124 N. W. 71; *Myers v. State*, 97 Ga. 76, 25 S. E. 252; *Jackson v. Com.* 100 Ky. 239, 66 Am. St. Rep. 336, 38 S. W. 422, 1091; *Kugadt v. State*, 38 Tex. Crim. Rep. 681, 44 S. W. 989; *Lide v. State*, 133 Ala. 43, 31 So. 953; *Benedict v. People*, 23 Colo. 126, 46 Pac. 638; *Reagan v. United States*, 44 L.R.A.(N.S.) 583, 120 C. C. A. 627, 202 Fed. 488; *People v. Hartman*, 103 Cal. 245, 42 Am. St. Rep. 108, 37 Pac. 154.

Per Curiam:

The only question in this case that merits discussion is whether the defendants, who were convicted of a crime against the United States, were given a public trial as required by the 6th Amendment to the Constitution.

Near the conclusion of the trial, which lasted several days, a night session of the court was held for the arguments to the jury. When the jurors were in the box, and just before the court convened, the court room, which had become crowded, was by the direction of the trial judge cleared of all spectators except relatives of the de-

fendants, members of the bar, and newspaper reporters, and a bailiff at the door was instructed to admit none but those of the excepted classes. The bailiff thereafter admitted a few others, but it was by way of favor of the court officers. Some citizens against whom no objections appeared on account of character or condition afterwards sought and were denied admission. The seats in the audience part of the court room back of the bar rail would have accommodated at least 100 spectators. About 25 were allowed to be present. Within the rail, besides the court officials and the defendants, a couple of women relatives of the latter, a few newspaper men, and about 10 members of the bar were present. The reasons for the action of the court were these:

The crime of which defendants were charged had connection with a train robbery, and the trial, which was held at Muskogee, Oklahoma, excited more than ordinary interest. At previous sessions the court room was crowded with spectators, so much so that in one instance the court directed the bailiffs to clear the aisles so that witnesses would not be impeded when called. Considerable ill feeling had developed between the defendants, their relatives and friends, and some of the witnesses for the prosecution, and the court had placed the latter in the custody and care of an officer. Precautions had also been taken that defendants should come unarmed into the court room. On the evening of the night session an encounter occurred in a restaurant, in which a relative of one of the defendants hit a witness for the prosecution across the face with a newspaper. This was reported to the court; also that one or more of the witnesses in the court room were intoxicated. It does not appear that the court room was crowded beyond its seating capacity when the order to clear it was made, or that any person was making a disturbance or threatening to do so, or that there was any well-founded apprehension that a disturbance would occur.

We appreciate the better position of the trial court to appraise the significance of surrounding conditions, but we cannot avoid the conviction that it acted upon the representations of those who did not adequately realize the great importance of keeping a place where the justice of the nation is judicially administered a public place for the admission of peaceful citizens. An intoxicated man could have been excluded or removed; the aisles and passageways could have been kept clear; when the seats were filled, other spectators could have been denied at the door; if the noise in the lobbies interfered with the proceed-

ings, the lobbies could have been cleared; and individuals whose conduct outside the court room made their presence within a menace might have been excluded. But it is quite a different thing to exclude the public generally, regardless of their conduct or character.

The 6th Amendment provides that "in all criminal prosecutions the accused shall enjoy the right to a . . . public trial." The provision is one of the important safeguards that were soon deemed necessary to round out the Constitution, and it was due to the historical warnings of the evil practice of the Star Chamber in England. The corrective influence of public attendance at trials for crime was considered important to the liberty of the people, and it is only by steadily supporting the safeguard that it is kept from being undermined and finally destroyed. As the expression necessarily implies, a public trial is a trial at which the public is free to attend. It is not essential to the right of attendance that a person be a relative of the accused, an attorney, a witness, or a reporter for the press, nor can those classes be taken as the exclusive representatives of the public. Men may have no interest whatever in the trial, except to see how justice is done in the courts of their country. The qualifications of the broad scope of the constitutional provision and of like provisions in the Constitutions of the states are few, and are based upon considerations of public morals and peace and good order in the court rooms. They are definitely illustrated in cases in which the exclusion of some or all of the spectators has been upheld.

In *Grimmett v. State*, 22 Tex. App. 36, 58 Am. Rep. 630, 2 S. W. 631, the audience was temporarily excluded during the cross-examination of a young girl who was a witness in a trial for rape. The court certified that persons in the audience persisted by their laughter in disturbing the proceedings and embarrassing the witness, and it was impossible to distinguish them from the others.

People v. Kerrigan, 73 Cal. 222, 14 Pac. 849, was a case of violent and abusive conduct of the defendant, and disorder in the audience. The court room doors were not closed, and the defendant's friends and reporters were allowed to enter and leave at will.

In *Benadict v. People*, 23 Colo. 126, 46 Pac. 637, the trial involved a recital of disgusting details. Members of the bar, officers of the court, law students, and witnesses were allowed to remain.

State v. Nyhus, 19 N. D. 326, 27 L.R.A. (N.S.) 487, 124 N. W. 71, was a prosecution for the rape of a girl under fourteen

years of age. The order excluding auditors excepted all jurors and litigants at the term, attorneys, witnesses for both parties, "and any other person or persons whom the several parties to the action may request to remain."

Reagan v. United States, 44 L.R.A. (N.S.) 583, 120 C. C. A. 627, 202 Fed. 488, was also a case of rape. Court officers, witnesses for both parties, and members of the bar were not excluded.

In State v. Callahan, 100 Minn. 63, 110 N. W. 342, during a part of the examination of the prosecutrix in a trial for rape, the court room was cleared of all persons excepting counsel, officers of the court, witnesses, and of course the defendant. The court held that, while a sweeping, unlimited order would have been erroneous, the situation was but temporary, and it appeared that the prosecutrix was so embarrassed by the crowd that counsel for the state was unable to elicit from her a definite statement of what occurred.

In Myers v. State, 97 Ga. 76, 25 S. E. 252, the court, in passing on defendant's complaint of an overcrowding of the court room, said that the requirement of a public trial did not prevent the exclusion of spectators for lack of seating capacity.

In Lide v. State, 138 Ala. 43, 31 So. 953, the clearing of the court room was because of applause by the spectators of remarks of counsel for the state. It was said: "It was not only the power, but the duty, of the court to prevent demonstrations of approval or disapproval by spectators in the trials of causes, and if need be to this end to exclude the offending parties from the courthouse."

In People v. Swafford, 65 Cal. 223, 3 Pac. 809, all persons were excluded except the judge, jurors, witnesses, and persons connected with the case. It was held that the word "public" in the Constitution was used in opposition to secret, and that defendant was not denied a public trial. This is an extreme case.

State v. Brooks, 92 Mo. 542, 5 S. W. 257, 330. In the early stages of the selection of the jury, bailiffs at the court room door refused to admit anyone except jurors, witnesses, officers of the court, and those having business in court. When the court was informed of this, it said it was without its direction, and it ordered that all persons be admitted until the seats were filled. It was held on appeal that this was not a denial of a public trial, but that there might have been ground for the complaint, had the order not been made, or had a request for a re-examination of the jurors questioned during the time been asked and denied.

In State v. McColl, 34 Kan. 617, 9 Pac. L.R.A. 1918C.

745, the trial court, at the instance of the prosecuting attorney, requested ladies to leave the court room, as the attorney was about to refer to some evidence unfit for them to hear. This was held proper. The complaint, however, was not that defendant was denied a public trial.

The above are most of the cases in which limited admissions have been upheld. We turn now to those in which they have been disapproved.

In State v. Osborne, 54 Or. 289, 103 Pac. 62, 20 Ann. Cas. 627, the charge was rape. Before the taking of testimony the court directed the sheriff as follows: "You will please exclude everybody from the court room except the defendant, the attorneys engaged in the trial of this case, the jury, and officers of this court, and the witnesses while on the witness stand; and you will observe this order so to exclude the public from the court room during the taking of testimony upon this trial."

The carrying out of this order was vigorously condemned by the supreme court of the state. It will be observed that there was no selective exclusion with reasonable regard for the nature of particular phases of the trial or the testimony.

Tilton v. State, 5 Ga. App. 59, 62 S. E. 651, was a case of adultery with a fourteen-year old girl. The state Constitution required a public trial, and a state statute authorized trial courts to clear the court room of "all or any portion of the audience" in cases where the evidence "relates to improper acts of the sexes and tends to debauch the morals of the young." As soon as the jury was impaneled the court ordered "the court room cleared of everyone not connected with the case." It was held on appeal that the court might properly have excluded "all minors, all women, and all others who failed to behave decorously, or who interfered in any manner with the decent conduct of the case," but that its order was too sweeping and denied the defendant a public trial.

In State v. Hensley, 75 Ohio St. 255, 9 L.R.A. (N.S.) 277, 116 Am. St. Rep. 734, 79 N. E. 462, 9 Ann. Cas. 108, the trial was adjourned from a large court room to a small one for the taking of testimony of an immoral or obscene nature, and the court directed the sheriff to admit none but the jury, defendant's counsel, members of the bar, newspaper men, and a named witness for defendant. It was held that the exclusion was too general for a public trial.

In People v. Hartman, 103 Cal. 242, 42 Am. St. Rep. 108, 37 Pac. 153, the charge was assault with intent to commit rape. The action of the trial court in excluding all persons from the trial except the officers

of the court and the defendant was said on appeal to be without justification in the law of modern times. The prior decision in *People v. Swafford*, supra, was held unsound. The court said: "The trial should be public in the ordinary common-sense acceptance of the term. The doors of the court room are expected to be kept open, the public are entitled to be admitted, and the trial is to be public in all respects, as we have before suggested, with due regard to the size of the court room, the conveniences of the court, the right to exclude objectionable characters and youth of tender years, and to do other things which may facilitate the proper conduct of the trial."

People v. Murray, 89 Mich. 276, 14 L.R.A. 809, 28 Am. St. Rep. 294, 50 N. W. 995, 9 Am. Crim. Rep. 719, was a case of murder. The attention of the trial court was directed to the fact that a policeman stationed at the court room door was denying admission to respectable citizens, but it refused to take action. It was shown by affidavits that there was ample accommodation in the court room, that but few were admitted, and that many were refused. The supreme court of Michigan held that defendant had not been accorded a public trial. It questioned whether respectability was a test of the right of access to a public trial, and, if so, whether it should be left to the knowledge or discretion of a police officer. After this decision was rendered a statute was enacted conferring discretion upon a trial judge to exclude from the trial, or any portion thereof, all persons "except those necessarily in attendance," whenever it appeared that "evidence of licentious, lascivi-

ous, degrading, or peculiarly immoral acts or conduct" would probably be given.

In *People v. Yeager*, 113 Mich. 228, 71 N. W. 491, the defendant was charged with assault with intent to commit rape, and the trial court, in applying the above-mentioned statute, allowed representatives of the press to remain in the court room, asked all others to retire, and directed an officer to admit any who were relatives or friends of the defendant. It finally announced: "I have told the officer not to let anybody in here who is not either a friend of the complaining witness or of the defendant. He will ascertain that fact as they apply for admission. All such people will be admitted, and the public will be kept out." The supreme court of the state held the trial not a public one. It said: "Who is to decide who are the friends of the accused? The law makes no such test, but allows all citizens freely to attend upon any trial, whether civil or criminal."

We think these latter cases are well founded in principle and reason, and that in the case at bar the defendants did not have the public trial contemplated by the 6th Amendment.

It is urged that no prejudice to defendants was shown. A violation of the constitutional right necessarily implies prejudice, and more than that need not appear. Furthermore, it would be difficult, if not impossible, in such cases, for a defendant to point to any definite, personal injury. To require him to do so would impair or destroy the safeguard.

The sentences are reversed, and the cause is remanded for a new trial.

Annotation—Right of court to exclude public from court room during criminal trial.

This note is supplemental to the notes in 9 L.R.A.(N.S.) 277; 27 L.R.A.(N.S.) 487; and 44 L.R.A.(N.S.) 583, where the earlier cases are collected.

The courts continue to differ materially on the question.

It will be observed that the decision in *DAVIS v. UNITED STATES*, ante, 1164, seems opposed to the two rape cases below referred to, from the ninth circuit, of *Reagan v. United States* (1913) 44 L.R.A.(N.S.) 583, 120 C. C. A. 627, 202 Fed. 488, and *Callahan v. United States* (1917) 240 Fed. 683, the court in the *DAVIS* CASE not apparently distinguishing it on account of the trial being for a crime having connection with a train robbery.

In California, on a trial for incest with a daughter, it was held to be error I.R.A.1918C.

to require all persons other than those directly connected with the trial to withdraw from the court room, and to try the case "behind closed doors." *People v. Letoile* (1916) 31 Cal. App. 166, 159 Pac. 1059, where the court said: "We do not doubt the right of the court to regulate the admission of the public to the court room in any appropriate manner in order to prevent overcrowding or disorder, but the right does not exist to wholly exclude the public."

In *State v. Keeler* (1916) 52 Mont. 205, L.R.A.1916E, 472, 156 Pac. 1080, Ann. Cas. 1917E, 619, it was held that the constitutional right to a public trial was infringed by excluding from the court room in a rape case all not present when the order was made, and denying those who retired permission to

return, except court officers, attorneys, doctors, and reporters.

In *People v. Collazo* (1913) 19 P. R. R. 912, it was held that the right of the accused to "a speedy and public trial" under the 6th Amendment to the United States Constitution and under the Porto Rico Code was infringed by excluding the public from the court room during the examination of one of the witnesses in a case for disturbing the public peace. The court said that the exclusion could not have been to prevent the public from hearing immoral testimony as other witnesses testified in the presence of the public regarding the same facts.

On the other hand, *Reagan v. United States* (Fed.) supra (to which the prior note in 44 L.R.A. (N.S.) 583, is attached), holding that the court might exclude the spectators in a rape case, was followed in *Callahan v. United States* (Fed.) supra, holding an order permissible in the discretion of the court, which excluded from the court room during the trial in a case of rape of a girl under the age of consent all persons who had no business before the court, but allowed to be present litigants, witnesses, jurors, counsel, officers of the court, and representatives of the newspapers.

In *Keddington v. State* (1918) — *Ariz.* —, 172 Pac. 273, it was held that the defendant's constitutional right to a public trial was not infringed where he was charged with contributing to the dependency of the girl of the age of sixteen years and the court directed that the court room be cleared and that the public be excluded except witnesses and relatives of the defendant and, by a modification, also newspaper reporters; but the court seems to have considered that the defendant was satisfied with the order after it had been modified by permitting the presence of newspaper reporters, and states that he made no objection or protest after such modification.

The exclusion from a trial for bastardy of all negroes and boys was held to be within the discretion of the trial judge in *State v. Adams* (1914) 100 S. C. 43, 84 S. E. 368.

The constitutional and statutory right to a "public trial" was held not to be infringed in a case of assault with intent to commit rape on an eleven-year-old daughter by an order excluding all spectators from the court room, in *State v. Johnson* (1914) 26 Idaho, 609, 144 Pac. 784, where the court said: "In cases like the one at bar, where the evidence is of a very immoral and dis-

gusting nature, we do not think the court erred in excluding the general public from the court room during the trial. Of course, the friends of the defendant who desired to be present and the officers of the court, including members of the bar, ought not to be excluded; but to exclude the general public, who only have a curiosity to hear the revolting details of a rape case, does not deprive a defendant of a public trial as provided by the Constitution and statutes above cited."

There was held to be no infringement of the right to a public trial where, after some disorder in the court room, the court ordered the galleries to be cleared, and the bailiff removed most of the spectators and without any order locked the main door, which remained locked for some forty-five minutes, some persons meantime coming in through an anteroom, and the counsel of the defendant, while observing the situation, made no objection. *People v. Tagwell* (1917) 32 Cal. App. 520, 163 Pac. 508.

In the next two cases the element of consent was present, although the court in the second case did not think consent necessary.

It was held in a jurisdiction where the Constitution did not in terms provide that trials should be public, that a case of assault with intent to rape tried by consent by the court without a jury was properly tried in a smaller room than the usual court room, with the consent of the prisoner's attorney, in the presence of the officers, attorneys, and witnesses, it not appearing that anyone desired by the prisoner was excluded; but the conviction was reversed because the testimony of the prosecutrix was taken out of the presence of the prisoner. *Dutton v. State* (1914) 123 Md. 373, 91 Atl. 417, Ann. Cas. 1916C, 89.

A defendant on trial upon the charge of omitting to provide for an illegitimate child may have the spectators excluded. *People v. Stanley* (1917) 33 Cal. App. 624, 166 Pac. 596. In this case the request was made soon after the trial was opened, and was granted by the court. Near the close of the trial the request was renewed, and the court made the ruling hereafter set out, but the extent to which either order was enforced does not appear. The appellate court considered that the second order might have been properly made without the request of the defendant, it being as follows: "I will clear it of all except any persons who have any legiti-

mate interest here. I am very much in sympathy with counsel's motion in so far as it has to do with a great many people who are attracted to the court room when cases of this character are on trial, not because they have any sort or kind of legitimate interest in the proceedings, not that they are concerned at all with the administration of public justice, but apparently simply and solely to gratify some sort of prurient curiosity or feeling or desire of some sort that finds great satisfaction in listening to testimony of the kind that is ordinarily adduced upon these hearings. If, upon the other hand, there are any persons here who are brought here because of any legitimate interest of any sort or kind in the case, or in any of those concerned with it, they may remain. For instance, if the defendant has here

any personal friends or relatives, they may remain. If the complaining witness has any relatives or friends now here, they may remain. But the rest of the people here, who have no interest in this case, will kindly retire. Mr. McKenzie (counsel for the defendant): Your Honor, if that is going to include the friends of this complaining witness we assert our right to a public trial. The Court: No, you have already waived your right to a public trial; that waiver will stand. Mr. McKenzie: We meant the whole court room with the exception of the officers, and that is the motion we make. The Court: All right. I will stand on that. Mr. McKenzie: We ask that we have a public trial and we refuse to waive the right. The Court: The trial will proceed as already ordered." B. B. B.

KANSAS SUPREME COURT.

KATHERINE KELLY

v.

CENTRAL UNION FIRE INSURANCE
COMPANY, Appt.

(101 Kan. 91, 165 Pac. 806.)

Appeal — effect of findings.

1. Rule followed that a general verdict and consistent findings of fact dispose of all controverted issues of fact when based upon substantial, though conflicting, testimony. For other cases, see *Appeal and Error*, VII. 1, 2, in *Dig. 1-52 N. S.*

Evidence — sufficiency.

2. Record shows evidence sufficient to prove the contract in controversy, and to prove its authorization and ratification. For other cases, see *Evidence*, XII. 4, in *Dig. 1-52 N. S.*

Corporation — purchase of own stock.

3. A statute forbidding a corporation to purchase or hold its own stock, either absolutely or as collateral, after it has once been issued, does not cover the transactions of a corporation during its formative stage and before its corporate structure is perfected, in contracting for the surrender and cancellation of subscription stock to suppress an overissue in excess of its authorized capitalization, when such correction of the illegal overissue is done in good faith,

Headnotes by DAWSON, J.

Rehearing headnote by MARSHALL, J.

free of any taint of fraud, and not in prejudice of the rights of third parties. For other cases, see *Corporations*, IV. 4, 1, in *Dig. 1-52 N. S.*

Same — ultra vires — benefit.

4. A corporation cannot avoid its obligation on a plea of ultra vires when it has appropriated the consideration and received the benefits of it, and where the party seeking to enforce it has fully performed her share of the bargain.

For other cases, see *Corporations*, IV. 2, in *Dig. 1-52 N. S.*

Same — oversale of stock.

5. Where a corporation in its formative stage discovers that it has oversold its authorized maximum capital stock, the fact that all stock sold after the maximum had been reached should have been treated as void will not bar a recovery for the agreed value or reasonable price of valid stock surrendered by a prior lawful subscribing stockholder to relieve the company's embarrassment and to extinguish the over-issue, when this method of correcting the company's capitalization is undertaken in good faith, free of any taint of fraud, and the rights of others are not affected thereby. For other cases, see *Corporations*, IV. 2, in *Dig. 1-52 N. S.*

On Rehearing.

Appeal — questions presented for first time.

6. The supreme court will not consider questions presented for the first time on appeal.

(June 9, 1917.)

Note. — The question as to how far a private corporation is estopped to raise the defense of ultra vires in an action brought against it is considered in the annotation following *Gilbert v. Citizens' Nat. Bank*, L.R.A.1917A, 749; and see later case, *Pol-L.R.A.1918C*.

lock v. Lumbermen's Nat. Bank, L.R.A. 1918B, 402.

The right of a corporation to purchase its own shares of stock is discussed in the annotation following *Lefker v. Harner*, L.R.A.1916F, 286.

APPEAL by defendant from a judgment of the District Court for Miami County in favor of plaintiff in an action brought to recover the value of certain shares of capital stock of the defendant company alleged to have been sold by plaintiff to it. Affirmed.

The facts are stated in the opinion.

Messrs. H. L. Burgess, Hugh C. Smith, Paul E. Bradley, and Leslie J. Lyons, for appellant:

The statutes of the state of Missouri (Rev. Stat. 1909, § 7063) prohibit the purchase, directly or indirectly, by an insurance company organized in Missouri, of its own capital stock, and therefore the contract, if any, is absolutely void.

St. Louis Carriage Mfg. Co. v. Hilbert, 24 Mo. App. 388; St. Louis Rawhide Co. v. Hill, 72 Mo. App. 142; Boley v. Sonora Development Co. 126 Mo. App. 116, 103 S. W. 975; Wilson v. Torchon Lace & Mercantile Co. 167 Mo. App. 305, 149 S. W. 1156; Chrisman-Sawyer Bkg. Co. v. Independence Wool Mfg. Co. 168 Mo. 645, 68 S. W. 1026; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; First Ave. Land Co. v. Parker, 111 Wis. 1, 87 Am. St. Rep. 841, 86 N. W. 604; Hayden v. Charter Oak Driving Park, 63 Conn. 142, 27 Atl. 232; Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968; People's Bank v. Kurtz, 99 Pa. 344, 44 Am. Rep. 112; Bruff v. Mali, 36 N. Y. 200, 6 Mor. Min. Rep. 574; People v. Parker Vein Coal Co. 10 How. Pr. 543; Sewell's Case, L. R. 3 Ch. 131, 18 L. T. N. S. 2, 16 Week. Rep. 381; Wright's Appeal, 99 Pa. 425; Chilli-cothe Branch of State Bank v. Fox, 3 Blatchf. 431, Fed. Cas. No. 2,663; Vail v. Hamilton, 85 N. Y. 453; American Railway Frog Co. v. Haven, 191 Mass. 398, 3 Am. Rep. 377; Com. v. Boston & A. R. Co. 142 Mass. 146, 7 N. E. 716; Cook, Corp. 6th ed. § 313; Williams v. Saving Mfg. Co. 3 Md. Ch. 418; City Bank v. Bruce, 17 N. Y. 507; San Antonio Hardware Co. v. Sanger, — Tex. Civ. App. —, 151 S. W. 1104; Coppin v. Greenlees & R. Co. 38 Ohio St. 275, 43 Am. Rep. 426; Tolman v. New Mexico & D. Mica Co. 4 Dak. 4, 22 N. W. 505; Union Trust & Sav. Bank v. Amery, 72 Wash. 648, 131 Pac. 199; Hall v. Alabama Terminal & Improv. Co. 173 Ala. 398, 56 So. 235; Richards v. Ernst Wiener Co. 207 N. Y. 59, 100 N. E. 592; German Sav. Bank v. Wulfek-huler, 19 Kan. 60; Abeles v. Cochran, 22 Kan. 405, 31 Am. Rep. 194; State ex rel. Colburn v. Oberlin Bldg. & L. Asso. 35 Ohio St. 258; Cartwright v. Dickinson, 88 Tenn. 476, 7 L.R.A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030; Barton v. Port Jackson & U. F. P. Road Co. 17 Barb. 397; Re International Radiator Co. 10 Del. Ch. 358, 92 Atl. 255; Johnston v. Laffin, 103 U. S. 800—L.R.A.1918C.

802, 26 L. ed. 532—534; Kom v. Cody Detective Agency, 76 Wash. 540, 50 L.R.A. (N.S.) 1073, 136 Pac. 1155; 4 Thomp. Corp. § 4076; Steele v. Farmers & M. Mut. Teleph. Asso. 95 Kan. 580, 148 Pac. 661.

The alleged contract, if made, will not be enforced, because Mr. Kelly made the supposed contract with his wife for a profit while he was the president and chief officer of the defendant company, and without the authority, sanction, or approval of the board of directors and a full disclosure of the terms and conditions thereof.

Stewart v. Harris, 69 Kan. 498, 66 L.R.A. 261, 105 Am. St. Rep. 178, 77 Pac. 277, 2 Ann. Cas. 873; 10 Cyc. 912; Washington Mut. F. Ins. Co. v. St. Mary's Seminary. 52 Mo. 480; First Nat. Bank v. Hogan, 47 Mo. 472; Barcus v. Hannibal, R. C. & P. Pl. Road Co. 26 Mo. 102.

A corporation is not estopped to urge the defense of ultra vires where the act or contract involved is void because directly prohibited in specific terms by statute.

7 Thomp. Corp. §§ 8319, 8320; Fidelity Ins. Co. v. German Sav. Bank, 127 Iowa. 591, 103 N. W. 958; Cincinnati Mut. Health Assur. Co. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; Pearce v. Madison & I. R. Co. 21 How. 441, 16 L. ed. 184; Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co. 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094; Pittsburgh, O. & St. L. R. Co. v. Keokuk & H. Bridge Co. 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. Rep. 770; Jacksonville, M. P. R. & Nav. Co. v. Hooper, 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. Rep. 379; California Bank v. Kennedy, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; National Trust Co. v. Miller, 33 N. J. Eq. 155; Miller v. American Mut. Acci. Ins. Co. 92 Tenn. 167, 20 L.R.A. 765, 21 S. W. 39; Chambers v. Falkner, 65 Ala. 448; Marion Sav. Bank v. Dunkin, 54 Ala. 471; Davis v. Old Colony R. Co. 131 Mass. 253, 41 Am. Rep. 221; Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781; Buckeye Marble & F. Co. v. Harvey, 92 Tenn. 116, 18 L.R.A. 252, 36 Am. St. Rep. 71, 20 S. W. 427; Greenville Compress & Warehouse Co. v. Planters' Compress & Warehouse Co. 70 Miss. 669, 35 Am. St. Rep. 681, 13 So. 879; West Penn Chemical & Mfg. Co. v. Prentice, 150 C. C. A. 153, 236 Fed. 891; Re La Vergne Refrigerating Mach. Co. v. German Sav. Inst. 175 U. S. 58, 44 L. ed. 65, 20 Sup. Ct. Rep. 25; First Nat. Bank v. Converse, 200 U. S. 439, 50 L. ed. 537, 26 Sup. Ct. Rep. 306; Gilbert v. Citizens' Nat. Bank, — Okla. —, L.R.A. 1917A, 740, 160 Pac. 635.

Messrs. Robert Stone and George T. McDermott also for appellant.

Messrs. Sheridan & Sheridan for appellee.

Dawson, J., delivered the opinion of the court:

This appeal relates to matters which transpired during the formative period of the defendant's corporate existence, and requires a review of certain transactions relating to plaintiff's purchase of subscription shares of defendant's stock, the surrender and cancellation of plaintiff's stock to extinguish an overissue of capital stock, the partial payment to plaintiff for her surrendered stock, and the question of the defendant's liability to plaintiff for the balance of the agreed price, or reasonable value, of plaintiff's stock thus surrendered by her.

Plaintiff's petition alleged that in July, 1911, she purchased from defendant 900 shares of its capital stock and paid for the same in money and property amounting to \$11,250, and that she received a proper stock certificate therefor; that about December 31, 1911, defendant discovered that it had overissued its capital stock to the number of some 1,500 shares in excess of its authorized capitalization; that its authorized capital was \$350,000, being 35,000 shares at a par value of \$10 per share; and that it was necessary that some of the stock thus issued be canceled so as to reduce the actual stock issue to its maximum legal limit. The petition continues: "Such overissue of the stock having occurred through an inadvertence in having agents at various sections of the country taking subscriptions for and selling the stock. . . . But when it became apparent to the defendant company, and its various officers, of the said overissue of stock, and that it was necessary to call in and cancel about 1,500 shares of the stock so issued, thereupon the defendant, because of the foregoing, and in its effort to retire or cancel stock, . . . under an oral agreement on or about December 31, 1911, . . . in consideration that this plaintiff would return the said certificate and permit it to be canceled by the defendant, . . . it was at that time agreed between the defendant and the plaintiff that it would pay to the plaintiff the sum or \$15 per share, or a total consideration of \$13,500, for the said certificate of stock, . . . and the defendant, in pursuance thereof, at or about that time, received the same, and caused the same to be canceled. . . . That the defendant paid to this plaintiff, on or about the ——— day of June, 1912, \$6,000, under the terms of the said oral agreement; and L.R.A.1918C.

that it has at all times since wholly refused and neglected to pay this plaintiff the remaining part of the said \$13,500, which it agreed to pay, etc."

Defendant's answer denied, generally and specially, all of the plaintiff's material allegations, denied that there was an overissue of its capital stock at any time, denied that it was necessary to cancel any stock, denied that it purchased or canceled plaintiff's stock, denied that it paid her \$6,000 thereon.

"But if said stock was purchased, as alleged, from the plaintiff herein, . . . said contract and agreement was entered into, if at all, in the state of Missouri. That it was to be performed within the state of Missouri. That the defendant is an insurance company, organized under the laws of the state of Missouri. . . . That § 7063 of the Revised Statutes of the state of Missouri for the year of 1909, among other things, provides as follows: 'No insurance company shall, directly or indirectly, purchase or hold, either absolutely or as collateral, its own stock, after the same has been once issued.' . . . That said alleged contract for the purchase of said stock, if made at all (and defendant denies that any such agreement was made), was contrary to said statute of the state of Missouri, and was therefore ultra vires, void, and of no force or effect, and not binding upon the defendant company."

Answering further, the defendant alleged that from the spring of 1910 until August 8, 1911, the plaintiff's husband, T. T. Kelly, was secretary of the defendant company, and as such official he had charge of the promotion and organization of the company and the sale of its capital stock: that after August 8, 1911, he was the president and a director of the company, and was the principal officer and manager of the company, and intrusted with its management and with control of its affairs; that on June 2, 1911, he caused a certificate for 1,000 shares of the stock to be issued to himself; that on July 20, 1911, he caused that certificate to be canceled, and in lieu thereof caused the issue of two certificates to be made, one for 100 shares in his own behalf and another for 900 shares to be issued to plaintiff; and that thereafter, through the company's stock salesman, he effected a sale of 1,000 shares to a Dr. J. M. Singleton for the sum of \$15,000, being \$15 per share.

"Said salesman in selling said stock to Dr. J. M. Singleton supposed that they were selling treasury stock of said company, but that said Kelly upon his own initiative, and without the knowledge or consent of defendant company, for the purpose of making a personal profit for himself, caused the two

certificates of stock then held by himself and his wife . . . to be surrendered and transferred upon the books of the defendant company, and a new certificate . . . for one thousand shares to be issued to Dr. J. M. Singleton. . . ."

The gist of other matters pleaded in the answer was that the Singleton stock was an outright purchase of the stock of plaintiff and her husband, and not a purchase of treasury stock; that Singleton paid for his stock by giving promissory notes for the purchase price; that plaintiff's husband, as president of the company, made a real estate loan to Singleton, with defendant's funds, upon condition that one of the promissory notes for \$7,500 given by Singleton should be paid with the moneys thus loaned to him; and that, pursuant thereto, plaintiff's husband received the sum of \$7,500.

"That this defendant has never exercised dominion or ownership of said notes, or either of them, and has never made any claim to or over the said notes, and it does not now claim any right, title, or interest thereto. That said notes have never been listed or scheduled among the assets or property of the defendant company, but at all times have been and now are in truth and in fact the property of the said T. T. Kelly."

Plaintiff's reply admitted that originally a certificate of stock in the name of her husband for 1,000 shares had been prepared, but never with her consent; that two certificates should have been prepared in the first instance, one representing her interest of 900 shares and one representing her husband's interest of 100 shares; that, when the overissue was discovered, her husband, as president of the company, offered to return to her the money and property (mortgages) which she had paid for her stock and pay her the balance of the then reasonable and agreed price, or, if the property could not be returned, the defendant would pay her \$15 per share. Other features of the plaintiff's reply read:

"That thereupon she surrendered the said certificate of stock, first indorsing it, and delivered it to T. T. Kelly, for the defendant company at Paola, Kansas, on or about the latter part of December, 1911, or the fore part of January, 1912, and that thereafter the defendant has kept and retained the said certificate and has not paid to this plaintiff any of the said purchase price, except the sum as stated in plaintiff's petition.

"Third. This plaintiff admits that T. T. Kelly is, and has been for many years, the husband of the plaintiff, and that he was the secretary of the defendant company as well as the president of the defendant company. L.R.A.1918C.

pany; that he had all the power and authority in behalf of the defendant expressed in the petition of the plaintiff; and further alleges that each and all of his acts and proceedings with relation to the defendant and in reference to the stock of this plaintiff and the surrender thereof were from time to time fully known and approved and ratified by the board of directors, stockholders, and the executive committee of the defendant, including the various officers of the defendant; and that the defendant and its said board and officers and the committees acquiesced in, approved, and consented, and had previously authorized, the procurement of the said certificate of stock by the said T. T. Kelly from this plaintiff. . . ."

On these issues, the cause was tried. The jury returned a general verdict for plaintiff, and answered certain special questions propounded by plaintiff.

"(2) . . . State if the plaintiff, at the instance and request of the defendant, caused the said stock certificate to be delivered to the defendant with the intention and purpose on the part of the defendant and plaintiff that the defendant would cancel the said stock certificate and the rights of the plaintiff as the holder of such stock. A. Yes.

"(3) . . . State if the defendant did cancel the said certificate and thereafter exercised absolute control over the said stock. A. Yes.

"(4) . . . State if it is true that, at the time the defendant so received the said certificate, it did so with the belief on its part that there was an overissue of stock of the defendant, and that it was necessary to procure at least as much as 900 shares, in order to cancel the same to reduce the stock issue of the defendant to 35,000 shares. A. Yes.

"(5) . . . State if the defendant at that time agreed to pay the plaintiff for the said stock, and, if so, the price of \$13,500. A. Yes.

"(6) . . . What was the reasonable market value of the 900 shares of stock represented by the certificate of the plaintiff, at the time it was so delivered to the defendant? A. \$15 per share, or \$13,500.

"(7) How much did the plaintiff cause to be paid to the defendant for the 900 shares represented by her certificate No. 488? A. \$12.50 per share, or \$11,250.

"(8) Was there, at the time the defendant received the certificate of stock in question, an overissue of stock of defendant? A. Yes."

Also certain questions of defendant:

"(3) Did the plaintiff in this action receive the check for \$7,500 issued by the

Central Union Fire Insurance Company to Henrie S. Dyson, given by Dr. J. M. Singleton in payment of one of his notes? A. Yes, she received the check.

"(4) Was said \$7,500 received by plaintiff and applied by her in part payment for her 900 shares of stock? A. \$6,000 was applied on her 900 shares of stock."

Defendant's principal contentions are that the contract for the surrender and cancellation of plaintiff's stock was in violation of the laws of Missouri and prohibited by Missouri statutes, and that the laws of a corporation's domicile follow and govern its conduct into whatever jurisdictions the corporation may go; that the contract was also void under the laws of Kansas; that no contract was proven and no ratification shown; that, if there was an overissue of defendant's stock, the plaintiff's stock would not be affected thereby, but only the Singleton stock, or whatever stock was issued after the authorized capitalization was sold in full; that the holders of the excess issue of stock had their remedy against the corporation by demanding a return of the consideration paid for the excess issue; that defendant's acquisition of plaintiff's stock did not change the situation or cure the defect in the capitalization; that the verdict was excessive in the principal sum of \$1,500 and interest computed thereon.

The general verdict and the special findings dispose of all controverted issues of fact. Although stoutly controverted by defendant, we find no difficulty in gleaning from the record ample evidence to prove the contract, its authorization, and ratification. *Getty v. C. R. Barnes Mill. Co.* 40 Kan. 281, 287, 19 Pac. 617; *Sherman Center Town Co. v. Morris*, 43 Kan. 282, 284, 19 Am. St. Rep. 134, 23 Pac. 569. There was, indeed, much evidence to the contrary. A skilful and persistent effort was made to prove that the cancellation of plaintiff's stock was merely to effect a sale and transfer of it to Dr. Singleton, and not at all to cure an overissue. But the jury has settled these matters. *Brington v. Wagoner*, 100 Kan. 10, 164 Pac. 1057, syl. ¶ 1.

Statutes of Missouri, Missouri decisions, and Kansas decisions are cited and quoted to show that the contract for the surrender and cancellation of plaintiff's stock to correct and cure the overissue was ultra vires and expressly prohibited, and that the contract was against public policy. These have been carefully examined. The Missouri statute forbids a corporation to purchase or hold its own stock, either absolutely or as collateral, after it has once been issued. 2 Mo. Rev. Stat. 1909, § 7063; *Chriaman-Sawyer Bkg. Co. v. Independence Mfg. Co.* 168 Mo. 646, 647, 68 S. W. 1026. Such is L.R.A.1918C.

the general rule. Whether the purchase of its own stock by a corporation is positively forbidden by statute or by mere judicial disapproval of such a practice, there is no doubt that the rule is based on sound public policy. *German Sav. Bank v. Wulfekuhler*, 19 Kan. 60; *Abeles v. Cochran*, 22 Kan. 405, 31 Am. Rep. 194; *Steele v. Farmers & M. Mut. Teleph. Assn.* 95 Kan. 580, 148 Pac. 661. There is usually some leeway allowed by statute, or by judicial interpretation, for a corporation's temporary acquisition or control of its own outstanding capital stock for the purpose of protecting itself against loss. U. S. Rev. Stat. § 5201, Comp. Stat. 1916, § 9762; Gen. Stat. 1915, § 2144; Mo. Rev. Stat. § 2990; *Batley v. Eureka Bank*, 62 Kan. 384, 63 Pac. 437; *Faulkner v. Topeka Bank*, 77 Kan. 385, 94 Pac. 153; *Abilene State Bank v. Strachan*, 89 Kan. 577, 46 L.R.A. (N.S.) 668, 132 Pac. 200; *St. Louis Rawhide Co. v. Hill*, 72 Mo. App. 142, syl. ¶ 2. See also notes in 61 L.R.A. 621, and 25 L.R.A. (N.S.) 50.

But the transaction involved in the present case is unique. The corporation's purpose in procuring plaintiff's stock and canceling it was to correct a breach of its corporate powers which it had already committed, and it was not to reduce or hold within its own control its legitimate capital, nor to commit a breach of any rule of public policy governing the manipulation of its own stock. The corporation had illegally issued stock in excess of its authorized maximum capital. Some mode of correction had to be devised. It was necessary that a report of its corporate financial status be made to the Missouri superintendent of insurance. To apprise that officer of the excess issue of stock at that time might have brought down on the corporation the drastic consequences of usurping illegal powers. The predicament of the corporation was not one which could be corrected by an amendment to its charter. The statute relating to that subject (Mo. Rev. Stat. § 7001a; Mo. Laws 1911, p. 276) regulates the reduction of a previously authorized and valid capitalization and provides for the amendment of the corporate charter in accordance therewith. That statute does not pretend to govern the suppression or extinguishment of an illegal overissue of stock. It cannot be denied that the defendant corporation had power to correct the infirmity in its capitalization. It was its duty to do so. When the state creates a corporation, it not only confers authority upon it, but it imposes a duty upon it,—the duty to exercise its corporate functions and to exercise them in conformity to its grant of powers. This corporation had erred, and it was bound to correct that error in some

appropriate way. The mode of relieving itself from its predicament was simple, and not seriously inappropriate. It certainly was a harmless mode of correcting the irregularity. It did not prejudice the rights of creditors. It was not done to escape a stockholder's liability. It had no taint of fraud. Defendant's bargain with plaintiff for the surrender and cancellation of her stock to cure the illegal overissue was not such a purchase of plaintiff's stock as is contemplated by the inhibitions of the Missouri statute, and the bargain by which defendant was relieved of its embarrassment did not offend against any rational rule of public policy. It does not appear that the creator of this corporation, the state of Missouri, has challenged the corporate acts of defendant in effecting the readjustment and correction of its stock issue. The defendant was vitally benefited by the arrangement—not necessarily in money, but in a more important way—by the restoration of its corporate integrity. The court is of opinion that the transaction involved here was not within the fair intentment of the statute cited, and did not offend against it either in letter or in spirit.

There are, indeed, two schools of jurists and two lines of authority on legal questions relating to ultra vires transactions. The case of *Harris v. Independence Gas Co.* 76 Kan. 750, 13 L.R.A. (N.S.) 1171, 92 Pac. 1123, discusses at length both the strict and the liberal view concerning the consequences of ultra vires transactions. A long line of well-considered decisions has committed this court to the liberal view that a corporation may not avoid its obligation on a plea of ultra vires when it has appropriated the consideration or received the benefits of it, and when the party seeking to enforce the obligation has fully performed his share of the undertaking. *Cooper v. First Nat. Bank*, 40 Kan. 5, 18 Pac. 937; *Sherman Center Town Co. v. Morris*, 43 Kan. 232, 19 Am. St. Rep. 134, 23 Pac. 569; *Sherman Center Town Co. v. Russell*, 46 Kan. 382, 26 Pac. 715; *Arkansas Valley Town & Land Co. v. Lincoln*, 56 Kan. 145, 42 Pac. 706; *Alexandria, A. & Ft. S. R. Co. v. Johnson*, 58 Kan. 175, 48 Pac. 847; *Blue Rapids Opera-House Co. v. Mercantile Bldg. & L. Asso.* 101 Kan. 76, 53 Pac. 761; *Harris v. Independence Gas Co.* 76 Kan. 750, 13 L.R.A. (N.S.) 1171, 92 Pac. 1123; *Saylors v. State Bank*, 99 Kan. 515, 519, 520, 163 Pac. 454, and cases cited; *First Nat. Bank v. Wilson*, 101 Kan. 72, 165 Pac. 859; *Main v. Casserly*, 67 Cal. 127, 7 Pac. 426; 10 Cyc. 1056-1067; 7 R. C. L. 677-681.

It is suggested that the plaintiff's stock, being subscribed and paid for and issued before the excess issue occurred, was not L.R.A.1918C.

affected by the overissue; and that the stock sold and issued after the authorized capitalization was completed was void. That is true. The plaintiff might have stood on her rights and held her valid stock, and let the defendant settle with Singleton, the last subscriber, or one of the last, on the best terms possible. Singleton was very much desired as a stockholder and as a director, and the promoters of the corporation believed it to be very much to the corporation's advantage to have him interested in its success. In the formative stages of a corporation's development, considerable bona fide discretion must be allowed to its promoters to effect its success, and the wise apportionment of its stock and unselfish concessions of stock distribution by promoters to invoke and attach the interest of other influential and responsible parties, free of any taint of fraud or prejudice of third parties, are worthy of commendation rather than condemnation. Be that as it may, it would never do to deny redress to plaintiff, who parted with her stock to favor and benefit the defendant and to relieve it from its dilemma, merely because as lawyers and judges we happen to know that there was another and more strictly regular mode by which the corporation might have dealt with its overissue.

It needs but a word to dispose of the question relating to the excessive verdict. The plaintiff and her husband surrendered their stock as a part of the arrangement to extinguish the overissue. She received \$7,500, of which \$6,000 was a payment on her own stock, and \$1,500 was to pay for her husband's stock. That matter was perfectly clear to the trial court and jury, and it is clear to us. The defendant owed her for the balance of the agreed price,—or the balance of the reasonable worth of the surrendered stock, which in this case amounted to the same thing,—and the verdict for that amount and interest is not excessive.

The judgment is affirmed.

A petition for rehearing having been granted, *Marshall, J.*, on November 10, 1917, handed down the following additional opinion (101 Kan. 636, 168 Pac. 686):

An opinion in this case is reported in *Kelly v. Central Union F. Ins. Co.* 101 Kan. 91, ante, 1170, 165 Pac. 806. After that opinion had been rendered, a rehearing was granted. The cause has been reargued, and the original abstract and briefs have been re-examined. Additional briefs have been filed, and these briefs have been examined. Every principle of law announced in the former opinion has been reconsidered. The court is satisfied with that opinion and adheres to it.

A new question is now presented. The action was commenced in the district court of Miami county, and, on the application of the defendant, was removed from that court to the Federal court. Thereafter certain correspondence took place between the insurance department of this state and the defendant, in which correspondence the department strongly recommended that the removal of the cause from the state courts be abandoned. On that recommendation a stipulation was signed on which the Federal court remanded the cause to the state court for trial. The defendant contends that the stipulation on which the action was remanded from the Federal court was obtained by threats and duress, and that the action is still pending in the Federal court, and that, therefore, this court is without jurisdiction to hear this appeal. This matter was not presented to the trial court. It was first brought to the attention of this court by the petition for a rehearing. In that petition the defendant set out the correspondence between it and the insurance department. The petition for the re-

moval of the cause to the Federal court, and the order of that court remanding the cause to the state court for trial, are set out in an additional abstract of the record, which has been filed since the cause was set down for rehearing in this court. The correspondence between the defendant and the insurance department does not appear in any abstract. It nowhere appears that the attention of the district court was in any way called to the matter that is now under consideration. This court has often said that it will not consider questions presented for the first time on appeal. *Sleeper v. Bullen*, 6 Kan. 303; *Stewart v. Murphy*, 95 Kan. 425, 148 Pac. 609, Ann. Cas. 1917C, 612; *Hennerich v. Snyder*, 101 Kan. 403, 168 Pac. 313; and numerous other decisions by this court. One reason for this rule is that appeals must be determined on the record coming from trial courts. *Root v. Topeka R. Co.* 98 Kan. 694, 153 Pac. 550; *Girten v. National Zinc Co.* 98 Kan. 405, 408, 158 Pac. 33.

The judgment is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

LAZAR JACOBSON

v.

BARNEY LARKEY, Trustee, etc., of American Beaver Company, Bankrupt.

HERMAN GOLD

v.

SAME.

(245 Fed. 538.)

Judicial sale — right of low bidder.

1. A low bidder at a judicial sale cannot oppose confirmation merely because he would have bid more had the property been offered in a different way, if the sale was regular and in conformity with the order of the court.

For other cases, see Judicial Sale, IV. in Dig. 1-52 N. S.

Same — right of high bidder.

2. The high bidder at a judicial sale has a right to urge the confirmation of the sale. *For other cases, see Judicial Sale, IV. in Dig. 1-52 N. S.*

Appeal — discretion — setting aside judicial sale.

3. The discretion of the court in refusing to confirm a judicial sale because of gross

Note. — As to right of bidder at judicial sale to be heard upon question of its confirmation, see annotation following this case, post, 1179.
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inadequacy of price will not, in the absence of abuse, be disturbed on appeal.

For other cases, see Appeal and Error, VII. i, in Dig. 1-52 N. S.

Evidence — appraisal of bankrupt property — discretion.

4. The appraisement of a bankrupt estate is evidence upon which the court may base a valid discretion when called upon to confirm or set aside a trustee's sale.

For other cases, see Judicial Sale, IV. in Dig. 1-52 N. S.

Judicial sale — setting aside — bond against loss — effect.

5. The setting aside of a judicial sale for inadequacy of price is not affected by the fact that a bond was taken to secure a slight increase in bids at a second sale.

For other cases, see Judicial Sale, IV. in Dig. 1-52 N. S.

(October 26, 1917.)

PETITIONS for review of an order of the District Court of the United States for the District of New Jersey (J. Warren Davis, Judge) affirming an order of the referee refusing confirmation of sales in bankruptcy because of gross inadequacy of price. Affirmed.

The facts are stated in the opinion.

Argued before Buffington, McPherson, and Woolley, Circuit Judges.

Mr. Cecil H. MacMahon for petitioners.

Messrs. Bilder & Bilder for respondent.

In refusing to approve the sales, the referee exercised the discretion vested in him by the Bankruptcy Act.

Re Monsarrat, 25 Am. Bankr. Rep. 820; Re Prager, 8 Am. Bankr. Rep. 356; Schuler v. Hassinger, 24 Am. Bankr. Rep. 184; Re Shea, 11 Am. Bankr. Rep. 207, 61 C. C. A. 219, 126 Fed. 153; Re Mitchell, 15 Am. Bankr. Rep. 735; Re Kronrot, 25 Am. Bankr. Rep. 738, 183 Fed. 653; Re Sanborn, 3 Am. Bankr. Rep. 54, 96 Fed. 551; Williamson v. Berry, 8 How. 495, 12 L. ed. 1170; Camden v. Mayhew, 129 U. S. 73, 32 L. ed. 608, 9 Sup. Ct. Rep. 246; Morrison v. Burnette, 83 C. C. A. 391, 154 Fed. 617; Ballentyne v. Smith, 205 U. S. 285, 51 L. ed. 803, 27 Sup. Ct. Rep. 527; Re Haywood, Wagon Co. 33 Am. Bankr. Rep. 618, 135 C. C. A. 391, 219 Fed. 655; Re Burr Mfg. & Supply Co. 32 Am. Bankr. Rep. 708, 133 C. C. A. 126, 217 Fed. 16; Coal City House Furnishing Co. v. Hogue, 28 Am. Bankr. Rep. 258, 116 C. C. A. 523, 197 Fed. 1; Brandenburg, Bankr. 4th ed. § 1286; Re Ohio Copper Min. Co. 38 Am. Bankr. Rep. 548; Porch v. Agnew Co. 66 N. J. Eq. 232, 57 Atl. 726; Adams v. Lambertville Heat, Light & P. Co. 84 N. J. Eq. 96, 92 Atl. 602; Ryan v. Wilson, 64 N. J. Eq. 797, 53 Atl. 1039; Fleming v. Fleming Hotel Co. 70 N. J. Eq. 509, 61 Atl. 739.

The referee was justified in considering the fact that the unsecured creditors opposed the confirmation and offered to indemnify the estate against loss.

Remington, Bankr. 2d ed. § 571.

The method of sale provided for in the order of resale was proper.

Re Benz, 33 Am. Bankr. Rep. 114; George Carroll & Bro. Co. v. Young, 9 Am. Bankr. Rep. 643; Re United States Graphite Co. 20 Am. Bankr. Rep. 573, 159 Fed. 300.

Woolley, Circuit Judge, delivered the opinion of the court:

The matter here involved was brought before the district court on petition to review an order of a referee refusing confirmation of a sale in bankruptcy on the ground of gross inadequacy of price. The court affirmed the order. Its decision is now before us for review and revision. Bankruptcy Act, § 24b (Comp. St. 1916, § 9608).

Pursuant to an order of the referee, the trustee offered at public sale, subject to confirmation, the property of the bankrupt, consisting of real estate, machinery, equipment, and merchandise theretofore used in the bankrupt's business of hat manufacturer. The real estate was encumbered by a first mortgage for \$9,000 and by a second mortgage for \$58,000, given to secure an issue of bonds. The latter mortgage purported to be a lien also upon the personal estate. Conceiving that the liens upon the two classes of property required that prop-

erty be sold separately in order to avoid confusion in the application of proceeds (the property being offered free of liens), the trustee declined to sell the property in bulk as a going concern, but sold it in separate parcels on different days.

The trustee reported that Lazar Jacobson had bid \$19,900 for the realty and Herman Gold \$7,600 for the personalty; that these were the highest bids; and recommended the confirmation of the sale.

Confirmation was opposed by Louis Kamm, an unsuccessful bidder, and by sundry unsecured creditors. Kamm's complaint was that he was forced to bid low because the property was offered in two parcels, realty and personalty; that he had no use for one without the other; that had the property been offered in bulk as a going concern, he would have bid and was still ready to bid a sum larger than the aggregate of the highest bids received. The creditors' objection to confirmation was that the property was sold for a grossly inadequate price.

Upon the question of inadequacy of price no evidence was produced. The creditors cited the appraisement, and the referee, relying upon it as evidence of value, was manifestly influenced in his conclusion by the great disparity between the valuations there made and the prices bid. The personal property was appraised at \$31,212.20 and was sold for \$7,600; the real property was appraised at \$34,350 and was sold for \$10,900.

Notwithstanding this disparity, the referee was not inclined to let go the bids at the first sale without first making sure of equally good bids at a second. To meet this situation the objecting bidder proposed giving a bond to insure that at a second sale the property would bring \$2,500 more than the amount brought at the first, and the objecting creditors similarly offered a bond that the amount obtained at the second sale would be at least \$1,500 more than that obtained at the first, provided that the property, after being offered in parcels, be offered as a whole. These tenders were accepted by the referee, the sale set aside (conditioned upon filing the bonds) and another sale ordered. On review the district court affirmed the order of the referee. This action of the court is the matter before us for revision.

The principal question, of course, is whether the trial court exercised a proper discretion in affirming the order setting aside the sale. But in this question are involved separate and conflicting rights of perhaps three classes of persons, (1) the low bidder, (2) the high bidders, and (3) creditors.

We may lay aside any claim of right made by the low bidder to have the sale set aside in order to give him another chance to bid. There was no irregularity in the sale. He simply complains that he would have bid higher if the property had been offered in a different way. The trustee offered the property in conformity with the order of sale, and, as there is nothing to show either in the order of sale or in the manner in which the trustee executed it that the low bidder was injuriously affected, he is without right to oppose confirmation. *Re Burr Mfg. & Supply Co.* 133 C. C. A. 126, 217 Fed. 19.

The high bidders, however, have a standing which permits them to appear and urge the acceptance of their bids and the confirmation of the sale. They were brought to the sale by invitation of the court, and, having done what the court asked them to do, they now have a right to ask the court to approve their acts.

Their right to be heard is based upon still another consideration. Judicial sales are an indispensable part of the machinery employed in administering bankrupt estates. Public policy requires stability in such sales. *The Ruby* (D. C.) 38 Fed. 622; *Re Burr Mfg. & Supply Co.* supra. To induce bidding at such sales and reliance upon them, the purpose of the law is that they shall be final. *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 356, 36 L. ed. 732, 734, 12 Sup. Ct. Rep. 887. They are not to be disturbed except for substantial reasons.

After much experience in scrutinizing bidding at judicial sales, courts now uniformly hold that the mere offer to pay more than the price bid is not a substantial ground for setting aside a sale, recognizing that nothing will more certainly tend to discourage and prevent bidding than a judicial determination that the highest bidder may be deprived of the advantage of his accepted bid by an offer of another person, subsequently made, to bid higher on resale. *Morrisse v. Inglis*, 46 N. J. Eq. 306, 19 Atl. 16; *Re Metallic Specialty Mfg. Co.* (D. C.) 193 Fed. 300; *Re Shapiro* (D. C.) 154 Fed. 673.

While such are the rights of successful bidders and while the policy of the law favors them as against lower bidders who attempt to overthrow them, their rights, however, are not superior to the right of creditors not to be deprived of their security at prices which are grossly inadequate. Therefore the issue in this case is not between the low and the high bidders, but is between the high bidders and creditors,—parties with equal standing,—and the issue is not whether the court exercised a valid discretion in ordering a second sale on a tender of a high-

er bid, but is whether it abused its discretion in setting aside the first sale on the ground that the bids were grossly inadequate.

The rule is that mere inadequacy of price is not a sufficient ground for setting aside a judicial sale; but when the inadequacy is so great as in itself to raise a presumption of fraud or to shock the conscience of the court, it becomes gross inadequacy, and is a sufficient ground. *Re Burr Mfg. & Supply Co.* 133 C. C. A. 126, 217 Fed. 21; *Cowen v. Stevens*, 3 Harr. (Del.) 494; *Oldham v. Hossenger*, 5 Houst. (Del.) 434; *Broomall v. Reybold*, 5 Houst. (Del.) 435; *Roger v. Ocheltree*, 4 Houst. (Del.) 452.

When in a given case a price is grossly inadequate, and when upon that ground confirmation should be refused are matters within the judgment and discretion of the tribunal ordering the sale. When a trial tribunal orders a judicial sale subject to its confirmation under authority expressly requiring of it the exercise of discretion in approving or setting aside the sale (*Bankruptcy Act*, § 70b), an appellate tribunal will not reverse its discretion by substituting its own, nor will it otherwise disturb or interfere with its exercise so long as it does not amount to an abuse of discretion. *Re Shea*, 61 C. C. A. 219, 126 Fed. 153. In the exercise of this discretion the trial court in this case found that the prices bid were grossly inadequate. It based its judgment, as we read the record, not on the difference between the bids made at the first sale and the bid offered to be made at a second, but upon the disparity between the prices bid and the property valuations made by the appraisement. Had the court refused confirmation of the sale upon a finding of an inadequate price, based upon the difference between the bids made and the bid proposed, it would have exercised a discretion of doubtful validity. *Morrisse v. Inglis*; *Re Metallic Specialty Mfg. Co.*; and *Re Shapiro*, supra. But having found gross inadequacy of price in the disparity between the bid and the appraisement, we cannot say that the discretion of the court was improvidently exercised,—if based upon evidence. As nothing was before the court showing the value of the property except the appraisement, the remaining question is whether the appraisement is evidence upon which the court may base a valid discretion.

An appraisal in bankruptcy is an estimate of the value of the bankrupt estate made by three disinterested persons. The appraisers are officers of the court and are selected with an especial regard to their fitness to give an opinion upon the value of the particular property comprising the estate. In the case under consideration the

kind of property appraised was a hat manufactory and merchandise. Two of the appraisers were men of long experience and high standing in that business. The appraisal, therefore, is the value data upon which the court subsequently acts in disposing of the bankrupt's property. To obtain such data the statute provides (§ 70b) that "all real and personal property belonging to bankrupt estates shall be appraised." Certainly this means that the property shall be appraised before it is sold, and as it is provided in the same section that property "shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value," the statute connects the appraisal with the sale, and plainly intends that the value of the property as appraised shall have a bearing upon and a relation to the price at which the court, in the exercise of its discretion, shall confirm to set aside the sale.

The sale in this case was made subject to confirmation, as shown by the terms of the order, and was conducted under authority of the provision which requires confirmation by the court when the property is sold for less than 75 per centum of its appraised value. As the provision conferring upon the court authority to confirm the sale declares that that authority shall be exercised when the price bid has a given relation to the value appraised, it is clear to us that the statute intends that the appraisal shall be employed by the court as a guide in the exercise of its discretion. When the purchase price approaches the appraised value, it leads the judgment of the court in one direction; when the disparity between the purchase price and the appraised value is so great as to suggest fraud or to shock the conscience of the court, then it directs the court's judgment

in another direction. The appraisal thus becomes evidence of value. It is not conclusive evidence, to be sure, nor does it speak absolute verity, but it is provided for the court's use, and the court may rely upon it alone or may rely upon it partially, or may look beyond it to other evidence in ascertaining the real value, as in an exceptional instance where a sale was set aside on a bid equal to the appraisal and a second sale ordered, on proof that the property was worth and would bring three times the appraised value. *Re Shea, supra.*

We are of opinion that the appraisal is evidence upon which the court may base a valid discretion when called upon to confirm or set aside a trustee's sale.

It is further contended in this case that the care exercised by the court to secure as good a bid at the second sale as was obtained at the first shows that the court's discretion was swayed, if not determined, not by the disparity between the bid obtained and the appraised value, but by the small difference between the bids made at the first sale and the bid offered to be made at a second. We are not of this view. Inadequacy of the price bid at the first sale, and the terms under which the first sale was set aside and a second sale ordered, are matters separate and distinct. Having found gross inadequacy of the price bid at the first sale, the court might validly set aside that sale on that ground and at the same time make an order for a second sale, conditioned upon terms that would secure to the estate whatever advantage it derived from the bids at the first sale. These terms are considerations which have to do with a new sale ordered, and have no relation to the discretion exercised in setting aside the first sale.

The decree below is affirmed.

Annotation—Right of bidder at judicial sale to be heard upon question of its confirmation.

There is very little direct authority upon the right of a bidder at a judicial sale to appear and be heard upon the question of the confirmation of the sale. It seems clear that the successful bidder, that is, the one to whom the property is struck off, has, as held in *JACOBSON v. LARKEY*, ante, 1176, the right

to appear in the confirmation proceedings and be heard therein. And this is the holding of the few cases that have passed directly upon this question.¹ In fact, a purchaser who has bid off the land and paid his money has been held to have a right to present his cause to the court although the sale has not been

¹ *George v. Norwood* (1905) 77 Ark. 216, 113 Am. St. Rep. 143, 91 S. W. 557, 7 Ann. Cas. 171, holding that, where a judicial sale is regularly made in accordance with the order of the court and is free from fraud or misconduct, and the evidence shows that the price bid was not inade-

quate, the court will not refuse to confirm the sale because another offers a higher price, and that the purchaser has the right to insist upon a confirmation of the sale according to this fixed rule.

In *Wise v. Wolf* (1905) 120 Ky. 263, 85 S. W. 1101, it is stated that, while the rule

reported.² It is stated that there can be no objection to the proposed purchaser presenting the matter of confirmation to the court by a petition, for the purpose of calling the court's attention to the status of the case; that "it is true, a purchaser or intending purchaser does not, until a report is made by the clerk, become a party to the cause, and does not acquire a right to have confirmation as, if the price and terms are such as the court ought to accept, he would have after report made; but the fact that he has made his bid and paid his money gives him a status, and justifies the court in entertaining his petition as that of one interested in the cause, and in not regarding him as a mere interloper."

Special statutes have been enacted giving purchasers at judicial sales the right to apply for a citation to persons

interested to determine titles to property sold at judicial sales, and it seems that under some such statutes the motion for the remedy may be made before confirmation.³

The right of the purchaser to appear in the confirmation proceedings is recognized in many cases which consider the objections that may be raised by him.⁴

It has been stated that, if a purchaser desires to except to the report of sale, he must file his exceptions before confirmation.⁵

That the successful bidder has a right to be heard in the confirmation proceedings receives indirect support from a number of cases in which such a bidder was permitted to appear and be heard without any question being raised as to his right to do so.⁶

of caveat emptor applies in all its strictness to judicial sales, it is not thought that when a purchaser before confirmation shows a failure of the title in some material particular a court of equity may not relieve him of his bid, where it was made under a clear misapprehension of facts alone inducing the bidding, the court thus recognizing the right of such purchaser to be heard in the proceedings for confirmation.

A similar recognition of the right of the purchaser to be heard in the confirmation proceeding appeared in *Farmers' Bank v. Peter* (1878) 13 Bush. (Ky.) 591, as that case is interpreted in *Carter v. Crow* (1908) 130 Ky. 41, 112 S. W. 1098.

In *Rea v. McEachron* (1835) 13 Wend. (N. Y.) 465, 28 Am. Dec. 471, a purchaser at an administrator's sale, who had gone into possession of the land purchased, was held, in an action of ejectment by the heirs of the decedent, to have no title to the land because the sale had not been confirmed; the remedy of such a purchaser being held to be by application to chancery for a confirmation of the sale.

It is recognized in *Coltrane v. Baltimore Bldg. & L. Asso.* (1903) 126 Fed. 839, that a purchaser may move for the confirmation of a judicial sale.

In *Re Kronrot* (1910) 182 Fed. 653, where a petition was filed by a third person to set aside a sale of real estate belonging to a bankrupt,—whether before or after confirmation is not clear,—the court recognizes the right of the purchaser to have the sale confirmed if fairly and legally made, and states that, upon the application of the third person, the purchaser was entitled to be heard to the extent of showing that he had rights, and to point out why the discretion of the court should not be exercised against those rights.

It has been held that a purchaser is entitled to file exceptions after the ratification of the sale. *Gottschalk Co. v. Samuelson* (1916) 128 Md. 541, 97 Atl. 1003. L.R.A.1918C.

Wolfe v. Lynch (1884) 2 Dem. (N. Y.) 610, was decided under a statute which is stated not to recognize the purchaser as a party at any stage of the proceedings or under any circumstances. The court there states that, if the purchaser refuses to comply with the terms of sale, he cannot be coerced by the surrogate court, to which he is in no wise subject.

² *Hazlewood v. Chrisman* (1901) — Tenn. —, 62 S. W. 39.

³ In the case of the Louisiana statute, it seems a motion to proceed thereunder could be made by the purchaser before confirmation, and would amount to a motion to confirm free from claims of other persons. *McDonough v. Copeland* (1836) 9 La. 308; *State v. Bermudez* (1838) 12 La. 352; *Ex parte Murray* (1843) 6 Rob. (La.) 74.

⁴ *West v. McDonald* (1908) — Ky. —, 113 S. W. 872, petition for rehearing denied in (1909) — Ky. —, 115 S. W. 1201, holding that a purchaser upon a sale of land under a foreclosure decree cannot appear and object to the confirmation of the sale on the ground that the petition did not state a cause of action and was insufficient to support the judgment, nor upon the ground that the property was divisible and should have been sold in separate parcels.

Crume v. McClure (1911) 144 Ky. 723, 139 S. W. 943, in which a purchaser was permitted to appear and be heard in the proceedings for the confirmation of the sale, and object to its confirmation on the ground of a change in his circumstances.

⁵ *Thompson v. Thompson* (1907) 32 Ky. L. Rep. 319, 105 S. W. 1185.

⁶ *Colonial & U. S. Mortg. Co. v. Sweet* (1898) 65 Ark. 152, 67 Am. St. Rep. 910, 45 S. W. 60 (sale upon mortgage foreclosure) *Reed v. Stewart* (1906) 12 Idaho, 609, 87 Pac. 1002, petition for rehearing denied in (1907) 12 Idaho, 707, 87 Pac. 1152 (purchaser at administrator's sale appeared and objected to confirmation).

It has been stated that "the authorities establish that a purchaser, by bidding at such sale, becomes a quasi party to the proceeding, and subjects himself to the jurisdiction of the court." From this it follows logically that such a bidder has the right to be heard. And it has been stated that the highest bidder at a judicial sale, to whom the property has been struck off, acquires vested rights which must be respected by the court.⁸

The right of a bidder other than the

Quigley v. Breckenridge (1899) 180 Ill. 627, 64 N. E. 580 (purchaser at partition sale filed a sworn answer to exceptions filed by a party to the proceeding, in which the party objected to a confirmation of the sale).

In Hughes v. Swope (1889) 88 Ky. 254, 1 S. W. 394, property was struck off at a judicial sale to one who was unable to make payment; the commissioner making the sale, upon being informed thereof, resold the property and struck it off to another at a less price than was originally bid. Subsequently, the first purchaser tendered a bond to the commissioner and demanded the property. Both purchasers were permitted to appear and be heard in proceedings for the confirmation of the sale.

Fox v. Reynolds (1878) 50 Md. 564 (purchaser permitted to object to ratification of the sale on the ground that the decree for the sale was improvidently passed, and, as appeared from the face of the record, unauthorized by law).

Brookfield v. Sharp (1898) 88 Md. 713, 41 Atl. 1072 (purchaser at private sale by a receiver appeared and filed exceptions to the ratification of the sale on the ground that there were prior liens upon the property).

Columbia Paper Bag Co. v. Carr (1911)

successful one to appear and be heard is not so clear. A bidder other than the one to whom the property has been struck off has been permitted to appear and be heard upon proceedings for the confirmation of the sale.⁹ The holding in JACOBSON v. LARKEY was not that the unsuccessful bidder was not entitled to appear, but that the particular objection urged by him was untenable, since there was nothing to show that he was injuriously affected by anything done at the sale.

116 Md. 541, 82 Atl. 442 (purchasers at a trustee's sale appeared and filed exceptions to the sale on grounds of irregularity in the proceeding and description of the property).

Re Hemiup (1832) 3 Paige (N. Y.) 305 (assignee of a purchaser appeared and was heard upon the question of confirmation).

Upchurch v. Upchurch (1917) — N. C. —, 91 S. E. 702.

One to whom executors had sold property belonging to an estate being administered by them at private sale under a power contained in a will was permitted to be heard in a court proceeding in which the executors, who had accepted a higher bid from another, were asking for the confirmation of the sale to the higher bidder. Re Robinson (1904) 142 Cal. 152, 75 Pac. 777.

⁷ Ogilvie v. Richardson (1860) 14 Wis. 158.

⁸ Robertson v. McClintock (1908) 86 Ark. 265, 110 S. W. 1052; Wells v. Lenox (1912) 108 Ark. 366, 159 S. W. 1009, Ann. Cas. 1914D, 11 (commissioners' sale upon mortgage foreclosure).

⁹ See Hughes v. Swope (1889) 88 Ky. 254, 1 S. W. 394, supra, note 6.

See Re Robinson (1904) 142 Cal. 152, 75 Pac. 777, supra, note 6. W. A. E.

MARYLAND COURT OF APPEALS.

CONSOLIDATED APARTMENT HOUSE
COMPANY, Appt.,
v.

MAYOR AND CITY COUNCIL OF BAL-
TIMORE et al.

(— Md. —, 102 Atl. 920.)

**Municipal corporation — removal of
waste — liability for failure.**

1. The removal by a municipal corporation of ashes and refuse falls within its charter authority over its streets and highways, and therefore it acts in its corporate capacity in performing such service so as to

Note. — As to liability of municipality for injury by employee engaged in removing refuse, see annotation following this case, post, 1188.

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be liable in damages for failure to enforce its ordinances in relation thereto.

For other cases, see *Municipal Corporations*, II. g, in *Dig.* 1-52 N. S.

Same — liability of officer.

2. A municipal commissioner is not liable in damages for failure to obey an ordinance requiring the removal of refuse from private property, if no funds are provided to cover the expense of the service.

For other cases, see *Officers*, II. c. in *Dig.* 1-52 N. S.

Same — disobedience of ordinance.

3. Members of a municipal board of estimates who direct the street cleaning department to disobey an ordinance requiring the removal of refuse from the premises of citizens are liable in damages for the injury thereby inflicted upon such citizens.

For other cases, see *Officers*, II. c. in *Dig.* 1-52 N. S.

(December 12, 1917.)

A PPEAL by plaintiff from a judgment of the Superior Court of Baltimore City in favor of defendants in an action brought to recover damages for failure of the city and commissioner of street cleaning to remove ashes and refuse from plaintiff's premises. Reversed.

The facts are stated in the opinion.

Messrs. **Ritchie & Janney**, **Enoch Harlan**, and **Robert W. Williams**, for appellant:

The defendant commissioner of street cleaning is responsible to plaintiff for damages sustained, due to his failure to have ashes and garbage removed from plaintiff's premises.

Baltimore v. Hampton Court Co. 126 Md. 341, 94 Atl. 1018; **Amy v. Supervisors (Amy v. Barkholder)** 11 Wall. 136, 20 L. ed. 101; **Stephenson v. Monmouth Min. & Mfg. Co.** 28 C. C. A. 202, 54 U. S. App. 499, 84 Fed. 114; **Baltimore County v. Baker**, 44 Md. 1; **Bank of Hartford County v. Waterman**, 26 Conn. 324; **Gates v. Neal**, 23 Pick. 308; **Culver v. Avery**, 7 Wend. 380, 22 Am. Dec. 586; 1 Dill. Mun. Corp. p. 775, § 441; **Mock v. Santa Rosa**, 126 Cal. 330, 58 Pac. 826; **Tearney v. Smith**, 86 Ill. 391; **Raynsford v. Phelps**, 43 Mich. 342, 38 Am. Rep. 189, 5 N. W. 403; **Clark v. Miller**, 54 N. Y. 528; **Mattson v. Astoria**, 39 Or. 577, 87 Am. St. Rep. 687, 65 Pac. 1066; **Ferguson v. Kinnoull**, 9 Clark & F. 251, 8 Eng. Reprint, 412; **Dow v. Humbert**, 91 U. S. 294, 23 L. ed. 368; **Porter v. Thomson**, 22 Iowa, 391.

Defendants, constituting the board of estimates, are also responsible to plaintiff for damages due to failure of the commissioner of street cleaning to remove ashes from its premises.

Baltimore v. Hampton Court Co. 126 Md. 341, 94 Atl. 1018; **Tracy v. Swartwout**, 10 Pet. 80, 9 L. ed. 354; **Little v. Barreme**, 2 Cranch, 170, 2 L. ed. 243; **Philadelphia Co. v. Stimson**, 223 U. S. 605, 620, 56 L. ed. 570, 577, 32 Sup. Ct. Rep. 340; **National Cash Register Co. v. Leland**, 37 C. C. A. 372, 94 Fed. 510.

The mayor and city council are liable to plaintiff for damages sustained due to failure of the city to remove ashes and refuse from its premises.

Baltimore v. Marriott, 9 Md. 160, 66 Am. Dec. 326; **Anne Arundel County v. Duckett**, 20 Md. 468, 83 Am. Dec. 557; **Barney Dumping-Boat Co. v. New York**, 40 Fed. 50; **Engle v. New York**, 40 Fed. 51, note; **Quill v. New York**, 36 App. Div. 476, 55 N. Y. Supp. 889, 5 Am. Neg. Rep. 423; **Hanrahan v. Baltimore**, 114 Md. 517, 80 Atl. 312; **Baltimore v. Schnitker**, 84 Md. 35, 34 Atl. 1132; **McCarthy v. Clark**, 115 Md. 454, 81 Atl. 12; **Missano v. New York**, L.R.A.1918C.

160 N. Y. 123, 54 N. E. 744, 6 Am. Neg. Rep. 652; **Ostrom v. San Antonio**, 94 Tex. 523, 62 S. W. 909; **Denver v. Porter**, 61 C. C. A. 168, 126 Fed. 288; **Re Zhizhuzza**, 147 Cal. 328, 81 Pac. 955; **Maryland use of Pryor v. Miller**, 114 C. C. A. 495, 194 Fed. 775; **Gutowski v. Baltimore**, 127 Md. 502, 96 Atl. 630; **Baltimore v. Pendleton**, 15 Md. 12; **Taylor v. Cumberland**, 64 Md. 68, 54 Am. Rep. 759, 20 Atl. 1027; **Cochrane v. Frostburg**, 81 Md. 54, 27 L.R.A. 728, 48 Am. St. Rep. 479, 31 Atl. 703; **Hagerstown v. Klotz**, 93 Md. 437, 54 L.R.A. 940, 86 Am. St. Rep. 437, 49 Atl. 836; **Havre de Grace v. Fletcher**, 112 Md. 562, 77 Atl. 114; **Annapolis v. Stallings**, 125 Md. 343, 93 Atl. 974; **Keen v. Havre de Grace**, 93 Md. 34, 48 Atl. 444, 9 Am. Neg. Rep. 487; **Delmar v. Venables**, 125 Md. 471, 94 Atl. 89; **Guest v. Church Hill**, 90 Md. 689, 45 Atl. 882; **Cahill v. Baltimore**, 93 Md. 233, 48 Atl. 705; **Thillman v. Baltimore**, 111 Md. 131, 73 Atl. 722; **Hitchins Bros. v. Frostburg**, 68 Md. 100, 6 Am. St. Rep. 422, 11 Atl. 826; **Frostburg v. Duffy**, 70 Md. 47, 16 Atl. 642; **Cumberland v. Willison**, 50 Md. 138, 33 Am. Rep. 304; **Baltimore v. Beck**, 96 Md. 183, 53 Atl. 976, 13 Am. Neg. Rep. 313; **Baltimore v. O'Donnell**, 53 Md. 110, 36 Am. Rep. 395; **Baltimore v. Walker**, 98 Md. 637, 57 Atl. 4.

Messrs. **Robert F. Leach, Jr.**, and **S. S. Field** for appellees.

Thomas, J., delivered the opinion of the court:

In this case, which is a sequel to the case of **Baltimore v. Hampton Court Co.** 126 Md. 341, 94 Atl. 1018, the suit was brought by the Consolidated Apartment House Company against the mayor and city council of Baltimore, **William A. Larkins**, commissioner of street cleaning, and **James H. Preston**, **John Hubert**, **S. S. Field**, **H. Kent McCay**, and **James F. Thrift**, constituting the board of estimates of Baltimore city, to recover damages for the failure of the city and commissioner of street cleaning to remove the ashes and household refuse from the plaintiff's premises between June 5, 1913, and July 22, 1915, which damages consisted of the expenses incurred by the plaintiff in the removal of such ashes and household refuse from its property. The defendants demurred to the declaration, and this appeal is from the judgment of the court below in their favor for costs.

The narr. sets out the following provisions of the charter of Baltimore city (chapter 123 of the Acts of 1898):

"The mayor and city council of Baltimore shall have full power and authority . . . to clean the streets and remove the dirt and filth therefrom, and to prohibit and punish.

by ordinance, the placing of any dirt, filth, or other matter therein, and to protect any pavement by prohibiting the travel thereon."

"The commissioner of street cleaning shall be the head of the fourth subdepartment of public safety. He shall be appointed by the mayor in the mode prescribed by § 25 of this article, and hold his office as therein provided. He shall be charged with the duty of cleaning the streets, as well as the cleaning of the sewers, subject as to the latter to the direction and orders of the city engineer, and shall perform such other duties as may be prescribed by ordinances not inconsistent with this article."

"The mayor and city council of Baltimore shall have full power and authority . . . to levy annually upon the assessable property of the city, by direct tax, with full power to provide by ordinance for collection of the same, such sum of money as may be necessary, in its judgment, for the purpose of defraying the expenses of said city over and exclusive of all expenses, charges, and sums of money which it is, or shall be, required by law to collect for other purposes, subject to the provisions and limitations herein contained."

The narr. also avers that at the time therein mentioned the following ordinances of the mayor and city council of Baltimore were in force:

"The said commissioner of street cleaning shall have exclusive charge of the cleaning of the public streets, lanes, alleys, and of the collection and removal of ashes, garbage, street and household refuse in the city of Baltimore. He shall have and exercise all the powers, and perform all the duties, heretofore performed by the health department in relation to the collection, sale, and removal of ashes, garbage, street offal, and refuse, of the cleaning of public streets, lanes, and alleys, the cleaning away of ice and snow from the gutters and crossings of the same, and from the front of public squares, public buildings, bridges, and public wharves belonging to the city, and the footway of the city spring and public squares."

"It shall be the duty of the commissioner of street cleaning to employ a sufficient number of drivers, horses, and water-tight carts, for each district, for the removal of offal and coal and other ashes from the dwellings and other places within the several districts; and it shall be the duty of the men not only to act as drivers, but also to collect all offal and coal and other ashes as herein provided; and said superintendent shall cause said horses, carts, and drivers to pass through all the streets, lanes, and alleys within their respective

districts, in such manner as shall insure the passage of one horse, cart, and driver through each and every street, lane, and alley not less than three times a week, on alternate days, from the 1st day of November until the 1st day of May, and daily (Sundays excepted) from the 1st day of May until the 1st day of November; and they shall give notice to housekeepers of their approach by sounding a trumpet, blowing at the intersection of each street, that may be heard at least one square; and said superintendents shall in no case own, or be interested in the ownership of, said horses or carts."

It is then alleged that the mayor and city council of Baltimore appropriated the sum of \$822,658.22 for the needs of the commissioner of street cleaning during the year 1913, and that of that amount \$66,500 was for removing garbage, \$227,483.22 was for the purpose of collecting garbage and ashes, and \$25,000 was for the disposal of nonperishable waste, and that, at the end of the year, there remained an unexpended balance of the appropriation, which was returned to the general treasury of the city; and that for the years 1914 and 1915 there were like appropriations, of which there remained at the end of each year an unexpended balance which was returned to the general treasury of the city; that on or about June 5, 1913, the defendants constituting the board of estimates unlawfully and without authority transmitted to the commissioner of street cleaning an order directing him to cease removing ashes and household refuse from dwelling houses of more than four stories or having an elevator, and that thereafter the commissioner of street cleaning discontinued removing ashes and household refuse from certain apartment houses, including the Plaza, an apartment house owned and managed by the plaintiff, until required to do so by the mandate of the court of appeals, filed June 22, 1915, although frequently requested to remove such ashes, etc.; that the mayor and city council of Baltimore, through its officers and agents, the members of the board of estimates, ordered the discontinuance of the removal of the ashes and household refuse from plaintiff's property; that at no time did the mayor and city council, or any person or officer in its behalf, remove or offer to remove such ashes, etc., from the plaintiff's property between the dates mentioned; and that by reason thereof the plaintiff was compelled to hire teams to remove such ashes, etc., to its great loss and damage.

In this court the only objections to the declaration urged by the appellees in support of their demurrer and the judgment of

the court below are (1) that a municipal corporation, unless there is a contract creating or a statute declaring the liability, is not bound to secure execution of its ordinances relating to its public powers, and is not responsible civilly for neglect of duty on the part of its officers in respect to their enforcement; and (2) that the removal of ashes and household refuse "in no wise involves the exercise of the city's corporate function," but that "such acts, from their very nature, are purely governmental."

In reference to the first of these contentions, and leaving out of consideration for the moment the distinction between the corporate and governmental powers of a municipal corporation, it is clear that in this state municipal corporations are liable for the neglect of their officers in respect to the enforcement of municipal ordinances passed in the exercise of powers conferred upon them, except where such corporations are deprived of the power to enforce their ordinances by statute. In *Baltimore v. Marriott*, 9 Md. 160, 66 Am. Dec. 326, the court, referring to the obligation imposed upon Baltimore city by the provision of its charter authorizing the city to pass all ordinances necessary "to prevent and remove nuisances," said: "In order that the city should relieve itself from this obligation, it was not only necessary that it should pass ordinances sufficient to meet the exigencies of the case, but it was also bound to see that those ordinances were enforced. To pass an ordinance, and not enforce it, would be the same as if none had been passed, so far as the public interests were concerned."

The cases of *Taylor v. Cumberland*, 64 Md. 68, 54 Am. Rep. 759, 20 Atl. 1027; *Cochrane v. Frostburg*, 81 Md. 54, 27 L.R.A. 728, 48 Am. St. Rep. 479, 31 Atl. 703; *Hagerstown v. Klotz*, 93 Md. 437, 54 L.R.A. 940, 86 Am. St. Rep. 437, 49 Atl. 836, and *Annapolis v. Stallings*, 125 Md. 343, 93 Atl. 974, are to the same effect.

Since the passage of Acts 1867, chap. 367, creating an independent police department for Baltimore city, and imposing upon it the duty of enforcing, within the city limits, all laws and ordinances, this court has held that the mayor and city council of Baltimore were not liable for damages resulting from the violation of the city ordinances by third parties, as distinguished from damages occasioned by the negligent conduct of the city's employees, or its failure to perform a duty imposed upon it. *Altwater v. Baltimore*, 31 Md. 462; *Sinclair v. Baltimore*, 59 Md. 592; *Taxicab Co. v. Baltimore*, 118 Md. 359, 84 Atl. 548; *Baltimore v. Walker*, 98 Md. 637, 57 Atl. 4; *McCarthy v. Clark*, 115 Md. 454, 81 Atl. L.R.A.1918C.

12; and *Gutowski v. Baltimore*, 127 Md. 502, 96 Atl. 630.

As municipal corporations are liable for any neglect to enforce ordinances passed in the exercise of their corporate powers, except where the power to enforce them is given to an independent board or officer, we are brought to the consideration of the question whether the power granted by its charter to the mayor and city council of Baltimore in reference to the removal of ashes and household refuse is a governmental power, one bestowed upon it as a public agency of the state, or a corporate power, one relating to its local interests or granted for its special advantage.

Learned counsel for the appellees insist that the city's relation to the removal of ashes, etc., is so "closely akin to matters touching health and fire conditions" it "can only be held to be governmental." They cite and rely upon the cases of *Wallace v. Baltimore*, 123 Md. 638, 91 Atl. 687; *Baltimore v. Hampton Court Co.* 126 Md. 341, 94 Atl. 1018, and *Gutowski v. Baltimore*, supra. In *Wallace v. Baltimore* the court held that a municipality in furnishing water gratuitously to be used in extinguishing fires acts in a governmental capacity; Judge Constable saying: "So practically unanimous have been the decisions denying the liability of the municipality for losses from fire through the alleged negligence in connection with the waterworks that it is impracticable to give all of the authorities so holding."

In *Gutowski v. Baltimore*, where the negligence complained of was the neglect of the city to enforce an ordinance which prohibited the use of iron hooks in loading a vessel with a cargo of dynamite, and where it was conceded that the place of the accident was not within the corporate limits of the city, but was alleged to be at a point on the river within the jurisdiction and control of the municipality, the court, after deciding against the right of the plaintiff to recover on other grounds, held, as a further reason why the city was not liable, that "the exercise by the city of its authority to provide for the safety of persons or property, where its corporate or proprietary interests do not require such action, is a governmental function for the nonperformance of which it cannot be sued, unless such a right of action is given by statute."

After referring to the many Maryland cases in which the municipality had been held liable for injuries caused by dangerous conditions which it negligently created or permitted to exist in its public thoroughfares, Judge Urner, speaking for the court, said: "In such instances the liability of municipal corporations is sustainable upon

the basis of their proprietary interest in the thoroughfares which they are empowered to maintain and keep safe for travel."

And in conclusion he said: "The decisions dealing with such questions recognize the difficulty of drawing a clear and definite line of distinction between municipal duties and powers which are to be regarded as governmental, and those which should be described as corporate in their character, but, with respect to such a situation as the one disclosed in the declaration filed in this suit, we can have no doubt that the asserted duty should properly be included in the former class, and its nonperformance held to be an insufficient ground upon which to require the city to respond to a suit for damages."

These cases recognize the difficulty of determining whether a particular municipal power is governmental or corporate in its character, and are obviously not controlling except where powers of similar nature or character are being considered. The Hampton Court Case is referred to as containing the statement that the mayor and city council of Baltimore had the power to regulate by ordinances the removal of ashes, in exercise of its police powers, and that it could "amend, alter, or repeal the existing ordinances on the subject, and, subject to the limitation that such ordinances must be reasonable in their provisions, could classify the buildings from which such removal should be made at the public expense." In this case, however, we are not concerned with the power of the city to amend and repeal the ordinance in question, but with the nature of the power to pass the ordinance, and the consequences of a failure or neglect to enforce it. We do not understand that case as deciding that the power of the city to provide for the removal of ashes is a part of its police power within the meaning of those cases holding that the police regulations of the city are not made or enforced in the interests of the city in its corporate capacity, but in the interest of the public, and the city is not liable therefor for the acts of its officers in attempting to enforce such regulations. 4 Dill. Mun. Corp. 5th ed. § 1656. That question was not presented by the record, and its decision was not involved in the disposition of the case.

It may be noted that the first provision of the city charter set out in the declaration is found in § 6 of chapter 123 of the Acts of 1898 (city charter) among the powers granted to the city in reference to "Streets, Bridges, and Highways," and that the duty of cleaning the streets and sewers is imposed by the charter upon the commissioner of street cleaning, who by ordinances of the city is given "exclusive charge of cleaning of

the public streets, lanes, alleys, and of the collection and removal of ashes, garbage, street and household refuse, . . . the cleaning away of ice and snow from the gutters and crossings of the same." The duties of the city in respect to its streets and highways and its liability for a neglect of those duties have been too frequently and clearly stated to require us to cite cases other than those we have already referred to and those mentioned in *Gutowski v. Baltimore*. That duty of the city in respect to its streets and highways is derived from the powers and authority given it. As said in *Marriott's Case*, and repeated in many of the later decisions of this court: "It is a well-settled principle that, when a statute confers a power upon a corporation to be exercised for the public good, the exercise of the power is not merely discretionary, but imperative, and the words 'power and authority' in such case may be construed duty and obligation."

The liability of the municipality in respect to such duties is based not only upon the ground that the statute imposed upon it a duty, but also upon the further fact that it has provided it with the means and clothed it with the power to enforce and discharge that duty. *Flynn v. Canton Co.* 40 Md. 312, 17 Am. Rep. 603. This liability, however, as already shown, only relates to the powers and duties performed and imposed upon the municipality in its corporate capacity, and not as a public agency of the state; but if the power to pass the ordinance in question is referable to the power conferred upon the city in respect to its streets and highways, then, under the decisions in this state to which reference has already been made, it should be classed among its corporate powers, to which the liability referred to attaches, as distinguished from its governmental powers.

It is said in 4 Dillon on Municipal Corporations, 5th ed. § 1665: "The doctrine may be considered as established where a given duty is a corporate one, that is, one which rests upon the municipality in respect to its special or local interests, and not as a public agency of the state, and is absolute and perfect, and not discretionary or judicial in its nature, and is one owing to the plaintiff, or in the performance of which he is specially interested, that the corporation is liable in a civil action for the damages resulting to individuals by its neglect to perform such duty, or for the want of proper care or want of reasonable skill of its officers or servants acting under its direction or authority in the execution of such a duty, and, with the qualifications stated, it is liable on the same principles and to the same extent as an individual or private corporation would be un-

der like circumstances. For illustration, if a city neglects its ministerial duty to cause its sewers to be kept free from obstructions, to the injury of a person who has an interest in the performance of that duty, it is liable, as we shall see, to an action for the damages thereby occasioned. So, if a city owns a wharf or pier and receives wharfage or profit therefrom, it is liable, like an individual or private corporation, for injuries caused by a failure to keep it in proper condition and repair. So in respect to its failure to keep its streets in a safe condition for public use, where this is a duty resting upon it."

In § 1662 of the same volume the learned author says: "A diversity in opinion appears in the decisions as to the liability of a municipal corporation for the negligence or torts of officers and agents of the municipality engaged in the cleaning of streets and in the removal of ashes and garbage from private premises. In some jurisdictions these duties are regarded as governmental in their nature, and any implied liability of the city for the negligence or torts of its employees in the performance of their duties in these matters is denied. But in other jurisdictions the contrary view is adopted, and the municipality has been held impliedly liable for the negligent acts of employees of its department of street cleaning. In other cases the principle that the city acts in a private or corporate capacity, and not in the performance of a governmental function, in the removal of ashes and garbage from the city, has been affirmed by the courts, and the city has, by virtue thereof, been held to be liable for creation of a nuisance in the maintenance of dumps in the vicinity of other property."

In the case of *Barney Dumping-Boat Co. v. New York (C. C.)* 40 Fed. 50, Justice Wallace said: "The only legal question in the case which merits notice is whether the city is liable for the negligence of the employees of this department. If the duties delegated to him by law are such as primarily devolve upon the city as a municipal or corporate obligation, he and his subordinates are the agents of the city, and the respondents are liable for their acts of misfeasance or nonfeasance done in the course of their ordinary employment. It does not seem reasonable to treat the commissioner [commissioner of street cleaning] as an officer of the general public rather than of the city. His duties, unlike those of the officers of the departments of health, charities, fire, and police, although performed incidentally in the interest of the public health, are more immediately performed in the interest of the corporation itself, which is charged with the obligation of maintaining its streets in fit

and suitable condition for the use of those who resort to them. Many cases are reported in the decisions of the state courts in which the city of New York has been held responsible to persons who have sustained injuries in consequence of obstructions which have been negligently suffered to intercept the safe use of the streets. The obligation of the city to keep its streets in such condition that those who use them may do so safely has been repeatedly declared, and the failure to remove ice or snow or dangerous accumulations of any kind by the proper authorities is a breach of that obligation. . . . The duty of cleaning the streets necessarily comprehends the duty of removing such accumulations."

In *Quill v. New York*, 36 App. Div. 476, 55 N. Y. Supp. 889, 5 Am. Neg. Rep. 423, the action was brought to recover for injuries claimed to have been inflicted upon the plaintiff by an ash and garbage cart belonging to the street cleaning department of the defendant, which was being driven along Manhattan street, and Judge Cullen, in the course of his opinion, said: "The question then is presented: Into which class does the duty imposed by law upon the city of New York to remove the dirt accumulating on the streets, and ashes and garbage from the abutting residences, fall? . . . The learned counsel for the respondent contends that this is a police regulation imposed in the interest of public health; that it is governmental as distinguished from municipal or corporate. . . . Now, the duty or labor imposed on the city by the Consolidation Act as to the removal of garbage and ashes seems to us plainly not the governmental function of abating nuisances, but the private duty which would otherwise rest on residents and property owners within the municipality. . . . The difficulty private parties find, where there is a large and dense population, in properly disposing of their sewage, led to the establishment of public sewers. But in reality it was a private duty assumed by a municipality on account of the difficulty of the citizens individually properly discharging it. The same is equally true of the duty now assumed to remove ashes and garbage. As to the ashes, they are in no sense a menace to health; they are used for filling in lots and low land all through the city. The burden of removing the ashes, if the owner does not wish them to remain longer on his property, is primarily just as much his personal obligation as it was to bring to his premises, in the first instance, the coal from the burning of which the ashes proceeded. As to the garbage, we do not see that it can be distinguished in principle from the case of the sewage. Both are occasioned by the acts

of private persons, and on account of the restrictions imposed by urban life, the city discharges the private duty of the members of the municipality which it has become difficult for those members to discharge themselves."

The judgment in favor of the plaintiff was accordingly sustained.

In *Hanrahan v. Baltimore City*, 114 Md. 517, 80 Atl. 312, this court held the mayor and city council of Baltimore liable for negligence in the construction of a sewer; and in the case of *Missano v. New York*, 160 N. Y. 123, 54 N. E. 744, 6 Am. Neg. Rep. 652, Judge Bartlett, speaking for the majority of the court, said: "At the time this alleged cause of action accrued it was the duty of the city of New York to keep its streets in repair and to see that they were thoroughly cleaned and kept clean at all times; also to remove the sweepings, ashes, and garbage as often as the public health and use of the streets required it to be done."

The fact that the discharge of this duty might incidentally benefit the public health would not make the acts of the commissioner of street cleaning a public function. It is clear upon principle and authority that the city of New York, in the ordinary and usual care of its streets, both as to the repairs and cleanliness, is acting in the discharge of a special power granted to it by the legislature, in the exercise of which it is a legal individual, as distinguished from its governmental functions, when it acts as a sovereign."

In *Denver v. Porter*, 61 C. C. A. 168, 126 Fed. 288, the circuit court of appeals, speaking through Judge Hook said: "It is contended with much earnestness and ability by counsel, that in the gathering of refuse and waste of the city, and the establishment, maintenance, and operation of dumping grounds for its ultimate disposal, the officers of the health department were not engaged in the performance of a duty imposed upon the city for its private or corporate profit, pecuniary or otherwise, but that, on the contrary, those officers were the agents and representatives of the public, acting for the public benefit, and that therefore no liability for their negligence rested upon the city; that, although they received their appointment and derived their compensation from the municipality, nevertheless the essential character of their powers and duties determines the identity of their principal, whether the city, on the one hand, or the state, in its sovereign capacity, upon the other; that the powers they were exercising and the duties they were performing pertained to the general police power of the state; and that use was made of the city merely as a convenient mode of exercising

the function of government, of accomplishing the purpose of the state through local instrumentalities."

After speaking of the nature of the duties referred to, he said further: "We are of the opinion that in the case before us the removal of waste and refuse from the alleys of the city in the city carts, the deposit thereof upon the dumping grounds near Porter's premises, and the supervision of such work and of the dump itself were of local or municipal concern, and that the officers and employees of the health department of the city, in the discharge of their duties in connection with such work and supervision, were acting as the representatives of the city, for whose negligent acts or omissions it would be liable."

In view of the duties imposed by the charter and the ordinances of the mayor and city council of Baltimore upon the commissioner of street cleaning, and the repeated decisions of this court in regard to the duties and liability of the city in respect to its streets, alleys, and highways, it can hardly be said that the commissioner of street cleaning is an officer of the state, or that the services performed by him are rendered the city as a public agency of the state, and not in its private or corporate capacity. As said by Judge Urner, the city has a proprietary interest in its thoroughfares, and while the removal of ashes and household refuse may contribute to the public health, it also bears a close relation to the obligation of the city to keep its streets and alleys clean and free from obstructions and safe for travel. The fact that the city may by ordinance impose the cost of the removal of ashes, etc., upon property owners, does not alter the nature or character of its duty to provide for such removal. *Flynn v. Canton Co.* 40 Md. 312, 17 Am. Rep. 603.

In 1 *Dillon on Municipal Corporations*, 5th ed. § 441, Judge Dillon said: "Where the law absolutely requires a ministerial act to be done by a public officer, and he neglects or refuses to do such act without sufficient legal excuse, he may be compelled to respond to an individual who has sustained special damage thereby, to the extent of the injuries arising from his misconduct. Mistake of duty and honest intentions will not relieve him from liability if such liability otherwise exists."

And in the case of *Baltimore v. Hampton Court Co.* 126 Md. 341, 94 Atl. 1018, Judge Stockbridge, speaking of the duty imposed by the ordinance upon the commissioner of street cleaning to remove ashes, etc., said: "The terms in which this duty is placed upon the commissioner of street cleaning are such as to make its discharge mandatory in character, under the uniform principle

of construction frequently declared by this court."

In the case of *Amy v. Supervisors* (*Amy v. Barkholder*) 11 Wall. 136, 20 L. ed. 101, Mr. Justice Swayne, speaking for the Supreme Court of the United States, said: "The rule is well settled that, where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect."

But it is said by Judge Dillon in vol. 1, § 440, of his work on *Municipal Corporations*, 5th ed: "The liability can only be enforced when three elements are present; viz., (1) that the services of the officer are not gratuitous or coerced, but voluntary and attended with compensation; (2) that the duty to be performed is entire, absolute, and perfect; and (3) that the duty is a personal one, and not only one which he is under obligation, but which he is also clothed with ability, to perform, both in the means furnished to him and the legal authority to act irrespective of superior officers."

In the *Hampton Court Case* the court also said that the board of estimates had no power to "set at naught the performance of a duty imposed by ordinance upon any department or subdepartment of the city government." The declaration alleges that the board of estimates transmitted to the commissioner of street cleaning "an order directing him to cease removing ashes and household and miscellaneous refuse from dwelling houses of more than four stories or having an elevator," and further alleges that at the end of each of the years

mentioned therein there remained "an unexpended balance of the appropriation for the needs of the commissioner of street cleaning," but it is not stated what that balance was, and it nowhere appears from the averments of the narr. that it was sufficient to enable the commissioner of street cleaning to remove the "ashes and household and miscellaneous refuse" from the plaintiff's property. The declaration does not therefore bring the case as to the commissioner of street cleaning within the rule stated by Judge Dillon, which is in accord with the principle upon which municipal corporations are held liable for their failure to discharge duties imposed upon them. *Flynn v. Canton Co. supra*.

It is said in *Kinhead, on Torts*, vol. 1, § 41: "All who aid, command, advise, or countenance the commission of a tort by another, or approve it after it is done, if for their benefit, are joint tort-fessors."

And Mr. Poe, in § 467 of vol. 1 of his work on *Pleading and Practice*, says: "The defendant should be he who actually caused or committed or participated in the commission of a tortious act, or who directed, ordered, or authorized it."

The same rule is stated in 38 Cyc. 485, 486.

The averments of the declaration are sufficient to bring the members of the board of estimates within the rule.

It follows from what has been said that the demurrer should have been sustained as to the commissioner of street cleaning, but that it should be overruled as to the other defendants. The judgment of the court must therefore be reversed.

Judgment reversed, with costs, and new trial awarded.

Annotation—Liability of municipality for injury by employee engaged in removing refuse.

This note supplements a note on the same subject appended to *Pass Christian v. Fernandez*, 39 L.R.A.(N.S.) 649.

Many other phases of the distinction between public and governmental or private and corporate functions as affecting the liability of municipalities are discussed in notes cited in the L.R.A. Indexes under the title, "Municipal Corporations," subtitle, "Liability for damages."

As pointed out in the earlier note, there is a want of harmony among the cases upon the point whether or not the act of a municipal corporation in gathering and caring for the refuse on its streets is in performance of a govern-

mental function, although the courts are apparently agreed that if it is in the performance of a governmental function, the municipality is not liable for injuries due to the negligence of an employee. It is, however, liable where, in disposing of the refuse collected on its contracts it creates a nuisance to the injury of adjacent property owners.

For example, in *Nashville v. Mason* (1917) 137 Tenn. 169, L.R.A.1917D, 914, 192 S. W. 915, it is held that even though the collection of garbage by a municipality is a governmental duty and the municipality is not liable for injuries due to the performance thereof, yet where the manner of disposing of the

garbage and refuse constitutes a nuisance, the city is liable for the injury thereby caused. To the same effect is *Keene v. Huntington* (1917) — *W. Va.* —, L.R.A.1917F, 475, 92 S. E. 119.

In *Snider v. High Point* (1915) 168 N. C. 608, 85 S. E. 15, it is held that no recovery can be had for the burning of a child due to the negligence of an employee of a municipality in leaving unguarded a pile of burning refuse which he had ignited when there were several small children, including the injured child, playing around the fire. The court said that the acts complained of was in pursuance of authority conferred by law for the public benefit, and came within the principle that unless a right of action is given by statute, a municipality could not be held liable to individuals for failure to perform or for negligence in performing duties which were governmental in their nature.

On the same ground *Louisville v. Carter* (1911) 142 Ky. 443, 32 L.R.A. (N.S.) 637, 134 S. W. 468, holds that a city is not liable for injury due to the negligence of an employee in running a garbage wagon over a child on the street.

And see upon this point *Montain v. Fargo*, ante, 600, holding that city officials act in a public and governmental rather than in a private or corporate capacity in overseeing and providing for the removal of the garbage. It is pointed out that the officer in ques-

tion, the city health officer, filled an office provided for by statute and had all the power and authority conferred by statute upon boards of health.

It has been held that a municipality is liable for piling refuse upon vacant ground to the extent of destroying a sewer, thereby causing surface waters to overflow adjoining lands. *Brennan v. Albany* (1911) 143 App. Div. 752, 128 N. Y. Supp. 334.

And see also *Pass Christian v. Fernandez* (1911) 100 Miss. 76, 39 L.R.A. (N.S.) 649, 56 So. 329, holding that the driver of a city cart engaged in removing trash or dirt for the city is not engaged in a governmental duty, and hence the city is liable for injuries caused a child due to such driver's negligence in the performance of his work.

In *Gulfport v. Shepperd* (1918) — *Miss.* —, 77 So. 193, however, the court distinguishes *Pass Christian v. Fernandez* (*Miss.*) supra, and points out that in that case the city was engaged in caring for its streets and removing garbage, and the injury was due to the negligence of one of its employees, while in the case then before the court, the injury was due to the negligence of an independent contractor appointed by the city to clean cesspools, but paid by the owner of the property, and the work of cleaning the cesspools was done under an ordinance relating to the sanitary conditions of the city. A. G. S.

MASSACHUSETTS SUPREME JUDICIAL COURT.

DAVID P. KIMBALL et al., Trustees,

v.

CHARLES E. COTTING et al., Trustees.

(— Mass. —, 118 N. E. 866.)

Tax — income — liability of lessee.

1. The Federal income tax is within a covenant in a lease to pay all taxes which may be payable upon or against the rent for or in respect to the period between the assessment day and the last prior assessment day, or in respect to the period between the first of such assessment days and one calendar year prior thereto, whether levied or assessed upon the same as rental or income.

For other cases, see Landlord and Tenant, II. b, 1, in Dig. 1-52 N. S.

Note.—The construction and effect of covenants in lease, sublease, or assignment of lease, as to payment of taxes and assessments, are discussed in the note to *J. L. Hammett Co. v. Alfred Peats Co.* L.R.A. 1915A, 334. L.R.A.1918C.

Same — retroactive tax — exemption.

2. Income taxes retroactively levied are within a provision in a lease relieving the lessee from payment of any other taxes or excises after establishing a liability for taxes for a period between the first assessment day and one calendar year prior thereto.

For other cases, see Landlord and Tenant, II. b, 1, in Dig. 1-52 N. S.

(February 28, 1918.)

REPORT by the Superior Court for Suffolk County, without decision, upon an agreed statement of facts, for determination by the Supreme Judicial Court of questions arising in an action brought to recover the amount of a tax deducted and withheld by defendants from rent due to plaintiffs. Judgment for plaintiffs.

The facts are stated in the opinion.

Messrs. Felix Rackemann and Harrison M. Davis, for plaintiffs:

The covenant, fairly and reasonably interpreted, covers the tax assessed under the Federal Income Tax Law, which the de-

fendants have deducted and withheld from the rent.

Suter v. Jordan Marsh Co. 225 Mass. 34, 113 N. E. 580; *Amory v. Melvin*, 112 Mass. 83; *J. L. Hammett Co. v. Alfred Peats Co.* 217 Mass. 520, L.R.A.1915A, 334, 105 N. E. 370; *Pollock v. Farmers Loan & T. Co.* 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912.

Messrs. Tyler, Corneau, & Eames, for defendants:

The clause in question was evidently intended to cover taxes which might be assessed upon the rent as rent or income included as a part of the personal property of the taxpayer either under the then existing Massachusetts statute or any similar statute, and it is carefully drawn so as to exclude any other taxes or excises in respect to the rent.

Hough v. North Adams, 196 Mass. 290, 82 N. E. 46; *Davis v. Bean*, 114 Mass. 358; *Wilcox v. Middlesex County*, 103 Mass. 544.

Rugg, Ch. J., delivered the opinion of the court:

The question presented is whether the burden of the Federal income tax on the rent reserved in a lease of real estate in Boston, of which the owners and lessors are the plaintiffs, and the lessees are the defendants, must be borne by the former or by the latter. The answer to that question depends upon the words of the lease. It is dated in 1902 for a term of ninety-nine years. One of its covenants provides comprehensively that the lessees shall pay "all taxes, charges, assessments, betterments, and liens" in any way assessed and levied upon or payable for or in respect of the demised premises. Another covenant upon which the decision must turn is this: "The lessees covenant and agree to pay and discharge any taxes or excises which during the term may on any assessment day be lawfully levied or assessed to either the lessors or the lessees upon or against the rent payable hereunder [forty-first word] for or in respect of the period between such assessment day and the last prior assessment day, or for or in respect of the period between the first of such assessment days and one calendar year prior thereto, whether levied or assessed upon the same as rental or income, but not for any other taxes or excises in respect thereof."

This covenant relates exclusively to the payment of taxes and excises levied upon the rent reserved by the lease. It concerns no other subject. It expressly includes such taxes and excises whether levied against the lessors or the lessees. It makes no difference with the scope of the covenant whether the burden is imposed by the law upon the

one or the other. In either event the lessees are liable by contract of the parties, so far as that point goes. If the covenant ended with "hereunder," its forty-first word, the lessees undoubtedly would be liable.

But the covenant contains additional words. Further reference is made to "any assessment day," and the obligation assumed by the lessees to pay rent is limited by the words, "for or in respect of the period between such assessment day and the last prior assessment day." It is manifest from words following in the covenant that it was the purpose of the parties to impose the obligation upon the lessee whether the tax was levied as a property or as an income tax. See in this connection *Tax Comrs. v. Putnam*, 227 Mass. 522, and cases collected at 531, 532, L.R.A.1917F, 806, 116 N. E. 904. An income tax necessarily has reference to moneys received during a specified period of time. At any single moment one can hardly be said to have income. Duration of time is required for its measurement. On the other hand, a property tax requires a definite moment for its assessment, in order that its items and their value may be measured by reference to a known or ascertainable standard. Since, by express words of the covenant, the lessee is liable for the tax, whether levied upon the rent "as rental or as income," it inevitably follows that it was the intent of the parties that the words "assessment day" were not intended to refer immutably to a single date, but were designed to include whatever period, not exceeding that elapsing between two successive assessment days, might be established by any tax law thereafter enacted as the measurement of the income.

The reference to the "assessment day" cannot under these circumstances be construed as referring exclusively to the 1st of May or the 1st of April, one or the other of which has been the state assessment date for a long time.

The Federal Income Tax Law here in question was approved October 3, 1913, U. S. Stat. 1913, chap. 16, 38 Stat. at L. 114, 168, Comp. Stat. 1916, § 5291. It expressly provides in ¶ D, § II. that the income tax shall be computed upon the net income "during each preceding calendar year ending December 31st." That fixes the last day of each calendar year as the "assessment day" for that kind of tax, as definitely as was the 1st day of May fixed for the year ending on that date by Rev. Laws, chap. 12, § 4, for the state income tax in force when the lease was executed. The return to be made by the taxpayer under each law is filed at some later time, and the actual completion of the tax is made later still. But the "assessment day" is as definite under

one statute as under the other, so far as it concerns a tax on income.

It is manifest that the parties intended to include both state and Federal taxes by the covenant. There is no express limitation to one or the other by the words of the covenant. In its absence it would be difficult to read into the covenant such a limitation by inference. Under our Constitution and laws in force at the time the lease was executed, a tax levied in respect of income from rents of real estate was a property and not an excise tax. *Opinion of Justices*, 220 Mass. 613-623, 627, 108 N. E. 579; *Perkins v. Westwood*, 226 Mass. 268-276, 115 N. E. 411. It would seem that the Federal income tax under various statutes has been regarded as an excise. See *Brushaber v. Union P. R. Co.* 240 U. S. 1-17, 60 L. ed. 493-501, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713, L.R.A.1917D, 414. The covenant relates to both property taxes and excises.

It had been held long before the date of the lease here in question that a Federal income tax might be retroactive, and might cover a period of time and an income already taxed by another tax statute. *Stockdale v. Atlantic Ins. Co.* 20 Wall. 323, 331, 22 L. ed. 348. The extent of such retroactivity, which would be held legal, has not been determined, so far as we are aware. But the final limitation of the covenant relieving the lessee from "other taxes or excises" would bar his liability for such taxes retroactively levied beyond the express limitation of the covenant. Thus, effect is given to all the words of the covenant. Although the case at bar is not governed by *Suter v. Jordan Marsh Co.* 225 Mass. 34, 113 N. E. 580, it falls within the same class, and is distinguishable from *Codman v. American Pismo Co.* — Mass. —, 118 N. E. 344.

Judgment for plaintiffs.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

MARYLAND CASUALTY COMPANY, PMF.
in Err.,
v.

IRMA SPITZ.

(246 Fed. 817.)

Insurance — accident — erysipelas.

Death from erysipelas is not accidental within the meaning of a policy insuring against death by accidental means, if it was caused by germs entering upon the breaking of the scab on a boil when scratched with unclean hands to allay itching.

For other cases, see *Insurance*, VI. b, 3, in Dig. 1-52 N. S.

(October 29, 1917.)

ERROR to the District Court of the United States for the Eastern District of Pennsylvania to review a judgment in favor of plaintiff, in an action brought to

recover the amount alleged to be due on a policy of accident insurance. Reversed.

The facts are stated in the opinion.

Argued before Buffington, McPherson, and Woolley, Circuit Judges.

Mr. Maurice W. Sloan for plaintiff in error.

Messrs. Julius C. Levi and David Mandel, Jr., for defendant in error.

McPherson, Circuit Judge, delivered the opinion of the court:

Irma Spitz, the widow of Samuel Spitz and the plaintiff in this action, recovered on a policy in her favor, which insured her husband in the Maryland Casualty Company against injury and death, "effected directly and independently of all other causes through external, violent, and accidental means." He died while the policy was in force, and one of the questions in the court below was whether his death was "effected . . . through . . . accidental means."

Note.—The question when death or injury may be deemed to have been caused by accidental means though the voluntary act of the insured was the primary cause thereof is treated in the notes to *Fidelity & C. Co. v. Carroll*, 5 L.R.A.(N.S.) 657; *Hutton v. States Acci. Ins. Co.* L.R.A.1915E, 127; and *New Amsterdam Casualty Co. v. Johnson*, L.R.A.1916B, 1018; and see later cases, *Stone v. Fidelity & C. Co.* L.R.A.1916D, 536; *Rock v. Travelers' Ins. Co.* L.R.A. 1916E, 1197; *United States Bank & T. Co. v. Switchmen's Union*, L.R.A.1917E, 311; *United States Casualty Co. v. Griffiths*, L.R.A. 1917F, 481; *Clay v. State Ins. Co.* L.R.A. 1918B, 508, and *Salinger v. Fidelity & C. Co.* L.R.A.1918C, 101. L.R.A.1918C.

The liability under an accident policy for sickness or death caused by blood poisoning is treated in the notes to *Cary v. Preferred Acci. Ins. Co.* 5 L.R.A.(N.S.) 926; and *Ballagh v. Interstate Business Men's Acci. Asso.* L.R.A.1917A, 1056; and see later case, *Anderson v. Great Eastern Casualty Co.* L.R.A.1918B, 1194. As to liability under an accident policy for condition caused by external infection without cut or abrasion, see note to *Sullivan v. Modern Brotherhood*, 42 L.R.A.(N.S.) 140, and later case, *Railway Mail Asso. v. Dent*, L.R.A.1915A, 314.

Other notes of collateral interest are referred to in those already cited.

Before stating the facts it may be well to consider briefly the quoted words.

They do not mean simply that death shall be accidental, that is, unintended or unexpected or unforeseen; but that the means or the cause of death shall be accidental. It is this to which the policy directs particular attention, and if the means be not accidental the death is not insured against. The words "accident" and "accidental" have been many times considered, and the numerous cases on this subject need not be reviewed. Their general meaning is not in doubt, and the Standard Dictionary's definition of "accidental" will serve as well as another: "Accidental: (1) Happening or coming by chance or without design; casual; fortuitous."

Accidental, therefore, is opposed to design, and a means is not accidental when it is employed intentionally, although it may produce a result not expected or intended. The intentional use of a means may produce more than one result; one may be likely and another unlikely to happen; but a result that is the natural, direct, and probable effect of such use must be regarded as intended, and cannot be regarded as accidental. The rule is thus stated in 14 R. C. L. § 418, p. 1238: "While it may be true that an accident is an event which takes place without one's foresight or expectation, and is undesigned, it is not true that every unforeseen, undesigned, and unexpected event is an accident. A result which, though not designed, foreseen, or expected, is yet the natural and direct effect of acts voluntarily done or of conditions voluntarily assumed, cannot be said to be accidental."

See also the cases on this subject to be found in *Fidelity & C. Co. v. Carroll* (1906) 5 L.R.A.(N.S.) 657, and note (74 C. C. A. 409, 143 Fed. 271, 6 Ann. Cas. 955) and in *Hutton v. States Acci. Ins. Co.* (1915) L.R.A.1915E, 127, and note (267 Ill. 267, 108 N. E. 296, Ann. Cas. 1916C, 577). In the recent case of *Preferred Acci. Ins. Co. v. Patterson* (1914) 130 C. C. A. 177, 213 Fed. 597, this court had occasion to say: "We agree that when a man is injured while doing merely what he intends to do he is not injured by an accident, unless the course of his action has been interrupted or deflected by some unforeseen and unintended happening. To illustrate from the facts before us: Since the deceased was attempting to start the engine of his car by turning the crank, whatever injury he might sustain from the ordinary strain of that operation would properly be regarded as a result of what he intended to do, and therefore would not be accounted accidental. But we can hardly suppose that he intended to slip and

fall in the course of the operation, and therefore if he did slip and fall, and sustained injury as the direct result thereof, the happening would be unforeseen and unintended, and the injury would be accidental."

Turning now to the evidence and giving it the weight most favorable to the plaintiff, we discover the facts to be as follows:

The insured died of erysipelas on January 22, 1915. Late in December a boil or furuncle had appeared on the back of his neck, and for this he was treated at the office of a doctor. About January 1 his condition was improved. How long afterwards he wore a bandage does not clearly appear, but in any event a healthy scab had formed, the doctor had discharged him, and he was able to be about his business. He was a butcher, and on January 4 was engaged in cleaning chickens, a work that soiled his hands with blood and other substances. In this situation his neck began to itch, and in order to relieve the irritation he put up his hand and rubbed or scratched the offending place (whether bandaged or not), with the result that he broke the scab. The only witnesses on this point were the plaintiff and the doctor, and the relevant testimony may be summarized as follows: On the morning of January 4 the deceased was at a block in the rear of his shop cleaning chickens, and his wife was in the front making out bills. She heard him say, "I have broken the scab on my neck," whereupon she turned and saw his hand rubbing his neck. She told him to quit it; his hand was not clean and had left some blood on the neck, and the scab was broken. Soon after the work of cleaning was done he went upstairs and washed his neck with peroxide. The doctor testified: "He told me he had rubbed it off or scratched it off the day prior. He said he rubbed his neck, it itched him, it was right in there; it hurt him and he found he had rubbed off the scab."

In a short time he became sick with erysipelas and died from this disease on January 22. The verdict has established, and we therefore assume the further fact to be, that the germs of erysipelas entered the wound after the scab had been rubbed or scratched off, and that the disease then introduced was the immediate cause of death: so that the only question now is whether the means that opened the way for the germs to enter, namely, the rubbing or scratching of the boil, was an accidental means.

The court submitted this question to the jury, asking them to find whether the injury was inflicted accidentally, and in this submission we think there was error. As we read the testimony, nothing appears to show that the injury was inflicted by

accidental means. The deceased rubbed or scratched his neck in the ordinary way; there is no evidence that he was disturbed or interfered with during the operation, and an ordinary and not unusual result followed; that is, he broke the scab. His hands were not clean, but he knew that fact and must be held to the risk of such harm as might follow therefrom. In a word, he seems to have done just what he intended to do, namely, rub or scratch his neck to relieve the itching, and in our opinion breaking the scab during the process was a probable result, one reasonably to be expected. We think the defendant was entitled to binding instructions.

The judgment is reversed.

A motion for reargument having been filed the following *Per Curiam* response was handed down on December 31, 1917:

The motion for reargument suggests that *United States Mt. Acci. Asso. v. Barry*, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755, was probably overlooked, and relies upon that decision as a controlling authority. We did not overlook that case, however, but considered and still consider it to be dis-

tinguishable. On page 121 of the report in 131 U. S. the Supreme Court approves the following instruction as correct: "That, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means."

And this instruction seems to us to cover the present situation, where, as we have already said, "nothing appears to show that the injury was inflicted by accidental means. The deceased rubbed or scratched his neck in the ordinary way; there is no evidence that he was disturbed or interfered with during the operation, and an ordinary and not unusual result followed, that is, he broke the scab. His hands were not clean, but he knew that fact, and must be held to the risk of such harm as might follow therefrom. In a word, he seems to have done just what he intended to do, namely, rub or scratch his neck to relieve the itching, and in our opinion breaking the scab during the process was a probable result, one reasonably to be expected."

The motion is refused.

COLORADO SUPREME COURT. (In Banc.)

CHARLES DE ROSE, *Plff. in Err.*,
v.

PEOPLE OF THE STATE OF COLORADO.

(— Colo. —, 171 Pac. 359.)

Forgery — padding pay roll.

Merely padding a genuine pay roll is not forgery under a statute making guilty of forgery every person who shall falsely make, alter, forge, or counterfeit any order or request for payment of money with intent to defraud any person or corporation.

For other cases, see Forgery, in Dig. 1-52 N. S.

(March 4, 1918.)

ERROR to the District Court for Lake County to review a judgment convicting defendant of forgery. Reversed.

The facts are stated in the opinion.

Messrs. Hogan & Bonner, for plaintiff in error:

Where a paper on its face does not have the capacity to injure or defraud so as to be the subject of forgery, but is so by reason of extrinsic facts, such facts should be averred in the indictment or information.

Note. — The question whether the making of a false instrument is within a criminal statute directed against the false making of an instrument is discussed in the annotation following this case, post, 1195. L.R.A.1918C.

Burden v. State, 120 Ala. 388, 74 Am. St. Rep. 37, 25 So. 190, 11 Am. Crim. Rep. 431; *People v. Parker*, 114 Mich. 442, 72 N. W. 250; *State v. Chinn*, 142 Mo. 507, 44 S. W. 245; *Lynch v. State*, 41 Tex. Crim. Rep. 209, 53 S. W. 693; *Black v. State*, 42 Tex. Crim. Rep. 585, 61 S. W. 478; *Wilson v. State*, — Tex. Crim. Rep. —, 75 S. W. 504; *France v. State*, 83 Miss. 281, 35 So. 313; *Belden v. State*, 50 Tex. Crim. Rep. 565, 99 S. W. 563; *Com. v. Tabor*, 31 Ky. L. Rep. 840, 104 S. W. 261; *Bagley v. State*, 63 Tex. Crim. Rep. 606, 141 S. W. 107; *Whitmire v. State*, 70 Tex. Crim. Rep. 475, 156 S. W. 1179; *People v. Shall*, 9 Cow. 778; *State v. Ryan*, 9 N. D. 419, 83 N. W. 865; *People v. Harrison*, 8 Barb. 560; *State v. Briggs*, 34 Vt. 501; *State v. Floyd*, 169 Ind. 136, 81 N. E. 1153; *Reed v. State*, 28 Ind. 396; *State v. Cook*, 52 Ind. 574; *People v. Tomlinson*, 85 Cal. 503; *Clarke v. State*, 8 Ohio St. 680; *Henry v. State*, 35 Ohio St. 128; *State v. Dunn*, 23 Or. 562, 37 Am. St. Rep. 704, 32 Pac. 621; *Tomby v. State*, 87 Ala. 36, 6 So. 271; *Terry v. Com.* 87 Va. 672, 13 S. E. 104; *State v. Thorn*, 66 N. C. 644; *King v. State*, 27 Tex. App. 567, 11 Am. St. Rep. 203, 11 S. W. 525; *Caffey v. State*, 36 Tex. Crim. Rep. 198, 61 Am. St. Rep. 841, 36 S. W. 82; *State v. Evans*, 15 Mont. 539, 28 L.R.A. 127, 48 Am. St. Rep. 701, 39 Pac. 850; *People v. Hoyt*, 145 App. Div. 695, 130 N. Y. Supp. 505; *Goodman v. People*, 228 Ill. 154, 81 N. E. 830.

Messrs. Fred Farrar, Attorney General, and Ralph E. C. Kerwin, Assistant Attorney General, for the People:

Where the false making of an instrument and uttering the forged instrument are both made forgery, and the instrument is both forged and uttered by the same person, there is only the single crime of forgery committed.

State v. Klugherz, 91 Minn. 406, 98 N. W. 99, 1 Ann. Cas. 307; Frisby v. United States, 38 App. D. C. 22, 37 L.R.A. (N.S.) 96; Devere v. State, 5 Ohio C. C. 509, 3 Ohio C. D. 249; Lingafelter v. State, 28 Ohio C. C. 800; Territory v. Poulter, 8 Mont. 149, 19 Pac. 594; State v. Mitton, 37 Mont. 366, 127 Am. St. Rep. 732, 96 Pac. 926; Nalley v. State, 11 Ga. App. 15, 74 S. E. 567; Ex parte Spencer, 7 Okla. Crim. Rep. 113, 122 Pac. 557; Townser v. State, — Tex. Crim. Rep. —, 182 S. W. 1104; Reeseman v. State, 59 Tex. Crim. Rep. 434, 128 S. W. 1126; Dudley v. State, 10 Ala. App. 130, 64 So. 534; State v. Smith, 77 Wash. 441, 137 Pac. 1008; People v. Johnson, 7 Cal. App. 127, 93 Pac. 1042; Curl v. People, 63 Colo. 578, 127 Pac. 951, Ann. Cas. 1914B, 171; People v. England, 170 Ill. App. 587; Green v. State, 66 Tex. Crim. Rep. 446, 147 S. W. 593; Powers v. United States, 223 U. S. 303, 56 L. ed. 448, 22 Sup. Ct. Rep. 281.

Where a forged instrument is valid on its face, it is not necessary to allege in the information matters aliunde to show in what manner the person alleged to have been injured could be affected by the forgery, nor to show that he owned property that would be affected thereby.

People v. McPherson, 6 Cal. App. 266, 91 Pac. 1098; People v. Johnson, 7 Cal. App. 127, 93 Pac. 1042; McLean v. State, 3 Ga. App. 660, 60 S. E. 332; Dudley v. State, 10 Ala. App. 130, 64 So. 534; People v. Rising, 207 N. Y. 195, 100 N. E. 694, Ann. Cas. 1914C, 466; Lingafelter v. State, 28 Ohio C. C. 800; State v. Mitton, 37 Mont. 366, 127 Am. St. Rep. 732, 96 Pac. 928.

Garrigues, J., delivered the opinion of the court:

Charles De Rose was convicted of forgery in the court below, and sentenced to a term in the penitentiary.

The information charged that he feloniously and falsely made and forged a certain order, warrant, and request for the payment of money by the Denver & Rio Grande Railroad Company, to wit, a certain railway time roll, and did feloniously utter, publish, pass, and attempt to pass as true and genuine, a certain false order, warrant, and request for the payment of money by the Denver & Rio Grande Railroad Company, to L.R.A.1918C.

wit, a railway time roll, with intent to damage and defraud the company.

On motion for a bill of particulars, the prosecution furnished defendant with a copy of the instrument alleged to have been forged and uttered, which is a time sheet or railroad time roll containing the names of men who worked on the Tennessee pass section; the time they worked and rate and amount of compensation due each for the month of December, 1915, which defendant as section foreman made and certified as correct and sent in to the roadmaster.

The evidence shows that defendant was section boss or foreman on the Tennessee pass section; that a part of his duties was to make out and send in the time roll of the men who were working for him on the section at the end of the month; that he "padded" the time roll for the month of December, 1915, by crediting Albert De Rose with more days than he had worked during that month. The customary method of paying section men was for the foreman to make out the time roll at the end of the month, certify it as correct, and send it to the office of the roadmaster, where it was checked over, countersigned, and sent to the superintendents' office as the basis of the pay roll. The time roll remains in the superintendents' office, and the pay roll is made up from it and sent to the treasurer's office in Denver, from which office the pay checks, when written, are sent to the men whose names appear on the roll. In this instance the fraud was discovered in the roadmaster's office before the pay roll was made up.

The court instructed the jury: "(3) Under the Statutes of Colorado, the fabrication of any false instrument with intent to defraud, or the attempt to pass such instrument with like intent, is forgery, even though there is no forged indorsement by the payee. The crime does not consist in accomplishing the fraud, but in attempting it by prohibited means, and if you should find from the evidence that Charles De Rose placed the name of Albert De Rose upon the pay roll with intent to defraud the Denver & Rio Grande Railroad Company out of pay for any number of days you will find him guilty of forgery."

The statute provides: "Every person who shall falsely make, alter, forge or counterfeit . . . any order or warrant or request for the payment of money . . . with intent to damage or defraud any person or persons, body politic or corporate . . . ; or shall utter, publish, pass, or attempt to pass as true and genuine, or cause to be uttered, published, passed, or attempted to be passed, as true and genuine, any of the above-named false, altered, forged or counterfeited matters as above specified

and described, knowing the same to be false, altered, forged or counterfeited, with intent to prejudice, damage or defraud any person or persons, body politic or corporate . . . ; every person so offending shall be deemed guilty of forgery." (Rev. Stat. 1908, § 1704.)

1. This writing is what it purports to be,—a true and genuine instrument,—although it contains false statements. It is not a false paper, and the execution of such a document does not constitute forgery. The prosecution failed to distinguish between falsely making an instrument and making a false instrument, and this paper was not falsely made or forged. To forge or counterfeit an instrument is to falsely make it. The term "falsely make" as used in the statute refers to the paper itself as being false, and not to the truth or

falsity of its statements. The statute refers to the false making or altering, and not to the tenor of the writing or the facts stated therein. A false statement of fact in an instrument which is itself genuine, by which another person is deceived and defrauded, is not forgery. *State v. Young*, 48 N. H. 266, 88 Am. Dec. 212; *Territory v. Gutierrez*, 13 N. M. 312, 5 L.R.A. (N.S.) 375, 84 Pac. 525; *United States v. Glasener* (D. C.) 81 Fed. 566. So in this case, defendant, when he made up and signed the time roll, did not make a false writing. The document itself is genuine, and the fact that he made a false statement in the writing does not constitute the crime of forgery.

The judgment of the lower court is reversed.

Scott, J., not participating.

Annotation—Is the making of a false instrument within a criminal statute directed against the false making of an instrument.

This note supplements the note to *Territory v. Gutierrez*, 5 L.R.A. (N.S.) 375.

The decision in *DE ROSE v. PEOPLE*, ante, 1193, that the act of defendant in making up a genuine time roll, which contained false statements, did not constitute a false making within the meaning of a statute providing that persons who should "falsely make" an order or

warrant for the payment of money with intent to defraud another should be guilty of forgery, is in harmony with the prior cases which have passed upon the question under annotation. No cases upon the question subsequent to the earlier note have been disclosed.

J. T. W

NEBRASKA SUPREME COURT.

ANNA HOMAN, Appt.,

v.

FLORENCE W. HALL et al.

(— Neb. —, 165 N. W. 881.)

Case — inducing breach of marriage contract.

A fiancée cannot maintain an action for damages against a third party not based on slander, but solely because her betrothed was induced by the defendant to break his engagement.

For other cases, see *Case, II. in Dig. 1-52 N. S.*

(December 22, 1917.)

Headnote by MORRISSEY, Ch. J.

Note. — As to liability of third person for inducing breach of marriage contract, see annotation following this case, post, 1197.
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APPEAL by plaintiff from a judgment of the District Court for Douglas County sustaining a demurrer to the petition and dismissing an action brought to recover damages for enticement or alienation of her fiancé. Affirmed.

The facts are stated in the opinion.

Mr. B. N. Robertson, for appellant:

When one person maliciously procures or persuades another to break a contract, or interferes between an employer and workman to prevent the latter from completing work he has undertaken to perform, or procures the nondelivery of goods according to contract, or deprives a woman of her marriage by false representations, substantial damages are recoverable.

Raymond v. Yarrington, 96 Tex. 443, 62 L.R.A. 962, 97 Am. St. Rep. 914, 72 S. W. 580, 73 S. W. 800; *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30; *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; *Shoppard v. Wake-*

man, 1 Lev. 53, 83 Eng. Reprint, 293; Addison, Torts, Wood's ed. § 17; Hollenbeck v. Ristine, 114 Iowa, 358, 86 N. W. 377; Peerless Pattern Co. v. Pictorial Review Co. 147 App. Div. 715, 132 N. Y. Supp. 37; Sperry & H. Co. v. Pommer, 199 Fed. 309; McClure v. McClintock, 150 Ky. 265, 42 L.R.A.(N.S.) 989, 150 S. W. 332; Mealey v. Bemidji Lumber Co. 118 Minn. 427, 136 N. W. 1090; Joyce v. Great Northern R. Co. 100 Minn. 225, 8 L.R.A.(N.S.) 756, 110 N. W. 975; Cumberland Glass Mfg. Co. v. DeWitt, 120 Md. 381, 87 Atl. 927, Ann. Cas. 1915A, 702; Kook v. Burgess, 167 Iowa, 727, 149 N. W. 858; Wheeler-Stenzel Co. v. American Window Glass Co. 202 Mass. 471, L.R.A.1915F, 1076, 80 N. E. 28; Walker v. Wunderlick, 33 Neb. 504, 50 N. W. 445; Mitchell v. Langley, 143 Ga. 827, L.R.A. 1916C, 1134, 85 S. E. 1050, Ann. Cas. 1917A, 469.

Messrs. Stout, Rose, & Wells, for appellees:

The allegation of a promissory engagement to marry and the assertion of the relation of a fiancée afford no standing to plaintiff as a suitor for the maintenance of an action for enticement or alienation. Allegations of marriage and the relationship of husband and wife are indispensable. Unlawful interference with the conjugal rights and privileges of a spouse, based on an existing relation of marriage, is an essential requisite to the maintenance of a suit for enticement and alienation.

21 Cyc. 1149, 1150; Adams v. Main, 3 Ind. App. 232, 50 Am. St. Rep. 266, 29 N. E. 792; Wolf v. Frank, 92 Md. 138, 52 L.R.A. 102, 48 Atl. 132; Callis v. Merrieweather, 98 Md. 361, 103 Am. St. Rep. 404, 57 Atl. 201; Neville v. Gile, 174 Mass. 305, 54 N. E. 841; Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17; Weston v. Weston, 86 App. Div. 159, 83 N. Y. Supp. 528; Leonard v. Whetstone, 34 Ind. App. 393, 107 Am. St. Rep. 252, 68 N. E. 197; Cooley, Torts, 2d ed. p. 277.

Morrissey, Ch. J., delivered the opinion of the court:

From an order sustaining a demurrer to the petition and dismissing the action, plaintiff appeals. The petition alleges that the plaintiff and one Bangs, now deceased had, during the lifetime of Bangs, entered into an agreement to marry. That they had agreed upon the date when the ceremony should be performed, and that each of the parties was capable of entering into the marriage relation. "That the said defendants each jointly and severally, maliciously, wrongfully, unlawfully, and without just cause, and to advance their own pecuniary interests, interposed objections to the said L.R.A.1918C.

Stephen D. Bangs carrying out his said contract with plaintiff, and through threats they they would place him in a sanitarium and have him removed out of the circle of society in which he was known and had lived, and through falsely representing that plaintiff was of an unchaste character, and by unlawful restraint and undue influence, caused the said Stephen D. Bangs not to fulfil his said contract of marriage with plaintiff, and caused the said Stephen D. Bangs to breach and break his said contract of marriage with plaintiff. That on the 4th day of November, 1914, said Stephen D. Bangs was ready and willing to marry the plaintiff, and but for the wrongful interference of the said defendants as aforesaid he was then and there able to do so. Plaintiff states: That, by reason of the said wrongful acts of the said defendants in causing the breach of the said contract of marriage, plaintiff sustained the loss of an advantageous matrimonial connection, the said Stephen D. Bangs being a man of wealth at the date set for the wedding, and a man of social position. That plaintiff's affections have been disregarded and blighted, she has been disappointed in her affections, and her spirit and feelings wounded, resulting in great mental distress and humiliation, and she has been damaged in the sum of \$200,000, no part of which has been paid."

The cause of action for slander was barred by the Statute of Limitations and is not relied upon by plaintiff, but her action seems to be for enticement or alienation of her fiancé. We are cited to no authority that sanctions a recovery under such circumstances. Where the marriage relation exists and third parties entice away the spouse or alienate the affections, a recovery is allowed; but the cause of action rests upon the right to the society, companionship, conjugal affections, and fellowship of the estranged spouse. There is no such right in the fiancé. An alienation suit, therefore, is maintainable only for interference with the conjugal rights of the plaintiff.

"The prevention of a marriage by the interference of a third person cannot in general, in itself, be a legal wrong. Thus if one, by solicitations or by the arts of ridicule or otherwise, shall induce one to break off an existing contract of marriage, no action will lie for it, however contemptible and blamable may be the conduct. But a loss of marriage may be such a special injury as will support an action of slander or libel, where the party was induced to break off the engagement by false and dam-

aging charges not actionable per se. Here the action, it is perceived, is for the defamation, and the loss of the marriage only the damage flowing from the injury. A contemplated marriage might be prevented by the forcible separation of the parties, or by the imprisonment of one of them; but the wrong in contemplation of law would consist in the assault, or in the false imprisonment, and not in the loss of marriage. The suit might therefore lie in favor of one party, and not in favor of the other, if only one was subjected to the illegal force." Cooley, Torts. 2d ed. p. 277.

It is not claimed that she was imprisoned or in any way restrained of her liberty. Under no circumstances could she recover

for the restraint or false imprisonment of Bangs. The right of engaged parties to ask the advice of their friends and the right of the friends to give advice have never been denied. To hold that a third party may be subject to answer in damages for advising or inducing an engaged person to break the engagement might result in a suit by every disappointed lover against his successful rival. The state has an interest in the marriage relation, and until the marriage is solemnized no domestic rights exist and therefore cannot be violated.

The ruling of the trial court is without error, and the judgment is affirmed.

Rose, J., not sitting.

Annotation—Liability of third person for inducing breach of marriage contract.

The general question as to the right of action for damages for inducing a breach of contract is covered in notes in 16 L.R.A.(N.S.) 746; 28 L.R.A.(N.S.) 615, and L.R.A.1915F, 1076. It is pointed out in these notes that one may be liable for maliciously interfering with and inducing a breach of contract. As to marriage contracts, however, the law has not been sufficiently developed to render it safe to formulate any rules from the few cases considering the point. According to these cases, there is no liability on the part of a third person for inducing the breach of a marriage contract, even though the act was done maliciously and wrongfully and accomplished by means of threats and false representations. This is the doctrine of *HOMAN v. HALL*, ante, 1195, and *Leonard v. Whetstone* (1903) 34 Ind. App. 383, 107 Am. St. Rep. 252, 68 N. E. 197.

To the same effect see *Davis v. Condit* (1914) 124 Minn. 365, 50 L.R.A.(N.S.) 142, 144 N. W. 1089, Ann. Cas. 1915B, 544, holding that an affianced husband has no right of action against a third person for maliciously debauching and seducing his affianced wife, alienating her affections, and interfering with the marriage contract then subsisting between the plaintiff and such affianced wife.

No reason is advanced by these cases why a different rule should be applied to persons who maliciously induce the breach of a marriage contract than is applied to persons who maliciously induce a breach of other contracts. To sustain liability in such cases would not render a parent or other person liable, L.R.A.1918C

who in good faith gave advice to one of the parties in such contract which lead to the breach thereof, nor would it render a parent liable for in good faith using his parental position to oppose and prevent the marriage of his child, provided he resorted to no unlawful means; neither would such a rule render a third person liable for a breach of the contract, induced by his or her entering into a similar contract with one of the parties thereto. Upon this latter point it is queried in *National Phonograph Co. v. Edison-Bell Consol. Phonograph Co.* 96 L. T. N. S. (Eng.) 218, that "sometimes it happens that a lady, having contracted to marry A, is induced to change her mind and marry B, it must be presumed, upon a pressing invitation by him to do so. If B was aware of the lady's previous engagement to A, can A, instead of bringing an action for breach of promise against the lady, recover damages in an action of tort against her husband B, upon the ground that he has interfered with a contractual relation between the lady and A, and induced her to break her contract? Could A, if he commenced his action soon enough, obtain an injunction against B, to restrain him from procuring the lady to marry him?"

In *Delage v. Normandeau* (1899) Rap. Jud. Quebec 9 B. R. 93, the father was held not liable for inducing his son to breach a contract of marriage, where it appeared that the son refused to perform the contract and breached the same upon his own initiative, and without being influenced by the father. A. G. S.

PENNSYLVANIA SUPREME COURT.

CHRISTOPHER C. BYRNE

v.

PITTSBURGH BREWING COMPANY,
App't.

(— Pa. —, 103 Atl. 53.)

Master and servant — authority to employ guide.

The driver of a delivery truck attempting to deliver goods on a country road has no implied authority to employ a guide to assist him in reaching his destination when he finds the regular route closed to travel, if verbal directions would be sufficient for that purpose, and therefore his master is not liable for injury to a guide so employed through defective condition of the truck.

For other cases, see Master and Servant, I. a, in Dig. 1-52 N. 8.

(January 7, 1918.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Allegheny County denying a motion for judgment notwithstanding a verdict for plaintiff, in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Grant Curry and Arthur E. Young, for appellant:

Under the pleadings plaintiff could recover, if at all, by showing his injuries were caused by a defective condition of the brakes, not otherwise.

Smith v. Price, 8 Watts, 447; Bausbach v. Reiff, 244 Pa. 559, L.R.A.1915D, 785, 91 Atl. 224, Ann. Cas. 1915C, 421; Shadowski v. Pittsburg R. Co. 226 Pa. 537, 29 L.R.A. (N.S.) 302, 75 Atl. 730; Smith v. Stoner, 243 Pa. 57, 89 Atl. 795; Com. v. Force, 43 Pa. Super. Ct. 363; Grim v. Bonnell, 78 Pa. 152; Briggs v. East Broad Top R. & Coal Co. 206 Pa. 564, 56 Atl. 36, 15 Am. Neg. Rep. 187; Quigley v. Adams Exp. Co. 27 Pa. Super. Ct. 116; Bigley v. Williams, 80 Pa. 107; Geohrig v. Stryker, 174 Fed. 897; Morris v. Guffey, 188 Pa. 534, 41 Atl. 731; Ogden v. Pennsylvania R. Co. 1 Monaghan (Pa.) 249, 16 Atl. 353; Wigmore, Ev. § 1018; Charlton v. Unis, 4 Gratt. 60; Gould v. Norfolk Lead Co. 9 Cush. 346, 57 Am.

Dec. 50; Dampman v. Pennsylvania R. Co. 166 Pa. 520, 31 Atl. 244; Giberson v. Patterson Mills Co. 174 Pa. 369, 52 Am. St. Rep. 823, 34 Atl. 563; Heddles v. Chicago & N. W. R. Co. 74 Wis. 241, 42 N. W. 237; Fletcher v. Com. 26 Ky. L. Rep. 1157, 83 S. W. 588; Francis v. Rosa, 151 Mass. 532, 24 N. E. 1024; Howard v. Patrick, 38 Mich. 795; Brown v. Dean, 52 Mich. 267, 17 N. W. 837; Sloan v. New York C. R. Co. 45 N. Y. 125; Law v. Fairfield, 46 Vt. 425.

Plaintiff was a volunteer and may not, as such, recover, even though his injuries were caused by a defective condition of the brakes.

Flower v. Pennsylvania R. Co. 69 Pa. 210, 8 Am. Rep. 251, 12 Am. Neg. Cas. 524; Wischam v. Rickards, 136 Pa. 109, 10 L.R.A. 97, 20 Am. St. Rep. 900, 20 Atl. 532; Geltzer v. Philadelphia Rapid Transit Co. 54 Pa. Super. Ct. 492; 2 Talbot, Mast. & S. p. 531; Gillen v. Rowley, 134 Pa. 209, 19 Atl. 504; Arzt v. Lit, 198 Pa. 519, 48 Atl. 297; Towanda Coal Co. v. Heeman, 86 Pa. 418; Morrison K. & T. R. Co. v. Moore, — Tex. Civ. App. —, 169 S. W. 916; W. B. Conkey Co. v. Bueherer, 84 Ill. App. 633; Langan v. Tyler, 51 C. C. A. 593, 114 Fed. 716; Everhart v. Terre Haute & I. R. Co. 78 Ind. 292, 41 Am. Rep. 567.

Messrs. L. K. Porter, S. G. Porter and Thomas L. Morris, for appellee:

Plaintiff was not a volunteer.

Wischam v. Rickards, 136 Pa. 109, 10 L.R.A. 97, 20 Am. St. Rep. 900, 20 Atl. 532; McConnell v. Pennsylvania R. Co. 223 Pa. 442, 72 Atl. 849; Wright v. London & N. W. R. Co. L. R. 1 Q. B. Div. 252, 45 L. J. Q. B. N. S. 570, 33 L. T. N. S. 830.

Mrs. Byrne's testimony was admissible in corroboration of witness Zehr's testimony on behalf of the plaintiff to the effect that the brakes were out of order and would not check the speed of the truck.

Turnbull v. O'Hara, 4 Yeates, 446; Foster v. Shaw, 7 Serg. & R. 156; Henderson v. Jones, 10 Serg. & R. 322, 13 Am. Dec. 676; Craig v. Craig, 5 Rawle, 91; McKee v. Jones, 6 Pa. 425; Crooks v. Bunn, 136 Pa. 368, 20 Atl. 529.

Stewart, J., delivered the opinion of the court:

The accident out of which this action

Note. — The liability of a master for injury to an emergency assistant is treated in the note to St. Louis & S. F. R. Co. v. Bagwell, 40 L.R.A. (N.S.) 1180, which includes cases turning, as does BYRNE v. PITTSBURGH BREWING Co., upon the implied authority of a servant to employ another person to assist him in an emergency. A somewhat related question is discussed in the notes to Grissom v. Atlanta & B. Air Line R. Co. 13 L.R.A. (N.S.) 561; Hunter v. Corrigan, 43 L.R.A.1918C.

L.R.A. (N.S.) 187; and Pooler v. Sargent Lumber Co. L.R.A.1916F, 1126, on "Liability of master for injury to volunteer;" and see later cases. Geer v. Sound Transfer Co. L.R.A.1916B, 987, and W. H. Neill Co. v. Rumpf, L.R.A.1917C, 1199.

Generally as to liability of master for injury to person riding with servant by latter's invitation or permission, see annotation following Gruber v. Cater Transfer Co. L.R.A.1917F, 425.

arose occurred in this way: The defendant company, in the conduct of its business, maintains and operates several gasoline motor trucks which it employs in the delivery of its brewery products to its customers in the surrounding country. One of these customers was the proprietor of what is known as the Byrne Hotel, located on the Butler plank road about 10 miles from the city of Pittsburgh. To fill an order for beer and ice it had received from this hotel, it loaded one of these trucks with the goods required, placed it in charge of a driver who had been in its employ for about seven or eight years and had frequently driven over the route, with directions to make the delivery. This employee drove out the Butler pike, a road running parallel with the plank road and with which he was familiar, until he reached a point nearly opposite the Byrne Hotel on the plank road. At this point there is a crossroad about a half mile in length leading directly across to the plank road, connecting at or near the hotel, and which he was accustomed to take in making his deliveries. He found this short piece of road impassable in consequence of repairs that were being made to it. Leaving his motor truck with its load in charge of a man who for unexplained reason had been riding with him, he walked over to the hotel, and there met this plaintiff, a son of the proprietor, whom he well knew, told him of the fact that he had the goods for delivery on his truck, where the truck was, but that the condition of the road over from the pike prevented his reaching the hotel by that way, and asked to be informed how to get across by another way. The plaintiff told him that by continuing on the pike for about a mile he would come to another crossroad leading directly from the pike across to the plank road to a point about a mile beyond the hotel. The driver asked him to walk back with him to the motor truck and ride with him from that point over the route he had suggested, as he was afraid of getting lost if he attempted it alone. The plaintiff declined, giving as his reason that he was needed about the hotel, it being near the dinner hour, but on being again requested he consented. Together they walked to the motor truck, the plaintiff there taking a seat with the driver on the truck, as did also the man whom the driver had left in charge of the truck and its load, and who was an entire stranger to the plaintiff. Together the three proceeded on their way up the pike until they reached the crossroad, where they turned to the right into the crossroad. They had nearly reached the end of this road, were very close to the plank road, when towards the foot of a declivity, the truck having then gotten be-

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yond the control of the driver, it ran into a gully, with the result that the truck was thrown over an embankment, and the plaintiff met the injury for which he brought his action. He based his right to recover on the ground that the proximate cause of the accident was defective brakes on the motor truck because of which the driver was unable to control the speed of the truck on the declivity. The verdict of the jury awarding the plaintiff damages in \$3,983 implies a finding of negligence on the part of the defendant in the respect indicated. At the conclusion of the testimony defendant's counsel asked for binding instructions in favor of the defendant. This was refused. A motion for judgment non obstante followed which was also refused, and judgment was accordingly entered on the verdict. Of the errors assigned on the appeal, one only need be considered.

If the plaintiff is entitled to recover at all against this defendant, it must be because he stood in the relation of servant or employee of the defendant and was in the course of his employment when he sustained his injury. It may be technically inexact to speak of plaintiff as a volunteer, since it is not disputed that he accompanied the driver on the truck at the latter's request; but that it is an immaterial matter, since it is clear that he had no other right to be upon the truck except such as he acquired from the driver. Except as the driver could confer such right, the plaintiff stood in no relation with the defendant whatever, and the latter owed him no duty of protection. It is a rule universally recognized that the relation of master and servant cannot be imposed on a person without his consent, express or implied. It is upon the exception to this general rule, which is quite as well settled as the general rule itself, that the plaintiff relies to establish the relation of master and servant in this case. The exception is that a servant may engage an assistant in the case of an emergency, where he is unable to perform the work alone. Both rule and exception have been repeatedly recognized and enforced in our own cases, notably in the case of *Flower v. Pennsylvania R. Co.* 69 Pa. 210, 8 Am. Rep. 251, 12 Am. Neg. Cas. 524, and of *Wischam v. Rickards*, 136 Pa. 109, 10 L.R.A. 97, 20 Am. St. Rep. 900, 20 Atl. 532, and neither calls for discussion further than to ascertain whether, from the evidence adduced on behalf of the plaintiff, it can be rightfully determined: (1) That the conditions existing when the driver requested the plaintiff to accompany him were such that the driver would be in danger of becoming lost and long delayed in reaching the place of delivery if he attempted the road he was ad-

vised to take, unaccompanied by someone familiar with it; and (2) whether, if the evidence warrants an affirmative answer, the conditions testified to constitute such an emergency as would warrant the driver in employing the plaintiff in such way as to make him a servant of the defendant, entitled to a servant's rights of protection. These were the questions in the case, and the burden of establishing both affirmatively was upon the plaintiff. They may be considered together.

No one knew better than the plaintiff, because of his admitted knowledge of and familiarity with the road which he had advised the plaintiff to adopt, what, if any, risk or danger the driver would run of missing the road or losing himself if he chose it. All that was required was that he should continue on the road which he had traveled, the Butler pike, for a distance of about one mile, when he would reach a short crossroad about a half or three quarters of a mile in length and the only crossroad he would encounter, one that led over to the plank road on which was located the hotel at which the delivery was to be made, this crossroad being, as plaintiff himself testified, in excellent condition and in no way confusing, since no other roads led from it. When the plaintiff was asked whether on the road he described it would be possible for the driver to get lost, his only reply was that he "did not suppose anybody would get lost as long as they had a tongue." Nowhere in his testimony does he pretend that in acceding to the request of the driver to accompany him he did so in order to save him from mistaking the road; but, on the contrary, he repeatedly asserted that his only purpose in accompanying him was to save time. How this was to result he nowhere says. Nor does a single witness testify that the situation in which the driver found himself called for any guidance whatever. On the case as presented by the plaintiff and his witnesses, it is simply incredible that in the L.R.A.1918C,

conditions there present, traveling from one thoroughfare over an established side or crossroad for a half or three quarters of a mile to another main thoroughfare which he wished to reach, a full-grown man and an experienced driver in such a country as that is would be in danger of losing himself. It is none the less incredible that under the conditions shown to have existed such a one could be left in uncertainty as to the particular road he was advised to take. This is the turning point in the case. Did there exist a necessity for the plaintiff's assistance? Did an emergency actually exist? The law in such cases is thus stated in *Fiesel v. New York Edison Co.* 123 App. Div. 676, 108 N. Y. Supp. 130: "An emergency employee, called on by another employee to assist him, for however short a time, becomes a fellow servant and subject to the rules of law applicable to the injury of a servant by his fellow. But he must be so called on as of necessity in order to make him an employee, for a servant has no authority to call on another to help him in his master's business as of necessity, unless the necessity exists. If he can do the work himself there is no occasion of necessity to imply power in him to employ assistance."

This is simply the common-law rule. At the furthest, the assistance rendered by the plaintiff in this case may be construed as serving the convenience or pleasure of the driver; but this comes far short of a necessity calling for assistance. The emergency as used in the rule implies necessity for assistance. Manifestly here was no emergency. There is absolutely nothing in the evidence which brings the defendant into any relation with the plaintiff out of which a duty of protection could possibly arise. The case called for judgment non obstante, and it was error to refuse it.

The judgment entered is accordingly reversed, and judgment is here entered for the defendant.

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Admissibility, in action for wrongful death, of evidence of profits or contributions from business conducted by decedent. 1918C, 1087.

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Admissibility and use of mortality tables in death actions. 1918C, 1071.

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Right of lien creditor to set up Statute of Limitations against other creditors of the debtor. 1918C, 1015.

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Right to declare private pipe line a public utility subject to the use of the public without making compensation. 1918C, 849.

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Evidence of the earnings of the deceased to show pecuniary loss by his death. 1918C, 1080.

Admissibility, in action for wrongful death, of evidence of profits or contributions from business conducted by decedent. 1918C, 1087.

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Right of parent to compromise infant's cause of action for personal injuries. 1918C, 58.

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Imputing negligence of parent to child. 1918C, 997.

Effect on infant's rights, of compromise by father of cause of action for personal injuries to infant. 1918C, 55.

Parent's right of action for death of child. 1918C, 1052.

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PIPE LINES.*Annotation.*

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Right of plaintiff to order for examination of defendant to enable him to frame his complaint. 1918C, 588.

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Annotation.

Priority over mortgage of statutory lien for work not beneficial to the property, done in the exercise of the police power. 1918C, 1029.

Priority between mortgage and lien created under the police power, in favor of a public agency, for doing something for the owner which he fails to do, and which the law makes it his duty to do. 1918C, 1022.

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Annotation.

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Lack of diligence of holder of obligation in collecting from principal. 1918C, 1.

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On distribution of insolvent estate. 1918C, 954.

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Annotation.

Civil liability of officer for injury inflicted by prisoner in his custody upon another prisoner. 1918C, 1103.

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Duty of owner to so use property as not to interfere with health, comfort, or rights of neighbors. 1918C, 227.

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Failure to stop engine after discovery of youth asleep on track as proximate cause of injury to him. 1918C, 1052.

Backing cars against others standing on switch, without warning or lookout, as proximate cause of death of inspector. 1918C, 376.

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Necessity of benefit to sustain assessment levied to reimburse a public corporation for the cost of performing some act which the owner of realty is bound by law to perform, but which he fails to do. 1918C, 1022.

PUBLIC MONEY.

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Deposit as trust fund on bank's insolvency. 1918C, 954.

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Power to prescribe the character of materials for depots. 1918C, 495.

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Right to disclosure of private contracts by electric railway company for utilization of its surplus power, for consideration in fixing rates. 1918C, 675.

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Mutual telephone companies as public utilities. 1918C, 827.

Pipe line companies as public utilities. 1918C, 855.

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Presumption as to correctness of rates fixed by commission. 1918C, 138.

Right of Public Service Commission to disclosure of private contracts by electric railway for utilization of its surplus power, for consideration in fixing rates. 1918C, 675.

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PUBLIC TRIAL.**Annotation.**

Right of court to exclude public from court room during criminal trial. 1918C, 1168.

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RACE SEGREGATION.**Annotation.**

Validity of segregation statute or ordinance prohibiting persons of different race or color from living in the same locality. 1918C, 220.

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Ordinance prohibiting colored persons from residing in any block in which the majority of residences are occupied by white people. 1918C, 210.

RAILROADS.**In general.**

Power of railroad company to pay a commission upon sale of unimproved lands of individuals to persons who will improve them. 1918C, 90.

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Contributory negligence, see *infra*.

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Negligence in allowing weeds and brush on right of way to obstruct vision. 1918C, 997.

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Failure to stop, look, or listen. 1918C, 997.

Imputing negligence of father to child riding with him. 1918C, 997.

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